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من انجـــــاز الـدكتور: أبو القاسم عيسى

بعنوان: " PHILOSOPHY OH LAW

موجه لطلبة : السنة أولى ليسانس حقوق

وعليه:

1- تودع نسخة من مطبوعة بيداغوجية بمكتبة الكلية

2- تسلم نسخة من هذا المستخرج إلى الأستاذ المعني، وتحفظ نسخة أخرى بأرشيف المجلس العلمي بمعرفة نائب العميد للبحث العلمي

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رئيس المجلس العلمي

جيلور حاج بشير
رئيس المجلس العلمي لكلية الحقوق والعلوم السياسية

جامعة غرداية
المجلس العلمي
كلية الحقوق و العلوم السياسية

Ghardaia University

FACULTY OF LAW AND POLITICAL SCIENCE

Philosophy of law

First-year joint-core law students

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Introduction

These lectures form part of the pedagogical framework designed for the teaching of Philosophy of Law to first-year undergraduate students (LMD system), within the scope of the Methodology module, during the first semester of their academic program. The aim is to provide students with a foundational understanding of the key concepts and domains of legal philosophy by addressing two central questions: the origin of law and its purpose.

This course focuses on analyzing law as a complex human phenomenon with philosophical and social dimensions. It traces its earliest foundations—was law born from the internal conscience of the community as an inherent necessity, or did it emerge in response to transformations in social reality? Or is it the result of the interplay between both factors?

Additionally, the course explores the ends that law seeks to achieve—ends that have long been the subject of profound philosophical debate and the source of the emergence of diverse legal and jurisprudential schools.

The material is structured into three main sections:

- The first section focuses on formalist schools, which attribute the binding nature of legal rules solely to the authority that issues them, with little attention to their substantive content.
- The second section is devoted to substantive schools, which regard law as a reflection of social realities or an embodiment of ideal values such as justice.
- The third section addresses mixed schools, which aim to reconcile formal and substantive approaches. A key example is the theory of the French jurist François Gény, who combined both social facts and moral ideals as fundamental pillars in understanding the law.

These lectures constitute a preliminary academic attempt to construct a comprehensive understanding of the philosophy of law, taking into account its historical, philosophical, and sociological development.

Part One: Formalist Schools

Formalist schools are those that focus on the form of the legal rule and its external appearance as an obligatory norm. According to this view, the binding nature of a legal rule stems from the authority that issued it. Law, therefore, is enacted by the sovereign authority and enforced by coercion if necessary. This explains the origin and nature of legal norms and the obligation individuals have to comply with them.

According to formalist theories, law is simply a command or prohibition issued by the ruler to the ruled. Societies are composed of two groups: a ruling class that enacts legislation, and a subject class that is bound to obey those laws.

In this perspective, law is the expression of the state's will—its external manifestation—and the tangible standard by which we recognize the legal rule. Thus, formalist schools trace the source of law to the will of the sovereign.

Major Formalist Thinkers:

John Austin (England)

The French Commentators on the Civil Code

G.W.F. Hegel (Germany)

Hans Kelsen (Austria)

Chapter One: John Austin's Theory

This chapter addresses the essence of Austin's theory, its implications, and the criticisms leveled against it. The discussion is structured into three sections:

Section One: The Core of Austin's Theory

John Austin, a legal scholar at the University of London in the first half of the 19th century, elaborated his theory in his renowned work Lectures on Jurisprudence, in which he stated:

"The subject of jurisprudence is positive law, which is set by political superiors to political inferiors".[1]

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[1] - Idris Fadli, Concise Philosophy of Law, University Publications Office, Ben Aknoun, Algeria, 2nd edition, 2006, p. 74.

Austin's core idea is that law is the will or command of the sovereign (or the state), binding upon individuals—by force, if necessary. Although the idea was not entirely new (having roots in ancient Greek philosophy that associated law with power)[2], Austin shaped it into a clear, systematic legal theory.

He was also influenced by the English thinker Thomas Hobbes, who argued:

"Law is not mere advice—it is a command. And not from just anyone, but from someone acknowledged as superior by those who are obliged to obey".[3]

Austin's most quoted definition of law is:

"A rule laid down for the guidance of an intelligent being by an intelligent being having power over him".[4]

Accordingly, Austin defines law as:

"A command issued by a sovereign authority to the governed, backed by a sanction".[5]

Three essential components must be present for a legal rule to exist under Austin's theory:

Requirement One: A Political Sovereign

The existence of a political authority to which individuals within a political society are subject is essential, as this authority exercises political sovereignty over them. Law, by its very nature, presupposes the existence of a political community structured around a supreme governing body vested with sovereign power, alongside a subordinate group that is bound to comply with the directives and prohibitions issued by the governing authority.[6] It makes no difference whether the governing authority is embodied in a single individual (a president,

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[2] - Ibrahim Abu Al-Naja, *Lectures on the Philosophy of Law*, University Publications Office, no publication year, p. 9.

[3] - Idris Fadli, *op. cit.*, p. 74.

- See: Mundhir Al-Shawi, *Philosophy of Law*, Dar Al-Thaqafa for Publishing and Distribution, 1st edition, Amman, 2009, p. 46.

[4] - Mundhir Al-Shawi, *op. cit.*, p. 46.

[5] - Ibrahim Abu Al-Naja, *op. cit.*, p. 10.

6 - See: Souleiman Cherifi, Methodology in Legal Sciences, Jiriss Com Publications, 1st edition, 2008, no place of publication, p. 77.

- *Ibrahim Abu Al-Naja, ibid., p. 10.*

emperor, king, or parliament), nor whether the form of rule is democratic or authoritarian.[7]

Thus, the rulers who hold power are the ones who establish legal rules; in other words, the law finds its foundation in the will of those in authority.[8]

Requirement Two: The Presence of a Command or Prohibition

According to Austin, for law to exist, it must originate from a command or prohibition issued by the political sovereign and directed at the governed, who are required to submit and obey. Law, therefore, is not merely a recommendation addressed to individuals, allowing them the freedom to comply or not at their discretion. However, it is also not necessary for the law to be expressed in an explicit imperative form; it suffices that it conveys a command or prohibition, even implicitly, as is the case with many legal rules. In such instances, the law merely states the ruling to be applied upon the fulfillment of specific conditions.

An example is found in Article 124 of the Algerian Civil Code, which provides: "Any act whatsoever committed by a person that causes harm to another shall oblige the person at fault to provide compensation".[9]

Law, therefore, is a command issued by the sovereign to the other members of the social group. In this regard, Austin states: “Every positive law, or every law strictly and properly so called, is set by a sovereign person, or by a sovereign body of persons, to a member or members of the independent political society”.[10]

Requirement Three: The Existence of a Sanction

For law to exist, according to Austin's theory, the command or prohibition must be accompanied by a sanction imposed by the sovereign upon those who violate it. This sanction constitutes a fundamental element of the legal rule; without it, the rule cannot be considered a legal norm, but remains merely a moral, ethical, or customary guideline.[11]

In this regard, Austin states: “Laws, properly so called, are a species of commands. But being a command, every law properly so called proceeds from a

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7 - Ali Marrah, Jurisprudential Approaches to the Interpretation of the Legal Phenomenon, Houama Publishing, Printing and Distribution House, Algiers, 2011, p. 124.

8 - *Mundhir Al-Shawi, ibid., p. 46.*

9 - See: Ibrahim Abu Al-Naja, ibid., pp. 11–12.
- Souleiman Cherifi, ibid, pp. 78–79.

10 - Mundhir Al-Shawi, ibid., p. 46.

11 - See: Slimane Cherifi, Methodology in Legal Sciences, Jirescom Publications, First Edition, 2008, no place of publication, p. 77. Ibrahim Abu Al-Naja, op. cit., p. 10.

definite source... Whenever a command is expressed or directed by one party, it implies a desire for compliance or abstention by the other party, and that the second party will suffer harm... inflicted by the first party in the event that his desire is disregarded".[12]

Section Two: Consequences of Austin's Theory

Austin's theory leads to the following consequences:

1. Denial of the Legal Status of Public International Law:

Austin denies the status of public international law as true law. He considers its rules to be mere protocols or moral obligations observed by states in their interactions, with no actual sanctions in case of violation. This stems from the absence of a supreme authority above states that can impose penalties for such violations.[13]

2. Denial of the Legal Status of Constitutional Law:

Austin also denies the legal nature of constitutional rules, as they regulate the powers and organization of the state and are directed at the sovereign, not the governed. Since these rules are issued voluntarily by the ruler, and there is no higher authority to enforce them or penalize him for violating them, Austin argues that these rules are merely self-imposed limitations. He refers to them as "positive morality" rather than law. [14]

3. Legislation as the Sole Source of Law:

Austin's theory leads to the conclusion that legislation is the sole source of legal rules. This is because legislation consists of commands or prohibitions issued by the sovereign and directed at the governed. Austin does not recognize any other sources of law, foremost among them custom. He argues that the repeated behavior of individuals over a long period cannot create binding legal norms unless permitted by the legislator. Custom, therefore, becomes part of positive law in only two cases: first, when it is explicitly enacted by the legislator;

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[12] - Mundhir Al-Shawi, *op. cit.*, p. 47.

[13] - See: John Austin, The Province of Jurisprudence Determined, Hackett Publishing, 1998, pp. 186–190.

- See: H.L.A. Hart, The Concept of Law, 2nd ed., Oxford University Press, 1994, pp. 220–221.
- See: Ibrahim Abu Al-Naga, previously cited reference, p. 13.
- See: Idris Fadli, previously cited reference, p. 83.

[14] - Raymond Wacks, Philosophy of Law: A Very Short Introduction, Oxford University Press, 2006, p. 28

- Ibrahim Abu Al-Naga, op. cit., p. 14.

and second, when it is applied by the courts. In the latter case, the silence of the political authority is considered an implicit command to the judiciary to apply it.[15]

4. Strict Interpretation Based on Legislative Intent:

Austin's theory leads to the conclusion that legal interpretation must be strictly confined to the will of the legislator at the time the legal texts were enacted. Subsequent changes in circumstances are to be disregarded. This is because Austin views law as a mere expression of the sovereign's will; thus, interpretation must aim to uncover the intention the sovereign sought to embody in the legal provisions at the moment of their enactment, regardless of any changes in the context over time. [16]

Section Three: Critique of Austin's Theory

the foundation of law and the conclusions he drew do not align with reality. His theory is also marked by contradiction and superficiality, and it encountered numerous difficulties. In fact, Austin failed to formulate a comprehensive theory capable of accounting for the legal phenomenon across different societies and historical periods. As a result,[17] his theory has been subject to the following criticisms:

1. Confusion Between Law and State:

Austin's theory equates law with the presence of the state and views the sovereign's will as law. This contradicts historical facts showing that law is a social phenomenon that existed in primitive societies before the emergence of the modern political state[18].

2. Confusion Between Law and Force:

Austin's doctrine holds that the will of the sovereign constitutes the law, grounding the law solely on the force embodied in the sanction imposed by the ruler. Consequently, power enables the sovereign to impose his will on

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[15] - Ali Merah, Previously cited reference, p. 126.

[16] - Abu Al-Naja, Ibrahim. Lectures in the Philosophy of Law. University Publications Office, [no date], p. 15.

- Shaoui, Mondher. Philosophy of Law. Dar Al-Thaqafa for Publishing and Distribution, 1st ed., Amman, 2009, p. 48.

[17] - Ali Merah, Previously cited reference, p. 127.

[18] - H.L.A. Hart, *The Concept of Law*, Oxford University Press, 1961, p. 3–5.

- See:
- Ibrahim Abu Al-Naja, op. cit., p. 16.
- Idris Fadli, op. cit., p. 85.
- Saïd Bouali, op. cit., p. 13.
- Slimane Cherifi, op. cit., p. 83.

individuals, based on the premise that his will is the law. This framework effectively places the law at the service of power—that is, the ruler—rather than positioning the ruler as subject to the law, bound by its provisions, and ensuring its enforcement through force when necessary. The failure of the ruler to comply with the law leads to despotism. From this perspective, Austin's doctrine inherently facilitates authoritarianism and absolute rule, which is why it is often labeled as the theory of despotism.[19]

3. **Exclusivity of Legislation as a Legal Source:**

Austin's theory regards legislation as the sole source of law, disregarding all other sources—an approach that contradicts reality. While legislation is indeed the principal source of law in modern states, it is by no means the only one. Other sources exist alongside it, most notably custom, which has long played—and continues to play—a vital role in the formation of legal rules, especially in commercial law. England, the country where Austin lived, has a legal system fundamentally based on customary principles.

It appears that Austin became aware of this reality and sought to reconcile his theory with the recognition of custom as a source of law. He stated: *"That which the sovereign approves of is as if he has commanded it."* In other words, Austin acknowledges custom as law because the judge applies it, and the sovereign's silence toward such application is considered tacit approval and thus an implicit command for its application. However, this assertion by Austin involves a fallacy: the judge applies custom **because** it is law, whereas Austin claims that it becomes law **only because** the judge applies it—thereby reversing the relationship between custom and legal authority. [20]

4. **Denial of Public International Law and Its Legal Character:**

One of the main criticisms directed at Austin's theory is his denial of public international law and his stripping it of legal character, on the grounds that there is no supreme authority in the international community capable of ensuring compliance with its rules or imposing sanctions on states that violate them. However, this view is unfounded. The majority of legal scholars affirm that public international law is indeed law in the true sense of the word, as it possesses the element of obligation. In fact, there are international bodies that have the authority

[19] - Ibrahim Abu Al-Naja, *Previously cited reference*, p. 17.
[20] - Ibrahim Abu Al-Naja, *op. cit.*, p. 18.

to impose sanctions and ensure the observance of international legal norms—most notably the United Nations, through its various organs and specialized agencies.[21].

5. **Denial of Constitutional Law and Its Legal Character:**

Austin also denied the legal character of constitutional law, arguing that it lacks binding force because it does not originate from an authority higher than the sovereign. According to him, no superior power exists within the state to compel the ruler to abide by constitutional norms or to sanction the ruler in case of their violation. However, this argument is unconvincing. Constitutional law clearly qualifies as law in the proper sense—it is, in fact, the supreme law within the state and possesses binding authority. In the twenty-first century, it is widely accepted that the people are the ultimate source of all authority and, as such, stand above the ruler in the hierarchy of power. Consequently, the people have the right to hold the ruler accountable for violating constitutional principles, using the legitimate mechanisms available within the legal and political framework.[22].

6. **Austin's theory fails to keep pace with evolving circumstances:**

Austin's doctrine ultimately concludes that legal texts must be interpreted strictly according to the will of the legislator at the time the texts were enacted, without taking into account any subsequent changes in circumstances. This leads to the rigidity of the law and its inability to adapt to development and social change, rendering such texts unresponsive to the needs of society under new and emerging conditions.[23].

7. **Austin's Theory is Superficial and Formalistic:**

Finally, Austin's theory is criticized for focusing solely on the external form and appearance of the legal rule without delving into its essence, nature, or the circumstances surrounding its emergence. This is inadequate, since law—at its core and in its essence—originates from the social conditions and factors that shape the life of a human community. What appears outwardly as state-issued

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[21]- See: Hans Kelsen, *Pure Theory of Law*, trans. by Mohamed Youssef 'Addas, (Kuwait: The Printing Agency, 1983), p. 231 et seq.
- Slimane Cherifi, Previously cited reference, pp. 85–86.
- See:
-Idriss Fadli, Previously cited reference, p. 85.
-Said Bouali, Previously cited reference, p. 14.
[22] - See: Said Bouali, op. cit., p. 15;
- Idriss Fadli, op. cit., p. 86;
- Slimane Cherifi, op. cit., pp. 87–88.
[23] - See: Slimani, *Philosophy of Law*, op. cit., p. 88

legislation is merely a formulation of that essence, intended to give it concrete expression and make it applicable within social life.[24]

Chapter Two: The Exegetical School (École de l'Exégèse)

The School of Exegesis is considered one of the formalist schools that emerged in France. This school was the result of the views of a group of French jurists who succeeded one another during the 19th century, following the codification of the French Civil Code in a single body of law known as the Code Napoléon.25 Among the most renowned of these jurists were Aubry, Rau, Demolombe, Baudry-Lacontinerie, and the Belgian jurist Laurent. The school formed by these commentators came to be known as the "School of Textual Commitment" or the "School of Interpretation of Texts," due to the method they adopted in explaining the Code Napoléon. In their research and writings, they were committed to interpreting its texts without subjecting them to criticism, considering them as sacred legislative provisions, and assuming that legislation was the sole source of law and that these texts contained all legal rules. Therefore, they dedicated themselves to translating and interpreting them text by text, in the exact order in which they appeared in the Code—a method akin to the interpretation of sacred scriptures.

This chapter examines the Exegetical School through three main sections. The first section is devoted to exploring the foundational principles upon which the school is based. The second addresses the key consequences that resulted from its adoption, while the third focuses on the main criticisms directed at it.

Section One: The Doctrinal Foundations of the Exegetical Approach

The Exegetical School is based on two main principles: the sanctity of legislative texts, and the belief that legislation is the sole source of law.

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[24] - See: Hans Kelsen, General Theory of Law and State, trans. by Anders Wedberg, (Cambridge, MA: Harvard University Press, 1945), pp. 59–61,

[25] - Although the French Civil Code was not the first codified law to appear, it was preceded by the Prussian Code, drafted in 1794 by the German jurist Samuel Cocceji under the order of Emperor Frederick William. The French Constitution of 1791 emphasized the need to unify the country's laws, leading to the formation of a committee headed by jurist Jean-Marie Portalis, tasked with preparing a unified and comprehensive code. It is said to have been inspired by Roman and Germanic law, though some argue that it was largely derived from the Majalla (Ottoman Code of Jurisprudence). The Code contains around 1,500 articles and came to be known as the Code Napoléon because it was enacted during Napoleon's rule and under his orders. See: Slimane Cherifi, Op. cit., p. 89.

1. Sanctity of Legislative Texts

The jurists of the Exegetical School adopted a distinctive method in interpreting and explaining legal texts, one that was based on reverence for the texts and treating them as sacred, given their presumed comprehensiveness in containing all legal rules.[26]

Legislation was regarded as complete and exhaustive—much like a sacred text that "encompasses all knowledge." This perspective led them to adopt, in their interpretation of the Civil Code, the same method used in the exegesis of holy scriptures: explaining the text article by article, and in the exact order in which the provisions appeared in the Code.[27]

The reason behind the reverence shown by the jurists of the Exegetical School for legislative texts lies in the state of legal fragmentation that France experienced prior to the enactment of the Civil Code. At that time, the legal system prevailing in France varied between the northern and southern regions of the country.

The northern part of France was governed primarily by a legal system based on customary rules and traditions, whereas the southern part adhered to a legal system rooted in Roman law. The unification of law across France had long been a cherished aspiration of the leaders of the French Revolution. However, this aspiration was only realized during the era of Napoleon, with the issuance of the Civil Code that came to bear his name—*Code Napoléon*—which was the first of its kind in the world and had a profound impact on legal systems both within and beyond France. It became a source of pride and admiration for the French people, and inspired in legal scholars a deep sense of respect and veneration toward the Code, which they regarded as the sole source of legal norms.[28]

2. Legislation as the Sole Source of Law

Jurists of this school confine the concept of law strictly to the written texts issued by the legislative authority, maintaining that these texts encompass legal

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[26] - In this regard, Demolombe stated: "My motto and the creed I believe in is: the texts above all else." See: Idris Fadli, Op. cit., p. 89.

[27] - The text serves as the commentator's compass. In this context, Marcadé explains: "The exegetical method requires following the text step by step: each article is interpreted for its application, sentence by sentence, word by word. Connections are drawn between what precedes and what follows, so that the meaning of each expression and term is determined, highlighting its precision or ambiguity, and revealing whether it contains value or triviality. Once the article is fully understood in itself, the jurist proceeds to examine its consistency or conflict with related provisions, deriving conclusions and clarifying gaps." See: Ibid., p. 89.

[28] - See: Slimane Cherifi, Op. cit., p. 91.

solutions for all possible cases and circumstances. Accordingly, legislation is regarded as the sole and ultimate source of law, as no legal rules exist except those formally enacted by the legislator, who is considered the exclusive authority competent to establish legal norms. They view legislation as the embodiment of the legislator's will, characterized by its supremacy over any other legal source, thereby rejecting non-legislative sources such as customary law, judicial precedents, or scholarly opinions. This stance entails an emphasis on the formal and binding nature of legislation, deeming it the sole legal reference to be adhered to in the interpretation and application of law, without consideration of social or economic factors that may arise subsequent to the enactment of the legal text.[29]

Section Two: Consequences of the Exegetical Approach.

The respect and reverence for legislative texts and the belief that legislation is the only source of law, as advocated by the jurists of this school, led to several consequences:

1. Judges Must Apply Legal Texts

The judge, according to the doctrine of the Exegetical School, is bound to apply the legal texts as they are, without claiming any deficiency in the solutions they provide. These texts are presumed to contain comprehensive answers to all social issues. Thus, the judge is not permitted to deviate from the provisions of the law, which are regarded by the jurists of this school as sacred and inviolable. His role is to adjudicate according to the law, not to pass judgment on it. This position was clearly articulated by the Belgian jurist Laurent, who stated: *"The codes have left nothing to the discretion of the interpreter. The latter is no longer tasked with making the law—the law has already been made. There is no more room for hesitation: the law has been written in official texts. But for the codes to provide this advantage, scholars and judges must accept their new position… Lawmaking will no longer be in their hands, for by legislating, they would wrongfully usurp the authority entrusted by the sovereign nation to those designated for that task."*[30]

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[29] - John Austin, The Province of Jurisprudence Determined, ed. Wilfrid E. Rumble, Cambridge University Press, 1995, p. 11.
- see: John Austin, The Province of Jurisprudence Determined, ed. Wilfrid E. Rumble, Cambridge University Press, 1995, p. 11.

[30] - See: Mondher Al-Chaoui, op. cit., p. 45.
- see also : René David, Les grands systèmes de droit contemporains, Dalloz, 11e éd., 1992, p. 116.

2. Interpretation Must Be Derived from Within the Text

According to the proponents of the Exegetical School, the legal scholar or judge, when interpreting statutory provisions, must confine their inquiry strictly to the texts themselves, without recourse to external sources. This is because legislation, in their view, encompasses all the legal rules and principles necessary to regulate the various cases that may arise. Consequently, the inability of the interpreter (whether jurist or judge) to deduce the applicable rule from the legislative text is not considered a flaw in the law itself, but rather a shortcoming in the interpreter's capacity or interpretive methodology. The legislation is presumed to be comprehensive and complete.[31]

3. Interpretation Must Seek the Legislator's Intent

When interpreting legal texts, the jurist or judge must seek to uncover the true intention of the legislator—that is, the purpose the legislator intended to express at the time the provision was enacted. Legislative texts are merely a manifestation of the legislator's will. Therefore, it is impermissible for the interpreter to adapt the text according to social or contextual changes that occurred after its enactment, as this would amount to attributing to the legislator an intention he never had. Accordingly, only the legislator's original or presumed intent at the time of drafting should be taken into account, while any hypothetical or subsequent intent at the time of application is irrelevant in the process of legal interpretation.

The legislator's actual (true) intent refers to the intent that can be clearly inferred from the text of the law itself—its words, expressions, or from the explanatory memorandum accompanying the law. If this actual intent is not clearly discernible, the presumed intent of the legislator is taken into account instead. The presumed intent is understood as the intent the legislator would have had at the time of enacting the provision, had he explicitly addressed the specific issue in question. This presumed intent may be inferred through analogy with provisions governing similar situations, from the general spirit of the legislation, from the fundamental principles of law, and from historical sources upon which the legislation was based.

In contrast, the probable intent of the legislator refers to the intention he might have had if he were drafting the text at the time of its application, in light of contemporary social conditions. Therefore, the probable intent differs from the presumed intent in that the former reflects what the legislator might intend if he were re-enacting the law under new circumstances; whereas the latter reflects

[31] - See: Idris Fadli, La théorie générale du droit, El-Khaldounia Publishing, Algiers, 1st ed., 2004, p. 91.

what the legislator did intend, considering the actual circumstances existing at the time the law was originally enacted.

This approach, rooted in the classical doctrine of interpretation, rests on the idea that it is not the role of the interpreter to create law, but rather to reveal and clarify what has already been legislated. As Ibrahim Abu Al-Naja explains, any failure to deduce the appropriate rule from the legal text is not a defect in the law itself, but rather a shortcoming of the interpreter[32].

Similarly, René David and Henry de Vabres argue that legislative texts were meant to be exhaustive and self-sufficient, and jurists must accept their role as mere interpreters of the enacted law, not as lawmakers themselves.[33]

Section Three: Criticisms of the Exegetical School

The School of Literal Interpretation (شرح على المتون) aligns with Austin's doctrine in adopting a formal-material criterion to define law, viewing law as every rule issued by the political authority within society or the state. Both schools emphasize that legislation is the sole and ultimate source of law. Consequently, these doctrines are subject to the same criticisms directed at Austin's theory, notably the following:

1. The School of Literal Interpretation is characterized by simplicity and clarity, as it confines itself to the external form of the legal rule as a direct manifestation of the legislator's will expressed through written legislative texts. It does not delve into the essence of the legal rule nor examine the social, economic, and cultural factors that influenced its formation and development. This superficial approach leads to neglecting the contextual background from which law emerges, thereby depriving it of flexibility and effectiveness in responding to societal changes.
2. The school relies exclusively on legislation as the sole source of law, disregarding other important sources, foremost among them customary law, which serves as a fundamental source reflecting the genuine desires and social needs of the community. Overlooking the role of custom confines law to a narrow framework that may fail to encompass all aspects of social life and limits its ability to adapt to evolving realities.[34]

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[32] - Ibrahim Abu Al-Naja, Al-Mabādiʾ al-ʿĀmmah fī Falsafat al-Qānūn, Cairo: Dar Al-Nahda Al-Arabiyya, 2000, pp. 26–27.

[33] - René David & Henry de Vabres, Les Grands Systèmes de Droit Contemporains, 11th ed., Dalloz, 2002, p. 128.

[34] - Ibrahim Abu Al-Naja, op. cit., pp. 26-27.

René David, Major Legal Systems in Contemporary Law, 1978, p. 134.

3. likewise, the exegetical school limits itself, in interpreting legal texts, to uncovering the legislator's intent at the time of enactment, without taking into account evolving social conditions or contemporary contexts of application. This rigid approach has resulted in a degree of legal stagnation, hindering the law's ability to adapt to new realities. Consequently, legal scholars were sometimes compelled to rely on the concept of the presumed intent of the legislator as a means of overcoming such limitations.[35]
4. The exegetical school's reverence for legislative texts led to the sanctification of the legislator's will, effectively reducing the concept of law to the mere expression of that will, while disregarding the surrounding social, economic, and cultural circumstances. This approach fostered an authoritarian tendency in legal thought, as it equated the legitimacy of law with the authority of the legislator alone, reinforcing a vision of law rooted in power and dominance.[36]

Chapter Three: Hegel's Doctrine

Hegel was a prominent German philosopher of the early nineteenth century who held prestigious academic positions, including professorships at Heidelberg University in 1816 and later at the University of Berlin in 1818. He contributed to various branches of philosophy, with one of his most significant works being *The Philosophy of Right*, published in 1821, which is considered a foundational text in classical legal philosophy.[37]

Our examination of Hegel's legal philosophy is structured into three main sections. The first addresses the philosophical foundations upon which his doctrine is based; the second explores the principal implications that result from it; and the third is devoted to analyzing the most significant criticisms that have been directed against it:

Section One: The Philosophical Foundations of Hegel's Doctrine

Hegel's doctrine is founded on the principle that law derives its authority and legitimacy from the state, insofar as it expresses the will of the state. According to this view, a rule can only be regarded as law if it emanates from, and represents, the will of the political authority within the state.[38]

Law, therefore, is viewed as an expression of the will of the state—within its territory, it governs the relationship between the state and its citizens, and

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[35] - Idris Fadli, op. cit., p. 99.

[36] - See: Idris Fadli, *op. cit.*, p. 99.
- Ibrahim Abu El-Naga, *op. cit.*, p. 28

[37] - Ibrahim Abu al-Naja, op. cit., p. 29.

[38] - Georg Wilhelm Friedrich Hegel, Elements of the Philosophy of Right, translated by H. B. Nisbet, edited by Allen W. Wood, Cambridge University Press, 1991, §3–§4.

beyond its borders, it governs its relations with other states and subjects of international law. For Hegel, the state is sovereign unto itself, and all entities within it must submit to its authority. The state is subject to no higher power, whether domestic or international. Hegel thus asserts the absolute authority of the state, which extends to both its internal affairs and its external relations.[39]

According to Hegel, everyone who constitutes the state must be subject to its authority on the domestic level. A society does not attain the level of a true state unless all individuals recognize a common interest towards which their wills must be directed. Their individual wills and freedoms must unite around this interest, which is expressed through what Hegel refers to as the "unity of individual wills." Thus, in Hegel's view, the state embodies human will and freedom. True human freedom can only be realized through integration into the state, which necessitates the complete submission of individuals to the authority of the state, whose very existence is founded upon the collective wills of its members.[40]

Hegel maintains that the sovereignty of the state is singular and indivisible. All divergent considerations and viewpoints must dissolve within its unity. This sovereignty should be embodied in a single individual who alone possesses the authority to express the general will upon which the state and its power are founded. His will becomes law, enforceable by virtue of the power he holds to impose it.

On the international level, Hegel argues that no authority or will exists above that of the state which can compel it to adopt specific behavior in its relations with other states. All states are equal in terms of sovereignty; therefore, no supranational power exists to regulate the relations between them or to resolve their disputes. War, consequently, becomes the means through which a state enforces its will in the international community and settles conflicts with other states. The outcome of war, for Hegel, reflects a kind of divine judgment or a verdict of the court of history. Throughout history, victory in war tends to favor the stronger party, who rightfully claims triumph. Thus, the prevailing state is the one capable of imposing its will on others through force.[41]

[39] - Ibrahim Abou al-Naja, *op. cit.*, p. 31
[40] - Fadli Idris, *op. cit.*, p. 102
[41] - Ibrahim Abou El-Naga, op. cit., p. 33.

Section Two: Consequences of Hegel's Doctrine

Hegel's legal theory gives rise to a set of fundamental consequences that reflect his philosophical conception of the state and law. These consequences can be summarized as follows:

1. Restricting the Sources of Law to Legislation Alone

Hegel views law as an expression of the general will embodied in the state. Accordingly, only that which is enacted by the legislative authority—representing the state's will—qualifies as law. This perspective excludes all other sources, such as custom or judicial precedent, on the grounds that they do not originate from the official will of the state. This restriction leads to a formalistic conception of law that disregards social realities, turning law into a mere instrument of political power.[42]

2. Denial of the Legal Character of Constitutional and International Law

Based on Hegel's understanding of the state as a sovereign and absolute entity, the rules of constitutional law and public international law are not recognized as binding legal norms. Regarding constitutional law, Hegel maintains that only the ruler embodies the general will, and thus constitutional texts derive their validity solely from the extent to which they reflect his will. On the international level, Hegel rejects the existence of any superior authority above the state capable of imposing binding norms on its conduct.[43]

This is clearly reflected in Hegel's view of war as a natural means of resolving disputes between states. He holds that all wars are legitimate and just, and that the outcome of war represents a manifestation of the will of history—or even a form of divine judgment. The victorious state, being the stronger one, deserves to triumph and to dominate. Accordingly, supremacy in international relations is reserved for the state capable of imposing its will by force, thus reinforcing the principle of might over right in the international order.[44]

3. Reinforcement of Authoritarian Tendencies in Legal Thought

By tying law to the absolute will of the sovereign and portraying the state as a supreme entity above individuals and society, Hegel's doctrine leads to the reinforcement of authoritarianism and despotism. Law becomes merely a tool for consolidating the power of the state, undermining the democratic notion of the

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[42] - Ibrahim Abou El-Naga, *op. cit.*, p. 31.

[43] - Idris Fadli, *op. cit.*, p. 102.

[44] Ibrahim Abou El-Naga, op. cit., pp. 33–34.

rule of law and preventing the emergence of a legal system that genuinely reflects the pluralistic will of society.[45]

Section Three: Critique of Hegel's Doctrine

Hegel's doctrine in the philosophy of law has not been immune to criticism, much like other positivist schools of thought, particularly that of Austin. The main concern lies in its justification of absolute state power and its promotion of a purely formalistic concept of law. The key criticisms may be summarized as follows:

1. **Restricting the sources of law to legislation alone**
   One of the major criticisms of Hegel's theory is its confinement of law to legislation as the sole source. This view is inconsistent with legal reality, where law arises from multiple sources, foremost among them custom, which reflects the direct and evolving needs of the social community.
2. **Equating law with the absolute will of the ruler**
   Hegel identifies law with the will of the state, embodied in the person of the ruler. This leads to legitimizing political absolutism by granting unchecked authority to the ruler and completely dissolving the individual into the collective identity of the state. Such a view undermines individual rights and freedoms.
3. **Legitimizing the use of force in international relations**
   On the international level, Hegel's doctrine glorifies the use of force, as he considers war a legitimate and necessary means of resolving disputes. In his view, victory alone determines justice, regardless of the moral or legal grounds of a conflict. This leads to instability in international relations and justifies aggression under the guise of "historical necessity."
4. **Emphasizing form over substance in legal theory**
   Hegel belongs to the school of formalism that focuses solely on the external form of legal rules—namely, their issuance by the state—while disregarding their content, social relevance, or justice. He neglects the role of social, economic, and cultural factors in the creation and evolution of legal norms, making his theory inadequate for explaining the complex nature of law in society.
5. **Using philosophy to justify absolute rule and German supremacy**
   Finally, Hegel is criticized for using his philosophical theory to legitimize the autocratic regimes of his time and for reinforcing the ideology of German supremacy. His doctrine served not only to justify internal authoritarianism but

[45] - Idris Fadli, *op. cit.*, p. 102.

also to assert Germany's historical destiny to dominate the world, thus politicizing legal philosophy to support imperial ambitions.

Chapter Four: Kelsen's Doctrine

The Austrian philosopher **Hans Kelsen** is considered one of the most prominent legal thinkers of the twentieth century. He held the position of Professor of Legal Philosophy at the University of Vienna in 1917. One of his most notable contributions to legal thought is his theory known as the "Pure Theory of Law" (*La théorie pure du droit*), which seeks to study law as an autonomous science, free from all non-legal influences such as morality, religion, politics, and economics. These influences, according to Kelsen, belong to other fields of knowledge and are not within the domain of legal scholars.

This theory is based on two central ideas: the exclusion of all non-legal elements from the scope of legal study, and the unification of law and state into a single legal order. This chapter is divided into three sections: the foundations of Kelsen's doctrine, the results that stem from it, and finally a discussion of the main criticisms directed at it.

Section One: The Foundations of Kelsen's Doctrine

Kelsen's Theory Is Based on Two Fundamental Pillars:
The theory developed by Kelsen rests on two foundational principles: the exclusion of all non-legal elements from the domain of law, and the unity or identification of law and state within a single legal system.

1. The Exclusion of All Non-Legal Elements:

Kelsen argues that all external social factors—such as economic conditions, political influences, moral ideals, religious beliefs, and political ideologies—must be excluded from the scope of legal analysis. Pure law should be limited solely to legal norms in their formal existence, as expressions of the state's will, whether these norms are just or unjust. The evaluation of justice and other non-legal considerations falls outside the domain of legal science and belongs instead to other fields such as economics, political science, and sociology, each according to its own disciplinary framework.[46]

[46] - Alî Marâḥ, *Falsafat al-Qânûn* [Philosophy of Law], op. cit., pp. 131–132.

However, while Kelsen confines the study of law to legal norms, he adopts a broad definition of what constitutes a legal norm. For him, legal norms include both general legal rules—such as those forming the various branches of the legal system—and individual legal acts, such as administrative orders, contracts, judicial decisions, and the like. Accordingly, the legal system, as conceived by Kelsen, consists of both general and individual legal norms.[47]

Section Two: The Results of Kelsen's Doctrine

Adopting Kelsen's theory leads to fundamental results that distinguish his approach from other legal doctrines. The most significant of these results are as follows:

1. Resolving the contradiction between viewing the law as the will of the state and the necessity of subjecting the state to the rule of law:

Kelsen argues that the traditional view, which holds that law is merely an expression of the will of the state—as asserted by many formalist schools—leads to an inherent contradiction when the state is required to abide by the law. Since the state is the source of law, any violation of a legal rule by the state would constitute a new act of will, and thus a new legal rule that replaces the previous one. In such a case, the state can never be bound by the law, as its will constantly creates or modifies it.

However, Kelsen addresses this contradiction by asserting a complete fusion between the concepts of law and the state. He rejects the idea that they are separate entities, and instead views them as one and the same—a unified legal order. Therefore, the requirement for the state to abide by the law does not imply any contradiction, since the state is not above or outside the law, but rather identical to it.[48]

From Kelsen's perspective, the state and the law are simply two aspects of the same reality: the legal system in its entirety. Accordingly, any act carried out by the state cannot be seen as a breach of the law but must be regarded as a continuation of the legal norm-production process within the hierarchical structure of the legal order.[49]

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[47] - Ibrahim Abu Naja, op. cit., p. 38

[48] - Ibid., p. 42.

[49] -see : Alî Marâḥ,, op. cit., p. 134.

2. The Unity of Law and the Inadmissibility of Dividing It into Public and Private Law:

Adopting Kelsen's doctrine implies the inadmissibility of dividing the law into public law and private law, as is traditionally done. This division, according to Kelsen, is based on political criteria that the legal scholar must avoid so as not to become entangled in political considerations stemming from ideological leanings.[50]

Accordingly, under Kelsen's theory, there is no room for dividing the law into public and private branches, since the law consists of a set of general and individual legal norms arranged in a hierarchical structure. Each level governs the relationships falling within its scope according to the rules established at that level, without the need to distinguish between rules that govern relationships in which the state is involved in its sovereign capacity, and those where the state is merely a private individual like any other citizen.[51]

Section Three: Criticism of Kelsen's Doctrine

Despite the appreciation of Kelsen's theory and the recognition of its importance by some critics—especially for resolving certain contradictions, such as the contradiction between considering law as the will of the state and the necessity of binding the state to the law—his doctrine has not been spared from criticism:

1. **It has been criticized for concealing the fundamental problem of the basis of law and for failing to provide a solution to it.** Kelsen's hierarchical gradation of legal norms stops at the supreme legal norm—i.e., the constitution—at the top of the pyramid, without the theory being able to derive this constitution from a higher rule that grants it legitimacy within the legal hierarchy. Therefore, Kelsen was compelled to posit the existence of a higher norm from which the constitution derives its legitimacy, a norm that must be presupposed as existing in reality without providing scientific evidence for it. This higher norm or "Grundnorm" may be historically grounded in a revolution or in a usurpation of power. And if this higher norm does not actually exist, its existence must at least be presumed. It is thus a merely formal norm that confers competence to the first authority that enacts the constitution, and its function ends there—it is not considered part of the positive legal order.[1] However, Kelsen's approach in this regard ultimately links the constitution

[50] - : Alî Marâḥ,, op. cit., p. 135.
[51] - Ibrahim Abu Naja, op. cit., p. 43.

either to force or to assumption, neither of which can be accepted as a legitimate foundation of law.[52]

2. The theory has been criticized for stripping law of all social, economic, political, and ethical elements that influence its emergence and development. Law is a social phenomenon shaped by the realities and highest values of societal life, and these should be taken into account. Excluding them renders the study of law deficient and flawed.[53]
3. In his attempt to eliminate the contradiction between viewing law as the will of the state and the necessity of subjecting the state to the law, Kelsen fused the state with the law, asserting their unity. However, this view contradicts reality, as the state exists independently of the law—a fact universally acknowledged today, particularly since constitutions explicitly restrict the power of the state and obligate it to respect institutions, systems, and both individual and collective rights and freedoms that exist within society.[54]
4. Kelsen's theory also neglects custom in the hierarchical structure of legal norms, despite its being a significant source of law whose role in the creation of legal rules cannot be denied. Supporters of Kelsen's doctrine have attempted to defend this by claiming that custom derives its legal force from the constitution. Yet this argument is purely speculative and contradicts reality, since constitutions typically limit themselves to regulating legislation and do not provide for the binding force of customary law.[55]
5. The theory focuses on the form of law rather than its substance. It reduces law to legal norms in their formal existence, disconnected from the practical and social realities of life, and from the various political, economic, and moral factors that influence it.[56]
6. Kelsen's theory overlooks the rules of public international law that govern relations between states. These rules have no place in the legal hierarchy he devised, as he traces every national legal order back to its constitution—a method that cannot account for the regulation of inter-state relations.[57]
7. Kelsen is also criticized for acknowledging the existence of individual legal norms. Yet it is well-established that legal norms are characterized by generality and abstraction—they are addressed to the public, to persons and situations in general terms, without referencing specific individuals or particular cases. Thus, individual norms do not meet the essential criteria of legal norms and cannot be classified as such.[58]

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[52] - Ibid., p.p. 44-45.
[53] - Alî Marâḥ,, op. cit., p. 135.
[54] - Ibrahim Abu Naja, op. cit., p. 45.
[55] - Ibid., p.46.
[56] - - Alî Marâḥ,, op. cit., p. 135.
[57] - Ibrâhîm Abou El-Nagâ, op. cit., p. 42.
[58] -Ibid., p. 43.

Chapter Two: Objective Doctrines

Objective doctrines are those that do not focus on the external appearance or formal structure of legal rules, but rather on their essence—the primary substance from which they are formed. These doctrines view law as a social phenomenon and seek to uncover the social factors that influence the formation and development of legal norms. In doing so, they establish a link between law and society.

While proponents of objective doctrines agree on the importance of focusing on the essence of legal rules, they differ on the substance of that essence. This divergence has led to the emergence of two major schools of thought:

- The **Idealist School** (*École idéaliste*), which holds that the essence of law lies in the ideal of justice, which humans derive through reason.
- The **Positivist School** (*École positiviste*), which believes that the essence of law is grounded in tangible reality, confirmed by observation and supported by experience.

The idealist school dominated until the early nineteenth century, when a new philosophy emerged that stood in opposition to the principles upheld by the idealists. This new philosophy, rooted in the concrete realities of life, gave rise to realist doctrines that now constitute the positivist school. These two schools continue to contest the nature and foundation of law to the present day. Meanwhile, other doctrines have emerged that attempt to reconcile both philosophies—these are the **mixed doctrines**, which will be examined later.

This chapter will explore the idealist doctrines in the first section, followed by the realist doctrines in the second.

Chapter One: Idealist Doctrines

The idealist doctrines are limited to two main schools: the doctrine of natural law and the doctrine of natural law with changing content. These will be addressed in two separate sections.

Section One: The Doctrine of Natural Law

The idea of natural law implies the existence of legal rules that precede and surpass positive law; they are eternal and immutable, valid in all times and places.[59]

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[59] - Mondher Al-Chaoui, op. cit., p. 76.

One can say that natural law embodies those eternal and timeless ideals that govern the entire order of the universe. This law is not man-made; rather, the human mind merely uncovers the values of its rules. It is a universal law binding upon all human beings because it is based on the unity of human nature and, as such, achieves justice in its most complete form.

Some have drawn a distinction between positive law and natural law. The former is the law that society actually applies and follows in practical life, while the latter represents the ideal of perfection, revealed through human reason to guide the formulation of positive law. The legislator draws from these higher ideals to establish legal rules for the organization of society. Thus, a law is deemed just if it aligns with the principles of natural law, and unjust if it contravenes them.[60]

Although the concept of natural law has retained its traditional essence—as eternal rules superior to positive law and representing an ideal throughout its historical evolution—its substantive content has changed over time, depending on the goals and ends that the notion of natural law has served. It began with the Greek philosophers as a philosophical concept, then became a legal idea with Roman jurists, transformed into a religious notion with church scholars during the Middle Ages, and evolved into a political concept with modern-era philosophers.[61]

These developments will be discussed in four subsections:

Subsection One: Natural Law Among the Greeks

The concept of natural law first appeared with the Greek philosophers as a philosophical notion rooted in contemplation of social life and the nature of its structure. They pondered the orderly system that governs the universe and all its phenomena and observed the presence of fixed rules that all natural phenomena obey—whether related to the cosmos, water, or air.[62]

Playwrights of the era spoke of divine, immutable, and unwritten laws that stood in opposition to the positive law of the city-state. For example, Sophocles, in his fifth-century BCE play "Antigone," has the heroine defy King Creon's edict forbidding her brother's burial, saying to him:

"No, no! I could never think that your decrees had such power that you, a mortal, could override the unwritten and unshakable laws of the gods. These laws are not born today or yesterday; they live forever, and no one knows their origin."[63]

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[60] - Alî Marâḥ,, op. cit., p. 140.

[61] - Ibrâhîm Abou El-Nagâ, op. cit., p. 51.

[62] - ibid, p.52.

[63] - Mondher Al-Chaoui, op. cit., p. 77.

Aristotle (384–322 BCE) [64] also highlighted the imperative force of the law that springs from nature and is intuited through a kind of innate anticipation.[65]

The Stoics, too, adopted the idea of a "law of nature." Professor Kastberck notes that the Stoic school was one of the most influential in the development of the concept of natural law. The distinguishing mark of the Stoic doctrine was its assertion of a connection between the laws of nature and the general rules that govern human life. This school had significant influence over Roman statesmen and philosophers, especially Cicero and his natural law theory.[66]

Greek philosophers believed that the rules of natural law most perfectly achieve justice, and that natural law should therefore be considered the ultimate ideal, which positive law must strive to fulfill. A law was just, in their view, only if it conformed to the principles of natural law—and unjust if it contradicted them.

Subsection Two: Natural Law Among the Romans

The concept of natural law was transmitted from Greece to Rome, where the Romans, influenced by Greek philosophy, adopted it as the ideal law—a collection of constant, eternal rules that do not change with time or place, that exist in nature, and that are grasped by human reason. This law applies to all

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[64] - Aristotle, or Aristoteles, was born in 384 B.C. in the city of Stagira, which was a Greek colony on the coast of Macedonia. Therefore, he was not Athenian by origin. His father was a physician in the court of Amyntas II, the father of King Philip, ruler of Macedonia. This background had an impact on Aristotle's upbringing, as it influenced his interest in biological research.

Aristotle moved to Athens at the age of 17, which enabled him to deeply study biology, understand scientific research methods, and engage with scholars in various sciences, enriching his thought with additional ideas and knowledge.

He joined Plato's Academy, as it was the most suitable place in the Greek world for pursuing advanced higher education. He remained a member for the entirety of Plato's life—around 20 years—during which he was strongly influenced by Plato's teachings. Aristotle famously said, "I love Plato, but I love the truth more."

Aristotle's doctrine came to be known as the **Peripatetic School**, because he used to teach while walking. He authored many works, the most important of which include *Ethics* and *Politics*.

See: Nour-Eddine Harrouche, *History of Political Thought*, Dar El Oumma, 3rd edition, Algiers, 2012, p. 77 and following.

[65] - The concept of natural law according to Aristotle is "justice in itself, represented by the ideal that aims at perfection, and upon which positive laws (enacted by the will of the legislator) must be based, since justice is the foundation from which these laws derive their binding force over individuals."

See: Al-Marah, *previous reference*, p. 143.

[66] - see Nourredine Harrouche, op. cit., p.p. 77.78.

peoples because it is superior to and predates positive law. It is not a product of human will; rather, it is imposed by nature and reason.[67]

In his work *De Republica*, Cicero wrote:

"There is a true law, right reason, in accord with nature, existing in us, constant and eternal… It is of divine origin, and it cannot be overruled or altered… It is the same in Rome and in Athens, the same today and tomorrow—one eternal and unchangeable law for all peoples and all times. Like God, it is universal and sovereign over all things: God is its author, promulgator, and enforcer."[68]

The Roman jurist Ulpian gave natural law a broader meaning, declaring it to be the law governing all living beings—humans and animals alike. Its rules stem from nature itself, whether seen in animal instincts or human motivations, though it is more developed in humans.

Likewise, the jurist Gaius defined natural law as a fixed and preexisting law superior to positive laws, unchangeable and not man-made but dictated by nature and reason.[69]

He further stated:"All peoples governed by laws and customs rely partly on their own law and partly on a law common to all humans. The law created by a people for itself is called civil law, because it pertains to that specific city. In contrast, the law established by natural reason, which is observed by all peoples, is called the law of nations (*jus gentium*)—precisely because all nations adhere to it."[70]

Thus, the idea of natural law evolved from a philosophical concept among the Greeks into a legal one with Roman jurists and philosophers, who regarded it as a source of legal rulings applicable to all peoples. These principles, arising from nature and discovered through reason, were seen as rational and acceptable across all nations.

This distinction laid the groundwork for Roman jurists to differentiate between *jus civile*—the civil law applicable only to Roman citizens—and *jus gentium*, the law of nations applied to foreigners, whether among themselves or in their relations with Romans.[15]

Roman civil law, being formalistic and focused on procedural strictness, often resulted in the loss of rights due to non-compliance with formalities. It was derived from ancient Roman customs and traditions. However, natural law influenced the civil law, freeing it from many of its rigidities and reducing the number of unjust outcomes arising from formalistic applications.[16]

The *jus gentium* was characterized by simplicity and lack of formalities. Its rules were derived from principles of justice accepted by reason and all peoples.[71]

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[67] - Ibrâhîm Abou El-Nagâ, op. cit., p. 51.

[68] - Mondher Al-Chaoui, op. cit., p. 78.

[69] - Ibrâhîm Abou El-Nagâ, op. cit., p. 54.

[70] - Mondher Al-Chaoui, op. cit., p. 79.

[71] -- Ibrâhîm Abou El-Nagâ, op. cit., p. 55.

Professors Al-Sanhuri and Hashmat Abu Sitta explain the meaning of the law of nations in their book *Principles of Law*, stating:
"The law of nations is the common law among all peoples. The Romans derived from its principles the law applied to foreigners. This is the true meaning of natural law. In Roman terminology, however, natural law was the law applicable to all living beings—human and animal alike."[72]

Section Three: Natural Law According to the Clerics

During the Middle Ages, the concept of natural law transitioned into the hands of the Church clergy and was transformed into a religious idea under the influence of Christianity and the dominant authority of the Church in Europe at that time. Canonical jurists and philosophers declared that natural law was a divine, eternal, and immutable law, superior to positive law, since it originated from God as the Creator of nature. Their objective in transforming it into a religious concept was to strengthen the Church's authority, reinforce its control, and subject kings to the rule of the Pope. They argued that positive law should not be obeyed when it contradicts divine law, from which natural law derives and with which it shares certain provisions.[73]

However, although natural law assumed a religious character during the clerical period, this did not result in the disappearance of the rational foundation that had characterized it in the Greek and Roman eras. For the clerics' jurists and philosophers, natural law was indeed a law inspired by God as the Creator of nature, yet it was a law discernible by human reason.

Thus, Saint Thomas Aquinas, in the mid-thirteenth century, distinguished between three types of laws arranged according to their importance: divine law, followed by natural law, and finally, positive law.

Thomas Aquinas, regarded as the greatest Christian philosopher, reaffirmed Aristotle's doctrine that natural law is rational law. He explained this by stating: "Moral virtue is defined by sound reason; consequently, whatever reason dictates to man is natural, meaning it is rational." Furthermore, he asserted that God commands something only because it is good according to reason, and forbids something only because it is evil in the eyes of reason. (In conclusion, there can

[72] - Mondher Al-Chaoui, op. cit., p. 79.
[73] - Ibrâhîm Abou El-Nagâ, op. cit., p. 57.

be no obedience to positive law if it contradicts divine law, from which natural law is derived.)[74]

Section Four: Natural Law in the Modern Era

The modern era refers to the period following the age of feudalism and the dominance of the Church, marked by the emergence of sovereignty as a key concept in modern legal thought, which ultimately dismantled the principle of ecclesiastical supremacy.[75]

A group of writers and philosophers in the sixteenth century advocated for this principle and supported it. Among the most notable were Machiavelli in Italy and Bodin in France.

However, these two thinkers exaggerated the idea of state sovereignty, likely due to their desire to strengthen nationalism and independence as a reaction against the prevalent feudalism and the subordination of the state to the Church's authority.

Machiavelli believed that the ends justify the means and that power is just as long as it is necessary. One of his famous statements is: "The prince must be both a fox and a lion, for if he is only a lion, he will not see the traps, and if he is only a fox, he will not defend himself from the wolves."

Bodin, on the other hand, advocated for absolute sovereignty of the state, allowing the ruler to exempt himself from the laws he imposed on his subjects. The ruler stood above the law because he was its source; thus, he was not bound by it, and nothing obliged him toward individuals except mere moral duties, which did not grant them any legal right to demand that he respect the very laws he imposed.[76]

As a result of this overemphasis on state sovereignty, the idea of natural law disappeared in the sixteenth century, and the state overwhelmed individual rights and freedoms. Force became dominant in international relations, prompting jurists and philosophers to call for the establishment of just foundations to govern the relationship between the state and individuals on one hand, and between states

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[74] - Al-Marah, op.cit, p. 148.
[75] - Idris Fadli, *op. cit.*, p. 133.
[76] - Ibrâhîm Abou El-Nagâ, op. cit., p. 61.

on the other. This led to the resurgence of the idea of natural law in the seventeenth and eighteenth centuries.77

Thus, the idea of natural law achieved great success in these two centuries and took on a political character. Jurists and philosophers used it to affirm individuals' natural rights, which rulers were not permitted to infringe upon. These were considered innate rights essential for human activity. Based on this, they called for organizing the state on democratic foundations built on liberty and equality. They also relied on it to demand a legal basis for international society, leading to the emergence of modern international law.[78]

The following details elaborate on this:

First: Natural Law as a Foundation for Public International Law

The Dutch jurist Hugo Grotius was the first to highlight the concept of natural law in the modern era. He is credited with shaping it into a clear and structured doctrine in the first half of the seventeenth century.

In 1625, Grotius published a book on war and peace titled *De Jure Belli ac Pacis* ("On the Law of War and Peace"), in which he defined natural law as "the rules dictated by sound reason, according to which an act may be deemed just or unjust depending on whether it aligns with or contradicts reason."[79]

Grotius' book constitutes the first systematic presentation of international law. Before addressing the law of war, he outlined his general conception of international law. He accepted state sovereignty, defining it as "the authority whose actions are independent of any superior power and cannot be annulled by any human will."

However, sovereign states should not ignore each other. They must accept the idea of a society governed necessarily by law. Sovereignty must therefore be limited only by the power of law, in the absence of any superior authority above states. This law is natural law.

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[77] - See: Said Bouali, op. cit., p. 45.
- Suleiman Cherifi, op. cit., p. 121.
[78] - Ibrâhîm Abou El-Nagâ, op. cit., p.p 61-62.
[79] - Ibid.p.62.

From this basis, Grotius defined the rules governing war. He recognized the legitimacy of war, as no authority exists above sovereign states to resolve their disputes. But such war must be just. It is considered just if it responds to injustice as defined by natural law. These instances arise when there is aggression against the "fundamental rights" recognized by natural law for sovereign states, namely: the right to equality, the right to independence, the right to self-preservation, the right to respect, and the right to international commerce.[80]

Second: Natural Law as a Basis for Constitutional Law

During the seventeenth and eighteenth centuries, jurists relied on the idea of natural law to regulate the state's authority over individuals. This was a reaction to the excessive emphasis on the state's sovereignty, which led to despotic rule and the suppression of individual rights and freedoms.

In defense of these rights and freedoms, philosophers and thinkers sought to justify the legitimacy of state authority and found such justification in the concept of the **social contract** (*Contrat social*). The most notable proponents of this theory were the English philosophers Hobbes and Locke, and the French philosopher Rousseau.[81]

The core of the social contract theory is that political society emerges when individuals relinquish their natural freedom and submit to the laws of civil society, through a mutual agreement among themselves and a governing authority.

Under this agreement, each individual surrenders part of their liberty in exchange for the state's guarantee of the remaining portion. Thus, the **contract** becomes the foundation of the state's creation and the basis for political society, thereby legitimizing individuals' subjection to law. Proponents of this concept used the social contract as an expression of natural law.[82]

While the general notion of the social contract was shared among philosophers, they differed in identifying its parties, content, and implications, based on their varying perspectives on the extent of the ruler's authority. As

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[80] - Mondher Al-Chaoui, op. cit., p. 79.
[81] - Ibrâhîm Abou El-Nagâ, op. cit., p.64.
[82] - Mondher Al-Chaoui, op. cit., p.p. 148-149.

such, both advocates of liberty and proponents of absolutism invoked the social contract to support opposing arguments.[83]

The positions of Hobbes, Locke, and Rousseau are as follows:

1. Hobbes' Social Contract

Hobbes believed the social contract was concluded among individuals, excluding the sovereign as a party. According to this contract, individuals fully and irrevocably surrendered all their liberties to the sovereign, who would ensure order and security. Since the sovereign was not a party to the contract, individuals had no right to object to his rule. Justice became whatever the sovereign commanded, and injustice was what he forbade. Therefore, subjects had to obey all his decrees, however oppressive, since despotism was preferable to a return to anarchy and the law of the jungle.[84]

This view leads to absolute despotism. Hobbes used the social contract to justify authoritarian rule, as he supported the absolute monarchy that dominated England during his time.[85]

2. Locke's Social Contract

John Locke asserted that the social contract was made between the people and the sovereign. Individuals did not surrender all their liberties, only enough to ensure public order and welfare. The ruler, in turn, was obligated to protect their remaining freedoms. If the ruler breached this obligation, the people had the right to revoke the contract, depose the ruler, and legitimately revolt.[86]

Locke, who lived during the English revolt against despotic monarchs, supported constitutional monarchy and used the social contract to resist tyranny and defend revolution against oppressive rulers.

3. Rousseau's Social Contract

Jean-Jacques Rousseau published The Social Contract in 1762, declaring that sovereignty belongs solely to the people. The contract was made among all individuals, who surrendered their natural freedoms to the collective in exchange for civil liberty under organized laws. Hence, the people are the sovereign authority in society.

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[83] - Ibrâhîm Abou El-Nagâ, op. cit., p.65.
[84] - Al-Marah, op.cit, p. 150.
[85] - Ibrâhîm Abou El-Nagâ, op. cit., p. -66.
[86] - Al-Marah, op.cit, p.152.

However, as all citizens cannot directly exercise this power, they delegate it to a representative (the ruler) who administers freedoms and ensures their protection. The ruler does not possess sovereignty—it remains with the people, who may remove him if he violates his duties.[87]

Rousseau thus used the social contract in the eighteenth century as a rational means to protect natural rights and freedoms—not to relinquish or restrict them—and to deny rulers a divine right to sovereignty, assigning this right to the people. Thus, the legitimacy of the political system and of positive laws derives from the people's will.

Assessment of the Social Contract Theory

The theory has been criticized as purely hypothetical. It assumes an original agreement through which humanity transitioned from a primitive natural life to organized society—an assumption not corroborated by history or reality.

Moreover, it is debatable whether such a contract could continue to bind future generations indefinitely.

Despite these criticisms, the theory of the social contract significantly benefited humanity. It helped dismantle despotic governments, affirm popular sovereignty, establish public rights and freedoms, and proclaim liberty and equality for all. These outcomes influenced the French Revolution and its far-reaching effects on Europe and the world.

Hence, it has been said that the social contract theory is "the greatest successful political fiction.[88]

Section Two: Natural Law with a Variable Content

The criticisms directed at the traditional doctrine of natural law significantly weakened it and nearly led to its abandonment. Some jurists who initially supported natural law conceded to these criticisms and adopted the view of the historical school, which asserted that the rules of natural law are not eternal or immutable principles applicable across all times and places. Instead, these rules are relative and vary depending on the specific social conditions surrounding each society. However, these jurists maintained that when a legislator enacts legal norms, they must be guided by an ideal of justice—an ideal that the legislator should draw upon and be inspired by. This ideal of justice, which is accessible to

[87] - Ibid. p.151.
[88] - Al-Marah, op.cit, p. 150.

human reason, constitutes the essence of natural law, although its precise content changes depending on the social environment in which the human being lives.

In this view, permanence is reserved for the very idea of justice, while its substantive content remains adaptable and contingent on the surrounding context. This interpretation came to be known as natural law with a variable content, a notion pioneered by the German jurist Stammler and later adopted and developed by the French jurist Saleilles. Stammler attempted to reconcile the notion of permanence with that of historical evolution. He argued that the essence of law is an enduring ideal of justice—constant in its abstract idea, yet variable in its concrete content. [89]

What emerges from the foregoing is that the doctrine of natural law with a variable content aligns with the traditional natural law theory in one fundamental respect: both assert that natural law is derived by human reason. However, beyond this shared foundation, they diverge significantly. Traditional natural law maintains that these reasoned principles are universally and eternally valid, while the modified version accepts their variation based on social context.

The Modern Trend Toward the Traditional Idea of Natural Law

Contemporary jurists have called for a return to the traditional concept of natural law, albeit within a more confined scope. Leading figures in this trend include Planiol and Josserand, who argue that natural law does not consist of a complete and exhaustive system of rules capable of providing solutions to all social problems. Rather, it encompasses a limited set of ideal principles grounded in justice. These include foundational maxims such as the principle of non-maleficence (do not harm others by fault), the principle of giving each person their due, and the principle of prohibiting unjust enrichment without lawful cause. These are universal moral principles common to all nations. While not directly applicable as legal rules in daily life, they serve as guiding ideals of justice and represent the foundational inspiration for positive legal systems throughout history and across jurisdictions.90

The ideal of justice, as conceived in this modern version of natural law, thus plays a dual role. First, it serves as a necessary guide for the legislator in formulating legal norms. Second, it provides an essential compass for the judge, particularly in situations where written legislation fails to offer a solution. In this

[89] - Ibrâhîm Abou El-Nagâ, op. cit., p.p -75-76.
[90] - Al-Marah, op.cit, p. p154-155.

sense, natural law constitutes a foundational basis for positive law—both in its original creation and in the supplementation of any deficiencies discovered in its application.

Many countries have explicitly recognized this complementary function of natural law in guiding judicial decision-making in the absence of statutory provisions. For instance, Article 1 of the Algerian Civil Code clearly expresses this legal philosophy:

"Legislation shall apply to all matters it expressly regulates, whether in its letter or spirit.
In the absence of a legislative provision, the judge shall rule according to the principles of Islamic law.
If no such principle exists, he shall refer to custom.
If there is no applicable custom, he shall apply the principles of natural law and rules of equity."

This legislative acknowledgment underscores the enduring relevance of natural law—not as a rival to statutory law, but as its ethical and philosophical foundation, ensuring that justice remains the ultimate aim of all legal interpretation and application.[91]

Chapter Two: Realist Doctrines

The realist school is composed of doctrines whose jurists believe that the essence of law lies in the tangible reality of social life, viewing law as a social phenomenon. However, they differ in their interpretation of the concept of social reality. The doctrines of this school include:

- The Historical Doctrine (La Doctrine Historique)
- The Social Purpose Doctrine (La Doctrine du But Social)
- The Doctrine of Social Solidarity (La Doctrine de la Solidarité Sociale)

Section One: The Historical Doctrine

The historical doctrine links law to the historical development of the community, meaning that law is a product of history; it is born and grows in the conscience of the community, develops with it, and keeps pace with its changes. It becomes embodied in the folds of its customs and is reflected in its traditions and practices.[92]

[91] - Ibrâhîm Abou El-Nagâ, op. cit., p80.
[92] - Al-Marah, op.cit, p.160.

This doctrine was advocated in the early 19th century by the German jurist Savigny, as a counter to the doctrine of natural law and in opposition to the idea of codifying laws that emerged in Europe during the 19th century—an idea rooted in the natural law school.[93]

This doctrine will be examined through the following points:

1. The emergence of this doctrine
2. The foundations upon which it is built
3. The consequences resulting from it
4. The criticisms directed at it

First Requirement: The Emergence of the Historical Doctrine

The early signs of this doctrine appeared in France, where some jurists highlighted the impact of the environment and surrounding conditions in the formation of laws. They emphasized the necessity for laws to be suited to the nature of the countries in which they are enacted and aligned with the peoples whose relationships they regulate. This inevitably leads to variations in laws according to the differences in countries and peoples based on their specific conditions.

Among the most notable of these jurists was the French jurist Montesquieu, in his book The Spirit of Laws (Esprit des lois), published in 1748.

These early signs that appeared in France were further developed into a clear-cut doctrine by Savigny, who thus became recognized as the founder of the historical doctrine, also known as the doctrine of historical evolution.[94]

Savigny promoted his doctrine to combat the call that had emerged in Germany for codifying the German Civil Law, following the example of the French Civil Code. After Napoleon consolidated various laws into codes such as the Civil Code and the Commercial Code, this codification movement received widespread support from jurists in many countries, as it aligned with the prevailing principles of natural law at the time. These proponents were led by the German jurist Thibaut, who advocated for the necessity of codifying German laws.

In response, Savigny launched a counter-movement opposing codification and attacking natural law and its a priori assumptions, which lack tangible

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[93] - Ibrâhîm Abou El-Nagâ, op. cit., p81.
[94] - Al-Marah, op.cit, p.p160-161.

evidence. He emphasized that the validity of law lies in the prevailing legal norms that are observed and confirmed through experience in a given society.

Savigny expressed this view in an article published in 1814 titled *Of the Vocation of Our Age for Legislation and Jurisprudence*, in which he outlined the harms and flaws of codification and criticized natural law. This article had a significant impact on legal circles, as it laid down the principles upon which the historical doctrine—and indeed the entire historical school—was based. Savigny became its leading figure, followed by many jurists such as Hugo, Puchta, and Saleilles.[95]

Second Requirement: The Foundations of the Historical Doctrine

The historical doctrine is based on a set of fundamental principles that its proponents adhere to and consider as the basis for their stance, especially their opposition to the codification of law. These foundations are:

1. Law is not created by the will of the legislator, but rather emerges from the spirit of the people:

According to Savigny and his followers, law is not the result of abstract reasoning or arbitrary human will; rather, it stems from the spirit of the people (*Volksgeist*). It arises naturally from the customs, traditions, and shared beliefs of a nation and evolves over time with its social and historical development. Thus, the law is not made, but discovered in the historical practices of the nation.[96]

2. Law evolves gradually with the development of the nation:

Since law is an organic expression of the spirit of the people, it does not come into existence all at once or in a complete form. Instead, it develops progressively with the gradual and continuous evolution of the nation itself. Any attempt to codify the law prematurely interrupts this natural evolution and imposes an artificial structure on the organic growth of legal norms.[97]

3. Custom is the primary source of law:

The historical doctrine emphasizes that custom is the main and most authentic source of law.[3] This is because it reflects the real and living will of the people and their collective legal conscience. Written legislation, in contrast, comes second and may only be valid if it aligns with the customary norms that have been organically formed.[98]

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[95] - Ibrâhîm Abou El-Nagâ, op. cit. p.p.84-85.
- See : Al-Marah, op.cit, p.161.
[96] - See: Ibid, p.162.
[97] - Idris Fadli, *op. cit.*, p. 176.
[98] - Ibrâhîm Abou El-Nagâ, op. cit. p.86.

4. The jurist's role is to discover and interpret, not to create law:

From the historical perspective, jurists are not lawmakers. Their role is to uncover the existing legal rules embedded in the spirit of the people and apply them appropriately. Thus, jurisprudence is a tool for interpreting the law as it exists within the nation's historical context.

These foundations led Savigny and his school to reject the codification of law, especially in Germany, at a time when national unity had not yet been achieved. He believed that codifying German law under such circumstances would hinder its natural development and obscure its historical roots.[99]

The third requirement: The Consequences of Adopting the Logic of the Historical School

Adopting the logic of the historical school leads to the following consequences:

1. **The compilation of legal rules into fixed codes is considered harmful**,

As codification results in the rigidity of laws and prevents their natural development. Codification imparts a kind of sanctity to legal rules, making the legislator hesitant to amend or adapt them in accordance with the evolving needs of society. Over time, such codes become detached from reality and incompatible with the community's changing circumstances.[100]

2. **The law enacted by the legislator is not actually of his own making**,

for law is believed to emerge and develop spontaneously and automatically. The legislator's role is merely to observe the evolution of law within the conscience of the community and to record this evolution in texts made known to the public. His function is thus passive, limited to documenting the content and development of the collective conscience over time.

However, the legislator is still expected to monitor every new societal development and to amend legal texts accordingly. This is precisely why the historical school expresses hostility toward legislation in general and codification in particular: its adherents fear that legislation or codification might obstruct the spontaneous development of law by confining it within rigid texts, thereby preventing it from responding to the inevitable evolution of society.[101]

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[99] - Jean Gaudemet, *Les naissances du droit: le temps, le pouvoir et la science*, Paris: Presses Universitaires de France, 1992, p. 78.

[100] - Al-Marah, op.cit, p.163.

[101] - Ibrâhîm Abou El-Nagâ, op. cit. p.88.

3. **Custom is considered the primary source of law**, since it is not written but arises in the conscience of the community, evolving alongside it. Custom reflects, with authenticity, the desires, needs, interests, and social conditions of the people. Accordingly, from the perspective of the historical school, custom is superior to legislation because it constitutes a direct and spontaneous expression of the collective conscience, ensuring the natural development of legal rules. In contrast, legislation is merely an indirect expression of this same collective conscience.[102]
4. **When interpreting legislative texts, one should not seek the intent of the legislator at the time of enactment**, as that intent was born of the specific historical circumstances surrounding the creation of the law. Rather, interpretation should aim at uncovering what the legislator would have intended if he were to enact the same provisions anew under the conditions in which the law is now being applied. In other words, the historical school bases legal interpretation on the **hypothetical intent** of the legislator.[103]

Four requirement: Criticism of the Historical School

In addition to the criticisms directed at the historical school, certain merits have been acknowledged. These will be clarified as follows:

First: Merits

1. **The historical school is credited with revealing the intrinsic link between law and the environment in which it arises**, as well as the specific circumstances of the community it seeks to regulate. It was the first to uncover the natural, historical, social, and economic factors that contribute to the formation of law. According to this school, law is not composed of rigid rules but of evolving norms that adapt to the conditions of society and respond to its emerging needs.[104]
2. **The historical school is also commended for exposing the fallacy of the idea upheld by proponents of the traditional natural law school**, who believed that natural law comprises a complete set of eternal, universal rules suitable for all times and places, which ought to dictate the laws enacted by positive legislators.[105]
3. **It is credited with demonstrating that law is not a mere expression of the will of the ruler**, but rather the product of interaction among various social factors and circumstances surrounding the community. Therefore, a legislator

[102] - Al-Marah, op.cit, p.163.
[103] - Ibrâhîm Abou El-Nagâ, op. cit. p.P.88-89.
[104] - Al-Marah, op.cit, p.164
[105] - Ibrâhîm Abou El-Nagâ, op. cit. p.88.

cannot impose a law on society that contradicts its conditions or impedes its development.[106]

4. **Finally, the historical school is praised for highlighting the importance of custom as a source of law**, after other schools had neglected its role in the creation of legal norms and denied its contribution.[107]

Second: Principal Criticisms of the Historical School

The main criticisms directed at the historical school may be summarized as follows:

1. **The school has been criticized for excessively linking law to the environment and society**, to the extent of denying the role of reason and will in the creation, direction, and development of law. By asserting that law evolves automatically within the collective conscience, the school ignores human will. It disregards the legislator's role in selecting laws that best suit the people and the efforts of individuals who resist unjust laws imposed by tyrannical rulers. As the saying goes, *"Just laws, like victories, do not come by themselves."*
2. **The historical school's opposition to codification**, based on the claim that it leads to legal stagnation and hinders societal development, lacks a solid foundation. Codification has numerous advantages, which is why it became widespread despite this opposition. The only tangible effect of such resistance was the delay of the German Civil Code's adoption until 1900. The fear that codification leads to legal rigidity is unfounded. It is not true that codification imparts sanctity to legal texts, causing legislators to refrain from adapting them to societal changes. Experience shows that legislators do not hesitate to amend codes when necessary.
3. **The claim that law is purely a product of each society's unique environment and circumstances is exaggerated and inconsistent with reality.** Many nations have unified under common laws, abandoning their own, as was the case in Germany, Switzerland, and elsewhere. Some countries have even wholly or partially adopted the legal systems of others, and these transplanted laws have proven effective despite originating in markedly different environments.
4. **The historical school overstated the role of custom as the ideal source of law**, citing its origin and evolution within the collective conscience. While custom was indeed central during the early stages of human civilization, in the modern era—marked by increasingly complex societal structures—human will has become essential for regulating social life. This necessitated legislative intervention and the formulation of legal texts to provide such

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[106] - Al-Marah, op.cit, p.163.

[107] - See: - Ibrâhîm Abou El-Nagâ, op. cit. p.90.

regulation. As a result, legislation has come to occupy the primary position among the sources of law, while custom has been relegated to a subsidiary role, invoked only in the absence of statutory provisions.[108]

Section Two: The Social Purpose Theory

The Social Purpose Theory is one of the realist schools of thought. It was advocated by the German jurist **Rudolf von Ihering** as a critique of the Historical School due to the conclusions the latter reached.

Von Ihering articulated the philosophy underpinning his theory in two major works: *"The Purpose of Law"* (*Le But du Droit*) and *"The Struggle for Law"* (*La Lutte pour le Droit*).
We will study this theory in two sections:

- The first addressing the philosophical foundations of his doctrine,
- The second examining the criticisms directed at it.

First Requirement: The Philosophy Underlying the Social Purpose Theory

The Social Purpose Theory is based on the notion that law is a means employed by human will to achieve a social objective—namely, the preservation of society, the safeguarding of its security, and the promotion of its progress. The realization of this objective may, at times, necessitate a struggle on the part of individuals.

According to Ihering, law is in a state of continuous development. However, unlike the Historical School, he does not view this development as automatic. Rather, it is subject to the conscious will of individuals. Law, as a social phenomenon, differs from natural phenomena in that it is governed by the principle of purpose rather than the principle of causality to which natural events are subject—such as the alternation of day and night due to the Earth's rotation. Social phenomena occur only through human will, which directs them toward the attainment of specific purposes. Hence, they are governed by the law of purpose.

This role played by human will may reach the level of struggle, involving the use of force and violence to steer the law toward achieving the intended objective. The abolition of slavery and the emancipation of workers from the domination of capitalists, for instance, were not achieved without a long struggle and bitter sacrifices to amend and replace the prevailing legal systems.

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[108] - See: - Ibrâhîm Abou El-Nagâ, op. cit. p.P.94-95.
- Idris Fadli, *op. cit.*, p.p. 177-178.

On this basis, law in its essence and nature, according to Ihering, is nothing but the product of purpose and struggle. The purpose is the preservation, security, and advancement of society; the struggle is the means to fulfill that purpose. For this reason, the theory is also known as the Theory of Purpose or the Theory of Struggle.[109]

Second Requirement: Critique of the Social Purpose Theory

Ihering emphasized the role of will and reason in the formation and development of law, thereby correcting the error of his fellow jurist Savigny, who believed that law arises and evolves automatically within the customs, traditions, and collective conscience of the community.

However, Ihering went to the opposite extreme by placing excessive emphasis on will as the foundation of law. He viewed law as the product of a struggle to achieve a specific goal, which risks attributing law to force and power, thereby undermining rights and establishing the rule of might over the rule of right.

A major criticism of Ihering's theory is that it regards the primary purpose of law as the preservation of society, rather than the establishment of justice within that society.

Furthermore, the theory is criticized for grounding law in conflict and struggle, and for tying its development to the outcomes of these struggles, in which victory may go to the stronger party, even if they are not in the right.[110]

Third Section: The Theory of Social Solidarity

The **Theory of Social Solidarity** is one of the **realist legal theories**, attributed to the prominent jurist and dean **Léon Duguit** (1859–1928), who advocated for it in the **late 19th century**. Duguit elaborated the foundations of his theory in several works, most notably in his **"Traité de droit constitutionnel" (Treatise on Constitutional Law)**.

This theory will be examined in **two main parts**:

- The first addresses the **philosophical foundation** upon which this theory is built.

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[109] - Ibrâhîm Abou El-Nagâ, op. cit. p.p.97-98.
See: - Al-Marah, op.cit, p.166.
- Idris Fadli, *op. cit.*, p.p. 180-181.

[110] - Ibrâhîm Abou El-Nagâ, op. cit. p..99.

The second focuses on the **criticisms directed** at it.

First Requirement: The Philosophy Underpinning the Theory of Social Solidarity

Duguit sought to link **law to social solidarity**, confining his study to **modern civilized society**. His theory faced sharp criticism from **conservative legal scholars** due to its novel approach to law, founded on unfamiliar and distinct bases that challenged long-standing, accepted legal doctrines. His theory is **scientific**, deriving from **observation and experience**.

The core of his theory of social solidarity is as follows: *"Man has lived in the past, and continues to live, with others in a social life; society, for him, is a tangible reality."* Man is, on the one hand, a **member of a human group**, and, on the other hand, an **independent personal being**, with individual needs and inclinations that **cannot be satisfied except within society**. From this perspective, man is connected to other members of society through a bond of **solidarity**. Thus, solidarity, according to Duguit, is a **scientific and factual reality**, not a **metaphysical ideal**, and it expands and intensifies as **human societies evolve**.[111]

Solidarity has manifested throughout all historical stages. In tribal societies, individuals would unite to defend their existence and living conditions. Solidarity was more evident within families due to **kinship and religious bonds**. It then appeared more clearly in **cities**, where families with common origins, traditions, and customs gathered. Eventually, **social solidarity fully materialized in the modern State**, which represents the latest form of the evolution of civilized communities. This evolution is the result of **the fusion of several elements**, such as shared history, common destiny, and similar cultural and economic conditions.[112]

Therefore, in his study of the **factors leading to the emergence and development of legal norms**, Duguit adopted a **realist research method** based on observing **tangible social phenomena** from which he derived **empirical truths**. These truths constitute the foundation of his theory of social solidarity. He acknowledged **only those concrete realities** that can be observed and verified

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[111] - Idris Fadli, *op. cit.*, p. 186.

[112] - Al-Marah, op.cit, p.167.

with certainty; all else he regarded as speculative and lacking tangible, conclusive evidence.

As a consequence, Duguit **rejected many foundational ideas and theories upon which traditional law is built**, such as the concepts of **right**, **legal personality**, **sovereignty**, **natural law**, and the **ideals** from which natural law is derived.[113]

Duguit identified the **scientific facts** that form the basis of his theory as follows:

1. The **existence of society**, in which man lives among others—this is a **tangible reality**, since humans cannot live in isolation and must depend on **shared life** to satisfy their needs. From this, the individual develops a **solidarity bond** with others.
2. The **presence of solidarity** among members of society—man is unable to satisfy all his needs alone; hence, he must **cooperate** with others to fulfill **mutual interests and shared necessities**.[114]

Social solidarity was described and precisely analyzed by the sociologist **Durkheim** in his famous work *"The Division of Labour in Society"*. Duguit, however, presented **a slightly different perspective** in his own works, such as *"L'État, le droit objectif et la loi positive"* and the **first edition** of *"Traité de droit constitutionnel"*. Duguit wrote:

"Individuals come together in society and remain united because they have shared and diverse needs, and at the same time, differing capacities. The shared needs can only be fulfilled through communal life. Individuals collaborate to meet their common needs by pooling similar capacities—that is the first component of social life, known as 'solidarity by similarity' (solidarité par similitude). But individuals also have diverse capacities and needs. They satisfy these through the exchange of services, with each offering his capabilities to fulfill others' needs, and in return receiving what he requires. This leads to an extensive division of labour in human societies, known as 'solidarity through division of labour' (solidarité par division du travail)."

The reality of social solidarity is **undeniable and beyond dispute**. However, the dominance of one type of solidarity over the other depends on the **degree of societal development**. In modern societies, **solidarity through**

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[113] - Ibrâhîm Abou El-Nagâ, op. cit. p.101.
[114] - Al-Marah, op.cit, p.168.

division of labour is more prominent, whereas in less developed societies, **solidarity by similarity** prevails.[115]

The achievement of both types of solidarity necessitates the **existence of rules** that regulate the behavior of individuals based on their **mutual bonds**. Duguit argued that the **sequential social facts**—the existence of society, the interconnectedness of individuals through solidarity, and the requirement for norms to regulate behavior—gave rise to what he called the **"social norm" (norme sociale)**. This norm imposes the **duty to promote and maintain social solidarity**, and to refrain from any action that might harm it.[116]

The **social norm** delineates the boundary between **actions that must be performed** and **those that must be avoided**, in order to uphold solidarity. From this norm stem all **social rules** governing individual conduct.

These **social rules** fall into three categories: **economic, moral, or legal**.

Economic rules govern all human activities related to **production, transfer, and consumption of wealth**. Violating them leads to a **social reaction** specifically tied to the production and use of wealth.

- **Moral rules**, according to Duguit, are those:

  "...which apply to every person living in a certain country and period, and which impose specific conduct related to clothing, housing, social relations, and religious practices. In short, moral rules compel individuals to align their behavior with the prevailing customs of society. Failure to comply triggers a spontaneous social reaction, giving these rules their binding nature."

- **Legal rules** may arise from economic or moral norms. However, **not all economic or moral rules qualify as legal norms**.[117]

Duguit maintained that **economic and moral rules become legal** only when **society collectively feels** that such rules are **essential to preserving social solidarity**, and that enforcing them requires **organized coercion**. Hence, for Duguit, the **foundation of the legal rule** is the **"sentiment of solidarity"**

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[115] -. Ibrâhîm Abou El-Nagâ, op. cit. p.103.
[116] - Ibrâhîm Abou El-Nagâ, op. cit. p.101.
[117] - Mondher Al-Chaoui, op. cit., p. p.124-125

(*sentiment de solidarité*)—a feeling that must be protected through **organized force** within the community.

However, Duguit later acknowledged that **the sentiment of solidarity alone** was not sufficient to justify legal rules. He therefore introduced a **second foundational element** to support his theory: the **"sentiment of justice"** (*sentiment de la justice*). Yet, by this he did not mean an **ideal or abstract notion of justice**, but rather the **actual and prevailing sense among individuals** regarding what is just and unjust.

Thus, according to Duguit, the **legal rule** is **neither** a rule enforced by **state authority alone**, as the formalist theories claim by attributing law to the will of the State, **nor** a rule grounded in **ideal values**, as proposed by the natural law tradition. Instead, it is the **rule that individuals in society perceive as necessary to preserve social solidarity**, and whose enforcement is deemed **just** through the application of organized coercion.[118]

Second Requirement: Critique of the Doctrine of Social Solidarity

The doctrine of social solidarity has demonstrated the importance of the factual realities derived from social life and their impact on the formation of law, considering them facts that should not be overlooked when researching the foundation of law. This is a merit credited to the doctrine.[119] However, aside from this, it has faced several criticisms, including the following:

1. Duguit sought to subject law to the scientific empirical method applied in natural sciences, despite the fact that natural sciences differ from social sciences, including law. This difference is evident in two aspects:

   First: Natural phenomena occur automatically if their causes are present, as they are governed by the notion of causality. In contrast, the voluntary phenomena addressed by social sciences, including those governed by law, are directed toward achieving a specific purpose. The realization of this purpose necessitates the intervention of the will. Thus, they are linked to the notion of finality, whereby it is conceivable that the will may fail to achieve the intended end. Therefore, although the empirical scientific method is valid for natural sciences, it cannot be applied to social sciences, including law.

[118] -- Ibrâhîm Abou El-Nagâ, op. cit. p.p.104-105.

[119] - See: Idris Fadli, *op. cit.*, p. 191.
- Al-Marah, op.cit, p.171.

Second: Natural sciences aim to uncover what *is*, whereas social sciences do not settle for what *is* but strive to determine what *ought to be*. Law, in particular, does not content itself with reality—what *is*—but transcends reality to reach what *ought to be*. In doing so, it moves beyond the realm of observation and experimentation to the realm of reason and reflection. Accordingly, subjecting law to the empirical scientific method constitutes a neglect of the nature of law and a denial of its function.[120]

2. Duguit did not remain faithful to the empirical foundation upon which he built his doctrine; rather, he contradicted himself, as illustrated by the following:

   First: Duguit considers the feeling of solidarity among individuals in society as one of the twofold foundations of the legal rule, viewing it as a factual reality. However, this is not the only fact verifiable through observation and experience in society. Alongside it exists the reality of competition and conflict among individuals, which Duguit ought not to have ignored in accordance with his empirical scientific method. Overlooking this fact and confining the foundation of the legal rule to the fact of solidarity is a selective preference between two realities. Such a selection can only be made by measuring each against an ideal standard imposed by reason, leading to the preference of solidarity over competition and conflict. In doing so, Duguit deviates from his empirical scientific method.

   Second: Solidarity is not limited to good but also encompasses solidarity in evil, which is likewise a factual reality in society, demonstrable through observation and experience. Duguit chose to rely solely on solidarity in good as the foundation for the legal rule, excluding solidarity in evil. This again constitutes a departure from his empirical scientific method, which requires him to consider both forms of solidarity—good and evil—equally. Choosing between them can only be done by evaluating solidarity based on a principle or ideal standard deduced by reason, thereby favoring solidarity in good over solidarity in evil.[121]

3. Duguit considered the sense of justice as one of the twofold foundations of the legal rule. However, he did not adopt the concept of justice as an ideal or as a higher value, but merely as a feeling actually present among individuals in society. This implies that, for him, justice is not an objective, fixed reality derived by reason but merely a subjective feeling. Making the foundation of law a mere subjective sentiment among individuals would lead to the

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[120] - Ali-Marah, op.cit, p.171.

[121] - See : - Ibrâhîm Abou El-Nagâ, op. cit. p.p.107-108.
- Ali-Marah, op.cit, p.172.

domination of personal whims, beliefs, and individual tendencies, whereas law ought to be grounded in objective truths so as not to result in chaos and arbitrariness.

Accordingly, solidarity as a factual reality is not sufficient to serve as a foundation for the legal rule unless it is endowed with ideal value by being measured against a higher standard derived by reason. This confirms the impossibility of relying solely on factual reality as the foundation of law.[122]

Part Three: The Mixed Doctrines

The theories and views espoused by both the formalist and substantive doctrines have been the subject of severe criticism due to their excessive focus on a single aspect of the legal rule while neglecting other essential dimensions. As a result, new doctrines emerged that sought to combine the advantages of both the formalist and substantive approaches, while striving to avoid the criticisms and shortcomings leveled against the aforementioned schools. These new approaches relied on methodologies aligned with the developments of social life and responsive to the transformations imposed by changing circumstances.

These are the **mixed doctrines**, which regard the legal rule from both a **substantive** and a **formal** perspective. Substantively, they combine **idealistic philosophy** with **realistic thought**, asserting that the essence of the legal rule is derived both from the **realities of social life** and from the **higher ideals** that govern that life. Formally, they recognize that it is the **will of the legislator** that gives shape to this essence and expresses it through an external legal form.

Among the most prominent legal theorists of the mixed doctrines is the **French jurist François Gény**, whose thought laid the foundations upon which the mixed doctrines have been primarily based.

Modern jurisprudence has been deeply influenced by Gény's doctrine, which traces the essence of the legal rule back to two key components: an **ideal element** and a **real element**. We will examine this in two chapters: the first is devoted to **Gény's doctrine**, and the second to the **essence of the legal rule in modern jurisprudence**.

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[122] - Ibrâhîm Abou El-Nagâ, op. cit. p 109.
- Idris Fadli, *op. cit.*, p. 191.

Chapter One: The Geny Doctrine

Geny was a professor of law at the University of Nancy in France. Among his most renowned works is his book titled *Science et technique en droit privé positif* ("Science and Technique in Positive Private Law"), which he authored in four volumes published between 1914 and 1924. In this work, he elaborated his doctrine on the foundation and nature of law. His doctrine or theory is also known as the Theory of Science and Technique.

We will study this doctrine in two sections: the foundations of the doctrine and the criticisms directed at it.

Section One: The Foundations of Geny's Doctrine

Geny derived his doctrine from both formalist and substantive schools after studying them thoroughly. He did not establish an entirely new theory but rather sought to reconcile existing schools of thought and based his doctrine on their principles.

He was influenced by the substantive schools (idealistic and realistic) when he affirmed that the essence of the legal rule is derived from the realities of social life as revealed by observation and confirmed through experience, guided by an ideal that is discovered through reason[1].

He was also influenced by the formalist schools when he asserted that the form of the legal rule is the external expression that gives applicability to the essence of the rule in practical life, in the form of general and abstract rules[2].

Geny refers to the essence in his doctrine as *science* (*la science*), and he calls the form *technique* (*la technique*). He asserts that the legal rule is composed of two elements: the element of science and the element of technique[3].

Subsection One: The Element of Science

Geny's concept of science is not confined to its narrow meaning limited to observation and experimentation. Rather, it encompasses all knowledge based on contemplation and rational reflection, with natural law being the central subject of study, for within it lies the deep essence of the law.

In this approach, he integrates both idealist and realist philosophies. He adopts from the natural law school the recognition of reason's role in discovering the foundational principles of the legal rule. From the historical school, he adopts

the acknowledgment of the evolution of law. From the social purpose school, he embraces the idea of an ideal that law should strive to realize. From the school of social solidarity, he values the significance of social facts and realities and their influence on the formation and development of law.[123]

Accordingly, Geny asserts that the scientific element in the legal rule is composed of four types of realities:

1. **Factual or natural realities**: These consist of the geographical, environmental, economic, social, political, and other circumstances surrounding the community.
2. **Historical realities**: These include the historical and cultural developments and events experienced by the community[7] .
3. **Rational realities**: These involve the refinement and synthesis of the various realities to form a foundational element suitable for legal norms. Reason deduces these rational realities from prior realities based on the conditions of the society.
4. **Ideal realities**: These are the prevailing ideological tendencies and intellectual currents within the society that generally aim for perfection.[124]

It should be noted that Geny does not consider these four realities to be of equal importance. He favors rational realities over the other types—factual, historical, and ideal—and concludes from this that there must be a minimum notion of natural law in forming the essence of the legal rule. This is represented by the necessity of having stable, supreme rules to which individuals are subject and which reason deduces from the nature of things.[125]

Subsection Two: The Element of Technique

The previously mentioned realities are not sufficient in themselves for application in practical life. They form the foundation and raw material for legal rules, but a second element is required to transform them into enforceable legal norms. This is the element of *technique*, which renders the rules general, abstract, binding, and enforceable. It is this element that grants them legal legitimacy.

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[123] - Idris Fadli, *op. cit*, p.205.

[124]- Ali-Marah, op.cit, p.p.175-176..

[125] - Ibrâhîm Abou El-Nagâ, op. cit. p 120.

Thus, Geny defines technique as “the art of legislation.” It follows specific formal procedures and thereby legal rules apply to everyone without distinction—including their drafters. This is how the principle of the rule of law is realized.[126]

Section Two: Criticism Directed at Geny’s Doctrine

Geny’s doctrine is distinguished by its combination of substance and form as the foundation of the legal rule, which made it more persuasive and closer to reality. Nevertheless, it was not immune to criticism, and the following points have been raised against it:

1. The facts mentioned by Geny within the "science" element are not scientific in the strict sense. Rational and ideal facts cannot be considered scientific facts, as they escape the tangible reality that is established through observation and experimentation. Therefore, only natural (or factual) facts and historical facts—those that can be observed and verified—can rightly belong to the element of science.[127]
2. It is difficult to distinguish between natural (or factual) facts and historical facts, or likewise between rational facts and ideal facts. This is because historical facts are those the community has acquired over generations, becoming part of its surrounding reality, and thus should be classified as natural facts.[2]

Similarly, ideal facts are gradually extracted from rational facts as the tendency toward perfection and progress evolves, and therefore they too should be considered rational facts.[3]

These are the most significant criticisms directed at Geny’s doctrine. Accordingly, modern legal scholarship tends to restrict the facts that constitute the substance of the legal rule to two categories only: experimental scientific facts and reflective rational facts, as will become clear in the following chapter.[4]

Chapter Two: The Substance of the Legal Rule in the Modern Era

The substance of the legal rule in modern jurisprudence consists of two elements: a **factual** element and an **ideal** element. These will be addressed in two sections. The first section will examine the factual element, while the second will focus on the ideal element.

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126 - Ali-Marah, op.cit, p.176.

127 - Idris Fadli, *op. cit*, p.212..

Section One: The Factual Element

The factual element in a legal rule includes **scientific facts in the proper sense**—those which can be subjected to observation and experimentation. These are often referred to as **empirical scientific facts**, and they cannot be ignored when drafting legal rules. The most important among these facts include:

1. **Natural Facts**: Whether they relate to human nature, the environment in which people live, or geographic conditions, natural facts play a significant role in shaping specific types of legal rules.[128]
2. **Economic Facts**: These relate to various activities in the economic sphere (industrial, commercial, or agricultural). Each type requires legal rules tailored to the nature and character of the activity, and as such, economic facts must be taken into account when establishing legal norms.[129]
3. **Political and Social Facts**: These are part of the lived reality of society and qualify as factual elements based on observation and experience. Political and social ideas have historically contributed to the creation of legal systems:
4. **In ancient times**: Dominant social and political ideologies led to the institution of slavery, resulting in two social classes—**free persons** with privileges and **slaves** with obligations.
5. **In the Middle Ages**: The prevailing social and political ideas gave rise to **feudalism**, and pre-modern class-based beliefs produced the **noble class system**, which ensured the preservation of social status. Legal rules were created to protect inheritance within noble families, such as restricting succession to the eldest son and excluding daughters from inheritance. Marriage contracts were also regulated to prevent interclass mixing, sometimes requiring **parental authorization** even for adult children.
6. **In modern times**: At the end of the 18th century, the **French Revolution** introduced values such as **liberty, equality, and fraternity**, which helped form the foundation of the French legal system.
7. **In the Soviet Union**, after the 1917 Communist Revolution, ideas such as **working-class supremacy** and **abolition of other social classes** emerged. These served as the foundation for the Soviet legal and political system, which lasted until the late 1980s.[130]
8. **Religious and Moral Facts**: These include prevailing traditions, beliefs, and religious and moral orientations in society. They are crucial in the development and evolution of legal rules and should never be overlooked.[131]
9. **Historical Facts**: Historical factors represent accumulated experience acquired by societies over time and reflect the evolution of their legal systems.

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[128] - Idris Fadli, *op. cit*, p.213.

[129] - Ali-Marah, op.cit, p.177.

[130] - Idris Fadli, *op. cit*, p.p.214-215.

[131] - Ibrâhîm Abou El-Nagâ, op. cit. p 128.

They form an essential component in the formation of legal norms and cannot be disregarded.[132]

Section Two: The Ideal Element

The aforementioned factors represent **social realities**—some experimental, others rational. However, these facts are **insufficient** to form a legal rule on their own, according to Geny. They must be accompanied by a value-based dimension that emphasizes **obligation**, measured against a **higher ideal** dictated by **reason**—namely, **justice**.[9]

From this perspective, an **ideal element** must be added to the factual element to endow it with a normative character and elevate it to the status of a legal rule.

Legal scholars distinguish between two forms of justice:

Private (or commutative) justice, which governs relationships between individuals and is based on strict mutual equality.[10]

Public (or general) justice, which governs the relationship between the community and its members and aims at achieving the **common good**.

Public justice has two sub-forms:

Distributive justice, which refers to the obligations of the community toward its members.

Social justice, which reflects the duties of individuals toward the community.

Thus, **justice** takes three forms:

1. **Commutative justice**
2. **Distributive justice**
3. **Social justice**.[11]

Chapter Two: The Ideal Element

The factors previously mentioned are considered social realities—some of which are empirical and others rational. However, according to *Gény*, these realities alone are insufficient to constitute a legal rule. They must be accompanied by a normative value that highlights their obligatory nature and is

[132] - Idris Fadli, *op. cit*, p.215.

measured against an ideal standard imposed by reason, namely, *justice*.[133] From this perspective, reality alone—no matter how rich and significant—is not sufficient to rise to the level of law unless it is elevated by an ideal element that bestows upon it the quality of obligation and transforms it from *what is* to *what ought to be*.[134]

Jurists distinguish between two main types of justice: **particular justice** and **general justice**.
Particular justice governs the relationships between individuals and is based on the principle of strict equality in their mutual rights and obligations. It rests on the idea of fair exchange without favoritism or bias and is thus referred to as *commutative justice*[3]. Its applications are typically found in contracts and civil transactions, where balance is required between what each party gives and receives.

On the other hand, *general justice* regulates the relationships between the community as a whole and the individuals that comprise it. It aims to achieve the general interest and the common good upon which society is built and sustained. General justice is further divided into two complementary forms:

1. **Distributive justice**: This refers to what the community owes its individuals. It is concerned with the fair allocation of public benefits—such as wealth, jobs, and opportunities—based on merit, need, and capability, rather than on strict numerical equality.[135]
2. **Social justice**: This refers to what individuals owe to the community. It involves each person contributing their effort and abilities toward the collective welfare. This includes respecting public order, paying taxes, performing national service, and other forms of civic solidarity.[136]

Based on this classification, justice manifests in three interrelated forms:

- **Commutative justice**: prevailing among individuals.
- **Distributive justice**: which the state or community owes to individuals.
- **Social justice**: which individuals owe to the community.

From this it becomes evident that justice is not a static or rigid concept, but rather a flexible one that takes various forms depending on the nature of the relationship it governs. Nonetheless, it remains the essential *ideal element* in the

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[133] - As Gény emphasized in his analysis of the components of legal norms.
See: Idris Fadli, *op. cit*, p.216.
[134] - This notion reflects a synthesis between realism and idealism, of which Gény is a key representative.
[135] - Principles of distributive justice form the foundation of the modern welfare state.
[136] - This concept is part of what is now called civic duties or active citizenship.

formation of legal rules—the element that grants them legitimacy, aligns them with the value of justice, and distinguishes them from mere administrative directives or coercive commands[6] . Thus, while law may be rooted in reality, it derives its value from its ascent to justice—a standard affirmed by reason, embraced by conscience, and foundational to the order of society.[137]

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[137] - *See Georges Ripert, "La règle morale dans les obligations civiles", in* Revue Trimestrielle de Droit Civil, *1932, pp. 21–45,*

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