(1) According to **Dias**, sovereignty cannot be defined in terms of obedience. It cannot be said that sovereignty of the Crown in Parliament was established by the "habitual obedience" of the judges that established the sovereignty of the Crown in Parliament.

(2) The negative mark of sovereignty is not so much the concern of municipal lawyers as of international lawyers makes no difference to municipal lawyers that the law-constituting body obeys some other body in the international sphere if in fact in municipal sphere it makes laws.

(3) The attribute of continuity of the sovereign may be questioned by asking "where sovereignty resides during a dissolution of Parliament." In one place, Austin said correctly that the sovereign body is the Crown, the Lords and the Commons; but elsewhere he asserted that it is the Crown, the Lords and the Electorate. The latter interpretation renders the whole of his conception meaningless. Who, in that case, is the commander and who the commanded?

(4) The attribute of indivisibility has also created difficulty. The question is whether sovereign authority can be vested in more than one body, not whether it may be exercised by more than one. Austin said that its exercise may be delegated to several.

Austinian theory could be applied to the British Parliament which is supreme (there is no division of power in England into different organs of State i.e. legislature, executive and judiciary). However, Austin's notion that sovereignty is indivisible is falsified by federal Constitutions e.g. India; USA; old Roman law, communist power of colonial legislature and West Minister Parliament (a "colony" has power to make law within its territorial limits, but the West Minister Parliament can also legislate for it, thus sovereignty is divided).

The ultimate authority may be vested as to different matters in various bodies. The indivisibility of sovereignty has now been judicially rejected. — — — —

(5) **Illimitability** – The question whether the sovereignty can limit or bind itself is an extremely debatable one.

Sir Mathew Hale had challenged Hobbe's conception of absolute sovereignty by arguing that sovereign powers accrue to sovereign by certain laws of the kingdom and that there are therefore certain qualifications of these powers.

According to Austin, a sovereign cannot be under a duty, since he cannot command himself. To be under a duty implies that there is another sovereign, above the first who commands the duty and imposes a sanction. In such a case, the first sovereign is not a sovereign.

It must be admitted that the whole notion of the sovereign being unable to command itself is a wholly unrealistic one, in the ambit of the complex web of modern public law. This unreality is underlined, for instance, by Austin's treatment of Constitutional law as not being positive law (since it is either mere question of fact as to who is habitually obeyed, or it consists of commands to the sovereign by itself.)

In modern conditions, the exercise of sovereign power may be limited by special procedure. Sovereignty may be divided in such a way that each component has a limited power to prescribe for the other..... this creates self bindingness on a sovereign. Unlimited sovereignty, therefore, can properly only refer to a body being without a superior in the structure of the State, but this implies nothing either logically or legally as to the degree of its freedom of action.

(6) **Law as the command of a sovereign** – This notion of Austin is criticised by the Dias: no one can command at least the rule which entitled him to command. As Olivecrona pointed out the bulk of the law existed before the individuals, who comprise the legal sovereign in law existed before the individuals, who comprise the legal sovereign in England, attained their positions, and they did so by virtue of rules of law.

There is no sense in saying that the rules which brought them to these positions are their own commands.

Further, why should the commands of a former sovereign continue to be "laws" under his successor? Austin reconciled this with the command theory by saying that what the

sovereign permits he commands "tacit commands". Hart objected to this by saying that a decision not to interfere with previous commands can not impart a fresh "law-quality" to something already "law". It is "law" though it has not been commanded by this sovereign, even tacitly. Continuance of majority of previous sovereign's laws is due to non-repeal by default which is in no sense an "expression of wish".

In modern times, law is nothing but the general will of the people, therefore, law cannot be said to be a mere command of the sovereign. The sovereign cannot stand above and apart from the community giving arbitrary commands, as State itself is a sovereign. The view that 'law is the command of sovereign', treats law as artificial and ignores its character of spontaneous growth.

(7) **International law** – According to Austin, international law lacks sanctions because there is no sovereign, hence no command which is to be obeyed by the States in mutual dealings.

But in the present day context, no body will accept that international law is not law (even if it lacks sanctions). The States who violates international law does not deny the existence of international law, rather tries to defend their action within the rules of such law.

Bryce: "Fear and reasons induce to obey law."

Gray: "If Austin went too far in considering law as always proceeding from state, he conferred great benefit on jurisprudence by bringing out clearly that law is at mercy of the state."

Allen: "In Law in Making": "for systematic exposition of the method of jurisprudence we will have to turn Austin."

Holland accepted command theory with variation. He says – "'law' in proper genre of the term is therefore, a general rule of human action, taking cognizance only of external acts, enforced by determinate authority."

Salmond: "Law consists of rules recognised and acted on by the courts' practice."

Gray: "Law is what has been laid down as a rule of conduct by the person sitting as judicial organ of state."

Differences between Analytical and Historical School.

Analytical School	Historical School
i) Law as command emanating from state	i) Law is self existent.
ii) no law in the absence of sovereign	ii) Law is antecedent to state
iii) enforced by sovereign	iii) Law independent of political authority
iv) State made law or statute	iv) Typical law is custom
v) Custom is not law unless validated by judiciary or statute	v) Custom is law by its own intrinsic work e.g. precedents and legislation to custom
vi) Judges should adopt purely syllogistic method.	vi) History of legislation

Pure theory of law (Kelsen/Positivist School)

- Also known as Vienna School of Legal Thought – Hans Kelsen (Austria).
- First exposition of the theory in 1911.
- Lawness of a norm is not dependent upon meta legal acts.
- Reaction against 'natural law' and modern 'sociology' jurisprudence.
- Supported codification of law.
- Close to Austin, Realists and even Duguit.

- Object of the theory: To free "law from the metaphysical mist with which it has been covered at all time by the speculations on justice or by the doctrine of jus naturale."
- He drew a distinction between is (sein) and ought (sollen).
- "If one breaks the law, he ought to be punished."
- Rejects 'command theory' of Austin as it introduces a psychological element.
- Law is a hierarchy of norms and the supreme norm i.e. 'grundnorm' is the starting point of any legal system. There is a gradual concretization of 'grundnorm'.
- He calls Austin's law as 'static'.
- Questions pertaining to grundnorm are pre-legal questions.
- Aim of a theory of law is to reduce chaos and multiplicity into unity by a process of purification of law.
- "Legal norm does not constitute a command, but a relation of condition and sequence."
- Law and state are the same.
- No sovereign.
- Private law same as public law.
- No difference between natural and juristic person.
- Only legal duties and not rights.
- International law is supreme law
  - Sanction is war and reprisals
  - Grundnorm – pacta sunt servanda
- Test of grundnorm – minimum efficacy.
- Follower of Kelsen – Lauterpacht
- Critic of Kelsen – Haggerstorm
- Stone and Friedman have defended Kelson's theory.

Basic Postulates of Kelsen's Theory

(1) Kelsen defines law as 'an order of human behaviour'. The specific nature of this order consists (a) in its being coercive, and (b) in the fact that this coercive power is derived solely from the sanctions attached to the law itself.

(2) The law is a normative not a natural science.

(3) The legal system is a system not of what is (reality), but only of what ought to be. A norm is not a statement about reality and therefore is incapable of being true or false, it can only be valid or non-valid.

(4) The 'binding force' of the legal order should be sought not in the motivation or behaviour-pattern of the people whose behaviour the order regulates, but in the sanction that is necessarily attached to every legal rule.

(5) The efficacy of a legal order is ascertained by whether the coercive elements in law make people obey.

(6) The essence of the legal norm is not its efficacy but its validity, if a norm is valid in the sense that it has been created in accordance with the Constitutional provisions and has a sanction attached to it. Then, even if it is not being enforced, it does not, for that matter, cease to be a valid legal norm.

(7) A norm is valid only because it has been derived from or is ordained by another (superior) norm. This presupposes a hierarchy of norms, each norm being valid on the presupposed validity of some other norm. The last in the series is the basic norm (grundnorm) whose validity is purely hypothetical and who imparts validity to every other rule of legal order.

(8) To the question why a certain coercive act (e.g. imprisonment) is a legal act, the answer is: because it has been prescribed by an individual norm, a judicial decision. To the question why this individual norm is valid as part of a definite legal order, the answer is: because it has been created in conformity with a criminal statute. This statute finally receives its validity from the Constitution.

(9) The relation between legal coercion and the use of force is analysed by Kelsen to prove that there is no antimony involved here. It has been usually argued that while the law seeks to prevent the use of force to settle differences, the law accomplishes this by the threat and, ultimately, the actual use of force.

According to Kelsen, there is no antimony because the sanction of force behind the law was legal force as it could be used only strictly in accordance with certain stipulated conditions by specified person; the law-enforcing organs must and do have the monopoly of the use of force.

(10) According to Kelsen, a dynamic system is one in which fresh norms are constantly being created on the authority of an original or basic norm; a static system is one which is at rest. He calls Austin's theory static because Austin's analytical jurisprudence regards law as a system of rules complete and ready for application without paying any attention to the process of their creation.

(11) Kelsen emphatically denies the existence of a 'sovereign' as a personal entity. He denies also the existence of State as an entity distinct from law. When all derive their power and validity ultimately from the grundnorm there can be no supreme or superior person as 'sovereign'. In the same way the 'State' is but a simple way of conceiving the unity of legal order and is only a synonym for the legal order itself.

Grundnorm

According to Kelsen, laws are "ought propositions i.e. 'norms': 'If X happens, then Y ought to happen', or in other words, 'if a person commits theft, he ought to be punished'. Law does not attempt to describe what actually occurs ('is') but only prescribe certain rules.

Every norm is an expression of an act of will that something ought to happen. Norm is a legal meaning attached to an act of will. The judgment that an act of human behaviour is 'legal' or 'illegal' is the result of a specific, namely normative interpretation.

"Norm" is the meaning of an act by which a certain behaviour is commanded, permitted, or authorised. A criminal code might contain the sentence: Theft is punished by imprisonment. The meaning of this sentence is not a statement about an actual event; instead, the meaning is norm: it is a command or an authorisation to punish theft by imprisonment. Similarly, legislative acts 'create' or 'posit' a norm.

"Ought" is the subjective meaning of every act of will, but not every act has also objectively this meaning and only if the act of will has also the objective meaning of an "ought" is this ought called a "norm". The command of a gangster to turn over to him a certain sum of money has the same subjective meaning as the command of an income-tax official, namely that the individual at whom the command is directed ought to pay something. But only the command of the official has the meaning of a valid norm (i.e. objective meaning), binding upon the address individual because the official's act is authorised by a tax law.

Therefore, the objective validity of a norm which is the subjective meaning of an act or will that men ought to behave in a certain way, does not follow from the factual fact i.e. from an 'is'; but from a norm authorising this act i.e. from an 'ought'. We interpret the killing of one individual by another ('hang-man') as the execution of a death sentence and not as murder, because our interpretation is based on the recognition that the act of killing constitutes the execution of a court decision that has commanded the killing as punishment. We attribute to the act of the court the objective meaning of an individual norm and in this way interpret the individuals who perform the act, as a court. We do this, because we recognise the act of the court as the execution of a statute (i.e. of general norms stipulating coercive acts). And we regard the act of legislation as the execution of the Constitution i.e. of general norms that authorise these individuals to establish general norms prescribing coercive acts.

Now, the act whose meaning is the Constitution has not only the subjective but also the objective meaning i.e. character of a binding form, if – in case it is the historically first Constitution – we presuppose in our juristic thinking that we ought to behave as the Constitution prescribes. Such a presupposition, establishing the objective validity of the norms of a legal

order, will be called a "basic norm" (grundnorm). It is not established by a positive legal act, but is presupposed and this presupposition is the ultimate reason for the validity of a legal order (it is very important to note that grundnorm is not the Constitution, it is simply the presupposition) demanded by theory, that this Constitution ought to be obeyed. Kelsen recognised that the grundnorm need not be the same in every legal order, but a grundnorm of some kind there will always be, whether, e.g. a written Constitution, or the will of a dictator. The basic point is that those who are in effective control ought to be obeyed.

Finally, it is to be noted that a norm need not be only the meaning of a real act of will; it can also be the content of an act of thinking. For example, grundnorm is an imaginary will whose meaning is the norm which is only presupposed in our thinking. The grundnorm is not a positive norm or rule of law but is an extra legal or non-legal norm as it is not derived from any higher norm. Further, it itself is not valid or invalid, it is an assumption or a jural postulate (in comparison, Constitution is a positive or legal norm; an actual or valid norm). It only empowers and does not impose sanctions. It validates the rest of the legal system; one cannot therefore utilise the system to validate it.

Thus, Kelsen's picture of a legal order emerges not just as a collection of 'oughts' but a hierarchy of norms starting from the basic norm i.e. grundnorm. A norm is valid only because it has been derived from or is ordained by another (superior) norm. This presupposes a hierarch of norms, each norm being valid on the presupposed validity of some other norm. At each level in this hierarchy norms can be generated or 'concretised'. The last in the series is the grundnorm whose validity is purely hypothetical and who imparts validity to every other rule of legal order. The entire hierarchy of norm-making organs and the process of concretisation of norms is called by Kelsen the 'Legal Order' of a particular State. According to Kelsen, legal norms cannot be derived from conflicting authorities. For example, a judgment derives its authority from an Order in Council, the Order from an Act of Parliament, the Act of Parliament from the Constitution.

Also, there occurs a movement from the generality of norms to a process of individualisation of norms (e.g. 'right to life' is a general norm, and 'right to education' an individual norm because the latter can be subsumed under the former general norm). Kelsen also pointed out that the norms embodied in a statute are primary norms.

Validity and effectiveness of norms

The validity of a norm means that one ought to behave as the norm stipulates, while effectiveness of a norm means that one in fact does so behave. Thus, effectiveness is an "is-fact", the fact that the norm is actually applied and obeyed. The validity is a quality of law; the so-called efficacy is a quality of the actual behaviour of men and not of the law itself.

A general legal norm is regarded as valid only if the human behaviour that is regulation by it actually conforms with it, at least to some degree. A norm that is not obeyed by anybody anywhere, in other words a norm that is not effective at least to some degree, is not regarded as a valid legal norm. A minimum of effectiveness is a condition of validity. Effectiveness is a condition of validity in the sense that effectiveness has to join the position a legal norm if the norm is not to lose its validity.

However, validity and effectiveness are different animus, and do not coincide in time. Thus, a norm is valid before it is effective, as is the case with a new statute before it has been applied.

Effectiveness of a legal norm attaches a sanction to a certain behaviour and thus qualifies the behaviour conditioning the sanction as illegal i.e. 'delict'.

The validity of a norm is ascertained with reference to its authorising norm, which confers a power to create it and may also specify conditions for its exercise. Thus, a norm is valid which is authorised by a superior norm. This means that every norm (other than the grundnorm) is valid, not because it is, or is likely to be, obeyed by those to whom it is addressed, but by virtue of another norm imparting validity to it. Yet, the validity of each norm does depend on the effectiveness of the legal order as a whole.

The basic norm which is the reason for the validity of a legal order refers only to a Constitution which is the basis of an effective legal order. Only if the actual behaviour of the individuals conforms, by and large, with the subjective meaning of the acts directed toward this behaviour (if, in other words, the subjective meaning is recognised as the objective meaning), only then are the acts interpreted as legal acts.

It will, therefore, be seen that with reference to a given norm, its validity and effectiveness have to be kept separate. Effectiveness of the order as a whole is a condition, not a reason of the validity of the grundnorm and of any individual norm. At the level of the grundnorm the question why is it valid, is meaningless; what is important is that the grundnorm should secure for itself a minimum of effectiveness i.e. a certain number of persons who are willing to abide by it. There must not be a total disregard of the grundnorm, but there need not be universal adherence to it. All that is necessary is that it should command a minimum of effectiveness. And, when it fails to do so, it ceases to be the basic of legal order, and any other proposition which does obtain support will replace it. Such a change in the state of affairs is said to amount to a revolution in law. This is because grundnorm is not itself the Constitution, but the assumption that the Constitution ought to be obeyed.

Austin v. Kelsen

For Austin, a law is a command backed by sanctions. Kelsen disagreed in two respects:

(1) In the Austinian sense, a sanction has a moral or psychological basis; the motivation by fear makes people to submit to law. Kelsen rejected the idea of command, because it introduces a psychological element into a theory of law which should, in his view, be "pure" (law is a de-psychologised command). In the Kelsenian sense, coercive act means forcible deprivation of liberty. There is no idea of fear involved, because the norms prescribe. The legal norm does not constitute a command, but a relation of condition and sequence.

(2) In the Austinian sense, the sanction was something outside a law imparting validity to it. While, according to Kelsen, a sanction is in-built in every legal norm.

To Kelsen, the operation of the sanction itself depends on the operation of other rules of law; and further, the validity of a rule has nothing to do with its sanctions.

Thus, Austin would have said that the sanction behind the proposition, you ought not to steal, is that if you do steal, you will be imprisoned. To Kelsen one rule prescribes that if a man has committed theft, he ought to be brought on trial; another rule prescribe that if the jury bring in a verdict of 'guilty', the judge ought to pass sentence; and so on. In this way, the contract between law and sanction in the Austinian sense disappears.

PHILOSOPHICAL SCHOOL
(Kant, Schelling, Hegel, Kohler, Spengler)

- An offshoot of History School in Germany.
- Friedman calls it "Philosophical Historism".
- It sought for a universal doctrine of history of evolution of the whole world (whereas the historical theory was limited only to a particular race) and its laws from some universal and metaphysical source.
- This school is primarily concerned with the relation of law to certain ideal. The aim of the school is to go into the purpose of law. The philosophical jurists regarded law neither as a command nor as something emanating from historical necessity, but as a product of reason. Thus it is essentially concerned with the relation between law and justice, the distinction between law and morality and their contribution to the ends of justice, the maintenance of justice in a society and fundamental legal concepts and principles which have ethical significance.
- **Relation between ethics and jurisprudence:** The aim and purpose of this school and the science of ethics is basically the same, namely perfection of human personality.

- **Ethics does not rely upon compulsion:** Immanuel Kant (German) in his "lectures on ethics" clearly differentiated between law and ethics. According to Kant ethics concerns itself with the laws of free action in so far as we cannot be coerced to it but the strict law concerns itself with free action in so far as we can be compelled to it."

"Woe to political legislator" said Kant who aims in his constitution to realize ethical purposes by force, to produce virtuous institution by legal compulsion.

Ethics as a science of human conduct lays down rules relating to ideal human conduct and the elevation of man's inner life based upon higher and nobler values of life. Laws on the other hand, are meant for regulating man's external conduct. According to Kant, in his book "Philosophy of Law" ethics aims at emancipation of inner life and it is possible to have a single universal principle of Law.

- **Common ground of law and ethics: Salmond:** Philosophical jurisprudence is the common ground of moral and legal philosophy of ethics and jurisprudence.

The philosophical school concentrates its attention on the purpose of law and the need for coercive regulation of human conduct by legal rules. Law is the means by which the individual requirement is subordinated to that of the society at large. Law achieves this harmony by determining the sphere of individual liberty in the pursuit of individual welfare so as to confine that liberty within the limits which are consistent with general welfare of mankind.

The immediate object of jurisprudence is to secure liberty to the individual and its ultimate object is akin to that of ethics i.e. human perfection.

- **Hegel:** The other leading exponent of the philosophical school was Hegel. Apart from building on the Kantian doctrine of freedom of will as being the end of law, Hegel contributed significantly to philosophical jurisprudence by his development of idea of evolution. Hegel's View, law as well as the manifestation of social life is result of an evolutionary process which takes on dialectical form. The human spirit sets out a thesis which becomes the leading idea of a particular period in history. In due course this thesis is opposed and an antithesis develops. From the resultant clash of idea a synthesis evolves which taking in elements of both, reconciles them on a higher plane. This process repeats in history itself. Hegel also showed that the idea of freedom pervaded the entire, course of history.
- **Hegel** talks of (1) 'individual subjective non-moral will' which gets purified and becomes (2) 'moral collective will' (objective).
- "State and law both are evolutionary products of reason."
- Theory of rational self-realisation and freedom of man.
- Law and morals are mixed together.
- Jurisprudence is more concerned with the ideal future of law. It was kind of revival of natural law and therefore it can be said to be a link between old and new thought.
- History and Philosophical schools acted and reacted upon each other and gave birth to new theories.
- **Historical school vs. Philosophical school** – According to **Historical School**, there will be no universality of law and according to **Philosophical School**, there will be universality of law.
- **Hegel** gave the theory of punishment also.

The Sociological School

The fundamental postulate of the sociological school is that we cannot understand what a thing is unless we study what it does e.g. Law in action. Law is a process of balancing conflicting interests and securing the **satisfaction of the maximum of wants with the minimum of friction.**

- Law as an instrument of social progress.
- Originated by French and German writers from the ideas of communism as well as biological evolution.

- 20th century trends.
- Reaction against positivism because positivist refused to take into account social processes.
- Law is not an isolated fact but a part of social phenomenon.
- Father of sociological jurisprudence is Roscoe Pound.

Roscoe Pound (USA)

- Sociological jurisprudence according to Pound should ensure that the making, interpretation and application of laws takes account of social facts. Towards achieving this end there should be:
  i) A factual study of the social facts of legal administration.
  ii) Social investigations as preliminaries to legislation.
  iii) A constant study of means for making laws more effective
  iv) Study both psychological and philosophical methods of jurisprudence
  v) Sociological study of legal history
  vi) Allowance for the possibility of a just and reasonable solution
  vii) Administration of justice in English speaking country
  viii) The achievements of the purpose of the various laws.

- The common law still bears the impress of individual rights. So in order to achieve the purpose of legal order there has to be

a) Recognition of certain interest. Individual, public, social
b) A definition of the limits within which such interests will be legally recognised and given effect.
c) The securing of those interests within the limits defined.

- Law is a means of social control e.g. if a factory is polluting, the court should see various social interests involved.
- Method of social engineering:
  - Jurist must prepare an inventory of social investigation.
  - Legal principles and actual social effects.
- According to Pound, jurisprudence is the science of **social engineering**. This brings a balance in conflicting interests in society. In order to assess the word social engineering, he classified various interests that are to be protected by law.

A) **Individual Interest:** These are claims or demands or desires involved in and looked at from the standpoint of individual life. They concern:
  i) **Personality** – includes interest in (a) Physical person (b) freedom of will (c) honour and reputation (d) Privacy (e) belief and opinion
  ii) **Domestic Relation** – (a) property (b) freedom of industry and contracts (c) promised advantage (d) advantageous relations with others (e) freedom of association (f) continuity of employment.

B) **Public Interest** – Interest of the state as a juristic person - includes: (a) integrity, freedom of action and honour of state personality and (b) claim of politically organized society as a corporation to property acquired and held for corporate purposes.

C) **Social Interest** –
  i) Social interest in the general security. Those branches of law which relate to - (a) general safety (b) General health (c) Peace and order (d) Security of acquisition (e) Security of transaction.
  ii) Social interest in security of social institutions: (a) Domestic institution (b) Religious institution (c) Political institution (d) Economic institution
  iii) Social interest in general morals: prostitution, drunkenness, gambling.
  iv) Social interest in conservation of social resources. (a) Conservation of natural resources (b) Protection of and gaining of dependants and defectives.

v) Social interest in general progress (a) Economic progress (b) Political progress (c) Cultural progress
vi) Social interest in individual life.

- **Tasks of law**
  - Satisfaction of maximum human wants and interests.
  - Duty of law to make valuation of interests – best interests to be secured.
  - Allen calls it: "Experimental Jurisprudence".
- **Jural Postulates** – These are the basic assumptions on which the ordering of conflicting interests rests in every society. In total there are five postulates as per **Pound:-**
  - I. Others will commit no intentional aggression upon men. (This relates to Criminal Law).
  - II. The society will use discoveries etc. for its own use. (This relates to Law of Patents).
  - III. In their general intercourse, men will act in good faith. (This relates to Law of Contract).
  - IV. Men will take due care of others in their general behaviour. (This relates to Law of Tort).
  - V. Harmful things will be kept in proper bounds. (This relates to the Rule of Strict Liability).
- **How to balance between the interests?**
  - The various interests are weighed on the same plane.
  - If an interest is transferred, it will be transferred only to the social plane. For example – individual's freedom will transform into social freedom.
  - New situations will arise to the new problems for which the existing law will not be sufficient. Therefore, the judges will dispense justice without law.
- **Criticism:**
  - (1) It only highlights the functional aspect of law and ignores the nature and character of law.
  - (2) In certain cases, law pre-exists interests.
  - (3) Lack of criteria of evaluation.
  - (4) Misleading, balancing metaphor.
  - (5) Emphasised judicial activism to be greater than legislation.
    - Judiciary has its own limitations.
  - (6) Interests cannot be confined in different categories as the value of different interests change according to times and society.
  - (7) **Applicability to India –**
    - Harmonising of interests is not always possible, e.g., labour-capital or landlord-tenant.

    Quinney:
    - Law is a social product
    - Majority interests/minority interests
    - Reservation for minorities in India has, infact, aggravated the problem
    - Fundamental Rights/Directive Principles of State Policy
  - (8) **Conflict/Consensual model of society:**
    Pound's theory is relevant only for an ideal society.

Pioneers of Sociological thought

Auguste Comte:

- First used the term 'sociology'.
- Founder of 'science of sociology'.
- 'Organic Theory' – Society is like an organism.
- Inspired Durkheim, who, in turn, inspired Duguit.

- Above organic theory.
- Allen ('Law in the Making') on organic theory – "The inter-dependence of organism, in the social aspect means the mutual relation of all members of civilised society..."

Durkheim:

- Made a distinction between two kinds of needs in the society – (a) common needs, and (b) individual needs.
- Division of labour.
- Theory of "social solidarity".

Duguit:

- "Law is rule which men possess not by virtue of any higher principle whatever good, interest, or happiness but by virtue of and perforce of facts, because they live in society and can live in society."
- State sovereignty declines.
- Decentralisation increases ⇨ Syndicalism increases.
- No distinction between private and public law.
- No private rights – "The only right which any man can possess is the right always to do his duty."

Gierke:

- German jurist.
- Theory of 'reality of group personality.'

Hauriou (and Renard):

- Inspired by Duguit.
- French.
- 'Institutional Theory'.

Rudolf Von Ihering:

- First great sociological jurist.
- A 'social utilitarian'.
- He continues the views of Austin, Bentham and Mill.
- "Development of law, like its origin, is neither spontaneous nor peaceful." Constant struggle or conflict with a view to attain peace and order." – "Law is the guarantee of conditions of life of society, assured by state's power of constraint."
- "Law is coercion organised in a set form by state."
- Theory of punishment: Punishment is a means to a social end.
- Avoiding pain and achievement of maximum pleasure is the purpose of law (like Bentham).
- Korkunov is his supporter.
- Friedman called him "Father of modern sociological jurisprudence".

Ehrlich:

- Law is to be found in social facts and not in formal sources of law.
- "Centre of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but **in society itself.**"
- Facts of law –
  - (a) Usage
  - (b) Domination
  - (c) Possession