CHAPTER 3

Western Perspective of Positivism in 19th Century

3.1 Introduction

Legal positivism is the study of law. Legal positivism is concerned with the law as it is¹ and not the law as it ought to be². It is called positivism because the advocates of legal positivism are concerned neither with the past of law nor with future of law but deal with the law as it is (Positum) i.e. as it actually exists. It starts from the actual facts of law as it sees today. Legal positivism school was dominant in England. Because of this reason, it is also known as English School, Analytical school. It is also known as imperative school of Jurisprudence because jurists of this school treated the law as a command emanating from the state. Legal theory jurists approach differently the idea of law making from different angles:

1. some Jurists consider law as abstraction of right of reason;
2. Others jurists consider law as command without involving value-judgements.³
3. Many others regard law as a product of popular consciousness.
4. Still there are larger numbers of jurists who view jurisprudence as a science of legal ordering of human conduct in a politically organized community.⁴ Thus, different jurists view differently the concept of law.

Legal positivism takes law as the command of sovereign. It puts emphasis on legislation as the source of law. The whole system is based on its concept of law. The exponents of legal positivism consider that the most important aspect of law is its relation to the State. They treat law as a common enacting from the sovereign i.e. State.⁵

The positivist school draws inspiration from the absolutist and idealistic theories of the state and its own origin to the Anglo-American legal tradition which flourished in

¹ Law exists in present from though it may be unjust.
² Which is morally desirable? Positivists exclude Morality and Justice from law.
³ Judgments also include morality and justice principles
⁵ Himanshi Mittal, Jurisprudence, 16(Universal Publishing Company: 2015)
the nineteenth century. The analytical jurists regard law as the deliberate and conscious command of the state. Law is the expression of the absolute sovereignty of the state. This school lays emphasis on legislation as source of law. The criterion of law is a legal enforcing agency. It is the ‘force’ behind legal rules, which is important.

Positivists do not deny that judge make law. As a matter of fact, a majority of them admit it. Positivists also acknowledge the influence of ethical considerations of judges and legislators. The object of legal positivism is to analyse the law without reference to their historical origin or their ethical significance or validity of law.

On the other hand, the supporters of natural law shared the common feature of law in order to conclude it in nature through reason and rule of universal legality which turning away the law from the realities of actual law.

According to the exponents of Natural Law, the validity of any legal system depends upon the moral principles. The moral principles impose limits on the ruler’s coercive powers. Leading natural law jurists include Aristotle, Cicero Thomas Aquinas, Hobbes, Grotius, and John Locke. Where as the legal positivism give importance to a political dimension. Legal positivism thus recognise the sovereigns powers of the rulers as the source of valid law and the leading positivists are Jeremy Bentham, John Austin, H. L.A. Hart & Kelson.

Prevailing theories of natural law shared the common features of take away law from realities of ‘Actual law’ in order to discover the nature, through the principle of reasons and principle of universal validity. But natural law theory’s universal principle failed to satisfy the intelligence of the age nurtured in the critical spirit of new scientific learning.

The start of the nineteenth century might be taken as, marking the beginning of the positivist’s movement. It represented a reaction against the ‘prior’ methods of thinking that characterized the preceding age.

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6 Dr. Neelam Kant, *An Introduction to Political Science, 97* (Central Law Publications).
Positive law means law established or ‘positum’ in an independent political community, by express or tacit authority of its sovereign or supreme government.\textsuperscript{11}

Analytical jurisprudence is a systematic study of positive law or the philosophy of positive law or the formal science of positive law as expounded by Austin and his successors. Jurisprudence originated initially as a method of controlling human conduct with the help of ideal laws or norms which the philosophers believed to be devised by some super-natural power for establishing righteousness, justice and order in society. In the twentieth century there has been revolt against the barren character of Austinian legal philosophy. As a reaction and revolt against rigid positivism a new tendency has emerged especially after the Second World War to widen the scope of jurisprudence to embrace all moral and social principles and values and other non-legal elements in it. Nevertheless analytical positivism is not completely routed in the twentieth century. The other advocates of analytical jurisprudence beside Salmond in the twentieth century are Professor H. L. A. Hart in England and Professor Hans Kelsen in the European continent. Among them Prof. Hart and Prof. Kelsen have made significant contribution by expounding a new form of analytical positivism\textsuperscript{12}

3.2 Contribution of the Legal Positivism:

Positivism is an approach to law which concern itself with positive law i.e., legal system and rules actually in force different from ideal systems or law which should be. It is mainly connected with Jeremy Bentham, Austin, Hart and Kelson. The term positivism has been generally understood in the sense law emanating from a real source which is mandatory, binding and involves sanction.

It is important to recognise the positivism is not an absolutely jurisprudential approach. Its central claim whether it is logical, scientific, philosophical, sociological or legal positivism- is view that only genuine knowledge which emerge only from the positive confirmation of theory by the application of rigid scientific method. Legal positivism attempts to identify the key feature of the legal system that are posited by legislators, judges and so on. The highest common factor among these writers it would probably be their emphasis on describing law by reference to formal rather than moral criteria. In their pursuit of a ‘scientific’ analysis of the law of law and legal


rules, it is their contention that law as laid down (positum) should be kept separate for the purpose of study and analysis from the law as it ought morally to be. In other words clear distinction must be drawn between ought (that which is morally desirable) and is (that which actually exists).  

The important contribution made by this theory is as follows:

1. All Positive law is deduced from a determinable law giver i.e. a sovereign.
2. This school has kept positive law and ideal law strictly distinct.
3. It also takes in to account the legal sources from which the law proceeds. The most important legal sources are legislation, judicial precedents and customary laws.
4. It also analyzes the concept of legal rights, together with the division of rights into various classes, and the general theory of the creation, transfer and extinction of rights, together with the investigation in to theory of legal liability, both civil and criminal.
5. It has laid down the essential elements that make the whole fabric of law like state sovereignty and the administration of justice.
6. It inquires into the scientific divisions of the whole fabric of law.
7. It favours codification of law and regards law as a command of sovereign with legal sanction behind it.

3.3 The Factors which led to the Emergence of Positivism are as follows:

1. Impact of Natural Law- the natural law school pre-dominated the juristic thought up to beginning of eighteenth century. Principles of natural law were considered as supreme and according to some writers override the man made law. The term natural law was differently defined and understood by different writers and no single general acceptable meaning of the term ‘natural law’ or the criterion for ascertaining the content of the principles of natural law was there. Nature, reason, supernatural source, justice etc. were some of the bases from which natural law was supposed to be derived. Positive law was reaction against the airy assumptions of natural law.

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2. **Impact of Progress in Physical or Scientific Law**\(^{16}\)- the physical or scientific law adopted the empirical approach which implied rejection of natural law as a system of norms whose validity depended on subject factors. Empiricism, on the other hand, relied on positive law which ascertainable and whose validity is not dependent on subjective factors.

3. **Political Factors:** analytical school was established to justify the power of the ruling monarch against that of the other agencies e.g., feudal lords, Pope etc. the rise of the analytical positivism coincided with the displacement of the ecclesiastical order by modern nation states which became free from not only the interference of pope but also from the power which the feudal lord earlier exercised thereby limiting the authority of the sovereign.

It was August Comte (1798-1857) the father of modern scientific positivism who ushered positive philosophy by rejecting abstract, vague, theological and metaphysical natural law which was supposed to be behind society and law. He was of the firm view that all the social phenomena including law should be studied through the process of observation, comparison, experiments, analysis and classification just as physical bodies are studied in physical science. Analysis of legal rules, concepts and ideas through empirical or scientific method is commonly described Analytical Jurisprudence. Similarly, legal analysis and examination of man made law- of the law as it is or as it actually exists (posited) is known as Positivism. It is mainly Bentham and Austin, who laid the foundation of analytical positivism in modern legal theory.\(^{17}\)

### 3.4 Purpose of Legal Positivism:

The main task of the Analytical school / legal positivism is the lucid and systematic exposition of the legal ideas pertinent to ampler and mature system of law. It starts from the actual facts of law as it seems them today. It endeavours to define those terms, to explain their connotation and show their relations to one another. One

\(^{16}\) Physical science or law is based on scientific experiments and observation over many years. Legal positivism is only genuine knowledge which emerges only from the positive confirmation of theory by the application of rigid scientific method. Law should be adopted through scientific method, reasoning and experiments. Legal positivists excluded religion and moral principles from the definition of law. Physical laws are also called natural law or the law of nature.(Glanville Williams, Salmond on Jurisprudence, 40(Sweet & Maxwell Ltd: London)

\(^{17}\) Supra note 4 at 49.
purpose of legal positivism is to gain an accurate and intimate understanding of the fundamental working concepts of all legal reasoning. The analytical school laid down that law as a command of the sovereign. It puts emphasis on legislation as the source of law. The whole system is based on its concept of law. The importance of analytical jurisprudence lies in the fact that it brought about precision in legal thinking. It deliberately excluded all external consideration which fall outside the scope of law.  18

The positivism of Comte declared impossible absolute knowledge of the primal cause, of essence & finality; it limited cognition to law, that is, to the constant relation of phenomena. Positive philosophy adopts the method of the logical and classical science, of which it is generalization and therefore unifies the most general laws of knowledge and gives methods of discovery and proof, and establishes the control of the science themselves. The mind according to Comte, who has followed Turgot passes through three stages, the theology, the metaphysical and positive. In theology, the principles of things are divine entities. In metaphysics, abstract conceptions rule as a real cause; in positivism the ever changing phenomena, found by the aid of experience govern all relations. 19

Auguste Comte distinguished three great stages in the evolution of human thinking. The first stage, in his system, is the theological stage, in which all phenomena are explained by the reference to supernatural causes and the intervention of divine being. The second is the metaphysical stage, in which the thought has recourse to ultimate principles and ideas, which are conceived as existing beneath the surface of things and as constituting the real moving forces in the evolution off mankind. The third and last stage is the positivistic stage, which rejects all hypothetical construction in the philosophy, history and science and confines itself to the empirical observation and connection of facts under the guidance of methods used in the natural sciences. This celebrated ‘law of the three stages, insofar as it characterizes positivism as the last and final stage in the development of human thought, is open to grave objections. It serves however, a useful purpose in describing the movement and general direction of Western philosophy from the early middle age to the beginning of the twentieth century. Beginning with the second half of the nineteenth century, positivism invaded

18 Supra note 7 at 439-440.
all branches of the social sciences, including legal science. Legal positivism shared with positivistic theory in general the aversion to metaphysical speculation and to the search for the ultimate principles. It sought to exclude the value considerations from the science of jurisprudence and to confine the task of this science to an analysis and dissection of positive legal orders. The legal positivists hold that only the positive law is law; and by positive law he means those juridical norms which have been established by the authority of the state.\(^{20}\)

Positivism is an approach to law which concerns itself with positive law i.e., legal system and rules actually in force distinct from the ideal systems or law which should be. It is mainly associated with Jeremy Bentham, Austin, Hart and Kelson. The term positivism has been generally understood in the sense law emanating from a real source which is obligatory, binding and involves sanction. The beginning of 19\(^{th}\) century might be taken as marking the beginning of positivist movement. People were looking for finality and certainty as to law which was lacking in natural law.

Legal positivists tend to view and understand the law as it is made and deem it imperative to accept it as such without going into question of justness and unjustness, goodness and badness of the law. Legal positivism thought originated from England and so is also called as English school.

The exponents of analytical school are neither concerned with the past of the law nor with the future of it, but they confine themselves to the study of law as it actually exists i.e. positus. It is for this reason that this school is also termed as the Positive School of jurisprudence. Thus analytical positivism presupposes that sovereign or the law-maker is over and above law and law is solely based on coercion or force and it has nothing to do with the concepts of morality, justice or ethics.\(^{21}\)

Thus it has been said that the nineteenth century may be considered as marking the beginning of the positivist movement. The term ‘positivism’ has different meaning as tabulated by Hart thus: (1) Laws are commands. This meaning is associated with two founders of British positivism, Bentham and his discipline Austin. (2) The analysis of legal concept is (a) worth pursuing, (b) distinct from sociological and historical


inquires, (c) distinct from critical evaluation; (3) decisions can be deduced logically from predetermined rules without recourse to social aims, policy or morality; (4) moral judgement cannot be established or defended by rational argument, evidence or proof; (5) the law as it is actually laid down has to be kept separate from the law that ought to be.\textsuperscript{22}

Legal positivism is based on the simple assertion that the proper description of law is a worthy objective, & a task that need be kept separate from moral judgements (regarding the value of the present law, & regarding how the law should be developed or changed). Early advocates of legal positivism included Bentham (1748-1832), Austin (1790-1859), and in quite different way H. Kelsen. In simple terms, legal positivism is built around the belief, the assumption or the dogma that the question of what is the law is separate from & must be kept separate from the question of what the law should be. The position can be summerised in the words of John Austin\textsuperscript{23}:

“The existence of law is something, its merit or demerit is another. Whether it be or be not is one enquiry; whether it to be or be not conformable to an assumed standard is a different enquiry. A law which actually exists is a law. Though we happen to dislike it or though it varies from the text by which we regulate our approbation & disapprobation.

3.5 Positivism in Law:

The separation in the principle of the law as it is, and the law as it ought to be, is the most fundamental philosophical assumption of legal positivism. Legal positivists tend to view and understand the law as it is made and deem it imperative to accept as it as such without going into the question of justness and unjustness, goodness and badness of the law. Chief Exponents of legal positivism are:-

3.5.1 Jeremy Bentham’s Approach (1742-1832):

Jeremy Bentham was an English philosopher and political radical. He is primarily known today for his moral philosophy especially his principle of utilitarianism, which evaluates actions based upon their consequences. The relevant consequences, in

\textsuperscript{22} Dr. N.Krishna Kumar, Jurisprudence & Comparative Law, 10 (Central Law Publications, Allahabad, ed. 1(2007).

particular, are the overall happiness created for everyone affected by the action. Influenced by many enlightenment thinkers, especially empiricists such as John Locke and David Hume, Bentham developed an ethical theory grounded in a largely empiricist account of human nature. He famously held a hedonistic account of both motivation and value according to which what is fundamentally valuable and what ultimately motivates us is pleasure and pain. Happiness, according to Bentham, is thus a matter of experiencing pleasure and lack of pain.

Although he never practiced law, Bentham did write a great deal of philosophy of law, spending most of his life critiquing the existing law and strongly advocating legal reform. Throughout his work, he critiques various natural accounts of law which claim, for example, that liberty, rights, and so on exist independent of government. In this way, Bentham arguably developed an early form of what is now often called "legal positivism." Beyond such critiques, he ultimately maintained that putting his moral theory into consistent practice would yield results in legal theory by providing justification for social, political, and legal institutions. A leading theorist in Anglo-American philosophy of law and one of the founders of utilitarianism, Jeremy Bentham was born in Houndsditch, London on February 15, 1748. He was the son and grandson of attorneys, and his early family life was colored by a mix of pious superstition (on his mother's side) and Enlightenment rationalism (from his father). Bentham lived during a time of major social, political and economic change. The Industrial Revolution (with the massive economic and social shifts that it brought in its wake), the rise of the middle class, and revolutions in France and America all were reflected in Bentham's reflections on existing institutions. In 1760, Bentham entered Queen's College, Oxford and, upon graduation in 1764, studied law at Lincoln's Inn. Though qualified to practice law, he never did so. Instead, he devoted most of his life to writing on matters of legal reform—though, curiously, he made little effort to publish much of what he wrote. His most important theoretical work is the Introduction to the Principles of Morals and Legislation (1789), in which much of his moral theory—which he said reflected "the greatest happiness principle"—is described and developed.24

Thus, Jeremy Bentham was an English jurist, philosopher, and legal and social reformer. He herald a new era in the history of legal thought in England. Bentham was the son of a wealthy London Attorney. He is considered to be the founder of positivism in the modern sense of term. Dicey in his book ‘Law and Public Opinion in 19th Century’ has sketched Bentham’s idea about individualism, law and legal reforms which have effected the growth of English law in positive direction. The contribution of Jeremy Bentham to the English law reforms can be summarized thus-

“He determined, in the first place, the principles on which reforms should be based. Secondly, he determined the method i.e. the mode of legislation, by which reforms should be carried out in England.”

According to Bentham, “Evil is pain or the cause of pain, good is pleasure or cause of pleasure. On the basis of this, he defined the concept of utility as, “the property or tendency of a thing to prevent same evil or to procure some good.”

Jeremy Bentham’s Definition of Law: he defined Law as follows:-

“A law may be defined as an assemblage of signs declarative of a volition conceived or adopted by the sovereign in state, concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power: such volition trusting for its accomplishment to the expectation of certain events which it is intended such declaration should upon occasion be a means of bringing to pass, and the prospect of which it is intended should act as a motive upon those whose conduct is in question.”

Theory of law given by Bentham’s considered different aspects of law show through following:

1. Social Desirability and Logical Necessity regarding nature of Sovereignty.

2. Judicial Review (Every law to be tested on the touchstone of principle of Utility).


4. Subordinate Legislation (Rule making power may be delegated).

25 Supra note 21 at 16.
27 Ibid
Bentham’s concept of law is an imperative one which means that law is an assembling of signs, declaration of volition or adopted by sovereign in a state. He believed that every law may be considered in the light of different aspects:

1. Source (law as the will of sovereign). The person or persons who had created the law and whose will it is that law express.

2. Subjects (may be persons or things). The person or things to which the law does or may apply.

3. Objects (act, situation or forbearance). The act, as a characterized by the circumstances, to which it may apply.

4. Extent (law covers a portion of land on which acts have been done). The range of its application, in terms of the persons which conduct it is intended to regulate.

5. Aspect (may be directive or sanctional). The various ways in which the will of the sovereign as expressed in the law may apply to objects of that law.

6. Force of law, sanctional or incitative part (a law depend upon the motivations for obedience. The sovereign’s respect of class of acts is a law as long as it is supported by a sanction. It includes physical, political, religious and moral motivations, comprising of threats of punishment and rewards).

7. Remedial appendages (sanctions are provided by subsidiary laws. They themselves require a further set of subsidiary laws, ‘remedial appendages’ addressed to the judges with a view to curing evil, stopping the evil or preventing future evil). Any other laws as may be created and published in order to clarify the requirements of the principle law.

8. Expression (the way in which the sovereign’s will may be expressed are various. Expression be complete i.e. the matter to be regulated coincides with one law. In all such cases a judge should adopt a literal interpretation). The manner in which law is published and the various ways in which the wishes of the sovereign are made known.

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28 Supra note 14 at 16-17.
Bentham attacked the common law system which embodied the natural reason. Bentham establishes the positive law theory, he believed the system of common law, that was then in use in England in the 17th century, was insufficient and inconsistent. He criticized the lack of legal certainty and clarity that the common law system provided. Bentham proposed a system whereby the limits of the power and conduct were specifically outlined, and were available for all to see and abide by. He often intertwined his own ideas with the ideas of utilitarianism (“i.e. the greatest good for the greatest number”), which then obviously formed the basis of the scientific approach to the law. it was Bentham that proposed a system of codification of the law, similar to the system of the legislation where the premise was that it would create a universal set of laws that was easy to understand and was able to be easily communicated to the public, so they knew what they had to do to obey the laws.  

Thus, Jeremy Bentham’s legal philosophy is called ‘utilitarian individualism’. He was an individualist. He said that the function of law is to emancipate the individual from the bondage and restraint upon his freedom. He pleaded for codification and condemned judge made law to him and customs etc. he was utilitarian also. According to him, the end of the legislation is the ‘greatest happiness of the greatest number’. He defined utility as the ‘property or tendency of a thing to prevent some evil or to procure some good. The consequences of good and evil are respectively pleasure and pain. His philosophy may be summed up, in his own words- 

“Nature has placed man under the empire of pleasure and pain. We owe to them all our ideas; we refer to them all our judgements and all the determination of our life. He who pretends to withdraw himself from this subjection knows what he says. His only object is to seek pleasure and to shun pain….. These eternal and irresistible sentiments ought to be the great study of the moralist and the legislator. The principles of utility subject everything to these two motives.”

Bentham is the greatest exponent of utilitarianism. His only object is seek pleasure and to shun pain. The principle of utility subjects everything to these two motives. He defines utility as expressing “the property or tendency of a thing to prevent some evil or to produce some good.” Good is pleasure, evil is pain. The ultimate end of the

legislation is to him the greatest happiness of greatest number. Although Bentham was a champion of individual rights and personal property, he refused to recognise the right of property as the natural right. Bentham was pre-eminently an advocate of social reform through legislation. In his Theory of Legislation he defines the main object of law as being to provide subsistence, to aim at abundance, to encourage equality and to maintain security. Of these security is the most important and it is the emphasis on the protective function of law which connects Bentham with positivist jurists. He saw law as a balancing of interest; interests of the individual and of the collective organization. He stressed the need for social reform through conscious law making by codification as against judicial precedents or custom. John Stuart Mill a disciple of Bentham, attempts a synthesis between justice and utility. He points out that the conduct of each individual should be such that all rational beings might adopt with benefit to their collective interest. The emphasis shifts from individual to the general interest. While he was supporting the economic principle of Laisser Faire, it means minimum interference of state in economic activities of individuals; he propounded the principle of ‘utilitarianism’. The end of good law is the promotion of greatest happiness of greatest number. Benthanite utilitarianism had become the most popular creed of English legislative reforms. Thus, Bentham proceeded from the axiom that nature has placed mankind under governance of two sovereign masters i.e. pleasure and pain. They alone point us what we ought to do and what we should refrain from doing. The good or evil of an action of pain and pleasure resulting from it. Bentham believed that happiness of the social order is to be understood in the objective sense and it broadly includes satisfaction of certain needs, such as need to be food, clothed, housed etc. according to him, happiness changes its significance in the same way as the meaning of happiness also undergo changes with the changes in social norms.

Thus, the object of law is to bring pleasure and pain. Pleasure and pain are the ultimate standards on which the law should be judged.

Bentham discussed the principle of utility in “Introduction to the Principles of Morals and Legislation”. Benthamite utilitarianism had become the most popular for English legislative reforms around 1830. According to him, the task of the

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32 Supra note 21 at 17.
government was to promote the happiness of the society by furthering the enjoyment of pleasure and affording security against pain. Thus take a particular enactment intended to protect the weaker section of the community. Place the measure of happiness, which we derive from that statute from on side of a balance and pain on its other side. If the pleasure side outweighs the pain side we can rightly say that it is a good legislation and there is utility. For example- (1) the Payment of Bonus Act will give happiness to the working class and unhappiness to the employer. (2) The Prevention of Food Adulteration Act will give happiness to the seller. Bentham wished to ensure happiness of the community by attaining four major goals, namely, subsistence, abundance, equality and security for the citizens. Security was the most important legal regulation because it was related to protection of honour, property and status of the person. According to him, It is not the liberty but security and equality which should form the main objective of legal regulation.33

Thus, Bentham was a realist and his activities were many sided. His keen desire for law reform based on the doctrine of utility, his ambition for codification based on complete desire for judge made law, filled his work with a sense of mission. He was a champion of codified law and of English law reform which in his view was in chaos in those days. He advocated that there could be no reform in substantive law without reforming its structure through a process of analysis. Therefore Jeremy Bentham distinguished between the termed ‘expositorial’ jurisprudence (what the law is) and ‘censorial jurisprudence (what the law ought to be). Bentham criticized the method of law making, corruption and inefficiency of the administration of justice and restraints on the individual’s liberty. Paton has said about Bentham’s work that “his work was intended to provide the indispensable introduction to a civil code.”34

Indeed, Bentham gained greater importance abroad, particularly with reference to the schemes for written constitutions and codification. In the four major works on the law Bentham constantly stressed the centrality of the principle of utility to his jurisprudence. In A Fragment on Government Bentham argued that utility extended to all men and to all societies, so it would serve any country with equal benefit. In the Comment on the Commentaries, Bentham wrote that ‘the principle of utility once

33 Dr. N. Krishna Kumar, Jurisprudence & Comparative Law, 11-12 (Central Law Publication, Allahabad. 2007).
34 Supra note 14 at 18.
adopted as the governing principle, admits of no rival, admits not even of an 
associate, and its validity could be proved by empirical observation. In Of Laws In 
General Bentham specified that common end of all laws as prescribed by the principle 
of utility is the promotion of the public good. The most consistent explication of 
utility principle came in The Principles of Moral and Legislation (1789). In it 
Bentham declared that the principle of utility provided the foundation of his work and 
he defined it is that principle “which approves or disapproves of every action 
whatsoever, according to the tendency which it appears to have augment or diminish 
the happiness of the party whose interest is in question: or what is the same thing in 
other words, to promote or to oppose that happiness.”

For Bentham, only happiness was the greatest good. The ‘Art of Legislation’ 
consisted in the ability best to tell or predict, that which would maximize happiness 
and minimise misery in society. The ‘Science of Legislation’ on the other hand, 
comprised the adequate and effective creation of laws which would advance or 
promote social happiness or pleasure whilst at the same time reducing social pain and 
misery.

Bentham divided his study into two parts-

1. Expositorial approach- examination of law as it is- command of sovereign.

2. Censorial Approach- as it ought to be/ morality of law.

3.5.2 John Austin View on Legal Positivism (1790-1859)

John Austin is the founder of analytical school. He is considered to be the ‘father of 
English Jurisprudence’. He was born in 1790 and till 1812 he served as an army 
officer for the total duration of 5 years. After his graduation he joined the newly 
founded Benthamite University College as Professor of Law and then in 1826, he was 
elevated to the chair of Jurisprudence in the University of London. Then he went to 
Germany and studied Roman law there. He was greatly influenced by the scientific 
treatment of the Roman law and therefore, he started scientific arrangement of the

35 Richard A. Cosgrove, Scholars of the Law English Jurisprudence from Blackstone to Hart, 66- 
36 Routledge Caven, Jurisprudence 34(Cavendish Publishing Ltd., London, 2009) available at: 
https://books.google.co.in/books?id=UvTJVzV0C&printsec=frontcover&dq=jurisprudence&hl=en&
a=X&redir_esc=y#v=onepage&q=jurisprudence&f=false (visited on August 22, 2016).
English law too. He applied the English method and avoided the metaphysical method which was prevalent in Germany and German characteristic. The first six lectures delivered by him in London University were the most influential part of his work. These six lectures were published in 1832 under the title of “The Province of Jurisprudence Determined” and rest were published posthumously in 1861. In these lectures he dealt with the nature of law, sources of law and presented an analysis of the English legal system.37

John Austin (1790-1859) was a nineteenth century British legal philosopher who formulated the first systematic alternative to both natural law theories of law and utilitarian approaches to law. (Bentham and Mill were utilitarian’s, advancing the view that there should be a separation between law and morality, and that law should be about maximizing utility, or personal pleasure or pain, and the effect or wisdom of a particular policy could be calculated by adding together all the pleasure and subtracting all the pain it brought everyone.) Austin’s analytic approach to law offered an account of the concept of law, that is, what law is. This was termed “Legal Positivism” because it set out to describe “what law is” in terms of what humans posited it was, thus the link between “positive law” and “Legal Positivism.” Austin’s theory of law is a form of analytic jurisprudence in so far as it is concerned with providing necessary and sufficient conditions for the existence of law that distinguishes law from non-law in every possible world. Austin’s particular theory of law is often called the “command theory of law” because the concept of command lies at is core: law is the command of the sovereign, backed by a threat of sanction in the event of non-compliance. Legality, on this account, is determined by the source of a norm, not the merits of its substance (ie it embodies a moral rule). Thus, the answer to the question “what is law?” is answered by resort to facts not value. On Austin's view, a rule is legally valid (i.e., is a law) in a society if and only if rule is commanded by the sovereign and is backed up with the threat of a sanction. The relevant social fact that confers validity, on Austin's view, is promulgation by a sovereign willing to impose a sanction for noncompliance.38

37 Supra note 14 at 19.
A consideration of Austin’s Theory should be prefaced with a brief reference to Bentham’s contribution. Bentham treated actions in terms of “Act” “circumstances” and “consequences”. In the Principle of Moral and legislation, Bentham discussed ‘Human Actions in General.” With the criminal transaction, he isolated four articles

“In every transaction, therefore, which is examined with a view to punishment there are four articles to be considered:

- The ‘act’ itself, which is done
- The circumstances in which it is done
- Intentionality that may have accompanied it.
- The consequences that may have accompanied it.”

Austin, a discipline of Bentham is a positivists and concerned with ‘what the law is’ and ‘not what the law ought to be’. Positus means as it is. The first six lectures were published in 1832, under the Province of Jurisprudence Determined. Under these lectures, he avoided the metaphysical method, which is German characteristic. The method, which Austin applied, is called analytical method and he confined his field of study only to ‘Positive law’. Therefore, school founded by him is called by various names- ‘Analytical’, ‘Positivism’ or ‘Analytical Positivism’. Prof. Allen thinks it is proper to call the Austin’s school as imperative school on the basis of the conception of law i.e. law of command. For Austin, the matter of jurisprudence is ‘positive law’ law simply and strictly so called or law set by politically superiors to political inferiors. He believed that law as a rule laid down for the guidance of an intelligent being by an intelligent being having power over him. To him, law is the command of sovereign requiring his subjects to do or forbear from doing something. There is an implied treat of sanction if command is not obeyed. Law properly so called must have three elements:-


The second category consisted of laws set by men to neither as political superior nor in pursuance of rights conferred upon them by such superiors, those set by a master to

a servant or the rules of a club. They are still a laws properly so called because they are commands, but the distinguished them from positive law by giving them the term ‘positive morality’. Positive law is the only proper subject matter of jurisprudence. Jurisprudence is the general science of positive law. Austin means command, sanction and duty, (C+S+D), which are inextricably linked and cannot be separated.\(^{40}\)

**1. Austin’s approach towards jurisprudence**

Austin said “Jurisprudence is a philosophy of positive law”. In other words, juris is not a moral Philosophy but it is scientific and systematic study of existing, Actual and positive law as distinguished from natural ideal or moral law.\(^{41}\)

The principle purpose or scope of the six ensuring lecture, is to differentiate positive law from a law which not a positive law. In his first lecture, he said that the matter of jurisprudence is positive law: law, simply and strictly so called: or law set by political superiors to political inferiors. He divided a law in to two classes:\(^{42}\)

1. Law of God.
2. Human Laws.

Thus this was the first systematic and comprehensive treatment of the subject which expounded the analytical positivist approach and as a result of this work, Austin is known as the father of analytical school. He limited the scope of jurisprudence and prescribed its boundaries. Austin built on the foundation of expository jurisprudence laid by Bentham and did not concern himself with extra legal norms. He distinguished between the science of legislation and law from morals. He divides the jurisprudence in to general jurisprudence and particular jurisprudence. According to him, general jurisprudence is the science concerned with the expression of the principles, notions and distinctions which are common to system of laws, understanding by systems of law, the ampler, and maturer systems, which by reason of their amplitude and maturity are predominantly pregnant with instructions. On the other hand, particular jurisprudence according to Austin, ‘is the science of any actual system of law or of

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\(^{40}\) Article on ‘Analytical School/ Positivism Theory of Law’, available at: [www.lawdissertation.blogspot.in](http://www.lawdissertation.blogspot.in) (visited on November 4, 2016).

\(^{41}\) Supra note 33.

any portion of it’. The only practical jurisprudence is particular. Austin took a legal system as it is i.e. positive law. Positive law is the outcome of the state and sovereign and is different from positive morality. The positive morality is not offspring of the state or sovereign hence it is not law properly so called.\textsuperscript{43}

The work of Austin remains most comprehensive and important attempt to formulate a system of analytical legal positivism in the context of modern state. Austin’s most important contribution to legal theory was his substitution of the command of the sovereign (i.e. state) for any ideal of justice in the definition of law. Austin defines law as “a rule laid down for the guidance of an intelligent being having power over him. Law is thus strictly divorced from justice, instead of being based on idea of good or bad, is based on the power of a superior.”\textsuperscript{44}

John Austin is generally regarded as being Jeremy Bentham disciple being, like the older man, both positivists and utilitarian. Austin was ultimate responsible for the popularization of the command theory of law. He argued for a distinction to be made between ‘analytical jurisprudence’ looking at the basic facts of law, its origin, existence and underlying concept, & ‘normative jurisprudence’ which involved the question of goodness or badness of existing law had to do with the same issues of sovereignty, power and sanctions. People with the power in a politically independent society would set down rules governing certain acts for those who were in habit of obeying them. \textsuperscript{45}

The method, which Austin applied, is called analytical method and he confined his field of study only to the positive law. Therefore, the school founded by him is called by various names,- ‘analytical’, ‘positivism’, analytical positivism’. Austin defined law as ‘a rule laid down for the guidance of an intelligent being by an intelligent being having power over him’\textsuperscript{46}.

2. **Austin’s concept of law**

According to Austin, “Jurisprudence as the philosophy of positive Law.” By the term of positive law, meant the law laid down by a political superior for commanding

\textsuperscript{44} Supra note 29 at 141.
\textsuperscript{45} Supra note 36.
\textsuperscript{46} Dr. B.N. Tripathi, *Jurisprudence and Legal Theory*, 18(Allahabad Law Agency, Faridabad, 2001)
obedience from their inferiors. Austin divided jurisprudence into two parts: General jurisprudence and particular jurisprudence. “General jurisprudence meant the concerned with the exposition of the principles of notions which are common to all the systems of law. Whereas “particular Jurisprudence” meant with the science of any such system of positive law as now obtains or one actually obtained in specifically determined notion.47

3. Classification of Law: Austin proceeded to distinguish between what he called. He divided a law in to two parts as show in following diagram:48 –

1. Law properly so called (these laws fit into Austin’s definition of law) - further law divided in to two parts-

2. Law improperly so called -
   i. Law by analogy (law of fashion and public opinion i.e. international by customs and traditions.
   ii. Law by metaphor e.g. scientific laws.

The law proper or properly so called, are commands; law’s which are not command that known as a law improper so called or improperly so called, may aptly divided into four following kinds:-

(1) The Divine Law’s or Law’s of God
(2) Positive law’s
(3) Positive Morality
(4) Law’s metaphorical or figurative.

The divine law or positive laws are law’s properly so called. Of positive moral rules, some are laws properly so called, but others are law improper. The positive moral rules which are laws improperly so called, may be styled laws or rules set or imposed by opinion: for they are merely opinions or sentiments held or felt by men in regard to human conduct. A law set by opinion & laws imperative and proper are applied by

47 John Austin, Lectures on jurisprudence, revised and edited by Robbert Campbell (Johan Murray, London), 1885
48 Supra note 11.
analogy merely; although analogy by which they are allied is strong or close. Laws metaphorical or figurative are laws improperly so called.

4. Theory of Sovereignty

It can be seen that law is a command. It emanates from a superior. It is therefore called imperative or analytical theory. The theory presupposes the following that, law is a product of the state; it is enforced by the sovereign. It there is no sovereign there can be no law. Consequently, superior power, sanction and command are the hallmarks of this theory.49

According to Austin, Any command by political constitute positive law. The inferior person habitually obeyed this command but who does not habitually obey – the violation of which results is a sanction.50

Austin’s definition of law as the “command of sovereign “suggests that only the legal systems of the civilized societies can become the proper subject matter of jurisprudence because it is possible only in such societies that the sovereign can enforce his commands with an effective machinery of administration. According to Austin, Constitutional law derives its force from the public opinion regarding its expediency and morality. According to Austin the distinction between the positive morality and positive law seeks to exclude the considerations of goodness or bad in realm of law. According to Austin, there is no space for justness in law for him, the existence of law is one thing and its merit ad demerit another thing. Thus according to Austin theory, positive law must be binding, though it may not be just. For him, command was the ‘key to science of jurisprudence.’51

In its popular sense, the term “Sovereignty” means supremacy or the right to demand obedience. A sovereign state which is subordinate to no other and is supreme over the territory under its control. Thus, the nature of sovereignty is explained by John Austin as follows:

50 Supra note 11.
51 Dr. Ashok K. Jain, Jurishprudence, 3(Ascent Publications, Delhi, 2015).
If a determinate human superior, not in the habit of obedience to a like superior receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society and the society, including the superior is society political and independent… To that determinate superior the other members of the society are subjects; or on that superior the other members of the society are dependent. The mutual relations which subsist between the superior and them may be styled the relation of sovereign and subject, or the relation of sovereign and subjection.”

Sovereignty in the Indian Constitution:

Austin’s theory of legally unlimited and invisible sovereignty finds no support in the Indian Constitution.

Legislative and Executive Sovereignty:

By Article 53 of the Constitution of India, provides the executive power of the union of India is vested in the president of India. Legislative power resides in Parliament which comprises the President, Council of States and the house of People. An amendment of the constitution can take place only after being amending bill duly passed as procedure required by Article 368 of the constitution of India, has received the assent of President. India is a Quasi Federal Constitution.

Can Sovereignty be located in the Constitution Amending Body?

In the Constitution of India, therefore, is no legally unlimited and indivisible sovereignty as understood by Austin. Sovereignty is in the sense of “supreme power, absolute and uncontrolled within its own sphere. Such sovereignty so far as the executive field is concerned, is in the President of India and in legislative sphere, such sovereignty resides in the Parliament.

5. Command: An Element of Law

According to Austin, law is a command of sovereign which is enforced by threat of sanction. In this way, the legal positivism has three main features.

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53 Ibid.
54 Id.52 at 62-63
1. Sovereign
2. Command

The sovereign can be a collective body of persons or single person, such as a Parliament. According to Austin, law is command of sovereign. Command is the term around which his entire theory moved. Thus command is an expression of desire of an intelligent person, directing another person to do or not to do or forbid from doing something, the violation of which will be followed by the sanction. For example Indian Penal Code, 1860 lays down the rule of command. Violations of IPC provisions are met with punishments.

Thus, Austin’s Command Theory:

- The foundation of any legal system is a legally unfettered sovereign.

- Law is essentially the sovereign’s command—an order backed by a credible threat—issued to a population who habitually obeys its commander.

- The existence of a legal system depended on a combination of the unfettered power of the sovereign and a habit of obedience in the subject population.

- To have a legal obligation is to be subject to a sovereign command to do or forbear, where a command requires an expression of will together with an attached risk.  

One of the most important developments in the understanding of law, what law is and why it is that law has authority in society, was the move away from natural law jurisprudence, articulated by Cicero, and by Hugo Grotius in the Nineteenth Century. Natural Law Jurisprudence was the idea that law derived its authority due to the perfection and purpose of nature and divinity. Law’s which were against the natural law, against the reason or justice, were not law’s at all. Early in the 19th century, legal positivism, espousing a narrow definition of law’s enacted by state or sovereign in the forms of command.

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56 Supra note 38.
57 Johan Austin, Legal Positivism and the Debate over the sources of law, Jan 14, 2017
Command exceptions

However, all the commands are not law, it is only general command, which obliges to the course of conduct, is law. According to Austin, there are three kinds of laws which, though not commands, are still within the province of jurisprudence. They are 58-

(i) Declaratory or Explanatory Theory- Austin does not regard them as commands, because they are passed only to explain laws already in force. Example General Clauses Act.

(ii) Laws to repeal laws- these too are not commands but rather the revocation of a command. Further they release the man from duties imposed by existing laws and are named permissive laws.

(iii) Laws of imperfect obligation- these laws have no sanction to attached them. Thus, there is a duty, but in case of non compliance there is no sanction behind it. For example Fundamental Duties, Directive Principles of State Policy.

Thus, it is clear that in Austin’s conception of law, notion of justice or morality have no place. The basis of the law is the power of superior and not the principles of natural justice.

But, Customary laws are not commands until it arise by the consent of governed. Thus custom laws are not creation of sovereign. The customs when decided by the judicial decisions they are enforced by the state, but before that custom is only a positive morality. Thus when the judges give a rule on custom, the legislator doesn’t change it. For example Bhopal leakage Gas Case, Keshavnanda Bharati case, Maneka Gandhi Case.

Thus, Austin took a legal system as it is i.e. positive law and resolved it into its fundamental conception. Positive law is outcome of state and sovereign and is different from positive morality. The great contrast between positive law and positive morality is according to Austin, that the former is set by a political sovereign and the latter is not the offspring of state and sovereign hence it is not a law properly so-called. Law cannot defined by ideal of justice. The science of jurisprudence is only concerned with positive laws without regard to their goodness or badness. 59

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58 Supra note 46 at 17-18.
59 Supra note 43 at 297.
Austin provided a clear designation of the scope of legal knowledge, an orderly theory of law that firmly distinguished the legal from the non-legal and made explicit the logical connections between legal ideas. Finally, he offered a way of looking at law that made legislation central rather than peripheral. Thus, his legal theory recognised the reality of modern state as a massive organization of power. It tried to show law’s relationship with this centralized and extensive power structure. It seemed in tune with modern circumstances in which government, not community, was the apparent source of law. Bentham viewed judge made law as like waiting for one’s dog to do something wrong and then beating it. However, Austin was not opposed to judicial law making. What offended him was the total lack of systematic organization or of a structure of clearly definable rational principles in common law. In his lectures he was determined to map out a rational, scientific approach to legal understanding: a modern view of law that would replace archaic, confused, tradition bound common law thought and encompass both legislation and judge made law.  

Applicability of Austin’s Theory in India –

1. We do not have a legally unlimited or indivisible sovereign. Our Constitution is supreme though it can be amended but basic structure cannot be.

2. Though, there is separation of powers yet sometimes judiciary makes law (Article 141). Example Vishaka case and D.K. Basu.

3. Ordinance making power of the Governor and the President. (Article 123 and Article 224).

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61 Article 41. Law declared by Supreme Court to be binding on all courts The law declared by the Supreme Court shall be binding on all courts within the territory of India. (Bare Act of the Constitution of India.)

62 Article- 123. Power of President to promulgate Ordinances during recess of Parliament
(1) If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinance as the circumstances appear to him to require (Bare Act of the Constitution of India.)
(2) An Ordinance promulgated under this article shall have the same force and effect as an Act of Parliament, but every such Ordinance
(a) shall be laid before both House of Parliament and shall cease to operate at the expiration of six weeks from the reassemble of Parliament, or, if before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions; and
4. We have a quasi-federal system. Though the President has the supreme power, but the same is exercised by the Prime Minister.

5. Directive Principles of State Policy are not positive law as per Austin, though Directive Principles are non-justiciable. Yet they are important as they govern the guidelines for the society.\textsuperscript{64}

\textbf{Sanction is an essential element of law:} sanction plays an important role to secure the command. Austin’s intention was not only to inflict punishment but also to secure the obedience of law.

\textbf{vi. Criticism of Austin’s theory}

Austin’s theory criticized on following grounds\textsuperscript{65}:

Salmond criticized of law which completely diverts law from morality and held that law to be effective must have in it elements of ethics, reasonableness and justice.

Austin’s positive law received criticism by Lon Fuller in United States who propagated a view that the law’s passed in derogation of popular will and needs of society would be short lived and cannot muster public support. According to him, purpose of law is to subject human conduct to the governance of rules. The law, therefore cannot be avoid of morality, which includes values, ideals, natural law and notice of justice.

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\textsuperscript{64} Article 224. Appointment of additional and acting Judges

\textsuperscript{65} Article on ‘Analytical School/ Positivism Theory of Law’, available at: \url{www.lawdessertation.blogspot.in} (visited on November 4, 2016).
Austin’s view that ‘law is the command of sovereign is not supported by historical evolution of law when customs played a important role in regulating human conduct. Further, custom’s still continue to be potent source of law even after the coming into existence of the state.

In the case of *N. Nagendra Rao v. State of Andhra Pradesh*¹⁶⁶, it was held by the court that the concept of sovereignty is different from the Austin’s theory. According to the Constitution of India, sovereignty is vests in the people of India.

Austin’s theory does not take notice of law’s which are of permissive character and confer privileges, e.g. The Bonus Act, the law of wills etc.

Judge made law has no place in Austinian conception of law, although the creative function of judiciary as a law making agency has been accepted in modern times all over the world.

Austin does not treat international law as ‘law’ because it lacks sanction He regards international law as mere positive morality. This view of Austin is hardly tenable in the present time in view of the increasing role of international law in achieving world peace.

Austin’s Theory of law over emphasis in ‘command’ as an inevitable, constituent of law. In modern progressive democracies law is nothing but an expression of the general will of the people.

Thus, the greatest short coming of Austin’s theory is that it completely ignores the relationship between law and morality. Law can never be completely separate from ethics / morality which provide strength to it.

Austin’s theory criticized as the sanction alone is not means to induce obedience. The power of state is only the last force to secure obedience of law. He treats law as artificial and ignores its character of spontaneous growth. Law is obeyed because of its acceptance by the community. In modern times, law is nothing but the general will of the people. Further, customs and conventions of the constitution, though not enforceable by law, regulate the conduct of the people and the state. Still further, judicial decisions become binding laws, while no body was commanded these.

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¹⁶⁶ AIR 1994 SC 2663
Duguit asserted that the notion of command is inapplicable to modern social welfares legislation, which do not command people but confer benefits; which binds the state itself rather than the individual. Law do not always commands, but confer privileges also e.g. right to make will. Thus, Austin’s concept of law clearly inapplicable in a modern democratic welfare state. Austin’s notion that sovereignty is indivisible is falsified by federal constitutions e.g. India, USA etc. In a federation, legislative power is divided between the union and member states. Thus, olivecrona acknowledged Austin as the pioneer of the modern positivists approach to law.\footnote{Supra note 51 at 1-5.}

\subsection*{3.6 Later Jurists improved upon his theory:}

‘Salmond and Gray further improved upon it and considerably modified the analytical positivist approach. They differ from Austin in his emphasis on sovereign as law giver. According to Salmond the law consists of the rules recognised and acted on by the court of justice. Gray defines law that has been laid down as a rule of conduct by the persons acting as judicial organs of the state. This emphasis on the personal factor in law, later on, caused the emergence of the ‘Realist School of Law.’\footnote{Manmeet Singh, “Analytical Positivism” available at: www.legalserviceindia.com (visited on December, 15, 2016)}

\section*{The 20\textsuperscript{th} Century}

The two most important statements of positivism in the 20\textsuperscript{th} Century are Hart 1997 & Kelsen 1970. Hart was influenced by earlier British Positivism like Austin and Bentham, Hart argues that every legal system is a union of obligation imposing rules (“primary”) & power-conferring (“secondary”) numbers of officials of the system accept those rules as guides to their conduct and standards and evaluation of the conduct of other legal participants. The most fundamental secondary rule of the system is what Hart calls a “rule of recognition”, which specifies the ultimate criteria of legal validity [e.g. “what parliament enacts is law.”]\footnote{Michael Sevel, Brias Leiter, “Legal Positivism”, available at: www.oxfordbibliographies.com (visited on January 1, 2015)}

\subsection*{3.6.1 H. L. A. Hart View on Legal Positivism}

Prof. Hart, a Britain philosopher and an eminent jurist, is considered as the significant exponents of analytical positivism. Hart in his vital contribution, ‘the Concept of
Law’ (1961) has expounded his legal theory as a system of rules by exploring the relationship between law and society. His main objective is to further explain understanding of law, coercion and morality. According to Hart, the law is a system of two type rules are Primary rules and secondary rules. Hart rejects Austin’s theory that rule is a kind of command and substitutes a more elaborate and general analysis what rules are. Hart observed, ‘union of these two types of rules is the most powerful tool, which will lead to proper general analysis the situation created by Austin’s definition of law. Under primary rules, human beings are required to do or abstain from certain action, whether they wish or not. Secondary rules, are in sense of parasitic upon or secondary to primary rules while primary rules are impose duties and secondary rules are confer power. According to Hart, a rule is a – 1. Something which creates obligation and simultaneously.

2. A standard by which one can judge whether rule is right or wrong.70

H. L. A. Hart may be regarding as the leading contemporary representative of British Positivism. He wrote book, the concept of law, which his theory builds on one hand and on the other hand, makes modifications in the theories of Austin and Kelsen. In his theory, he emphasis on recognition and social obedience as the essential characteristic of law or legal norm, so he criticized Austin & Kelson on this point because those emphasis law as a coercive order having elements of authority, command and sanction. Hart said that law is a system of social rules which acquire the character of legal rules. Law is a body of ‘publicity ascertainable rules. Majority of the people conform to a particular pattern of behaviour.71

H. L. A. Hart's The Concept of Law (1961) is one of the most important contributions to Analytical Jurisprudence to have been made in England since the appearance of Austin's The Province of Jurisprudence Determined in 1832. Indeed Hart's Concept of Law has come as an alternative to, and to a great-measure has developed a new theory of, British positivism by rejecting Austin's command-duty-sanction them. In The Concept of Law he presents a positivist account of law that is designed to give a more


71 Dr. Rega Surya Rao, Lectures on Jurisprudence & Legal Theory, 203(Asia Law House, Hyderabad, 2014)
adequate idea of the notion of law by dealing with various difficulties besetting Austin's philosophy of law. At the centre of Hart's analysis of the concept of law is the concept of rules and in particular the concept of a social rule, the former being a kind of directive which sets out directions for behaviour and the latter being different kinds or more or less wide practices or habitual behaviour of a community which require compliance. His works have initiated a renaissance in Analytical Jurisprudence in England. As Austin had claimed that trilogy of command, sanction and sovereign constitutes essence or nature of law Hart law is a system of rules— primary and secondary— the union of which explains the nature of law and provides 'key to science of jurisprudence'. His legal system— a union of primary and secondary rules— cannot be complete without the minimum content of Natural Law shared both by law and morals. His positivism contains within it a ‘minimal version' of Natural Law which Hart says every legal system must have as a natural necessity. In short, H. L. A. Hart at best can be described both a positivist and naturalist who by correlating law and morality conceived what Austin and Kelsen failed to conceive in legal theory.72

According to H.L.A. Hart, the law is the collection of rules whose status as legal rules is a consequence of some official action (they are, for the most part declared by the legislature or courts). Hart’s theory of law appearing in the most complete formulation the concept of law, articulates roughly two stages for determining what the law requires two stages of legal interpretations: the first involves the identification of legal rules, the second stage, of the requirements of these rules vis a vis a particular case. Together these two process establish what the law says or whether it says anything on any given matter. According to Hart, all legal system have a test for identification of legal rules, a test which all practitioners know and agree upon. Hart calls this test ‘the Rule of Recognition’. Only rules which satisfy the test are recognised as legal rules (rather than moral rules or what have you). The rule of recognition specifies certain ‘sources of laws’ where legal rules are to be found. These sources include the collection of statutes passed by Parliament, judicial precedents, the decisions of administrative agencies and other authorities.73

72 Supra note 12
1. Hart’s Theory of law:

Thus, Hart replaced Austin’s sovereign …. Command with the idea of a complex law system comprised of ‘primary rules’. Primary rules governing human conduct and that are also regulated by secondary rules or understanding the concept of law and the related legal concepts of ‘obligation, rights, validity and source of law, legislation and jurisdiction and sanction ‘requires the insight that law is a union of primary and secondary rules.\textsuperscript{74}

He is an analysis of the relation between morality, law, and coercion. He explains that to classify all law’s as moral commands is to oversimplify the relations between law, coercion and morality. Thus, Hart rejected Austin’s theory of Positivism and expounded his own legal theory which is based on relationship between law and morality.\textsuperscript{75}

\textsuperscript{74} HLA Hart, The Concept of Law, 78-79, 91-94(Oxford University Press, Oxford 1961)
\textsuperscript{75} Ibid at 61.
Hart’s account of law’s normativity rests ultimately on the fundamental accepted norm, which he calls the rule of recognition. Hart offers a general theory of law that conforms to the requirements of legal positivism. Like Kelsen, Hart conceives of law as a system of norms or as he says rules. He conceives of law as a system of primary duty imposing rules and secondary rules of change, adjudication and recognition. Here, rule of adjudication constitute courts, and other law applying organs and regulate their activities and the rule of recognition lays down criteria for the identification of the rules of system.76

2. Reformulations of Positivism:

Law’s are rules that may forbid individuals to perform various kinds of actions or that may impose various obligations on individuals. Law may require individuals to undergo punishment for injuring other individuals. The law may also specify how legislatures are to be assembled and how courts are to function. Law may also specify how new law’s are enacted by the legislature and how old law are to be changed. Hart says that laws may differ from the command of sovereign as Austin propounded because law may apply also on individuals who enact them and not merely to other individuals who are political inferior.77

Laws may also differ from coercive orders because law may not only impose duties or obligations but may also confer powers or privileges. Thus laws that impose duties or obligations on individuals are described by Hart as “Primary rules of obligation.” Secondary rules may also be necessary in order to provide an authoritative statement of all the primary rules because secondary rule enables the legislature to modify their policies according to the needs of society. Secondary rules may also be necessary in order to enable courts for interpretation and application of the primary rules. The secondary rules of a legal system may thus include (i) rules of recognition 2) rules of change and 3) rules of adjudication. Hart says that Primary rules of obligation are not in themselves sufficient to establish a system of laws that can be formally recognised

changed or adjudicated. Hart distinguishes between the external and internal points of view with respect to how the rules of a legal system may be described or evaluated.\textsuperscript{78}

3 The Rule of Recognition

The rule of recognition fulfils the two main important functions\textsuperscript{79}:

- It identifies the law; i.e. custom, legislation, judge made law
- He constitutes that the ultimate source of law’s Normativity by imposing a legal duty on the officials to apply all and only norms that meets the criteria of validity laid down in it.

According to Hart, law may also be regarded as hierarchy of rules. The each rules validity maybe traced back to the rule of recognition. These rules may be primary rules or secondary rules. Thus, recognition is a social rule whose existence can be empirically recorded because this rule of recognition is not a mere postulate theory like Kelson’s basic norm.\textsuperscript{80}

Prof. Hart is regarded as the leading contemporary representative of British Positivism. According to Hart, law is the system of two types of rules the union of which provides key to the science of jurisprudence. These rules, he called as Primary and secondary rules. H.L.A. emphasized that primary rules are duty imposing while secondary rules confer power and the union of two is the essence of law. Prof. Hart approaches his concept of law in this way. According to him, ‘where there is law, this human conduct is made in some sense non-optimal or obligatory’. Thus the idea of obligation is at the core of a rule. Thus primary rules which impose duty upon individuals are binding because of the popular acceptance such as Kinship, family sentiments etc. these being unofficial rules. They suffer from three major defects namely, 1. Uncertainly, 2. Static character; 3. Insufficiency. The secondary rules which are power conferring enables the legislation to modify their policies according to the needs of the society. Infact they seek to remedy the defects of the primary rules and it is out of the union of these two types of rules that law takes its birth. Prof Hart’s Positivism explains the existence of law with reference to the rule of recognition, binding force of which depends upon its existence. The validity of law is to be vested

\textsuperscript{78} Ibid.
\textsuperscript{79} Joseph Raz, \textit{the concept of legal system} 19 (Oxford press, 1980).
on the basis of rules of recognition which is similar to Austin’s conception of sovereign.  

Thus, At the center of this significant contribution to jurisprudence is the contention that a proper analysis of law begins with a consideration of the viewpoint of the community whose law it is. It is only from this “internal” standpoint that the functions of law may be understood. Thus viewed, law may be broken into two elements: Primary rules and secondary rules. Primary rules are standards of behaviour for a society: They impose obligation which are “accepted” by a substantial part of the community as binding apart from sanctions. If they existed alone, they would be largely indistinguishable from morals. Secondary rules supply the obvious deficiencies that attend a set of primary rules alone. Secondary rules perform three main roles, distinct from each other and from the creation of obligations. One kind of secondary rules, “the rule of recognition, identifies the primary rules so that they are marked off from morals, etiquette or private wish. Thus in England the rule of recognition prescribes that statutes enacted by queen in parliament are law, decisions of courts are law, duly enacted by municipal ordinances are law. A second group of secondary rules provides for change in primary obligations. These rules include both those which permits the making of new public laws and those, such as las of contracts, or wills, which give private parties the right to create or alter primary obligations. A third branch of secondary rules deals with the tribunals to determinate the violations of primary rules and with the application of sanctions for their breach. Their combination of primary and secondary rules is the “Key to the science of jurisprudence.”

4 Hart’s Theory of Law difference with Austin:

1. Hart said that Austin has talked about society and not a legal system.

2. He said Austin failed to acknowledge that law’s are applicable not only to the general members of the society, but also to the sovereign members of the society in their role as individual citizens.

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81 Supra note 5 at 26.
83 Supra note 70.
3. All laws are not coercive commands. There are other varieties of law, such as a law conferring legal powers to adjudicate (public power) or legislate or to create or very legal relations (private power).

4. There are legal rules like customs, which Austin completely ignored.

5. The analysis of the law in the terms of sovereign habitually obeyed, failed to take into account the model legal system.

6. While the Austin’s command merely predicts the obligation, Harts rule actually constructs the obligation.

7. Hart said that the judges have a limited discretion but infact; the judicial discretion must be conceived in positivism permitting judges to look outside law for standards to guide them while deciding cases.

8. Austin and Kelsen, condemned natural law, but Hart considers that it is necessary for law and morality to have a certain content of natural law. Rules of morality ate implicit in Hart’s system of law of primary rules and secondary rules.

Hart states that Austin & Bentham did not mean that moral principles may never form parts of legal rules but that in the absence of an expressed. Legal provision, it could not follow from the mere act that a rule violated standards of morality that it was not a rule of law; and conversely, it could not follow from the mere fact that a rule was morally, desirable that it was a rule of law.”

3.6.2 Kelsen View on Legal Positivism

Kelsen is the Austin jurist. He challenged both the philosophical and natural theories of law. He owes his fan chiefly due to the ‘pure theory ls law or the ‘Doctrine of pure law.’ He advocated he separation of law from metaphysics, politics and sociology. The Vienna school of jurisprudence is popularly known as “Kelsen’s Pure Theory of law.” Analytical positivism has been developed and placed on a theoretical philosophical basis by the Vienna school of jurisprudence. Kelsen, worked as Professor in Vienna University, developed basically Austin’s theory of law. He released the theory of law entitled, “The General Theory of Law and State” in the year

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1945. The theory of Kelsen represents a development in two directions. On the one hand, it marks the most refined development to date of analytical positivism; on the other hand, it marks a reaction against the role of different approaches that characterized the opening of the twentieth century. Like Austin, Kelsen too challenge the philosophical and natural law theories of law. The main purpose of Kelsen’s theory is that it proceeds to free the law from the metaphysical mist with which it has been covered by all times by the speculations on justice or by the doctrine of jus naturalis.85

Kelson was a Prof. of jurisprudence in Vienna University, Austria. He owes his fame mainly due to his pure theory of law. According to him, pure theory of law must deal with law as it is actually laid down not as it ought to be. Kelson law should be uniform and it should be all time & in all places. A theory is something which is universal application. He advised a Pure Theory of law, which would have the ingredient of only one discipline, i.e. law and totally devoid of sociology, political science, economic etc. though their value is not denied but Kelson insisted that a theory of law must not have such consideration. There must be a pure theory of law. For Kelson law is a normative science and not a natural science, based on a cause and effects. It is a norm that directs an official to apply force under certain circumstances, thus theory of law is a theory of positive law.

1. Kelsen’s Pure Theory of Law:

Though the natural law was rejected in England as early as in the 19th Century, in the continent it had its footing till the beginning of the 20th century. New theories in the 20th century started inflicting severe blow’s on ‘Natural Law Theories’. The ‘Pure Theory of law’ also rejected the idea of natural law. Secondly, Kelson’s theory came also as a reaction against the modern schools which have widened the boundaries of jurisprudence to such an extent that they seen almost conterminous with those of social sciences. Thirdly after the world war-I most of the countries in the continent adopted written constitutions. The idea of a fundamental law as the basis of the legal system reflected in then. The idea of ‘Grundnorm’ which may be said to be the foundation stone of the ‘Pure Theory’ and the definition of law as the ‘hierarchy of

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85 Supra note 71 at 204.
norms’ seem to be inspired by the above principle. Pure theory of law means that it is concerned solely with that part of knowledge which deals with law, excluding from such knowledge everything which does not strictly belong to the subject matter of law. The pure theory of law separates the concept of the legal completely from that of the moral norm and establishes the law as a specific system independent even of the moral law... Thus, a norm becomes a legal norm only because it has been constituted in a particulars fashion, born of a definite procedure and a definite rule. Law is valid only as a positive law, that is, statute (constituted) law. Therefore, the basic norm of law can only be the fundamental rule, according to which the legal norms are to be produced; it is the fundamental condition of the law making.  

Further, the pure theory of law is general theory of law that conforms to the requirements of legal positivism. It aims to understand the law as it is, not as it ought to be, and its method is structural analysis. The pure theory conceives of law as a system of norms, which norms function as schemes of interpretation in the light of which we can view human behaviour and other natural events. The structure of such a system is described by Kelsen’s analysis that norms on a higher level authorize the creation of norms on a lower level. On Kelsen’s analysis, a norm is the meaning of an act of will directed at the meaning of an act of will directed at the behaviour of another. To say that a legal norm, is valid, Kelsen explains, is to say that it exists and to say that exists is to say that it ought to be obeyed or applied that it has binding force. Thus a norm, is legally valid if and only if it was created in accordance with another and higher legally valid norm. Kelsen rejects John Austin’s command theory of law. He maintains instead that a command can be binding only if the commander has the legal ponder to issue that command, and that the commands illegal power depends on the existence of a legal system that confer’s on him the requisite legal power. Hence, a gangster’s command that you hand over your money to him cannot be binding as there is no legal valid norm conferring legal power on the gangster to issue such commands. Kelsen concludes that Austin wrongly thought he could derive itself, when instead he should have focused on the conditions under which the command is issued.

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86 Supra note 30 at 17-18.
87 Supra note 76.
2. The basis norm’s as Hypothesis:

When tracing the validity of a given legal norm through the chain of validity, one finally arrives at historically first constitution. Since that constitution can not have been created in accordance with another and higher valid norm, Kelsen terminates the chain of validity by simply presupposing that we ought to believe in accordance with the historical first constitution. He called this presupposition the basic norm and explain that it is “the final postulate, upon which the validity of all the norms of our legal system depends.\textsuperscript{88}

3. Postulates of Kelsen’s:

Jurists are not concerned with the nature and origin of “Grundnorm.” In every legal system there is always a ‘Grundnorm’ although its forms are different in different legal systems. The ‘Grundnorm’ can be recognised by the ‘minimum effectiveness’ which it possesses. But any discussion about the nature and origin of the ‘Grundnorm’ is not within the province of the pure theory of law’. Before applying Kelsen’s theory to any legal system one must discover the ‘Grundnorm’.

Kelson said that ‘Norm’ is a rule forbidding or prescribing certain behaviour. In other words, norm means an act of will by which certain behaviour is commanded or allowable or sanctioned. Grundnorm is vital fundamental norm is the initial assumption upon which the whole system rests. The Grundnorm is reason for the rest of legal system. The ‘Grundnorm’ is the starting point for the philosophy of Kelson. A legal order comprised of norms placed in hierarchal manner one norm place above other norm and every norm deriving its validity from the norm above it. Thus, the function of Grundnorm is to give objective validity to positive legal order that it is the common source for the validity of all norms that belong to legal order. Kelson stated that ‘Grundnorm’ need not be the same in every legal system, but a Grundnorm of some kind will always be there.

Thus, According to Kelsen, “Norms determine human behaviour, the science of law, in describing the law as a set of norms is also describing human behaviour; but it does not describe it as it takes place as cause and effect in natural reality. It describes behaviour as it is determined i.e. prescribed or permitted by legal norms.\textsuperscript{89}

\textsuperscript{88} Id.
\textsuperscript{89} Hans Kelsen, “Science and Politics”, 651 The American Political Science Review, vol. XLV [September 1951].
Positivism is something which is morality netural and based on empiricism (experiments and observation). It was the reaction to the vagueness of natural law. Austin analysis of the sovereignty embraces the existence of the supreme power which is determinate, absolute, illimitable, inalienable, indivisible all the comprehensive and permanent.\textsuperscript{90}

The main focus of Kelson’s Pure Theory of Law is the notion of ‘basic norm’ which he called the ‘Grundnorm’- a hypothetical norm presupposed by the jurist from which hierarchy of all ‘lower norm’ in a legal system, are understood to derive their authority or abidingsness. The Grundnorm is initial hypothesis upon which whole legal system depends.\textsuperscript{91}

Kelson maintained his theory that law is pure norm. one of his leading manifesto demonstration that legal rules are abstract entities identifiable neither with events which give rise to them (their legislative history) nor with the events which constitute its application either judicial or administrative action.\textsuperscript{92}

According to Kelson, that legal norms bindingness can be understood without tracing it with superhuman sources such as God, Nature. According to Kelsen, “legal science as a science of norms”. According to Kelson, positive norms are valid only on one assumption that is basic norm which establishes the supreme law creating authority. The validity of Grundnorm/ Basic Norm is unproved and remains the sphere of positive law itself.\textsuperscript{93}

According to Kelsen’s theory it is logically necessary that in every legal system there exist one basic norm. The basic norm can be said to exist for Kelsen says that it is valid and validity is the mode of existence of norms. Kelsen postulates the existence of basic norms because he regards of unity and normativity of legal systems. A legal system is not haphazard collection of norms. It is a system because its norms, as it were, belong together. They are inter-related in special way. Kelsen accepted two propositions which he considers too self-evident to require any detailed justification. They can be regarded as axioms of his theory. The first says that two laws, one of

\textsuperscript{90} Abhinav Thakur, “Austin’s Concept of Sovereignty and Its Relevance In Indian Legal System and Indian Judiciary”, available at: [www.legallyindia.com](http://www.legallyindia.com) (visited on October 13, 2016).

\textsuperscript{91} Supra note 7 at 545.

\textsuperscript{92} J.W.Harris, Law and Legal Science: An Inquiry in to the Concepts Legal System, 34(Oxford University Press, 1979).

which directly or indirectly authorizes the creation of the other law, necessarily belong to the same legal system. For example, a criminal law enacted by Parliament and a Constitutional law authorizing parliament to enact a criminal laws belong to one legal system just because one of them authorizes the creation of other. The second axion says that all the laws of a legal system are authorized directly or indirectly by one law. Thus, though every law is created by human action it derives its validity not from the act, but from another law authorizing its creation. Ultimately, all positive laws owe their validity to non-positive law, a law not created by human action. Only a non-positive law can be the ultimate law of a legal system, only it does not presuppose another norm from which it derives its normativity. This non-positive law is the basic norm. The functions assigned to the basic norm explain its content and its special status. It must be non-positive norm. Basic norms are not enacted, nor are they created is any other way. It is pre-supposed by legal consciousness, but Kelsen, makes it clear that it is created by the acts of enacting other law or by the recognition by the population of duty to obey the law, as some nor is a power conferring law. Kelsen explains that the content by the facts through which an order is created and applied.94

According to Kelson, “Law is a normative science”. But law norms have a distinctive feature. They may be distinguished from science norms on the ground that norms of science are norms of being, while the law norms are ought norms. Law does not attempt to describe what actually occurs but prescribes certain rules. He says, “if one breaks the law then he ought to be punished.” According to Kelson, ‘norm is the rule forbidding or prescribing certain behaviour.’ For him, legal order is the hierarchy of norms having sanction and jurisprudence is the study of these norms which comprises legal order. He distinguished moral norms with legal norms. For example, moral norms says that one shall not steal but since it has no punitive, consequence it lacks coercive force but if it is reduced into form of legal norms, it would say, ‘if a person steals, he ought to be punished by the competent organ of the state’. This ought to in the legal norm refer to the sanction to be applied for violation of the law. Essential elements of Kelson’s Theory as follows95:-

95 Supra note 5 at. 27-29.
1. The aim of Pure Theory of Law, as of any science, is to reduce chaos and multiplicity to unity.
2. Legal theory is science, not volition. It is knowledge of what the law is, not of what the law ought to be.
3. The law is normative science not a natural science.
4. A theory of law is formal, a theory of way of ordering, changing contents in specific way.
5. The relation of legal theory to a particular system of positive law is that to possible to actual law.

Though the natural law was rejected in England as early as in the 19th Century, in the continent it had its footing till the beginning of the 20th century. New theories in the 20th century started inflicting severe blow on ‘Natural Law Theories’. The ‘Pure Theory of law’ also rejected the idea of natural law. Secondly, Kelson’s theory came also as a reaction against the modern schools which have widened the boundaries of jurisprudence to such an extent that they seen almost conterminous with those of social sciences. Thirdly after the world war-I most of the countries in the continent adopted written constitutions. The idea of a fundamental law as the basis of the legal system reflected in then. The idea of ‘Grundnorm’ which may be said to be the foundation stone of the ‘Pure Theory’ and the definition of law as the ‘hierarchy of norms’ seem to be inspired by the above principle. Pure theory of law means that it is concerned solely with that part of knowledge which deals with law, excluding from such knowledge everything which does not strictly belong to the subject matter of law. The pure theory of law separates the concept of the legal completely from that of the moral norm and establishes the law as a specific system independent even of the moral law... Thus, a norm becomes a legal norm only because it has been constituted in a particulars fashion, born of a definite procedure and a definite rule. Law is valid only as a positive law, that is, statute (constituted) law. Therefore, the basic norm of law can only be the fundamental rule, according to which the legal norms are to be produced; it is the fundamental condition of the law making.\footnote{Supra note 30 at 17.}

Thus, Kelsen’s pure theory of law is a distinct improvement upon Austin’s theory. It has steered clear of many of the bit falls encountered by the Austinian. The theory
has, however, its own limitations. The identification of the state with legal order seems to be opening in question. The State has to operate even outside the ambit of the legal order unless the legal order is made co-terminus with society as in totalitarian status. Even if the ambit of the legal orders is thus extended, it must be admitted that the state has to operate vis-à-vis other states and the sphere of such operation may have to fall outside the legal order. So, the denigration of the concept of state does not seem to be justified. The main weakness of Kelsen’s theory is the admission that Grundnorm is an improved hypothesis. If this Grundnorm is to differ from country to country depending upon its past traditions and history, the very concept of ‘Jurisprudentia’ ‘generalizing’ is undermined. This must be admitted to be a drawback of this theory.

3.7 Legal Positivism – Indian Perspective:

3.7.1. Austin’s Theory of Legal Positivism: Before 1947

Before the arrival of British ruler in India, the legal system of India mainly based on customary, moral-cum-religious rule as embodied in ‘Dharmashastra’. In ancient India, the King was the symbol of dharma. The rule of law was generally described in ‘Manusamhita’. King played a role as protector of the people and promulgator of law and justice. Later 200 B.C. and 200 A.D., Code of Manu constructed which deprive king’s law-making power and treats him merely as executive head with duty to use danda or authority judiciously in the interest of sustaining Dharma. Law of Dharma was higher law in ancient India. Law of Dharma bound both the king and the peoples. A true king was always subject to dharma or ordained in ‘Dharmashastra’ and interpreted by sages. In that period, law was never of the proto type of Austinian sovereign concept because the Law of Dharma was supreme law. Importance was given to values of justice and mortality because Indian sovereign was never so legally empowered to be as powerful to dare to break or violate the rule of Law (Dharma). Indeed the law of Dharma enshrined duties and obligations of the ancient king for the welfare of his subjects and promotion of Dharma.

It was only in the wake of British hegemony over India that British rulers indiscriminately and arbitrarily imposed their political system, laws, and language on

97 Supra note 52 at 62-63.
98 Supra note 4 at 63-70.
Indians. The British imperialism and absolutism implementation was no theory of law. It could fit only with Austin’s Analytical jurisprudence. Austin’s Analytical jurisprudence meant absolute despotism, police state, gun man rule, anti-people administration devoid of morality and justice.

In essence the system of British rule and spirit of law, India before 1947 was Austinian in origin, thought and content which was extolled by Indian judges, lawyers and jurists as a hall-mark and great contribution of the West to the East. Thus Indian legal community was fully converted to Austinian jurisprudence. They treated Austin as their God-father and rejecting their ancient legal heritage. Austinian positivism theory being anti-values, anti-freedom, anti-people vesting absolute power in hand of sovereign of state greatly helped the British jurists Macaulay to impose their laws and legal institutions on Indians. Such laws were in the nature of commands to meet and suit the needs of British interests in India and not to serve the people.99

The First Law Commission of India with Lord Macaulay as its President set the example for incorporating English Law both statutory and common law in Indian Codes and Statutes. The device of ‘Equity, Justice and Good Conscience’100, was another indirect method of assimilating English law in areas so far not covered by statues. For the certainty of the Law, Law Commissions was adopted positivistic legal rules as enunciated by John Austin101. For examples:

I. The Indian Penal Code, 1860,
II. The Indian Contract Act, 1872,
III. The Indian Evidence Act 1872,
IV. The Code of Civil Procedure,
V. The Code of Criminal Procedure, etc.

3.7.2 Austin’s Theory of Legal Positivism: After 1947

With the adoption of the Constitution in 1950, Indian legal theory and legal notions acquired new dimension with Freedom, Liberty, Equality and Social justice as

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99 id
100 The law of Trusts, Specific Relief, Doctrine of Election, Rule against Perpetuity etc. have been borrowed from the English doctrine of equity, justice and good conscience
101 Supra note 4.
signature tune of the Indian Constitutional jurisprudence. In the prophetic words of justice Krishna Iyer:\(^{102}\):

“The Constitution became the National Charter pregnant with social revolution, not a legal Parchment barren of militant values, to usher in a democratic, secular, socialist society which equally belongs to the masses including Harijan and Girijan millions hungering for a humane deal after feudal-colonial history’s long night”.

Thus in India there is vital require complying with Austinian positivism. The Indian Parliament accordingly embarked on an ambitious legislative programme to give fair deal to weaker sections and suppressed masses of the society.

According to Austin’ “Law was a command of sovereign backed by sanction”.

The theory of Legal Positivism has been used by the judiciary in India while deciding landmark cases. Therefore, there have been cases in India where the judiciary has been influenced by the legal positivist school while giving the judgement. Therefore, there are cases where the judges have interpreted the law as has been laid down by the legislature. Therefore, the legal positivist school has played a great role in the Indian perspective also.\(^{103}\)

Researcher would try to explain Austin’s concept in Indian perspective by giving the examples of few judgements. Such as:

In the case of In the case of Shankari Prasad v. Union of India\(^{104}\), In order to abolish the Zamindari system widely prevalent in India, some State Govts enacted the Zamindari Abolition Act to acquire huge holding of land that lay with rich zamindars, and redistribute them among the tenants. But the same was challenged as being unconstitutional and violative of the Right to Property that was included in the Fundamental Rights. The Act was held unconstitutional by the HC of Patna but was upheld by the HCs of Allahabad and Nagpur; whereby eventually the matter was put before the Supreme Court. In the midst of this, the Union Govt brought forward the

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\(^{102}\) Supra Note 91.


\(^{104}\) AIR 1951 SC 458
First Amendment to the Constitution, validating the Zamindari Abolition laws and limiting the Fundamental Right to Property. New Articles 31 A and B were included in the Constitution to validate the impugned measures. The Zamindars challenged the constitutional validity of first amendment (1951), which curtailed the right to property, was challenged. It was challenged that Amendment (in this case an amendment to Article 31A and 31B) that take away fundamental right of the citizens is not allowed by article 13. It was argued that “State” includes parliament and “Law” includes Constitutional Amendments. It was held by Supreme Court that ‘Law’ in Article 13 is ordinary law made under the legislative powers. And therefore, the parliament has power to amend the constitution.

In *Golak Nath v. State of Punjab*, the validity of 17th Amendment which inserted certain Acts in Ninth Schedule was once again challenged. The Supreme Court ruled that the Parliament had no power to amend Part III of the Constitution and overruled its earlier decision in Shankari Prasad and Sajjan Singh case.

Once again the concept of legal positivism revived in the landmark judgement of *A.K. Gopalan v. State of Madras*, the petitioner was detained under the Preventive Detention Act. The petitioner challenged the constitutionality of the said act on the ground that the act infringed Article 19 as well as Article 21 of the Constitution.

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105 Article 13 Laws inconsistent with or in derogation of the fundamental rights
(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void
(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void
(3) In this article, unless the context otherwise requires law includes any Ordinance, order, bye law, rule, regulation, notification, custom or usages having in the territory of India the force of law; laws in force includes laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas
(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368 Right of Equality (Bare Act of the Constitution of India.)

106 Available at: https://lawlex.org/lex-bulletin/case-analysis-shankari-prasad-vs-union-of-india-air-1951-sc-455/9758 (visited on February 6, 2018)

107 AIR 1967 SC
108 AIR 1950 SC 27.
109 Article 19. Protection of certain rights regarding freedom of speech etc
(1) All citizens shall have the right
(a) to freedom of speech and expression;
(b) to assemble peaceably and without arms;
(c) to form associations or unions;
(d) to move freely throughout the territory of India;
of India. The Supreme Court upheld the validity of the Preventive Detention Act and stated that law is ‘lex’ and not ‘jus’. Therefore, what is laid down by the legislature is to be regarded as the law of the land even if it is not just. This judgement clearly reflected the thinking of the positivist school. In Gopalan Case, the Supreme Court revived the Austinian Positivism in Indian Constitution.

“Justice Patanjali Shastri was of the view that Law in Art. 21 does not mean the jus naturale of civil law but means positive or state made law.”

Through this judgement, the Court observed that the word Article 20 is nothing but law made by the state and Procedure established by law means law made by the sovereign i.e. state.

(e) to reside and settle in any part of the territory of India; and
(f) omitted
(g) to practise any profession, or to carry on any occupation, trade or business
(2) Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence
(3) Nothing in sub clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub clause
(4) Nothing in sub clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub clause
(5) Nothing in sub clauses (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe
(6) Nothing in sub clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub clause, and, in particular, nothing in the said sub clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,
(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or
(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

(Bare Act of the Constitution of India.)

Article 21. Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law. (Bare Act of the Constitution of India.)

the enacted law
the principles of natural justice
AIR 1950 SC 91
It has been characterized as the 'high-water mark of legal positivism’. A. K. Gopalan reflected the sway of positivism the Superior authority of law enacted by the Legislature as final for determining law overlooking the moral and the natural law principles as incompatible. It rejected natural law as the criteria for determining the law.\textsuperscript{114}

\textbf{R.K. Garg v. Union of India,}\textsuperscript{115} This case was popularly known as Bearer Bond case. The validity of the Special Bearer Bonds (Immunities and Exemptions) Act, 1981, was challenged on the ground of arbitrariness under Article 14\textsuperscript{116} of the Constitution of India and it was argued that this particular piece of legislation was encouraging the evasion of taxes. The legislature passed a law under the Special Bearer Bonds (Immunities and Exemptions) Act, 1981, that if black money was invested in certain government bonds within a stipulated period of time, the government would not question with regard to the source of the black money. The court upheld the validity of the law as it is.

In \textit{Keshavananda Bharati} case, the Supreme Court upheld that the parliament cannot amend the basic structure of Constitution of India while making a law.

\textit{In A. K. Roy}\textsuperscript{117} judgement, a positivistic posture is criticized. Another facet of India Positivism is visible in the Terrorist and Disruptive Activities (Prevention) Act, 1987. The Apex Act, by holding that preventive detention was not incompatible with guarantees provided in Articles 19 and 21 and declared that no detenu, prisoner including the TADA hardcore militants shall be subject to handcuffs and other fetters except under special reasons and directions issued by the Supreme Court during transport from jail to court. The Apex Court affirming that Personal liberty is one of the most cherished freedoms, perhaps more important than other freedoms’ guaranteed under the Constitution. It was for this reason that the Founding Fathers enacted safeguards in Articles 22\textsuperscript{118} in the Constitution so as to limit the power of the

\textsuperscript{114} Supra note 94
\textsuperscript{115} AIR 1976 SC 1559.
\textsuperscript{116} Article 14. Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. (Bare Act of the Constitution of India.)
\textsuperscript{117} AIR1980 SC
\textsuperscript{118} Article 22. Protection against arrest and detention in certain cases
State to detain a person without trial which may otherwise pass the test of Article 21, by humanizing the harsh authority over individual liberty. In a democracy state, the people are governed by Rule of Law and the drastic power to detain a person without trial for security of the State or maintenance of public order must be strictly constructed\textsuperscript{119}.

Prof. Hart in England and Prof. Lon Fuller of Harvard University have attacked the analytical separation of law from morals. According to them legal positivism must fulfill the requirement of justice, fairness and morality, otherwise it is liable to rejection or being declared not binding.\textsuperscript{120}

In the case of \textit{Smt. Indira Nehru Gandhi v. Sri Raj Narain}\textsuperscript{121} a Constitution Bench of the Supreme Court held that it was subversive of the principle of free and fair election postulate and basic structure of the Constitution. Justice K.K. Mathew, held it

\begin{itemize}
\item[(1)] No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice
\item[(2)] Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate
\item[(3)] Nothing in clauses ( 1 ) and ( 2 ) shall apply (a) to any person who for the time being is an enemy alien; or (b) to any person who is arrested or detained under any law providing for preventive detention
\item[(4)] No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless (a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:
\item[(5)] When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order
\item[(6)] Nothing in clause ( 5 ) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose
\item[(7)] Parliament may by law prescribe
  \begin{itemize}
  \item[(a)] the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub clause (a) of clause ( 4 );
  \item[(b)] the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and
  \item[(c)] the procedure to be followed by an Advisory Board in an inquiry under sub clause (a) of clause ( 4 )
\end{itemize}

\textsuperscript{119} Supra note 91.\textsuperscript{120} Supra note 4 att 63-70.\textsuperscript{121} AIR 1975 SC 2299
was outside the scope of constituent power. The court declared that the 39th Amendment violated the basic structure of the Constitution.

In *Maneka Gandhi case* the Supreme Court found fissure in the Passport Act, 1967 under which Maneka Gandhi’s passport was impounded by the Central Government. It was lacking fairness, justness or morality and accordingly judges declared such an order as void. The apex court upheld that every law must contain and fulfill the moral as well as procedural criteria within it otherwise it would not be regarded as law. Further, it held that the mere prescription of some kind of procedure is not enough to comply the mandate of Article 21. A procedure to be fair or just must embody the principles of natural justice. Natural justice is intended to invest law with fairness and to secure justice the Court said: ‘Law should be reasonable law and not enacted piece of law’.

3.7.3 Austin’s Theory of Legal Positivism: Present Scenario

Justice Bhagwati and justice Krishna laid the foundation of a new social legal philosophy by interpreting law according to Indian situations.

As Justice Krishna Iyer remarked—“Where doubts arise the Gandhian talisman becomes a tool of interpretations: Whenever you are in doubt…………….. Apply the following test. Recall the face of the poorest and the weakest man whom you may have seen, and ask yourself, if the step you contemplate is going to be of any use to him.”

Today Article 21 embodies within itself the essential parameters of a welfare State in India as set out in the Preamble, the Directive Principles of State Policy and Articles 14 and 19 of the Constitution. In fact right to life and social justice are compendious concepts ensuring a new social order for a civilized living of common masses rather than of a few classes. Therefore these expressions have generated an aura of peaceful transition from archaic legal positivism to healing and expanding contents and reach of social justice jurisprudence solely on account of judicial interpretation to achieve the right to life which was not even foreseen by the founding fathers of the Constitution. In Maneka Gandhi, justice Bhagwati laid the sheet anchor of new legal

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122 The Thirty-ninth Amendment of the Constitution of India, the Vice President, the Prime Minister and the Speaker of the Lok Sabha beyond the scrutiny of the courts of India.

123 Supra note 109.
theory when he remarked: “The Principle of reasonableness which legally as well as philosophically is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer to the test of reasonableness in order to be in conformity with Articles 14.” The court has interpreted the concept of social justice and right to life in the light of emerging social conditions to resolve social problems to achieve to avowed social purposes and goals: Life, Liberty and Equality\(^\text{124}\).

While we compare the Gopalan and Maneka Gandhi case, in Gopalan as the judiciary was unconcerned with social reality, the Court took a narrow approach of Article 21. However, in Maneka Gandhi case, the Apex Court is not merely interpreting the provisions of the Constitution but has been expounding the Constitution giving it a touch of immortality for the coming generations.

*In Union of India v. Prabhakaran Vijaya Kumar and ors*\(^\text{125}\), it was held that with the advance of industrialization the laissez faire theory was gradually replaced by the theory of the welfare State, and in legal parlance there was a corresponding shift from positivism to sociological jurisprudence.

Mr. Justice Bhagwati echoed: “Today a vast revolution is taking place in the judicial process; the theatre of law is fast changing and the problems of the poor are coming to the forefront. The Court has to involve new methods and devise new strategies for the purpose of providing access to justice to a large masses of people who are denied their basic human rights and to whom freedom and liberty has no meaning.”

### 3.7.3.1 Post-Independence Perceptions:

As a result of long British Colonial rule in India, Certain Principles of natural law enshrined in the English Law automatically found place in the Indian law which is broadly modeled on the British laws. The Principles of natural justice, doctrine against bias, judicial review, reasoned decisions and many other precepts of administrative law are based on principles of natural law. The law of Trusts, Specific Relief, Doctrine of Election, Rule against Perpetuity etc. have been borrowed from the English doctrine of equity, justice and good conscience. It must be stated that the

\(^{124}\) Supra note 91.

\(^{125}\) (2008) AIR(SCW) 4165
principles of natural law find a prominent place in the Constitution of India. The provisions relating to Preamble, Fundamental Rights (Part III) and Directive Principles of State Policy (Part IV) amply show that the framers of the Indian Constitution were particularly conscious above the inclusion of natural rights in the constitutional document. Such as\textsuperscript{126}:

1. The right to equal justice and free legal aid (Art. 39A)\textsuperscript{127}.

2. Workers participation in Management of Industries (Art. 43A)\textsuperscript{128} have further been inserted in the Constitution by the Constitution (42\textsuperscript{nd} Amendment) Act, 1976 to ensure adequate protection to poor and indigent persons.

3. Articles 15 (4)\textsuperscript{129} which was added by the Constitution (First Amendment) Act, 1951 provides for special provision for advancement of backward classes by way of exception to Article’s 15 (1) & (2) and Article 29 (2). The clause is

\textsuperscript{126} Supra note 4 at 63-70.
\textsuperscript{127} Article 39. Certain principles of policy to be followed by the State: The State shall, in particular, direct its policy towards securing
(a) that the citizens, men and women equally, have the right to an adequate means to livelihood;
(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;
(d) that there is equal pay for equal work for both men and women;
(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;
(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. (Bare Act of the Constitution of India.)
\textsuperscript{128} Art. 43. Living wage, etc, for workers The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co operative basis in rural areas. (Bare Act of the Constitution of India.)
\textsuperscript{129} Article 15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth
(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them
(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to
(a) access to shops, public restaurants, hotels and palaces of public entertainment; or
(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public
(3) Nothing in this article shall prevent the State from making any special provision for women and children
(4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. (Bare Act of the Constitution of India.)
applicable in case of both socially and educationally backward classes. The import of natural law theory in this provision of the Constitution is meant for the protection of backward classes of citizens against discrimination.

4. The Constitutional protection against double jeopardy and prohibition against self-incrimination as provided under Arts. 20\textsuperscript{130} (2) and 20 (3) of the Constitution respectively embodies the principle of natural law theory.

5. Again, safeguards against arbitrary arrest and detention envisaged by Art. 22\textsuperscript{131} of the Constitution also contain the element of natural law philosophy by guaranteeing to the person who is arrested under any ordinary law four rights, namely (1) the right to be informed ‘as soon as may be’ the ground of arrest,

\textsuperscript{130} Article 20. Protection in respect of conviction for offences

(1) No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence
(2) No person shall be prosecuted and punished for the same offence more than once
(3) No person accused of any offence shall be compelled to be a witness against himself. (Bare Act of the Constitution of India.)

\textsuperscript{131} Article 22. Protection against arrest and detention in certain cases

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice
(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate
(3) Nothing in clauses (1 ) and ( 2 ) shall apply (a) to any person who for the time being is an enemy alien; or (b) to any person who is arrested or detained under any law providing for preventive detention
(4) No law providing for preventive detention shall authorize the detention of a person for a longer period than three months unless (a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:
(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order
(6)Nothing in clause ( 5 ) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose
(7)Parliament may by law prescribe
(a)the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub clause (a) of clause ( 4 );
(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and
(c) the procedure to be followed by an Advisory Board in an inquiry under sub clause (a) of clause ( 4 )
Right against Exploitation. (Bare Act of the Constitution of India.)
(2) the right to consult and to be represented by a lawyer of his own choice (3) the right to be produced before Magistrate within 24 hours, and (4) the freedom of detention beyond the said period except by an order of the Magistrate.

6. The Provision of Article 311\textsuperscript{132} of the Constitution which provides adequate protection to civil servants against arbitrary dismissal, removal or reduction in rank is also based on the principle of natural justice. Thus in the case of Union of India Vs. Tulsiram Patel the Supreme Court held that the dismissal, removal or reduction in rank of a government servant under the second proviso of Article 311 (2) and 14 of the Constitution. The second proviso to Article 311 (2) expressly provides that the ‘audi alteram partem’ rule of natural justice shall not apply in three circumstances and the petitioner’s case fell in one of such circumstances. Therefore, it leaves no scope for any kind of opportunity and hence Art.14 was not violated.

7. The basic structure theory propounded by the Supreme Court of India in \textit{Kesavananda Bharati v. State of Kerala}, furnishes the best illustration of judiciary’s zeal to incorporate the principles of natural law in the Constitutional jurisprudence.

8. Adopting the twentieth century revivalist approach to the natural law philosophy, the Supreme Court ruled that fundamental rights are not absolute and immutable but they are relative in nature and changeable in order to build a ‘just’ social order.

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\textsuperscript{132} Art. 311. Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State

(1) No person who is a member of a civil service of the Union or an all India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by a authority subordinate to that by which he was appointed

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed: Provided further that this clause shall not apply

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State, it is not expedient to hold such inquiry

(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause ( 2 ), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final. (Bare Act of the Constitution of India)
9. The Supreme Court affirmed the doctrine of basic structure in *Minerva Mill Ltd. v. Union of India*. The Court held that fundamental rights enshrined in Part III and the directive principles of State policy contained in Part IV of the Constitution, taken together constitute the core of the Indian Constitutional mechanism by postulating new ideals and values in order to strengthen the cause of democracy. It has become a sheet anchor of individual liberty and social justice.

10. The principle of natural justice was earlier confined to only judicial and quasi-judicial enquiries and did not extend to administrative actions. But with the decision in Maneka Gandhi’s case, the scope of natural justice principle now extends even to purely administrative actions. The Supreme Court, in this case noted, “for the applicability of the doctrine natural justice, there can be no distinction between quasi-judicial and an administrative function. The aim of both administrative enquiry as well as quasi-judicial enquiry is to arrive at a just decision and if a rule of natural justice is calculated to secure justice, or to put it negatively, to prevent miscarriage of justice, it is difficult to see why it should not be applicable to an administrative function. The setting up of the Administrative Tribunals, family courts, consumer redressal forums, free legal aid services, Lok Adalat, Human Rights Commission, Women’s’ Commission etc. are directed towards promoting the cause of social justice and providing speedy relief to aggrieved persons against injustices.

11. The Supreme Court’s contribution to human rights jurisprudence through judicial activism and public interest litigation has revived people’s faith in justice delivery system in India.

These new developments evince that the principles of natural law and natural justice which embody higher values of life, liberty, equality and justice have gained increasing importance in the Indian legal system so that a social order with just and human conditions may be accomplished as contemplated by the framers of the Constitution.\(^{133}\)

### 3.8 Relationship between Indian Jurisprudence and Analytical Positivism

**Ancient Period:** In the Austinian positivism, sovereign is considered superior to law. On the contrary in the ancient Indian legal system, law is given the highest place by

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\(^{133}\) Supra note 4 at 63-70.
which the subjects as well the ruler were equally bound. Dharma occupied the prime positions. Law, morality and religion co-existed unlike analytical positivism of Austin which completely divested notions of morality and justice from law. Sovereignty in ancient India was diffused in the community as a whole. The kind was also an upholder of dharma. The king was not free to exercise his prerogative power of punishment arbitrarily in the Austinian sense. Thus, the Dharma was the real sovereign and not the king. Kelsonite theory of Grundnorm fits into the legal philosophy of ancient India in so far as Indian jurists subordinated the authority of king to Dharma.¹³⁴

**Medieval Period:** With the invasions of Mughals, during the medieval period, the ancient Indian legal system collapsed and was substituted by the Muslim law or sharia as laid down by the Holy Quran. Though Muslim rulers were found by Quranic injunctions, in practice many of them were despotic and autocratic like Allaudin Khilji. They were not bothered by religious law. **Allaudin Khilji** asserted, “Law is what I saw and not what the Quran says.” Discriminatory laws for Hindus and Muslims came into existence. By and large, there was hardly any juristic contribution of Muslim rulers to the development of Indian legal theory except that they destabilised the ancient legal system.¹³⁵

**British Rule and Indian legal system:** British rule brought radical changes in the existing legal system. The system was based on British imperialism which imposed English laws and political institutions in India.¹³⁶ Sir Henry Maine, the author of Ancient Law, called Indian jurisprudence as ‘an idealistic imagination.’³⁰ Macaulay introduced notions of British juristic concepts through equity, justice and good conscience and codified these laws. These were akin to Austinian concept of positive law having elements of certainty, definiteness, effective enforcement and sanction. British Kind in Parliament was the supreme sovereign authority and was above the law. The Indian legislature could not change this law and the subjects were bound to obey. Thus, analytical positivism found its place in India during British rule.

**Post-Independence Legal System:** A fresh approach was given to the existing laws which did not suit the changed socio-economic and political conditions of the newly

¹³⁵ Supra note 14 at 32
¹³⁶ Supra note 4 at 143.
independent country. Now instead of darma, the constitution of India could be termed as Grundnorm in the Kelsonite sense because all the statutes and enactments derive their validity from Constitution of India. The validity of Constitution lies in the whole hearted acceptance by the Indian community without any exception.\textsuperscript{137}

The post-independent Indian positivism differs from Austinian positivism in the sense that the former seeks to establish harmonious relationship between ‘is’ and ‘ought’. This can be seen in the harmonious construction adopted by the Supreme Court in deciding cases involving conflict between fundamental rights and directive principles of state policy where we find a fusion of justice and morality.\textsuperscript{138} In some cases Supreme Court has adopted a rigid positivistic approach. In the case of \textit{Re Kerala Education Bill}\textsuperscript{139} the Apex court declined to look beyond the letter of fundamental rights and did not think it necessary to consider sociological imperatives which impelled the legislature to pass such a law.

Similarly, in \textit{Tilakayat Shri Govindlalji Maharaja v. State of Rajasthan}\textsuperscript{140} the court rules that the firman of a ruler’s law by which the subjects were bound legally without exception. Such positivism is also seen in the enactments like Preventive Detention Act 1950, Prevention of Terrorism Act 2002 etc. The \textit{Habeas Corpus Case}\textsuperscript{141} which suspended the fundamental rights during emergency upheld the arbitrary powers of the State during emergency and disregarded the imperatives of social justice in the Preamble, Fundamental Rights and Directive Principles of State Policy. But this influence of Austinian Positivism is now receding gradually and law is now being seen as an instrument of social change for the welfare of the society. There is increasing judicial activism and public interest litigation.

Principle of utilitarianism of Bentham is also seen in the Indian jurisprudence of modern times in various judgements where the courts have tried to look at ameliorating the conditions of the public to better their conditions. In the case of \textit{Olga Tellis v. Bombay Municipal Corporation},\textsuperscript{142} There is reflection of the principle of utility laid down by Bentham provides that the true aim of any legislation should be

\textsuperscript{137} Id. at 143  
\textsuperscript{139} AIR 1958 SC 956  
\textsuperscript{140} AIR 1963 SC 1638  
\textsuperscript{141} A.D.M. Jabalpur v. Shivkant Shukla, AIR 1976 SC 1207  
\textsuperscript{142} AIR 1986 SC 180
the greatest happiness of greatest number of people. This implies majority of the members of society whose pain should be reduced and happiness maximized by the legislation. The judgement noted that the slum dwellers and the payment dwellers constitute half of the population of the city of Bombay and through the decision they hoped to reduce their suffering.

3.9 Conclusion

The Modern Indian Law is different from the law in the ancient and colonial times:

- The modern law does not touch the moral or religions aspects of ancient Dharma. Law in the Modern context is confined to rights, legal obligations, duties etc. It is therefore, different from Dharma or Sadachar because the former sustains in particular society but the latter is all pervasive and applies to the entire universe.

- Law confines itself to such obligations as are created by the sovereign or the state but Dharma has a much wider connotation and includes religious, moral, social and legal activities of mankind.

- Every improper or undesirable conduct is oppose to Sadachar and hence is opposed to Dharma, but this is not so under the modern jurisprudence where it is not opposed unless specifically prohibited.

- The modern law for most of its part emanates from legislative enactments i.e. they are man-made. It is mainly concerned with actions or omissions but does not bother itself about motives. But religious part of dharma always looked at the motive behind the act.

The legal theory of ancient India conceived by the scriptures and ‘Dharmashastra’ was a unique combination of religions, law and morality. The concern of ancient law makers was social solidarity and sanctity of law.\textsuperscript{17} With the passage of time and changes in the socio-political conditions of India due to influence of Mughal and British rule, “the ancient Hindu law which at one time governed the entire gamut of human activity-civil, criminal and miscellaneous, was modified, supplemented and finally superseded by various legislative enactments.”\textsuperscript{18} Thus, the Hindu law which
was at one time revealed to have a divine origin, in the modern times has become man-made.

The modern concept of Indian law still presupposes that a good law always corresponds to demands of justice or morality or men’s notion of what ought to be. But it is based on the premises that there is a fundamental distinction between law and morality. The laws today are enacted on account of expediency and are based on reasonableness.

This analysis would also show the modern Indian jurisprudence has a glorious past in the ancient scriptures. The historical approach to study of modern Indian law is relevant even today to understand its various phases of development of India law.