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## Nature and Sources of Law: Definition and Imperative Theory of Law/Austin's Theory of Law

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### Definition

- "An attempt to establish a satisfactory definition of law is to seek to confine jurisprudence within a strait jacket from which it is continually trying to escape" -Keeton
- Law is the command of the sovereign-Austin
- "Law maybe defined as the body of principles recognized and applied by the state in the administration of justice" - Salmon
- Kelson defines Law as "depsychologised command" .

### Imperative Theory of Law/Austin's Theory of Law

Basically, three elements in law:

- it is a type of command
- it is laid down by political superior enforced by a sanction.
- Law is a general command given from a political superior to political inferior.
- He defines sovereign as " : a person or body whom a bulk of politically organized society habitually obeys."

### Criticism

- Paton: it is not applicable on international law because it is obeyed without any sanction.
- It is not applicable on the family law as it came into existence long before the legislative functions.
- According to Salmon, it lacks moral and ethics as it ignores the most important element called justice.

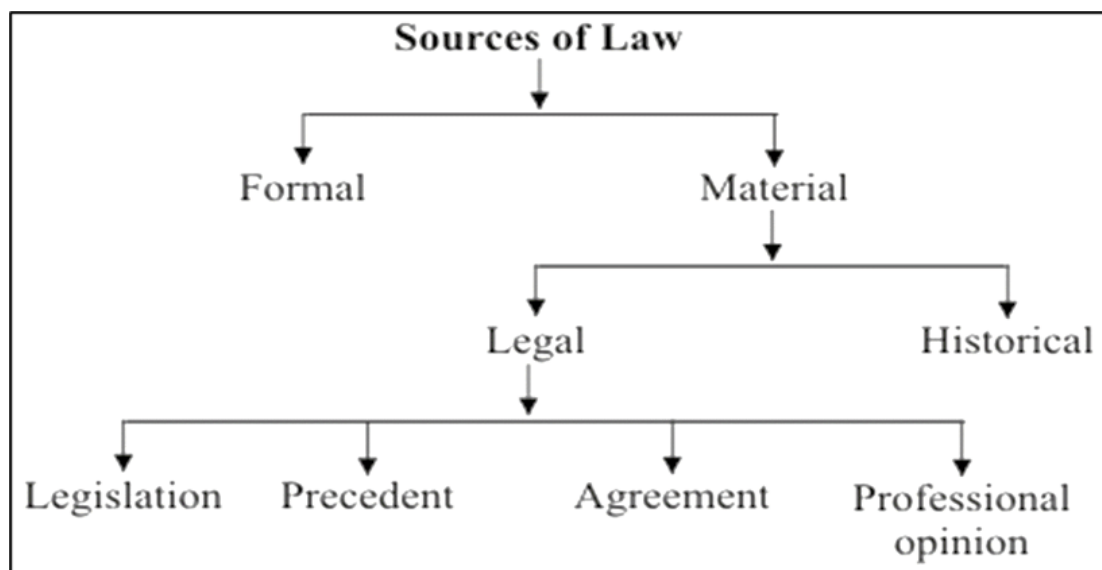
### Types of Law: Austin

- Divine Law- Given by God to men
- Human Law- Given by men to men.
- Positive Laws-Statutory Laws or set by political superiors
- Non-Positive Laws- Non- Statutory Laws, Customs, Traditions etc.

### Sources of Law

- Historical school, Savigny, Henry Maine, Puchta- Foundation of law is in human consciousness, which is manifests itself in the customs, practices, usages etc.
- Sociological jurist- they disagree with the orthodox thought that law originates from state. The law is made from many sources.
- Ehrlich said that at any given point of time, the centre of gravity of legal development lies not in legislation, not in science, nor in judicial decision but in the society itself.

### Salmond on Sources of Law



### Legal Sources of English Law

- Enacted Law through Legislation.
- Case law having precedence.
- Juristic law- professional opinion of an expert

### Legislation

- Austin, "There can be no law without a Legislative Act."
- Analytical positivist school is a believer that statute is a formal source of law making and strongly disagrees that court can make laws.
- Historical school doesn't regard legislation as a source of Law as its main work is to give better form and effectuate customs and traditions.

### Types of Legislation

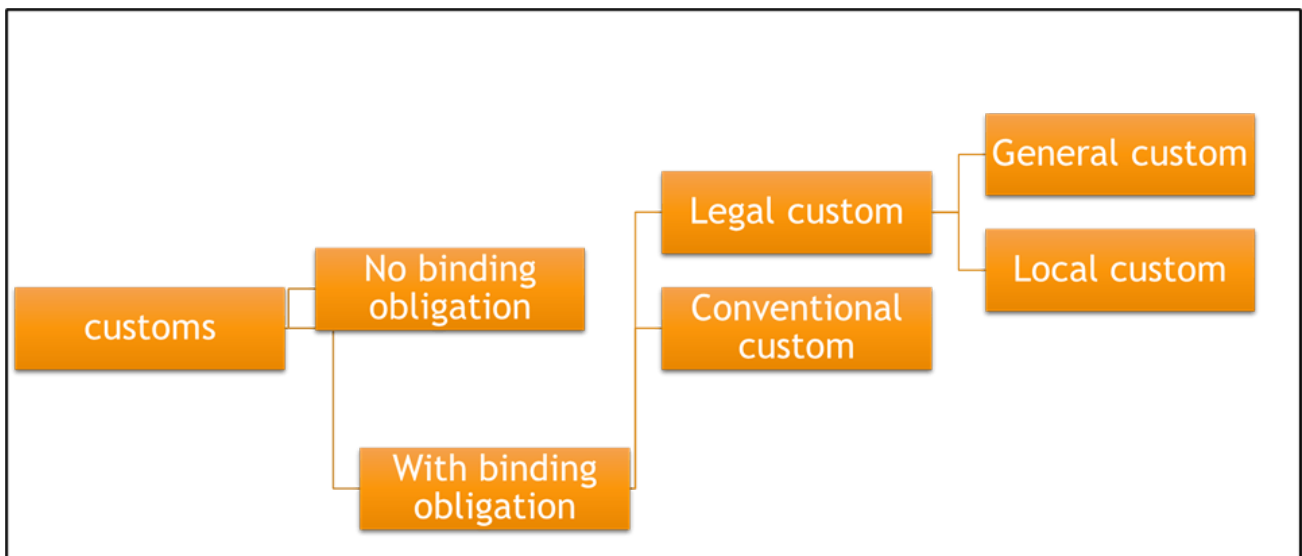
- Supreme Legislation: any law which proceeds from the sovereign power of state and cannot be annulled or repealed by any other legislative authority.
- Subordinate Legislation: it is the law which proceeds from any authority other than sovereign.
- Delegated legislation: It is a form of subordinate legislation. Main function of Executive is to enforce law, in this case executives form the provision of law also called executive legislation. It is usually in the form of bye laws, orders and rules.

### Custom

- Salmond, "custom is the embodiment of those principles which have commended themselves to the national conscience as the principle of justice and public utility"
- Keeton, "customary laws are those rules of human action, established by usage and regarded as legally binding by those to whom the rules are applicable which are adopted by the courts and applied as a source of law because they are followed by political society"
- Holland, "custom has its origin in the usage. Usage is a spontaneous evolution by the people or part of them of rules, the existence and general acceptance of which is proved by their regular observance."

- Usage are not ex proprio vigore.

## Kinds of Customs



## Test for Custom

- Immemorial time
- Continuous
- Peaceable usage
- Obligatory force
- Certain
- Not contrary to law
- Not be unreasonable

## Precedent

- Inductive method- judges look upon the similar cases to get the general principles and use them to decide the case.
- Deductive method- great reliance is placed to the statutes and enactments. Judges go solely by the words.
- Austin- precedent are "Judiciary's law"
- Bentham- Judge made law.
- Judicial decision lay down new rules and principles called Doctrine of Precedent.
- Precedent is purely constitutive and not abrogative. (make law not alter it)
- Precedent has been recognized by ICJ in Article 38 (2) (d)
- Article 59 says precedents have persuasive value not binding on itself.

## Elements

- Doctrine of stare decisis- Latin term stare decisis et non quita movere-to stand by what is decided and not disturb the undisturbed.
- Ratio decidendi

- Obiter dictum- by the way

## MCQs

1. . "Law maybe defined as the body of principles recognized and applied by the state in the administration of justice"

- A. Keeton
- B. Salmon
- C. Ehrlich
- D. Austin

Answer: B

2. ex proprio vigour means?

- A. of its own force
- B. Not of its own force
- C. Binding
- D. Wrong

Answer: A

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