Some key terms and individuals..

- Natural law
- Legal Positivism
- Analytical Jurisprudence
- Command Theory
- Social Contract Theory

- Thomas Hobbes
- Jeremy Bentham
- John Austin
- H.L.A. Hart
Thomas Hobbes

- Advocated strong government and some consider him the father of totalitarianism...
- Insightful exposition of the human condition—“...solitary, poor, nasty, brutal and short…”
- Known for one interpretation of the Social Contract Theory

Contribution to Jurisprudence?

- One of the earliest philosophers to break away from the natural law description of law and adopt a positivist stance in the 17th century.
- Real father of positivism?

Leviathan (1651)

- Necessary to understand the political background to appreciate Hobbes’ theory propounded in *Leviathan*
- Published just after the English Civil War (1642-1651), and
- Thirty Years war (1618-1648)
- Treaty of Westphalia (1648)- Nation-State, State Sovereignty
- Hobbes was born in 1588, and the thirty year war started in 1618 (lasted till 1648). Hobbes was 30 when the war started and 60 when it finished.
- We are all creations and victims of our times
Three things to be noted:

1. Thirty Years war started out as a religious conflict and showed how religion could be a force of destruction and how man is at a constant state of war
2. Treaty of Westphalia - established a new political order the Nation-State
3. English Civil War – to Hobbes showed the necessity for a strong ruler

All these factors influenced the political theory brought forth in *Leviathan* and Hobbes’ conception of government and law.

- He wanted to create a new order where the newly emerged nation-states will be governed by a human ruler (God on earth) according to human created, *cased*, law.
- Because of the destruction and chaos he witnessed for thirty years, felt the paramount need of human society was security and a sense of order.
- Thought a powerful sovereign was the solution to achieve this.
- He thought humans were continuously at war with each other and they needed to be protected from this ‘state of nature’ of theirs. He came up with a new notion of governance which is embodied in the social contract he envisaged.
Social Contract as per Hobbes

Initially man lived in a ‘state of nature’ free from encumbrances and an organized form of government. The ‘state of nature’ was a primitive situation where the existence of man was ‘solitary, poor, nasty, brutish and short’. He believed that the man was at war with each other, in the sense that there was an unending competition between men who were pursuing their vainglorious and selfish ends.

As this was detrimental to human existence, the people contracted amongst themselves and gave the power to govern them to a single man or an assembly of men, who in turn would protect their rights.

In this relationship, the people would surrender their rights to the government and in turn, the government would give them an organized social structure and protect their interests. The contract was only between men and not between men and ruler, although the position of the ruler was created by the very contract the men entered amongst themselves.

As the ruler was not party to the contract and as such he was not bound by its terms either. Hence, even if the ruler became a despot, the people had no right to effect a change in the ruler. Hobbes, it seems, was proposing an absolute monarchy where the people could be reduced to ‘subjects’. Sovereignty, according to Hobbes, lied with the absolute ruler.

- Positivist characteristics of Hobbes’ proposition: Law is created by man and it does not flow from God.
- Hobbes contributed to the command theory that Bentham and Austin developed, by firmly establishing the sovereign as the lawgiver.
- Note- The problem with Hobbes is that the sovereign is absolute and it could do whatever it wanted. This could lead to totalitarianism and further oppression. There are no guidelines for the Sovereign.
Jeremy Bentham

• 18th century positivist philosopher and reformer. His theory of law was based on a relationship of political superiority and inferiority, similar to Austin’s Command Theory.
• It is said Bentham’s command theory was more insightful and sophisticated than Austin’s.
• E.g.1 - For Bentham, a sanction in the form Austin envisages it is not necessary for a command to be a valid law (even moral or religious sanctions are enough).
• E.g.2- Bentham did not insist on indivisible and unlimited sovereigns as Austin did.

Bentham defines ‘law’ as:
“A law may be defined as an assemblage of signs declarative of a volition conceived or adopted by a sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power...” (Of Laws in General)
John Austin

- Austin was a 19th century philosopher who set out to define ‘Law’.
- ‘The Province of Jurisprudence Determined’
- Austin followed Bentham’s lead and tried to work out for himself what ‘Law’ was as a positivist. He tried to show what ‘Law’ really was without alluding to moral notions of what it ought to be (analytical jurisprudence).
- His theory accepts that law is something posited by men (positivism). Austin’s command theory is found in a series of lectures (Please read Subject Guide/Freeman for extracts)
- Austin’s theory is an oversimplified and crude reflection of what law really is. THEN WHY STUDY IT?

- Austin’s Command Theory purports to analyze the qualities of ‘Law’.
- Termed these ‘Laws strictly so called’
- However, according to him, there were so many other types of laws which did not amount to ‘laws strictly so called’. He wanted to distinguish ‘laws strictly so called’ from other laws before embarking on his study of law
- First step is to look at Austin’s classification of laws...
Austin’s Classification of Laws

There are 2 types of laws: ‘laws properly so called’ and ‘laws not properly so called’.

‘Laws not properly so called’ are of two kinds: ‘Laws by analogy’ and ‘Laws by metaphor’.
• Laws by analogy - rules of fashion, dictates of honour, rules imposed upon gentlemen by opinions current among gentlemen, and also international law. These are laws to be followed, they are a species of command, but the repercussions of breaching these laws would be limited to gaining the disapproval of other members of the group. Eg - Must remove hat when entering church. Failure to do so will only be the disapproval of others. Similarly, when a State breaches international law, that State will only gain the disapproval of other States.
• Laws by metaphor - laws that govern the growth and decay of vegetables and animals, or laws that govern the movement of inanimate masses. These laws are not a species of command and it is difficult to imagine how these laws can be broken.

• ‘Laws properly so called’ – These are rules laid down for the guidance of an intelligent being by another intelligent being who has power over him.
• These laws too are of two kinds: ‘God’s laws’ and ‘human Laws’.
• Human Laws are 2 types: ‘Laws strictly so called’ and ‘Laws set by men, not as political superiors’
‘Laws set by men, not as political superiors’ – are not laws in the proper sense and not set by sovereign superiors to inferiors, and nor are there sanctions from the sovereign for breaking them.

‘Laws strictly so called’ include the laws we refer to as ‘law’ today. These are commands of a sovereign for which there will be sanctions if the subjects breached them.

In addition to the classification discussed before, there is a second classification of law by Austin:

‘Positive law’ and ‘positive morality’

• ‘Positive law’ - means ‘laws strictly so called’
• ‘Positive morality’ - means ‘laws set by men, not as political superiors’ and ‘laws by analogy’

The difference between the two types is that, ‘positive morality’ does not deal with laws set by men as political superiors, or with laws set by men in pursuance of legal rights.

Laws under positive morality are positive in the sense, they are ‘posited’ (created/set) by men, although no sanctions. Hence, they are not laws strictly so called.
“The matter for Jurisprudence is positive law: simply and strictly so called: or law set by political superiors to political inferiors” (Austin, Lecture I)

Austin’s Command Theory is about these positive laws, or ‘Laws strictly so called’.

(Note- See, Freeman (9th edn.) pp. 237-248 for a more readable account of Austin’s classification and command theory)

Austin’s Command Theory

- As per Austin, Law is a command, given by a determinate common superior (sovereign) to whom the bulk of a society is in the habit of obedience, and who is not in the habit of obedience to a determinate human superior, enforced by sanctions. The elements of ‘command’ and ‘sanctions’ play a pivotal role in Austin’s theory.
Judicial Law Making

• According to Austin, judicial law making is permitted as long as there is no objection to it by the common superior (sovereign) and as long as there is acquiescence (see, lecture V).
• This type of laws were classified as ‘tacit commands’ by Austin (lect. I).
• Note- Bentham opposed judicial law making by equating it to waiting for a dog to do something objectionable and then beating it with a stick.

Morality and Law-

• Austin was not opposed to morality in law. What he said was for a command to be a valid law, its moral content was not material.
• What was important was whether the command (law) was given by the proper authority (common superior).
• “The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals” (lect. V)
• Note- Nazi laws are valid proper laws as per Austin’s theory. (In the future lectures, this issue will be discussed at length- Hart-Fuller Debate)
Sovereignty as per Austin

Austin discusses the nature of sovereignty at length in his lectures. As the commands (laws) are issued by the sovereign, it is important to examine the nature of sovereignty as described by Austin. There are several salient features as per Austin:

1. The common superior (person or body) must be ‘determinate’. It could be a person with specific characteristics such as a King. Or it could also be a body of persons such as a Parliament.

2. The society must be in the habit of obedience to the common superior. This means, either by respect, acceptance or whatever reason, the society must habitually obey the common superior. However, there can be sporadic and isolated incidents of disobedience, but these do not erode the authority of the common superior.

3. The habitual obedience of the society must be given to the one and the same determinate common superior (person/body).

4. The common superior to whom habitual obedience is rendered, must not himself be habitually obedient to a determinate human superior. This does not mean occasional obedience to a more powerful authority, but permanent obedience.

5. The power of the sovereign is incapable of legal limitation. According to Austin, the sovereign is not even subject to the constitution.
Criticisms of Austin’s Command Theory

1. Austin’s insistence of sanctions as a mark of ‘Law’ oversimplifies and misrepresents what a ‘Law’ is - Sanctions place an undue amount of importance of the element of fear as the reason for the acceptance of the law. Note-Bentham relied less on sanctions as a mark of law.

2. Not all laws are commands backed by sanctions - The nature of Austin’s laws are that they are orders backed by threats. But this is not the case with all laws. Laws that prescribe how to make wills, contracts, marriage, do not compel people to behave in a certain way under the threat of a sanction.

• 3. Range of application - According to Austin, the lawmaker (common superior) is not bound by the commands he gives. His commands are directed at the subjects. Although there may be certain dictatorial regimes that reflect this character, this approach has no universal application. Most societies today, bind the lawmaker as well.

• 4. Mode of origin of laws in Austin’s theory is problematic - According to Austin, an order backed by a threat occurs at a specific time/date and through a deliberate act of the common superior. However, this model does not take into account customs that are treated as laws.
5. The habit of obedience by the bulk of the population is notionally deficient (Hart, story of Rex I and II)

6. Austin’s notion of ‘legally unlimited’ sovereignty is deficient. Consider, modern Constitutions, International criminal Law, Human Rights Law, EU

Austin’s notion of ‘indivisible’ sovereignty is deficient – consider Federal Constitutions

Austin’s contribution to Jurisprudence?

1. Analytical Jurisprudence
2. Positivism
3. Platform for Hart to build his concept of Law