# Analytical law school
# (Command theory)

**Analytical Jurisprudence is** a legal theory draws on the resources of modern analytical philosophy to try to understand the nature of law. Analytic or 'clarificatory' jurisprudence uses a neutral point of view and descriptive language when referring to the aspect of legal system. This was a philosophical development that rejected natural law's fusing of what law is and what it ought to be at the starting of $19^{th}$ century posistivistic thinking was becoming very strong because of the height of natural law theory. Legal positivism is the dominant theory, although there are a growing number of critics, who offer their own interpretations. Analytical law school advocates the positivistic law. Positivistic law gives a scientific opinion. It rejects the idea of reason, morality human will and attempt the law after systematically analyzing of the legal concepts.

Austin is considered as considered as the father of analytical or positivism but Jeremy Bentham was the founder of this thought. Austin was the students of Bentham who described this though further actually Bentham first time utilized the analytical method to study law in place of abstract method to study law. But due to some reasons they cannot published their thought and further this thought published by H.L.A. hart who was another great jurist in this thought.

## Jeremy Bentham-

Jeremy Bentham (1748-1832) was an English jurist, philosopher, and legal and social reformer. Bentham was calling natural law 'Nonsense upon stilted' Bentham made a sharp distinction between people be called.

## Expositors-

Those who explained what the law in practice was, and

## Censors-

Those who criticized the law in practice and compared it to their notions of what it ought to be.

He is best known for his advocacy of utilitarianism. Bentham's legal philosophy is called utilitarian individualism. He was an individualist. According to Bentham function of law is to emancipate the individual from the bondage and restraint upon his freedom. Once the individual was made free, He himself shall be looking after his welfare. The purpose of law is to bring pleasure and avoid pain. Law should be judged by the pleasure and pain. Bentham wants to improvement of law and set the unmistakable principles for the law framers. According to Bentham natural law or rights is a myth because it cannot be practical and there is need to new concepts which based on public opinion. But it is wrong to say that bad law is not a law. Command or order of the legislation/sovereign is a law unless and until legislation or sovereign not repeals it.

In simple words the command of sovereign is a law whether it is good or bad and there is no space for the discussion about it. Sovereign is the group of parsons and their will is the will of political society as well as people.

## John Austin:-

Austin (1790-1859) was the student of Bentham who excluded absolute analysis and gone to be father of analytical law school. He researched on positive law. He leaved the concept of nature law by Hobbes and the concept of individualism by Bentham. Appropriate law is a command of sovereign and which law is not a command by sovereign that will be a inappropriate law. Laws are the species of commands. Law is aggregate of different laws. All laws are rules and mostly control the behavior of human being. These rules are either directives or passed by social consent. Directive is the guideline to do something or to do nothing and it declare in the forms of command by sovereign. So law is a set of rules which passed by an intelligent person to other intelligent people who are under his sovereignty.

**Austin Defines Law in two kinds:-**

1. **Law of God- Laws set by God for men.**
2. **Human Laws – Laws set by men for men.**

There are two kinds of human laws.

## Positive Laws-

These are the laws set by political superiors (by men.) only these laws are the proper subject matter of jurisprudence.

## Other Laws-

Those laws are not set by political superiors the three basic points are Austin theory of law are that:

- **The law is command issued by the commander the sovereign**
- **Such Commands are backed by threats/sanction and**
- **A Sovereign is one who is habitually obeyed**

John Austin is best known for his work development the theory of legal positivism. He attempted to clearly separate moral rules from 'Positive law'.

Austin was greatly influenced in his utilitarian approach to law by Jeremy Bentham. Austin took a positivist approach to jurisprudence. He viewed the law as commands from a sovereign that are backed by a threat of sanction in determining' a, sovereign. Austin recognized it as one who society obeys habitually.

Law is a command of sovereign but all commands by Sovereign can not be a law. So Austin divides the concept of command into two parts as follows-

## Particular/occasional command -

Some commands are made for either specific group of people or specific time limit or specific target For example emergency provisions. Although these commands can be for all people in general way but its object is specified. Another example is command for blackout at night in danger of external attack by air force. This command is general but for specific time and object. These commands are forcing either unless relative people obey it or to achieve the object.

## General command –

General command is a command to all people either to do something or do nothing. According to Austin it's very difficult even impossible to assessment of the system of rules for particular community or group of person that is why mostly commands are declare in the form of general command.

Though accordingly to Austin law is command of sovereign, and these commands imply duties and backed by sanctions decided by the sovereign.

This method can be applied in civilized societies because it's possible only in such societies that the sovereign can enforce his commands with an effective machinery of administration. Law should be carefully studied and analyzed and the principle underlying therein should be found out.

## Criticism of Austin's theory-

1. **Customs ignored:**

Law is the command of sovereign as Austin says not appropriate theory for the law. There are different customs in different states which follows as law before the establishment of any state or sovereign.

2. **Law conferring privileges –**

The law which is purely of a permissive character and confers only privileges, as the will act which lay down the method of drawing a testamentary document so that it may have legal effect is not covered by Austin definition.

3. **Judge made law-**

In Austin's theory there is no place for judge made law. But there are many orders of superior court regards as law by inferior /subordinate courts.

## 4 .Conventions (Tradition)-

According to Austin's definition conventions of the constitution shall not be called as law because these are not enforceable by court. But they are law and subject matter of a study of jurisprudence.

## 5. Rules set by private person-

austin's view that "positive law' includes within itself rules set by private persons in pursuance of legal rights is an undue extension because their nature is very vague and indefinite.

**6. International law**

Austin says international law as the law of honors and fashion with positive- morality because there is not any sanction authority. But anybody will not say that international law is not a law. Austin ignored a very important branch of law from the study.

**7. Command theory untenable -**

The idea of command (for law) in the present systems of government is completely untenable because in modern times the machinery of state remains always changing and it is run by a multitude of persons. So the idea of command does not apply in such system.

**8. It is Artificial-**

Law is command of sovereign suggest that the Sovereign is standing just above and apart from the community and giving arbitrary commands, this view treats law as artificial and ignores its character of spontaneous growth. In modern times mostly theories says that the sovereignty of state remain in the people and law is the general will.

**9 . Sanction not the only means to induce obedience-**

According to Austin sanctions induces the man to obey law but it is not correct. People follow many rules for sympathy, fear, reasons etc.

**10. Relation of law and moral overlooked-**

According to Austin the study of jurisprudence is positive law which is strictly called whether it is good or bad. But law only neither an arbitrary command nor grown as a result of blind forces. In fact many times people follows the law or rules for sympathy, greed of prize reasons, ethics and morals etc without any fear of sanction.

## Pure Theory of Law

(Law is a normative science)

Pure theory of law is found by Hans keelson leader of the group namely vienna school in Austria. This approach was the result of reaction against the natural law, school (law ought to be) and analytical law school (law it is). After the declaration of law as command of sovereign there was a need to distinguish between sovereign/state and law. Sovereign is supreme because he issues the command and law is a command because it is bound order by the sovereign. But in concept of command there is fear to follow it so this was the need to remove that fear and a new concept of law which called as pure theory of law. In Austria a group (known as Vienna school) has established this thought and Hens keelson was the leader of that group and founder of the pure theory of law. According to Hans Kelsen there was a part of natural justice in the command theory of John Austin but Austin ignored the concept of 'law ought to be' keelson used the term of 'Grundnorm' which was the centre point for the clarification between law it is and law ought to be.

## Hans Kelsen (1881-1973)-

Hans's kelsen was an Austrian jurist and legal philosopher. He has been regarded as one of the most important legal scholars of the 20$^{th}$ century. His pure theory of law aims to described law as binding norms while at the same time refusing, itself, to evaluate those norms. That is 'legal science' is to be separated from 'legal politics' central to the pure theory of law is the nation of a basic norm (Grundnorm) – 9 hypothetical norm, presupposed by the Jurist, from which in a hierarchy all 'lower' norms in a legal system, beginning which constitutional law, are understood to derive their authority or 'bindingness' (boundation).

## Definition of pure theory –

According to keelson pure theory of law is a theory of positive law. It clarify that what law is but there is no question of what law ought to be. So this theory called as pure theory of law because it is a science of law not politics of law. Specific science of law is called jurisprudence and it should distinguish between philosophy of justice and social reality/sociology. Doctrine of law cannot explain that what the elements are for the justice on scientific ground. If any gives the answer that will be depends on its validity. It's necessary for any justice that it use as general rule in every matter as per require. So objective of the justice is establishment of positive law with due internally purity.

## Normative Science-

According to keelson law is a normative science and norms (sanction) mean that certain rules. He does not admit the command theory of Austin. He says that 'Law is a depyschologised command a command which does not imply a will in a psychological sense of the term.' The science of law is the knowledge of hierarchy of normative relations. He does not want to include in his theory 'what the law ought to be and speak his theory of law as a structural analysis, as exact as possible.

**The Norms can be of 3 kinds-**

**1. To command for certain act.**

**2. To authorize for certain act.**

**3. To permits for certain act.**

## Grundnorm (Basic Norm)

**Basic norm (Germani Grundnorm)** is a concept in the pure theory of law created by Hans's kelson, a jurist and legal philosopher. Kelson used this word to denote the basic norm, order, or rule that forms an underlying basis for a legal system. A Grundnorm is presupposed in legal science for each order of positive law. It make possible to understand that material as an order of positive law. The theory is based on a need to find a point of origin for all law, on which basic law and the constitution can gain their legitimacy after the world war the idea of Grundnorm was the foundation stone of the pure theory of law. This norm is simply that the historically first constitution is to be obeyed. That constitution may have become established by custom or by revolution. The jurist does not evaluate the circumstances. Grundnorm mention the specific constitution and can be based on customs. It mentions socially and generally effective oppressive arrangement applied by constitution. Grundnorms is different from other norms because other norms get their validity by grundnorm but other side Grundnorm is valid itself. Grandnorm is not a constitution although it advice to follow the norms of constitution. It has principles/symptoms of natural law but it is different from natural law. Grundnorm help in framing of constitution. It clarifies the validity of norms that they are relative or absolute.

## According to kelsen Grundnorms is an act of will.

## Essential foundations by Kelson theory

1. This theory tries to decrease the disorganization of diversity of diversity and establish unity in the society.
2. Law has a scientific nature and does not resolution or expression of will. It clarifies the law it is not talk about law ought to be.
3. Law is a normative science and not a Natural science.
4. Legal theory as a theory of norms is not concerned with the effectiveness of legal norms.
5. A theory of law is formal, a theory of way of ordering, changing contents in a specific way.
6. The relation of legal theory to a particular system of positive law is that of possible to actual law.

## Criticism of Kelsan's Theory-

1. Kelson's said that all the norms excepting the basic norms have no logical bases. According to Julius stone we are invited to forget the illegitimacy of the ancestors in the administration of the pure blood of the progress.
2. He excludes all references of social facts and needs of the society. Thus, his pure theory of law is without any sociological foundation.
3. The theory is found to be based on hypothetical consideration without any practicability.
4. Lastly, law cannot be completely divorced/exclude from ethics and morality which gives it an honorable place in the society.

## Conclusion-

Kelsen has made an original striking and greatly contribution to jurisprudence. He has considerably influenced the modern legal theory. He has repeated jurisprudence from all the other social sciences and liberated the law from the metaphysical myth. At all times it have been speculations of justice or by doctrine of exponent of the jus natural. In short the credit goes to keelson for devoting a pure theory of law.

<u>**Herbert Lionel Adolph us Hart**</u> (1907-1992) was an influential legal philosopher of the 20th century. He was professor of Jurisprudence at Oxford University.

H.L.A Hart argued that the law should be understood as a system of social rules. Hart rejected Kelsen's views that sanctions were essential to law and that a normative social phenomenon, like law, can not be grounded in non normative social facts. Hart revived analytical jurisprudence as an important theoretical debate in the twentieth century through his book the concept of law. Hart argued that law is a 'system of rules'.

Rules, said Hart, are divided into primary rules (rules of conduct) and secondary rules (rules addressed to officials to administer primary rules). Secondary rules are divided into rules of adjudication (to resolve legal disputes), rules of change (allowing laws to be varied) and the rule of recognition (allowing laws to be identified as valid) The 'rule of recognition,' a customary practice of the officials (especially judges) that identifies certain acts and decisions as sources of law.

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यह पूरा विषय — **Analytical School of Jurisprudence (विश्लेषणात्मक न्यायशास्त्र)** — आपके *Jurisprudence (न्यायशास्त्र)* पेपर में **Long / Descriptive Type Question (दीर्घ प्रश्न)** के रूप में पूछा जाता है।
नीचे इसका हिंदी रूपांतरण दिया गया है ताकि आप इसे नोट्स या उत्तर के रूप में उपयोग कर सकें 👇

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## 📘 विश्लेषणात्मक न्यायशास्त्र (Analytical School of Jurisprudence)

*(Command Theory / Austin's Theory / Legal Positivism)*

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### 🔹 परिचय

विश्लेषणात्मक न्यायशास्त्र (Analytical Jurisprudence) वह विधिक सिद्धांत है जो आधुनिक विश्लेषणात्मक दर्शन के सिद्धांतों के आधार पर "कानून की प्रकृति" को समझने का प्रयास करता है।
यह विचारधारा कानून को **नैतिकता, धर्म और सामाजिक परंपराओं से अलग** रखकर केवल उसके *वैज्ञानिक स्वरूप* का अध्ययन करती है।

19वीं शताब्दी की शुरुआत में जब *Natural Law Theory* (प्राकृतिक विधि सिद्धांत) अपने चरम पर थी, तब इसके विरुद्ध प्रतिक्रिया स्वरूप *Positivistic Thinking* (सकारात्मक विचारधारा) विकसित हुई।
इस विचारधारा के अनुसार —
"कानून वही है जो विधायिका या सर्वोच्च सत्ता द्वारा बनाया गया हो, चाहे वह अच्छा हो या बुरा।"

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### 🔹 मुख्य प्रवर्तक

1. **Jeremy Bentham (1748–1832)** – संस्थापक (Founder)
2. **John Austin (1790–1859)** – प्रवर्तक (Father of Analytical School)
3. **Hans Kelsen (1881–1973)** – Pure Theory of Law के संस्थापक
4. **H.L.A. Hart (1907–1992)** – Modern Analytical Thinker

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## ⚖️ 1. Jeremy Bentham

### 🔸 परिचय

जेरेमी बेंथम एक अंग्रेज़ विधिवेत्ता, दार्शनिक और सामाजिक सुधारक थे।
उन्होंने प्राकृतिक विधि को "Nonsense upon stilts" कहा था।
उनका सिद्धांत **उपयोगितावाद (Utilitarianism)** पर आधारित था —
"कानून का उद्देश्य आनंद (Pleasure) बढ़ाना और पीड़ा (Pain) घटाना है।"

### 🔸 बेंथम के प्रमुख विचार

- कानून का कार्य व्यक्ति को बंधनों से मुक्त कर स्वतंत्र बनाना है।
- कानून को वैज्ञानिक दृष्टि से बनाना चाहिए।
- **अच्छा या बुरा कानून भी कानून है** जब तक उसे विधायिका रद्द न करे।
- सर्वोच्च सत्ता (Sovereign) का आदेश ही कानून है।
- उन्होंने कानून समझाने वालों को दो वर्गों में बाँटा —
    1. **Expositors** – जो बताते हैं कि कानून क्या है।
    2. **Censors** – जो बताते हैं कि कानून कैसा होना चाहिए।

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## ⚖️ 2. John Austin (1790–1859)

### 🔸 परिचय

ऑस्टिन, बेंथम के शिष्य थे और उन्होंने *Legal Positivism* को व्यवस्थित रूप दिया।
उन्होंने कहा —
"Law is the command of the sovereign backed by sanction."
"कानून सर्वोच्च सत्ता का आदेश है, जिसके पालन न करने पर दंड मिलता है।"

### 🔸 ऑस्टिन के अनुसार कानून के तत्व

1. **Command (आदेश)** – सर्वोच्च सत्ता द्वारा दिया गया निर्देश।
2. **Duty (कर्तव्य)** – आदेश से पालन का दायित्व।
3. **Sanction (दंड)** – आदेश का उल्लंघन करने पर परिणाम।
4. **Sovereign (सर्वोच्च सत्ता)** – वह जिसे समाज नियमित रूप से मानता है।

### 🔸 कानून के प्रकार

1. **Law of God** – ईश्वर द्वारा बनाए गए नियम।
2. **Human Laws** – मनुष्य द्वारा मनुष्य के लिए बनाए गए नियम।
    - (a) **Positive Laws** – राजनीतिक सत्ता द्वारा बनाए गए।

- (b) **Other Laws** – जो राजनीतिक सत्ता द्वारा नहीं बनाए गए।

🔸 **आदेश के दो प्रकार**

1. **Particular Command** – किसी विशेष परिस्थिति या वर्ग के लिए (जैसे आपातकाल)।
2. **General Command** – सभी नागरिकों पर समान रूप से लागू।

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🔹 **ऑस्टिन सिद्धांत की आलोचनाएँ**

1. **रीति-रिवाजों की उपेक्षा** – प्रथा आधारित कानूनों का उल्लेख नहीं।
2. **न्यायालय निर्मित कानून (Judge-made law)** को स्थान नहीं दिया।
3. **संवैधानिक परंपराएँ (Conventions)** कानून की परिभाषा से बाहर।
4. **अंतरराष्ट्रीय कानून** को "Positive Morality" कहकर अस्वीकार किया।
5. **नैतिकता का अभाव** – कानून और नैतिकता को पूरी तरह अलग किया।
6. **सर्वोच्च सत्ता की धारणा अव्यावहारिक** – आधुनिक लोकतंत्र में सत्ता विभाजित है।
7. **दंड को ही पालन का कारण मानना** – जबकि लोग नैतिक, सामाजिक कारणों से भी कानून मानते हैं।

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### ⚖️ 3. Hans Kelsen (1881–1973)

🔸 **Pure Theory of Law (शुद्ध विधि सिद्धांत)**

- Hans Kelsen ने *Vienna School* (ऑस्ट्रिया) के अंतर्गत यह विचार प्रस्तुत किया।
- उन्होंने कहा कि कानून को "राजनीति" या "नैतिकता" से अलग कर **शुद्ध विज्ञान (Pure Science)** के रूप में देखा जाना चाहिए।
- उनका केंद्रीय सिद्धांत था — **Grundnorm (मूल नियम)**।

🔸 **Grundnorm**

"Grundnorm वह मूल सिद्धांत है जिससे सभी कानून अपनी वैधता प्राप्त करते हैं।"

- यह स्वयं में वैध (Valid) होता है।
- संविधान उसी के अधीन है।
- यह प्राकृतिक कानून से भिन्न लेकिन उससे प्रभावित अवधारणा है।

🔸 **Kelsen के अनुसार**

- कानून एक **Normative Science** है — यानी कानून "क्या है" बताता है, "क्या होना चाहिए" नहीं।
- कानून आदेश नहीं बल्कि **मानदंडों (Norms)** की श्रृंखला है।
- ये मानदंड तीन प्रकार के हो सकते हैं —
    1. आदेश देना,
    2. अधिकार देना,
    3. अनुमति देना।

🔸 **आलोचनाएँ**

1. समाज और नैतिकता से कानून को पूरी तरह अलग करना अव्यवहारिक।
2. यह सिद्धांत काल्पनिक और अत्यधिक सैद्धांतिक है।
3. सामाजिक यथार्थ को नज़रअंदाज़ करता है।
4. कानून को पूर्ण रूप से नैतिकता से अलग नहीं किया जा सकता।

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### ⚖️ 4. H.L.A. Hart (1907–1992)

🔸 **परिचय**

H.L.A. Hart आधुनिक युग के प्रमुख विधिवेत्ता थे।
उन्होंने अपनी प्रसिद्ध पुस्तक *“The Concept of Law”* (1961) में कानून को **Rules (नियमों)** की प्रणाली के रूप में समझाया।

◆ **मुख्य विचार**

- कानून केवल आदेश नहीं बल्कि **सामाजिक नियमों की प्रणाली (System of Social Rules)** है।
- नियम दो प्रकार के —
    1. **Primary Rules** – आचरण के नियम (Rules of Conduct)
    2. **Secondary Rules** – कानून को लागू, संशोधित या पहचानने वाले नियम।
        - **Rules of Adjudication** – विवाद सुलझाने के लिए।
        - **Rules of Change** – कानून में परिवर्तन के लिए।
        - **Rule of Recognition** – मान्य कानून पहचानने के लिए।

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◆ **निष्कर्ष**

विश्लेषणात्मक न्यायशास्त्र ने कानून को नैतिकता और धर्म से अलग एक **वैज्ञानिक अध्ययन** के रूप में स्थापित किया।
बेंथम ने “कानून का उद्देश्य सुख”,
ऑस्टिन ने “कानून सर्वोच्च सत्ता का आदेश”,
केलसन ने “कानून मानदंडों की श्रृंखला”,
और हार्ट ने “कानून नियमों की प्रणाली” बताया।
इन सबने मिलकर यह स्पष्ट किया कि —
“कानून को समझने के लिए पहले यह जानना आवश्यक है कि कानून *क्या है*, न कि कानून *क्या होना चाहिए*।”

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