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The Foundations of Law: Jurisprudence & its Schools (Part 2)

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In the Part 1 of schools of law of jurisprudence series, we focused entirely on the ideals of natural law school. Where law was bound to morality, justice, and divine principles. In part 2 we'll discuss the remaining schools of law i.e. analytical, historical, sociological, and realist schools. As societies modernized, the definitions of law shifted from 'what it ought to be' to 'what it actually is'.

Analytical School (Positivism)

The Analytical School of jurisprudence, also known as positive or imperative school. It focuses strictly on 'positum' i.e 'law as it exists'.

Rise of Positivism

Until the early 18th century, legal philosophy was controlled by natural law theories. Under natural law the legal system was based on absolute morality, divine rules, and human reason. While natural law relies on unwritten moral principles, the modern era demands a written, enforceable command.

As a result, the analytical school rose during the 19th century. It distinguished the law from ethics and morality to a purely logical and formal authority.

This approach provides the clarity and certainty that abstract moral philosophies simply could not deliver.

Chief Jurists

Jeremy Bentham (The founder of Positivism)

Bentham is often regarded as the founder of the Analytical school. He asserted that a law's primary function is to maximize societal utility. He viewed law as an instrument to achieve the

greatest happiness of the greatest number.

Bentham distinguished legal studies into two distinct categories –

- Expository Jurisprudence – states 'law as it is' and
- Censorial Jurisprudence – states 'law what it ought to be'.

John Austin (Father of English Jurisprudence)

Austin gave the command theory of law. He defined law as the 'command of a sovereign backed by a sanction.' He separated law from morality to analyze it systematically. According to him every true law contains 4 essentials.

- Sovereign – The political superior or power enforcing the rules.
- Command – the rules issued by the sovereign.
- Duty – the obligation on individuals
- Sanction – the punishment attached for non-compliance of rules.

Austin further classified law into two primary categories –

- Laws set by god – divine law or natural law for mankind
- Laws set by men – Human laws established for political governance.

Hans Kelsen

Kelsen gave the 'pure theory of law'. He sought to create a 'pure' science of law, free from ethics, politics, sociology, or history. He viewed law as a hierarchy of 'norms'. A norm derives its validity from a higher norm.

At the top of this norm sits the 'Grundnorm'. It is the most basic norm which validates the entire legal system, e.g. the Constitution. It is not validated by any other norm, its validity is presupposed.

Features of Kelsen's Theory of Pure Science of Law

- Reduces chaos created by natural law philosophies.
- Focuses on what law is, not what it ought to be.
- Treats law as a normative science of rules.

- It only focuses on laws validity, not its practical enforcement.
- Limits its study strictly to formal legal systems currently in operation.

Historical School

The historical school emerged as a reaction against the concept of natural law and the strict analytical positivism. Jurists of this school believed that law is not made by rulers, rather it is found within the history and consciousness of the people.

Friedrich Carl von Savigny (Father of Historical School)

Savigny argued that law is a product of a nation's culture, language, and character. He stated that a law made without taking into consideration past history and tradition is not 'law' rather an 'artificial lifeless mechanical device'.

He gave the theory of **Volksgeist**. Through this concept he believed that law is the manifestation of the '*common consciousness of the people*'. It means that the origin of law lies in the spirit of people.

Savigny opposed the sudden codification of laws by legislation, stating that it grows naturally through customs. Contending that custom precedes legislation.

Sir Henry Maine

Maine added a comparative and scientific approach to historical jurisprudence. He studied legal developments across various civilizations. He outlined legal development in progressive societies because of the movement from **Status to Contract**.

In traditional societies, an individual's rights depended on family status whereas in modern societies they depend on free individual agreements.

He gave the four stages of development of law –

- Divine law – laws believed to come directly from God.
- Customary law – laws made by repeated legal practices followed by customs.
- Priestly Class – Priests memorise and monopolize unwritten customary laws.

- Codification – The last stage of development where written text replaces priests with clear, accessible legal codes.

Comparison between Analytical & Historical School

Feature	Analytical School	Historical School
Origin	State creates law	Society finds law.
State Relationship	Law needs a sovereign.	Law existed before states.
Enforcement	Maintained by state enforcement.	Maintained by social pressure.
Primary form	Standard law is a statute.	Standard law is a custom.
Judicial role	Judges interpret text only.	Judges consider legislative history.

Sociological School

This school views law as a social phenomenon. It shifts the legal lens from legal texts to the actual impact of law on human behaviour and society.

Rudolf von Ihering

Ihering gave the modern concept of sociological jurisprudence. He is widely considered as the founding father of this school. He used comparative methods to study different legal systems. Through this, he proved law develops from conscious human efforts. This theory rejects the historical evolution of law.

Ihering defined law strictly through its social context. He argued that law exists to balance individual interest with collective social interests, driven by the levers of social motion i.e. coercion and reward.

Roscoe Pound

Legal theorist W. Friedmann explicitly crowned Pound as the **'father of modern sociological jurisprudence'**. He believed that the law is a living instrument that shapes society and must be studied alongside fields like history, economics, and psychology.

Pound gave the prominent theory of '**Social Engineering**'. He equated the lawyers and judges to a social engineer, arguing that the primary purpose of law is to organize society by satisfying maximum human wants.

Pound created **5 jural postulates** to serve as a practical tool for judges to balance conflicting human desires in a changing society.

1. In a civilised society, people must be able to assume that others will not intentionally attack or harm them.
2. People must assume that they can safely control and use everything they have created, discovered or legally acquired.
3. People must assume that others will act in good faith, keep their promises and carry out their legal agreements.
4. They must assume that others will take proper care to prevent their actions or possessions from accidentally hurting anyone.
5. They must assume that people who handle dangerous things will keep them under control so they do not cause harm.

He classified human demands using 'jural postulates' into three main categories –

- Private interests – Cover personal claims like physical safety, reputation, property ownership, and family relations.
- Public interests – involve the claims of the state as a legal organization.
- Social interests – encompasses the broader needs of a society, such as maintaining peace, protecting public health and safeguarding moral standards.

He believed that by balancing these claims through law, society can maintain order and progress smoothly.

Eugen Ehrlich

Ehrlich is widely considered as the one of the founding fathers of sociology of law. In his famous work, Fundamental Principles of the Sociology of Law (1913), he introduced a profound shift in sociological jurisprudence.

He declared that the 'centre of gravity of legal development lies in society itself.' Ehrlich gave the theory of living law, which means law actually regulates everyday human life, regardless of whether it has been codified. The actual, everyday rules that people naturally follow in their marriages, business dealings, and community actions forms the true 'living law'.

He argued that the state did not create law, instead human behaviour and social habits shaped law naturally.

Realist School (legal Realism)

Legal realism focuses law in action rather than the law in textbooks. It focuses entirely on what judges, lawyers and courts actually do in the real world to resolve disputes.

Oliver Wendell Holmes Jr.

He famously stated in his essay **'The Path of the Law',** *"The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."* Through this he meant that law is not a set of abstract moral principles, but simply a prediction of how a judge will rule on a specific case.

Holmes gave the '**Bad Man Theory**' which meant that to understand law, one needs to view it from the perspective of a 'bad man'. A bad man only cares about practical consequences and penalties of his actions, not moral duties. Whereas the good man does what is right because of his morals.

In brief, the bad man only cares about how the judge will interpret his actions on trial. Therefore it justifies the realist view that law is defined by judicial actions, not legislative texts.

Karl Llewellyn

Llewellyn focused on how appellate courts handle legal rules. He argued that written statutes do not tell about court outcomes. He stimulated realism as –

- As a practical approach, not philosophy.
- Focus on what judges actually do.
- Law must serve changing social ends.

- Society changes much faster than formal law.
- Law means how officials handle human disputes.

Conclusion

The schools of jurisprudence offer different and evolving perspectives on the nature of law. The analytical school provides structural clarity of law made by state. Historical school grounds law in cultural evolution, while sociological school demands that law address practical societal needs. Finally realism reveals that law is much more than paper and depends upon the human machinery of the courts.

Together these schools show that law is not a static set of rules rather a dynamic reflection of human society.