

**BA-LL. B Vth Sem.**  
**Jurisprudence-I**  
**(Legal Theory)**  
**(BL-5005)**

**Analytical School**

**Schools of jurisprudence:-**Schools of jurisprudence are the very important part. School means thought. It is the ideas of different jurist. The central theme of the subject matter of jurisprudence is to study the nature of law. It is concerned with as to what the law is. Is it a science, a philosophy or both. Or is Jurisprudence a functional study of social regulation and control of human behaviour or is it a theory or method of regulating general human conduct? These are the various perspectives of law with which all legal scientists are concerned with. Each school is the product of different times and place, and they differ not only in their points of view, method and tendencies but in their fundamental concepts, their problems and purposes. As such various school have emerged to define law with reference to its nature, content, purpose and function. A study of all these schools become necessary for understanding law. The story of all these schools depicts the movement of human thought and legal philosophy from the very beginning of human history to the present day. Each school, therefore, is treated in the order of its growth, evolution and characteristics.<sup>1</sup> These school are :-

- 1) Natural law school
- 2) Analytical school
- 3) Historical school
- 4) Sociological school
- 5) Comparative school

**Analytical school or Imperative school**

**Introduction:** - Analytical school of jurisprudence is deals with law as it exists in the present form It seeks to analyses. the first principles of law as they actually in agiven legal system. This school consider that the most important aspect of law is its relation to the state. They treat law as a command emanating from the Sovereign, namely, the State. So, this school is called the Imperative school. This school is neither concerned with the past of the law nor the future of it, but this

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<sup>1</sup>Dhyani Prof. S. N, Jurisprudence Indian Legal Theory, Central Law Agency, 5<sup>th</sup> Edition 2019, p.39.

school study of law as it actually exists i.e. positus. It is for this reason that this school is also termed as the positive school of jurisprudence. It is for this reason that this school is also termed as the positive school of jurisprudence. Bentham and Austin are considered to be the fore runners of this school in England, It is known as Austinian school of jurisprudence.<sup>2</sup> The main jurists of this school are

- Jeremy Bentham (1748 -1832)
- John Austin (1790-1859)
- Erskine Holland (1835 -1928)
- Sir John Salmond (1862 –1924)
- H.L.A. Hart Hans Kelson (1881 1973)

**Analytical Positivism:** - Legal positivism is one of the most influential schools of thought in jurisprudence. The start of the nineteenth century might be taken as marking the beginning of the positivist movement. Legal positivism at birth was part of the wider 18<sup>th</sup> century intellectual movement known as the enlightenment, which turned away from traditions, superstitions and irrationality to embrace empiricism and science. Positivism is the approach towards law which deals only with positive law, rules and regulations actually in force in the society, as distinguished from ideal rules, regulations and laws which should be in force. The positive law is the law which emanates from a supreme or sovereign authority, which is upon the subjects and can be enforced by imposing sanctions<sup>3</sup>. So positivism is the study of positive law and the positive school is also known as the Analytical school. It was developed by Bentham and Austin.

### **Jeremy Bentham (1748-1832)**

Jeremy Bentham was born in 1748 in London. He was the son of a wealthy London Attorney. His genius was of rarest quality. He was a talented person having the capacity and acumen of a jurist and a logician. He started a new era in the history of legal thought in England. He is considered to be the founder of positivism in the modern sense of the term. John Austin is regarded as the father of analytical or positive school. However, it was actually Jeremy Bentham who was the true founder of this school. Austin was inspired by Bentham, and on many points, his arguments are just a para-phrasing of Bentham's theory. Dicey described

<sup>2</sup> Paranjape Dr. N.V, Studies in Jurisprudence & Legal Theory, Central Law Agency, 9<sup>th</sup> Edition 2019, P.24.

<sup>3</sup> Dias, Jurisprudence, Lexis Nexis, 5<sup>th</sup> Edition 2013 Reprint 3017, P.331-332.

Bentham's ideas about individualism, law and legal reforms in his book "Law and Public Opinion" in 19<sup>th</sup> Century. Bentham was opposed to natural theory of law and he co-related law with sovereignty and utility.<sup>4</sup> In this theory of Legislation Bentham define the main functions of law as being: -

- a) To provide subsistence
- b) To aim at abundance
- c) To encourage equality
- d) To maintain security

**There are some books: -**

- The limits of jurisprudence defined 1782.
- Introduction to the principles, morals and legislation.
- Theory of punishment and rewards 1811.
- A treatise on jurisprudence evidence 1813.
- Paper on codification and public instruction 1817.<sup>5</sup>

**Bentham Analytical Positivism:-** Bentham came in England the advent of positivism, sovereignty, command, duty and sanction. This is the basic elements of Analytical jurisprudence, which were subsequently borrowed by John Austin. It was Jeremy Bentham who defined, law as a command of the sovereign, an idea which he had taken from Hobbes. Bentham was a reformer and he was a strong believer in social progress. He was the staunch critic of the natural law. He believed in logical and scientific principle of Utility. he defined utility as the hedonistic calculus of pleasure and pain, which can measure the efficacy of every law, like other measurable things. The doctrine of pleasure and pain acquired highest place in his theory of legal and social reforms. So Bentham's theory is called Utilitarian School.<sup>6</sup>

### **Bentham's Utilitarianism**

Bentham's legal philosophy is called utilitarian individualism, He was an individualist, He said that the function of law is to emancipate individual from the bondage and restraint upon his freedom he supported the economic principle of "Laissez-faire". which meant minimum interference of the State in the economic

<sup>4</sup> Paranjpe Dr. N. V., Studies in Jurisprudence & Legal Theory, Central Law Agency, 9<sup>th</sup> Edition 2019, P. 25.

<sup>5</sup> Anirudh Prasad, Principles of Jurisprudence, Eastern Book Company, 3<sup>rd</sup> Edition 2004, P. 75.

<sup>6</sup> Dhyani Prof S. N., Jurisprudence Indian Legal Theory, Central Law Agency, 5<sup>th</sup> Edition 2019, P. 57.

activities of individuals Bentham propounded the principle of utilitarianism.<sup>7</sup> According to this theory, that the main object of legislation is the carrying out of the principle of utility, in other words the proper end of every law is the promotion of the greatest happiness of the greatest number. Bentham defined utility as the property or tendency of a thing to prevent some evil or procure some good. According to him, the consequences of good and evil are respectively pleasure and pain. Utility is an abstract term. It expresses the property or tendency of a thing to prevent some evil or to procure some good. Evil is pain, or the cause of pain. Good is pleasure, or the cause of pleasure. That which is conformable to the utility, or the interest of an individual, is what tends to augment the total sum of happiness. That which is conformable to the utility, or the interest of a community, is what tends to augment the total sum of the happiness of the individuals that compose it. He adopts the Principle of utility, esteems virtue to be a good only on account of the pleasures which result from it, he regards vice as an evil only because of the pains which it produces. Moral good is good only by its tendency to produce physical good, Moral evil is evil only by its tendency to produce physical evil, But when I say physical, I mean the pain and pleasures of the soul as well as the pain and pleasures of sense. I have in view man, such as he is, in his actual constitution.<sup>8</sup>

### **John Austin (1790-1859)**

John Austin was the greatest exponent of this School, who is the father of English Jurisprudence. He was born in 1790. At a very age he entered the army in which he served for five years. In 1826 he was appointed to the Chair of jurisprudence in the University of London. His lectures delivered in London University were published under the volume entitled "The Province of Jurisprudence Determined". In his lectures he discusses the nature of law and its proper bounds. He also discusses the sources of law and presented an analysis of the English legal system.<sup>9</sup> His work remains the most comprehensive and important attempt to formulate a system of analytical legal positivism in the context of the modern state. It was he who

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<sup>7</sup>Tripathi B. N. Mani, Jurisprudence The Legal Theory, Allahabad Law Agency, 19<sup>th</sup> Edition 2012 reprint 2016, P.16.

<sup>8</sup>Bentham's, Theory of Legislation, N. M. Tripathi Private Limited, 5<sup>th</sup> Reprint Edition 2000. P.2.

<sup>9</sup>Dhyani Prof S.N., Jurisprudence Indian Legal Theory, Central Law Agency, 5<sup>th</sup> Edition P.59.

founded English jurisprudence as a subject of serious legal study, was also the first exponent of modern analytical jurisprudence.<sup>10</sup>

**Some importance books: -<sup>11</sup>**

- The Province of Jurisprudence Determined.
- A Plea for the Constitution.
- Lectures on jurisprudence or Philosophy of positive law 1863.
- On Parliamentary Government 11

**Austin`s Analytical Positivism**

**Austin`s definition of law:** -Austin is the father of English jurisprudence. He confined his only to the positive law. Austin defined law as “A rule laid down for the guidance of an intelligent being by an intelligent being having power over him.” He also stated that “Law is the command of the Sovereign”. Austin believed that in the society, subjects are bound by the command issued by the sovereign from time to time.

**Classification of law:** -According to Austin law are two type –

1) Laws properly so called

2) Laws improperly so called

**1) Laws properly so called:** -These laws are commands which are backed by sanctions of the state, are called law properly so called. Law properly so called is the positive law, which means law “as it is” rather than law “as it ought to be” with which he is not at all concerned. It is divided in two part.

**A) Laws of God**

**B) Human laws**

**A) Laws of God:** -these are the laws which are made by God for men.

**B) Human laws:** -These are the laws which are made by one human being for other human beings. They may be further divided into two parts.

**a) Positive Laws**

**b) Other Laws**

**a) Positive Laws:** - These are the laws set by political superiors as such, or by men not acting as political superiors but acting in pursuance of legal rights conferred by political superiors, only these laws are the proper subject matter of jurisprudence.<sup>12</sup>

<sup>10</sup>Dwivedi Dr. S. P., Jurisprudence & Legal Theory, Central law Publication, 6<sup>th</sup> Edition 2012, P.14.

<sup>11</sup>Gupta Dr Radha, Jurisprudence & Legal Theory, University Book House (pvt), 4<sup>th</sup> Edition 2017, P.40.

**b) Other Laws:** - Other laws is known as positive Morality, other laws which are not set by political superiors or by men in pursuance of legal rights. This class includes International Law.

**2) Laws improperly so called:** -These laws are not commanding and thus, are not backed by sanctions. These laws are not obligatory.<sup>12</sup>

**Austin's Imperative Theory of Law or Analytical Positivism:** -This theory is known as Positive theory of law, Commandtheory, Imperative theory of law.

Austin opined that only positive law is the proper subject matter of the study of jurisprudence. He defined" the jurisprudence is the philosophy of positive law.

#### **Positive law has four element-**

- 1) Sovereign
- 2) Command
- 3) Sanction
- 4) Duty

**1) Sovereign:** -Law is the command of sovereign which obliges a person or persons to a course of conduct. Sovereign means,such a person who is superior,nobody can interfere in his work.He is the supreme,irresistible,absolute and uncontrolled authority.There are some importance salient features of sovereignty :-

- a) Indivisibility-Not dividable
- b) Illimitability -No limit
- c) Essentiality-Essential
- d) Inalienability-Not transferable

**2) Command :-**A command means a wish or desire conceived by a rational being to another rational being who shall do or forbear .it is an evil to proceed from the former to be incurred by the latter in case of non -compliance and it is an expression or intimation of will by word or otherwise Command are two type

- a) General Command
- b) Particular or specific Command

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<sup>12</sup>Tripathi B. N. Mani, Jurisprudence The Legal Theory, Allahabad Law Agency,19<sup>th</sup> Edition 2012 Reprint 2016,P.19

**a) General Command:** -A general command is a law or rule where it obliges generally to acts so forbearances of a class. All command is not law, it is only the general command.

**b) Particular Command:** -It is particular when it obliges to a specific individual act.

**3) Sanction:** -Sanction is an evil which will be incurred if a command is disobeyed and is the means by which a command or duty is enforced. It is wider sense of punishment. A reward for obeying the command can scarcely be called a sanction.

**4) Duty:** -when the party commanded and threatened is under an obligation to obey it. It is called duty.

Thus, in Austin's theory duty and command are co-relative and fear of sanction is the motive for obedience of such command i.e. law. The chief characteristics of positive law are Sovereign Command, Duty and Sanctions.<sup>13</sup>

#### **Criticism of Austin's Imperative Theory of law:-**

- 1) Sovereign is not the only source of law.
- 2) Law is older than state.
- 3) Customs overlooked.
- 4) No place for judge-made law.
- 5) Law is not always shaped in the form of a command.
- 6) All commands are not laws.
- 7) International law is not a law.
- 8) Over Emphasis on logic.
- 9) This theory is Artificial.
- 10) Conventions is not law.<sup>14</sup>

**Contribution of Austin's theory:**-In spite of the various criticisms Austin's theory, Salmond says that his theory of law contains an important element of truth in as much as it rightly recognizes the essential fact that civil law is the product of the state and depends for its existence on the physical force of the state exercised through the agency of judicial tribunals. The credit goes to Austin for opening an era of new approach to law. Austin was intimate with great thinkers and philosophers of his time like Bentham and Mill. Austin told the true meaning of law and legal terms

<sup>13</sup>Anirudh Prasad, Principles of Jurisprudence, Eastern Book Company, 3<sup>rd</sup> Edition 2004, P.80-84.

<sup>14</sup>Paranjape Dr..N. V, Studies in Jurisprudence & Legal Theory, Central Law Agency, 9<sup>th</sup> Edition 2019, P.33-34.

.his stand was to expel from the mind all ethical notions while considering the nature of “positive law”. He gave a new life of theory of natural law.He is the father of English jurisprudence. Austin was first who distinguished between law and justice. Salmond and Gray further improved upon his theory and considerably modified the analytical positivist approach.Gray remarked:if Austin went too far in considering the law as always proceeding from the state he conferred a great benefit on jurisprudence by bringing out clearly that the law is at the mercy of the state.

### **Hans Kelson (1881-1973)**

Hans Kelson was great jurist of the analytical school, who gave a theory “the Pure Theory of Law”. This theory is known as Vienna school. Kelson belongs to Austria. He was born at Prague in Austria in 1881 .He was a Professor of law at Vienna University .He was also the judge of the Supreme Constitutional Court of Austria for ten years during 1920-1930.After some time he shifted in England .He came to United States and worked as Professor of law in several American Universities.<sup>15</sup> The theory of Hans Kelson represents a development in two directions. On the one hand ,it marks the most refined development to date of analytical positivism ,on the other ,it marks a reaction against the welter of different approaches that characterized the opening of the 20<sup>th</sup> century.<sup>16</sup>

He wrote many books—

- The pure theory of law.
- What is justice
- Principles of International law

**Kelson’s Pure Theory of Law:** -Hans Kelson’s theory is an interesting revival of analytical jurisprudence. Kelson said that Law is a normative science not a natural science. This theory is known as pure theory of law because he separates law from politics, sociology ,history, economic ,psychology ,ethics etc. .Such approach is usually known as Vienna School with Hans Kelson its founder. It is said that Kelson’s pure theory of law tried to rescue jurisprudence from vague mysticism and thus it was in a way revival of John Austin `s 19<sup>th</sup> century analytical jurisprudence.He created a pure science of law devoid of all moral and sociological considerations. but he rejected Austin `s definition of law as a command because it

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<sup>15</sup>Paranjape Dr.N. V. Studies in Jurisprudence &Legal Theory, Central Law Agency, 9<sup>th</sup> Edition 2019,P.41.

<sup>16</sup>Dias, Jurisprudence, Lexis Nexis, 5<sup>th</sup> Edition 2013 Reprint 2017,P.358



introduces subjective considerations where as he wanted legal theory to be objective .He defines science as a system of knowledge or a totality of cognitions systematically arranged according to logical principles .Kelson said law must be “As it is” not “ought to be” Kelson`s Grundnorm is analogous to Austin`s concept of “sovereign” without which law cannot be obligatory and binding thus Kelson`s pure theory of law is a theory of positive law based on normative order eliminating all extralegal and nonlegal element from it. Kelson said that his pure theory was applicable to all place and at all times .it must be free from ethics,sociology, history.

**Law As Normative Science :-**Kelson defined law as the depsycholised command . He described law as a normative science as distinguished from natural science which are based on cause and effect such as Gravitation .The natural science are capable of being accurately described, determined and discovered in the form of “Is”(sein) which is an essential element of all natural science .But the science of law is knowledge of what law ought to be (sollen).it is the “ought” character which provides normative character to law.

**The Grundnorm:-** Kelson`s pure theory of law is based on pyramidal structure of hierarchy of norms of which derive their validity from the basic norm it is called Grundnorm .The Grundnorm or basic norm determines the content and gives validity of other norms derived from it. Kelson considers legal science as a pyramid Norms with Grundnorm at the apex .the subordinate norms are controlled by norms superior to them in hierarchical order .However the Grundnorm is independent of any other noun being at the apex .the process of one norm deriving its power from the norm immediately superior to it, until it reaches the Grundnorm has been termed by Kelson as concretization of the legal system thus the system of norms proceeds from downwards to upwards and finally it closes at the Grundnorm at the top.<sup>17</sup>

### **Essential foundations of Kelson theory**

- 1) The aim of theory of law asof any science,is to reduce chaos and multicity to unity.
- 2) legal theory is science, not volition it is knowledge of what the law is not of what the law “ought to be”.

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<sup>17</sup>Paranjape De. N. V. Studies In Jurisprudence &Legal Theory, central Law Agency, 9<sup>th</sup> Edition 2019,P. 42-44.

- 3) The law is a normative not a natural science.
- 4) Legal theory as a theory of norms is not concerned with the effectiveness of legal norms.
- 5) A theory of law is formal, a theory of way of ordering, changing contents in a specific way.
- 6) The relation of legal theory to a particular system of positive law is that of possible to actual.<sup>18</sup>

**Implications of Kelson's theory pure science of law:-** Kelson's pure theory of law covers wide concept of state such as state as State sovereignty, private public law, legal personality, right and duty and international law. the implication of Kelson's theory of law are discussed below-

- 1) Law and state are not different from each other
- 2) There are no difference between Public law and private law.
- 3) There are no difference between natural person and juristic person.
- 4) There are no individual rights and duties in legal system.
- 5) Supremacy of international law.<sup>19</sup>

#### **Criticism of Kelson's pure theory of law**

- 1-Grundnorm is vague and confusing
- 2-The purity of norms cannot be maintained
- 3-This theory has lacks practical significance
- 4-Kelson ignored Customs
- 5-Kelson ignored Natural law and Morality.
- 6-International law is the weakest point of Kelson's theory.

Hans Kelson was one of the greatest jurist of the 19th century. He gave a new shape of jurisprudence. Kelson took positive law as the subjects matter of his study. The credit goes to Kelson for developing a pure theory of law. He has separated jurisprudence from all other social science, and liberated the law from the metaphysical mist with which it has been covered at all times by the speculations of injustice.

#### **Herbert Lionel Adolphus Hart (H. L. A. Hart) (1907- 1992)**

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<sup>18</sup>Tripathi B. N. Mani.,Jurisprudence The Legal Theory, Allahabad Law Agency, 19<sup>th</sup> Edition 2012 Reprint 2016, P.69.

<sup>19</sup>Tripathi B. N. Mani, Jurisprudence The Legal Theory, Allahabad Law Agency, 19<sup>th</sup> Edition 2012 Reprint 2016,P.70.

**H.L.A Hart-Prof** Hart may be regarded as the leading contemporary representative of British positivism. In his book "The Concept of Law", published in 1961, he brought to bear the training of a philosopher, barrister and jurist to the elucidation of jurisprudential problems.<sup>20</sup> Hart was one of the greatest jurists of the 19<sup>th</sup> century; he belongs to the Analytical school. His theory was based on the relationship between law and Society. He makes very important modifications in the theories of Austin and Kelson.

He was born in England in 1907. He practiced at the Chancery Bar in his early age. He worked as a professor of jurisprudence at Oxford University from 1952-1968. Then he joined as principal of Brasenose College, Oxford. He rejected the Austin theory of analytical positivism. His legal theory is based on the relationship between law and society. His book "The Concept of Law" was written as a critique of Austin's theory. His books are-

- Liberty and Morality
- The Morality of the Criminal Law
- Punishment and Responsibility

**Hart Concept of law:-** In Hart's concept of law, there are two types of rule in a legal system.

- 1) **Primary rule** :- The union of which provides key to the science of jurisprudence. These rules are called primary rules. Primary rules which impose duties upon individuals and these rules are binding because of the popular acceptance such as rules of kinship, family. These being unofficial rules, they suffer from three major defects like –
  - a) Uncertainty
  - b) Static character
  - c) Inefficiency
- 2) **Secondary rule** :- The secondary rules are power-conferring, which enable the legislature to modify their policies according to changing needs of the society. The remedy for the defects of the primary rule and it is out of the union of these two types of rules that law takes its birth.<sup>21</sup>

**Difference between Primary rule and secondary rule:-**

- 1) Primary rules impose duties, while secondary rules confer powers either public or private.
- 2) Primary rules are concerned with action which individuals must do or must not do, while secondary rules are all concerned with primary rules themselves.<sup>21</sup>

**Rule of Recognition:-** Hart's positivism explains the existence of law with reference to the rule of recognition, the binding force of which depends upon its acceptance. The validity of

<sup>20</sup>Dias, Jurisprudence, Lexis Nexis, 5<sup>th</sup> Edition 1013 Reprint 2017, P. 351.

<sup>21</sup>Tripathi B. N. Mani, Jurisprudence The Legal Theory, Allahabad Law Agency, 19<sup>th</sup> Edition 2012 Reprint 2016 P.74.

law is to be tested on the basis of rule of recognition which is similar Austin's theory Sovereign .Hart's rule of Recognition is not an extra-jural hypothesis like Kelson's basic Grundnorm. Hart's rule of recognition is the sole rule in a legal system whose binding force depends upon its acceptance .For example whatever is enacted by British Queen in Parliament is rule of recognition .the various constitution laws ,which constitute rule of recognition are rules of positive law which are binding on citizens officials legislatures courts and various other Governmental agencies.<sup>22</sup>

**Hart's Views on Law and Morality:-** Hart does not reject significance of natural law in his positivism .unlike Austin and Kelson. Hart said that it is necessary for law and morality to have certain element of natural law as a logical necessity .thus morality is implicit in Hart's positive law which he describes as union of primary and secondary rules .As a member of society ,individuals feel morally bond to abide by these rules both as a matter of complementary and supplementary to each other .There are four type of morality

1-Importance

2-Immunity from deliberate change

3-Voluntary character of moral offence

4-forms of moral pressure which separate it from etiquette ,custom and other social rules

**Criticism of hart's Concept of law:-**Hart's concept of law was criticized by Ronald Dworkin and Lon Luvois Fuller .They have many doubts in his concept of law as a union of primary and secondary rules .

**Conclusion: -**Austin's theory proved as a guide for latter jurist. Therefore, we can say that Austin made a very significant to jurisprudence. His theory was very practical and logical basis.The merit of Austin's theory of law lies in its simplicity,consistency and clarity of exposition. In ancient India ,society and the legal system were based on Dharma. King was bound to enforce Dharma .thereforein ancient era Law,Morality and Religion were co-existing and inseparable concept.Our constitution is also viewed by the courts as the Grundnorm to which all the subordinate norms have to conform. The validity of legislative and Executive action has to be judged in accordance with this supreme norm.Thussomejurist are say that The doctrine of basic structure is actually the Grundnorm in the Indian Constitution.

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<sup>22</sup>Paranjape Dr. N. V,Studies In Jurisprudence &legal Theory, Central Law Agency,9<sup>th</sup> Edition 2019,P37-38.

**Exercise**

**Q-1 “Law is the command of the sovereign.” Critically examine this statement?**

**Q- 2** Explain Kelson`s pure theory of law?

**Q-3** What are the points of criticism of this theory?

**Q-4** What do you understand by Hart`s concept of law?

**Q-5** What are the difference between Austin and Kelson?

**Reference:-**

- N.V. Paranjape, Study in jurisprudence & Legal Theory(CLA Allhabad 9<sup>th</sup> edition-2019).
- S.N. Dhyani Jurisprudence Indian Legal Theory( CLA Allahabad 5<sup>th</sup> Edition 2019)
- V.D. Mahajan, Jurisprudence and Legal Theory.
- Anirudh Prashad ,Principles of Jurisprudence.
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