BLOGS

Analytical School/ Positive School – Jurisprudence For CLAT PG

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Analytical School was focused upon law as it exists today and not going into the past of law. Also, the study of law should be my method of Analysis. Analytical school is also called Positive School or English School or Imperative School or Teleological School. Bentham is called the founder of this school and Austin is called the father or propounder of this school. There are four Jurists in this school:

1. Jeremy Bentham
2. John Austin
3. Hans Kelsen
4. HLA Hart

Bentham

According to Bentham, it is quite possible to study and understand the present day law on some scientific lines. There are five dimensions of the theory given by Bentham under Analytical School.

- Scientific Positivism: Present day law can be studied on the scientific lines and it can be reformed
- Expository: A jurist by his study of law will expose i.e. he will surface out the bad elements of law and he will censor those elements and thus the law can be reformed.
- Hedonism: According to Bentham, Pleasure is the ultimate goal of human life and purpose of law is to maximize pleasure and minimise the sufferings and pain. Pleasure is the highest good and it is the source of all moral values. Pleasure and happiness are the way of life. By pleasure, Bentham meant satisfaction of desires i.e. materialistic pleasures. Human Life is spent in pursuit of pleasure and law plays a role of maximising pleasure and minimising pain. On the basis of the above, he gave his hedonistic or Felicific Calculus.

- Hedonistic of Felicific Calculus: It is also called as utility calculus or hedonic calculus. The felicific calculus of Bentham is an algorithm formulated by Bentham to calculate the amount of pleasure that a specific human action is likely to cause. In his book, 'Limits of Jurisprudence Defined', in Chapter IV 'Introduction to the Principles of Morals and Legislations (1789)', Bentham has given the tests with respect to the human actions which will result into pleasure or pain. According to him, the following are the criteria to examine to examine, pleasure or pain:

1. Intensity
2. Duration
3. Certainty
4. Propinquity
5. Fecundity
6. Purity
7. Extent

According to Bentham only that human action should be allowed which increases the pleasure and minimise the pain.

- Utility/ Utilitarianism: According to Bentham, Utility is that principle which approves or disapproves human action according to the tendency to increase or decrease the happiness or pain of the party whose interest is in question. Bentham also gave the idea of individual and community interest and according to Bentham, there is no conflict between individual interest and community interest as community interest is sum total of individual interest.

According to Bentham, there are 4 primary goals of Government:

1. Security
2. Equality
3. Subsistence
4. Abundance

It has been inferred from the above that by talking about four goals of Government, Bentham has laid down foundations for welfare state. According to Bentham, the Sovereign is absolute and individuals have no natural rights except the rights rights conferred upon them by the Sovereign.

But at the same time, sovereign would be bound by utility/ principles of pain and pleasure. Bentham supported the concept of private property and private right. Law is the will or command of the legislature.

John Austin (1790- 1859)

Austin was a supporter of legal positivism and he was opposed to Natural Law School or morality approach. According to him, there is no need to relate law with morality. According to Austin, law should be objective and not subjective on elements of morality. Austin had Analytical approach i.e. in order to understand law, there is a need to analyse legal system and existing laws.

Austin defined State and according to him, State is politically organised society where politically organized society where political inferiors are in the habit of obeyng political superiors. It is on the basis of the above definitions that Austin gave his command theory. According to Austin, law is command of the sovereign coupled with sanction.

Austin does not define sovereign as such but it is the Supreme Authority which issues the command. However, Austin's sovereign like Bentham's Sovereign is also limited by the Principles of Utilitarianism. The Sovereign according to Austin also, will not make any law against utility.

As far as command is concerned, Austin clearly says, it has to be a general command and not a particular command.

Ought Proposition by Austin

"X ought to do or ought not to do a thing else he shall be punished."

In Austin's proposition, the words ought to do or ought not to do are binding upon the people. The people are bound or obliged by the State to do or not to do a particular thing. At the same time, the sanction i.e. punishment element goes with the word shall and that is compulsory.

Austin's command is called the psychologized command. People can be bound to obey command because of a mental fear created upon them. Psychological fear is because of the sanction element coupled with the fact that there is the sovereign to enforce the sanctions.

Hans Kelsen

The grundnorms are not artificially created. The existence of the grundnorm is a pre legal question i.e. grundnorm is never created rather it automatically comes into existence on the basis

of the idea of grundnorm, in every society, there exists a hierarchy of norms. At the top of the hierarchy, it is grundnorm and below that it is other norms/ law. Every other norm derives its validity from the grundnorm. Thus the grundnorm becomes the criteria of validity of all other norms or laws.

In Kelsen's theory, the command does not necessarily flow from Sovereign rather the command may be from any source which may be the Sovereign also. People follow the command not necessarily due to the sanction, rather it is out of their self consciousness due to the grundnorm. Therefore, it is said, in Kelsen's theory, people follow the command not due to any fear command.

In Kelsen's theory, there is a system of normative order wherein there is a hierarchy of other norms or laws and there other norms derive their validity from the grundnorm. Unlike Austin, fear element is missing in Kelsen's theory and therefore in Kelsen's theory, the command is called the depsychologised command.

The odd proposition of Kelsen will be that "X does or does not do it, else he ought be punished."

In Kelsen's theory, the grundnorm plays the role of the command and the grundnorm is not created by State rather it has its own automatic existence. Therefore, the ultimate command i.e. grundnorm cannot be said to be created by the State, though the smaller norms can be created by the State but these norms also have to subscribe to the requirements of grundnorm.

On the other hand, in Austin's theory, there is no concept of grundnorm rather the command originates directly from the Sovereign and it need not conform to any superior norm as such.

According to Kelsen, the test for Grundnorm is that it should have minimum efficacy in the society.

Pure Theory of Kelsen

An analysis or any jurisprudential study of law should be free from any surrounding circumstances and from the jurist's personal viewpoints. The study of law should be pure i.e. juristic study of law should not be affected by any external factors. The thought of jurists about elements of morality etc. should creep into his juristic studies. Kelsen was opposed to the idea of reductionism. Reductionism means that any study of law should be seen in the surrounding context i.e. it should be seen in the light of political and moral ideologies. Reductionism seeks to reduce law to be natural and social science. Kelsen was opposed to the above and according to him we should not

try to derive ideologies from law or do idealisation of law rather we should study law as it is, in its purity. Kelsen was opposed to law as a metaphysical myth i.e. he was opposed to any kind of idealization of law. It is said that Kelson tried to rescue law from vague mysticism.



HLA Hart (1907- 1992)

Hart says that the purpose of human being is to survive in the society and for an effective survival, it is essential that the elements of morality and human reasoning should be a part of the legal process. Since Hart includes there are two elements, he is also called a Naturalist and hence he is called an Analytical Naturalist.

According to Hart, for law to be effective, there should be minimum content of morality and natural law in law. He says if the society does not have to be a suicide bomb, it should have a minimum content of morality. According to him, law and morality are two distinct concepts but they overlap. He also says that law is not derived from Morality rather it has an independent existence and it incorporates the element of morality.

According to him, a legal system is a system of social rules and the two minimum conditions for the existence of a legal system is morality and human reasoning. Legal System is a system of certain rules and he divides those rules into primary rules and secondary rules.