

**SCHOOLS OF JURISPRUDENCE**  
**HISTORICAL SCHOOL AND SOCIOLOGICAL**  
**SCHOOL**

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## **HISTORICAL SCHOOL**

Historical jurisprudence, viewed law as a legacy of the past, a product of each individual community or people of nation impeding any reflecting its peculiar traits, unique customs, special habits and other peculiarities which are deeply rooted in its heritage and culture. Accordingly, historical jurists regard law a biological growth, an evolution any phenomena and not as an arbitrary fanciful and artificial creation.

### **MONTESQUIEU (1689 -1755)**

Sir Henry Maine observed, that Montesquieu was the first jurist who followed the historical method. He made researches into the institutions and laws of various societies and come to the conclusion that "Laws are the creation of climate, local situations, accident or imposture". Though he did not lay any principles as to relation between the law and society, yet his suggestion that the law should answer the needs of the time and place was a step in the direction of new thinking. His famous work is the "Spirit of law" approved in 1948.

### **BURKE (1729-1797)**

He stressed the importance of tradition and gradual growth of law against wreck less shifting of political order as advocated by French revolution arise.

### **HUGO (1783.1845)**

The view of Hugo is that law like language and manners of people forms itself and develops as situated to the circumstances. The essence of law is its acceptance, regulation and observance by the people.

### **F.K. VON SAVIGNY (1779.1861)**

He is the founder of Historical school. To him law is a product of time, the germs of which like the germs of state, exists in the nature of men as being made for society and which develops from this germ in various forms according to the envioning influences which play upon it. He observed

that the law is prehistoric. In all societies it is found already established like their language manners, and political organization law languages, customs and government have no existence but one force and power in people. According to Savigny, law is a rule of human action and conduct sanctioned by national usage. It is always based on popular support and approval. He held that all early laws was customary and the function of legislation is merely to supplement and re define customs. Customary law is a law as an expression of the general consciousness of right and not by virtue of sanction of legislature. To him law like language, grows with the growth and strengthens with the strength of people and finally dies away as the nation loses its nationality. Law is henceforth more artificial and complex, since it has a twofold life as a part of the aggregate existence of the community which it does not cease to be and secondly as a distinct branch of knowledge in the hands of jurists. According to him the nature of any particular system of law was reflection of the spirit of the people who evolved it. This was later characterized as Volksgeist by Putcha, a disciple of Savigny. Savigny's thesis has been criticized on the grounds national consciousness alone cannot make law for so, also every custom has not the force of law. Volksgeist is not only the source of law similarly customs not always based on popular consciousness. As to contribution we may said that he interpreted jurisprudence and law. In terms of peoples will Volksgeist and this sowed the seeds of modern anthropological and sociological law in relation to society comparative is another development which has emerged as a result of Savigny's work.

### **PUTCHA (1798-1856)**

To him the idea of law came due to conflict of interest between the individual will and general will. That automatically formed the state which delimits the sphere of the individual and develops into a tangible and workable system. The contribution of Putcha is that he gave two fold aspect of human will and origin of state.

### **SIR HENRY MAINE (1822-1888)**

Sir Henry Maine was the legal member of viceroys' executive council in India. He is mainly associated to Historical school of jurisprudence. His main works are Ancient Law village community "Early History of Institution" and dissertation on early law and customs. His evolution of law is based on the evolution of society, may be the Hindu, Romans, Anglo Saxon's Celtic, Hebrew or German communities.

## **Development of Law**

Maine made a comparative study of law of the various legal system and traced the course of their evolution, though he gave no definition of Law. As per Maine the law developed through the following stages-

(1) At first the law was made by the commands of the rules believed to be acting under the divine inspiration as the inspiration by Thormites in the Homeric poems.

(2) In the second stage the command crystallize in to customary law.

(3) In the third stage the knowledge and administration of customs goes into the hands of a minority usually of a religious of a religious nature, due to the weakening of the power of original law makers.

(4) Then under fourth stage, comes the era of codes. Now law is promulgated in the form of a code, as solon's attic code, or the twelve tables in Rome. Maine further states that the societies which do not progress beyond the fourth stage which classes the era of spontaneous legal development are static societies. The societies which go on developing their law by new methods are called progressive. Progressive societies develop their laws by three methods - (1) Legal fiction (2) equity & (3) legislation. Legal fiction change the law according to the changing needs of the society without making any change in the letter of law. These are innumerable examples of it in English and Roman law. Equity consists of those principles which are considered to be invested with a higher sacredness than these of positive law. It is used to modify the last which is most direct and systematic method of law making. As to contributions of Maine, we find in him a very balanced view of history. Savigny explained the relation between community and the law but Maine went further and pointed out the link between development of both and purged out many of the exaggerations which Savigny had made. Maine studied the legal system of various communities and by their analysis laid down a comprehensive development of law. He reorganized legislation as a very potent source of law. He used the study of legal history mostly to understand the past and not to determine the future course and standards, and in this field he made valuable contribution to legal theory. Maine's theory preaches a belief in progress and it contained a sociological approach.

## **SOCIOLOGICAL SCHOOL**

Sociological school to study law in terms of immediate needs and requirements of individuals and other varying social groups. In its view law is wholly concerned with its effects or results on society rather treating law as a will of God or command of sovereign or universal reason or Volksgist of people. In the functional sense how the law works or what are its effect and social consequences is actual are the key points that underline the basis of sociological jurisprudence.

### **HERBERT SPENCER (1820-1903)**

In his famous work "Principles of Sociology" Spencer traced this theory of the origin of law. To him law arises from four sources inherited usages with quasi-religion sanctions, injunctions of deceased leaders, the will of the predominant man and collective opinion of the community. For Spencer evolution was the key point of the understanding of human progress.

### **DUGUIT (1859-1928)**

All human activities and organization should be directed to the end of ensuring the harmonious working of man with man" Durguit calls it the "Principle of social solidarity". To Duguit the essence of law is to reconcile resolve and comprise the interest of the individuals in the interest protecting and promoting the larger social good. Law according to him consists of duties without corresponding rights. Thus the soul of the law is duty. Duguit further says that the law is a spontaneous product of individual consciousness, inspired at the same time by social necessity and the sentiments of justice. This and this can be the norms of law. That being so legislation can only be conceived of as a means of expression of the rules of law. The legislator does not create it, he defines it only.

### **RUDOLF VON IHERING (1818-1892)**

"The spirit of law" is the main work of Ihering, but he is very well known for his principal work Der Zweck in Reett (1877 -83) translated or "Law as means to an End" He says that the law is coericon organised in Act from by the state. It is a process to achieve a proper balance between

social and individual interests. It is through two impulses viz, coercion and reward that society compels individuals to subordinate selfish individual interest to social purposes and general interests. Thus his insistence on the need to reconcile competing individuals and social interest made him "the father of modern sociological jurisprudence that inspired jurists like Roscoe Pound and others.

### **EUGEN EHRLICH (1862-1922)**

Ehrlich expounded the organic concept of living law by avoiding Savigny's mystical notion of Volksgeist for which he stipulated the nation of facts of law and of living law. His living law therefore exists outside and beyond the four walls of positive law, in other words in society itself. He says, at present as well as at any other time, the center of gravity of legal development lies not in legislation not in juristic science, nor in judicial decisions but in society itself: Further he says there in order to study the living law one must turn to marriage contracts, leases, contracts of purchase, wills, the order of succession, partnership articles and by laws of corporations. To him codes may be technically in force in the sense that a court may apply their provisions if they are called in questions, but frequently a community ignores the codes and lives according to the rules created by consent.

Hence to understand the legal life of a community the jurists must supplement his study of code or decisions of courts by an analysis of facts: To attempt to impound the laws of a people within the sections of code is about as reasonable as to attempt to confine a stream within a pond. The water that is put in the pool is no longer a living stream but a stagnant pool but little water can be put in the pool. He suggests to study living law. To him the real law consists not of propositions but of legal institutions created by the life of groups within society, hence required study of functional institutions that create law.

### **HOMES OLIVER WINDELL (1841-1935)**

His famous work is the "Common Law". To Holmes, Life of law has not been experience. To Holmes Law is the expression of the dominant force of the community as enunciated by the Judges Likewise he considers law to protect and promote the collective group interests vis-a-vis individual interests.

### **BENJAMIN NATHAN (1870-1938)**

He was the judge of U.S. Supreme Court (1932-38), to him law is nothing but what is expounded in concrete situations in the form of judgment by court. In consonance with custom, history, traditions and needs of people. He remarked that logic, history, custom, utility and the accepted standards of right conduct are forces which singly or in combination shape the process of law.

### **ROSCOE POUND (1870-1964)**

In twentieth century Pound is regarded as the father of sociological jurisprudence in U.S.A for his scholarly writings and works. Some of his celebrated works are "Spirit of the common law" in 1921. An Introduction to the philosophy of law "1922 "Interpretations of legal history" 1923, Law and morals 1926, Contemporary Justice theory" 1940, "Social control through law" 1942 "The task of law" 1944 etc. Pound looks at law as a pragmatist from the point of view of its working, ends, consequences, fruits, and effects on society. His attitude is functional and he measures law only in terms of social ends for which law is designed to serve.

Pound has formulated also a new concept of law popularly known as social Engineering" when he conceives law as an administration as a part of much wider process of social ordering, functioning through courts and administrative agencies with the aid of legal precepts serving as partial guides.

If law is viewed as social engineering, the end is conceived to be the satisfaction of all demands and securing of all interest with a minimum of conflict so that the means of satisfaction have the widest possible destruction. Just as engineers minimise friction. And waste when dealing with machinery, similarly jurists ought to enable to resolves, conflicts in society In the Interests of harmony, reform and progress. This methodology is described by provide as social Engineering which is actually the operation of law rather than abstract contents Since the society is always changing, the law should be adopted and readopted to the needs of individuals and society. He therefore stresses the need of paramount co-ordination and co-operation between the legislators, administrators, judges and jurists to work in unison towards the realization and effectual implementation of law for security social harmony and social Justice.

The word engineering has been criticized in the pound's theory because it suggests a mechanical application of the principles to social needs. But it seems that pound has used this words as an



example for comparing and indicating the problems which the law has to face the objective which it has to fulfill and the method which it will have to adopt for the purpose Another criticism is that the word engineering ignores an important part of law which develops and evokes in the society according to the social needs. But his contribution is great his legal philosophy is free from dogmas. He emphasis engineering but does not forget the task of maintaining a balance. His approach is experiment. He points out the responsibilities of lawyer, Judge and justly and gives a comprehensive picture of the scope and field of the subject.

### **Practice questions**

- (1) Who is the father of historical jurisprudence?
- a) Savigny
  - b) Roscoe Pound
  - c) Henry Maine
  - d) Duguit
- (2) As per Maine the law developed through how many stages?
- a) 4
  - b) 5
  - c) 6
  - d) 7
- (3) According to Maine progressive societies develop their laws by which three methods?
- a) Legal fiction, Equity, Legislation
  - b) Justice, equity, liberty
  - c) Sovereignty, equality, liberty
  - d) Liberty, legal fiction, legality
- (4) What is the famous work of Herbert Spencer's where he traced the theory of origin of law?
- a) Principle of sociology
  - b) Principle of social solidarity

- c) Spirit of law
- d) Common law

(5) Who is the father of Sociological Jurisprudence?

- a) Roscoe Pound
- b) Henry Maine
- c) Duguit
- d) Savigny