

Comparison of Historical School with Analytical School of Jurisprudence

Dr Ketan Govekar

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**KARE COLLEGE OF LAW
MARGAO, GOA**

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Introduction

Jurisprudence

The English term Jurisprudence is based on the Latin word *jurisprudencia*: *juris* is the genitive form of *jus* meaning "law", and *prudencia* means "prudence" (also: discretion, foresight, forethought, circumspection; refers to the exercise of good judgment, common sense, and even caution, especially in the conduct of practical matters). Thus meaning comes from the Latin term *juris prudentia*, which means "the study, knowledge, or science of law". The word first appeared in English in 1628, at a time when the word *prudence* had the now obsolete meaning of "knowledge of or skill in a matter". It is also believed that the word may have come via the French *jurisprudence*, which is appeared much earlier.

Jurisprudence is thus the study and theory of law. Scholars of jurisprudence, or legal theorists (including legal philosophers and social theorists of law), try to assign a deeper understanding of the nature of law, of legal reasoning, legal systems and of legal institutions. Modern jurisprudence began in the 18th century and was focused on the first principles of the natural law, civil law, and the law of nations. Hence jurisprudence is a name given to certain type of investigation into law and investigation of an abstract, general or theoretical in nature which seeks to lay the essential principles of law and legal system

General jurisprudence can be broken into categories both by the type of question scholars seek to answer and by the theories of jurisprudence, or schools of thought, regarding how those questions

are best answered. Answers to these questions come from four primary schools of thought in general jurisprudence:

- **Natural law** is the idea that there are rational objective limits to the power of legislative rulers. The foundations of law are accessible through human reason and it is from these laws of nature that human-created laws gain whatever force they have.^[2]
- **Legal positivism**, by contrast to natural law, holds that there is no necessary connection between law and morality and that the force of law comes from some basic social facts. Legal positivists differ on what those facts are.^[3]
- **Legal realism** is a third theory of jurisprudence which argues that the real world practice of law is what determines what law is; the law has the force that it does because of what legislators, judges, and executives do with it. Similar approaches have been developed in many different ways in sociology of law.
- **Critical legal studies** is a younger theory of jurisprudence that has developed since the 1970s. It is primarily a negative thesis that holds that the law is largely contradictory, and can be best analyzed as an expression of the policy goals of the dominant social group.^[4]

Schools of thoughts/Schools of Jurisprudence

School of thought is a principle or body of principles accepted as authoritative and advocated by one or more scholars belonging to a specific discipline. Schools are groups of thoughts that are based on broadly the same fundamental premise. As a theory or philosophy of Law, Salmond dividend Schools of Jurisprudence into three types: Analytical School, Historical School and Philosophical School while others have suggested different number of schools of thoughts.

Schools of jurisprudence have attempted to the questions: formalism proposes that law is a science; realism holds that *law* is just another name for politics; Positivism suggests that law must

be confined to the written rules and regulations enacted or recognized by the government; and naturalism maintains that the law must reflect eternal principles of justice and morality that exist independent of governmental recognition.

Each school of jurisprudence is not a self-contained body of thought. The lines separating positivism from realism and natural law from formalism often become blur. It is a known fact that the legal philosophy of Justice Holmes, for example, borrowed from the realist, positivist, pragmatic, and historical strains of thought. In this regard, some scholars have observed that it is more appropriate to think of jurisprudence as a spectrum of legal thought, where the nuances of one thinker delicately blend with those of the next.

Historical School

Historical jurisprudence came to prominence during the German debate over the proposed codification of German law. In his book *On the Vocation of Our Age for Legislation and Jurisprudence*, Friedrich Carl von Savigny argued that Germany did not have a legal language that would support codification because the traditions, customs and beliefs of the German people did not include a belief in a code. The Historicists believe that the law originates with society.

The historical school of jurists was founded by Friedrich Karl von Savigny (1779–1861). Its central idea was that a nation's customary law is its truly living law and that the task of jurisprudence is to uncover this law and describe in historical studies its social provenience. As in other schools of thought, acceptance of this approach did not necessarily mean agreement on its theoretical or practical consequences.

To followers of Savigny the identification of law with custom and tradition and the *Volksgeist*, or genius peculiar to a nation or folk, generally meant a rejection of rationalism and natural law; a rejection of the notion of law as the command of the state or sovereign, and therefore a disparagement of legislation and codification; and a denial of the possibility of universally valid rights and duties and of the individual. The German Historical School of Law was a 19th-century intellectual movement in the study of German law. The Historical School is based on the writings and teaching of Gustav Hugo and especially Friedrich Carl von Savigny. Natural lawyers held that law could be discovered only by rational deduction from the nature of man.

The basic premise of the German Historical School was that law is not to be regarded as an arbitrary grouping of regulations laid down by some authority. Rather, those regulations are to be seen as the expression of the convictions of the people, in the same manner as language, customs and practices are expressions of the people. The law is grounded in a form of popular consciousness called the *Volksgeist*. Laws can stem from regulations by the authorities, but more commonly they evolve in an organic manner over time without interference from the authorities. The ever-changing practical needs of the people play a very important role in this continual organic development.

The German Historical School was divided into Romanists and the Germanists. The Romanists, to whom Savigny also belonged, held that the *Volksgeist* springs from the reception of the Roman law. While the Germanists (Karl Friedrich Eichhorn, Jakob Grimm, Georg Beseler, Otto von Gierke) saw medieval German Law as the expression of the German *Volksgeist*. The German Historical School has had considerable influence on the academic study of law in Germany. Georg Friedrich Puchta and Bernhard Windscheid continued the Romanist vein founded by Savigny,

leading to the so-called *Pandektenwissenschaft* which is seen as *Begriffsjurisprudenz* (conceptual jurisprudence).

Positivists and naturalists tend to converge in the area of historical jurisprudence. Strictly speaking, history does not completely fall within the definition of either positivism or natural law. Historical events, like the Civil War, are not legislative enactments, although they may be the product of governmental policy. Nor do historical events embody eternal principles of morality, although they may be the product of clashing moral views. Yet, historical events shape both morality and law. Thus, many positivists and naturalists find a place for historical jurisprudence in their legal philosophy.

Criticism of Historical School

Many scholars criticise this school of thought. Karl Marx devoted an entire essay in 1842 titled- "The philosophical manifesto of the historical school of law" to criticize the historical school of law, calling it the "sole frivolous product" of the eighteenth century.

School of Analytical Jurisprudence

Analytical jurisprudence is a legal theory that draws on the resources of modern analytical philosophy to try to understand the nature of law. Since the boundaries of analytical philosophy are somewhat vague, it is difficult to say how far it extends. H. L. A. Hart was probably the most influential writer in the modern school of analytical jurisprudence, though its history goes back at least to Jeremy Bentham.

Analytical jurisprudence is not to be mistaken for legal formalism (the idea that legal reasoning is or can be modelled as a mechanical, algorithmic process). Indeed, it was the analytical jurists who first pointed out that legal formalism is fundamentally mistaken as a theory of law.

Analytic, or 'clarificatory' jurisprudence uses a neutral point of view and descriptive language when referring to the aspects of legal systems. This was a philosophical development that rejected natural law's fusing of what law is and what it ought to be. David Hume famously argued in *A Treatise of Human Nature* that people invariably slip between describing that the world is a certain way to saying therefore we ought to conclude on a particular course of action. But as a matter of pure logic, one cannot conclude that we ought to do something merely because something is the case. So analysing and clarifying the way the world is must be treated as a strictly separate question to normative and evaluative ought questions.

The most important questions of analytic jurisprudence are: "What are laws?"; "What is the law?"; "What is the relationship between law and power/sociology?"; and, "What is the relationship between law and morality?" Legal positivism is the dominant theory, although there are a growing number of critics, who offer their own interpretations. Its Central Idea is that Law as it exists i.e. Law as it is, regardless of good or bad, past or future. "A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation." (Austin 1832/1995: Lecture V, p. 157) It is called Positive School because it focused on „positum (Latin) which means „as it is. It is also termed English School, because this school was dominant in England. Also called as Austinian School because it was founded by John Austin. But the imperative concept of law was actually first proposed by Bentham during his life time (1742-1832) but his work remained unpublished till 1945. But

until recently John Austin used to be styled the “father of the English Jurisprudence”, but it is now clear from a work of Bentham first published in 1945 that it is he, if anyone, who deserved such a title. However, John Austin is considered the de facto originator of this school of jurisprudence.

The Chief exponents of this school are thus Jeremy Bentham (1742-1832), John Austin (1790-1859), Sir William Markby (1829-1914), Sheldon Amos (1835 – 1886), Thomas Erskine Holland (1835 – 1926) John Salmond (1862 – 1924), Herbert Lionel Adolphus Hart (1907-1992), Horace Gray (1828-1902), Wesley Newcomb Hohfeld (1879-1918), Hans Kelsen (1881-1973) and Nikolai Mikhailovich Korkunov (1853-1904)

The Scope of Analytical jurisprudence can be said as below;

- i) Analysis of the legal system and legal concepts such as Right, Duty etc.
- (ii) Analysis of the relation between civil law and other forms of law.
- (iii) Analysis of the legal structure of a state and administration of justice.
- (iv) In depth investigation into the actual sources of law.
- (v) Investigation of the theory of legislation, precedents and customary law.
- (vi) An inquiry into the scientific arrangement of law into distinct departments along with an analysis of distinctions on which the division is based.
- (vii) An investigation of the theory of legal liability in civil and criminal cases.
- (viii) An examination of all other relevant legal concepts.
- (ix) Worldwide legal education today owes its basis to analytical school of jurisprudence

The Utility or Use of Analytical jurisprudence lies in the fact that Analytical school of jurisprudence explains in detail the complex legal concepts such as „Law“ itself, „State“ „possession“ etc. It provides analysis of the various legal systems of the world. It elaborates the structure of a legal

system. It provides a logical basis and helps determine the purpose of law. It provides answer to the question Why is it so?" It separates law from morality. It enables lawyers and judges to interpret law with logic and efficacy for smooth functioning of a legal system

Analytical jurisprudence was a reaction to the Natural Law Theory which was based on morality and ethics. The main influence came from the development of science and scientific approach. Sir Henry Maine termed this school as Analytical school. But it is John Austin who is considered by many to be the creator of the school of analytical jurisprudence, as well as, more specifically, the approach to law known as "legal positivism." Austin's importance to legal theory lies elsewhere—his theorizing about law was novel at four different levels of generality. First, he was arguably the first writer to approach the theory of law analytically (as contrasted with approaches to law more grounded in history or sociology, or arguments about law that were secondary to more general moral and political theories). Analytical jurisprudence emphasizes the analysis of key concepts, including "law," "(legal) right," "(legal) duty," and "legal validity." Though analytical jurisprudence has been challenged by some in recent years (e.g., Leiter 2007a, 2007b), it remains the dominant approach to discussing the nature of law.

Austin's basic approach was to ascertain what can be said generally, but still with interest, about all laws. Austin's analysis can be seen as either a paradigm of, or a caricature of, analytical philosophy, in that his discussions are dryly full of distinctions, but are thin in argument. The modern reader is forced to fill in much of the meta-theoretical, justificatory work, as it cannot be found in the text. Where Austin does articulate his methodology and objective, it is a fairly traditional one: he "endeavored to resolve a *law* (taken with the largest signification which can be

given to that term *properly*) into the necessary and essential elements of which it is composed” (Austin 1832: Lecture V, p. 117).

As to what is the core nature of law, Austin's answer is that laws are commands of a sovereign. He clarifies the concept of positive law (that is, man-made law) by analyzing the constituent concepts of his definition, and by distinguishing law from other concepts that are similar:

- “Commands” involve an expressed wish that something be done, combined with a willingness and ability to impose “an evil” if that wish is not complied with.
- Rules are general commands (applying generally to a class), as contrasted with specific or individual commands (“drink wine today” or “John Major must drink wine”).
- Positive law consists of those commands laid down by a sovereign (or its agents), to be contrasted to other law-givers, like God's general commands, and the general commands of an employer to an employee.
- The “sovereign” is defined as a person (or determinate body of persons) who receives habitual obedience from the bulk of the population, but who does not habitually obey any other (earthly) person or institution. Austin thought that all independent political societies, by their nature, have a sovereign.
- Positive law should also be contrasted with “laws by a close analogy” (which includes positive morality, laws of honor, international law, customary law, and constitutional law) and “laws by remote analogy” (e.g., the laws of physics).

(Austin 1832: Lecture I).

Austin also wanted to include within “the province of jurisprudence” certain “exceptions,” items which did not fit his criteria but which should nonetheless be studied with other “laws properly so

called”: repealing laws, declarative laws, and “imperfect laws”—laws prescribing action but without sanctions (a concept Austin ascribes to “Roman [law] jurists”) (Austin 1832: Lecture I, p. 36).

In the criteria set out above, Austin succeeded in delimiting law and legal rules from religion, morality, convention, and custom. However, also excluded from “the province of jurisprudence” were customary law (except to the extent that the sovereign had, directly or indirectly, adopted such customs as law), public international law, and parts of constitutional law.

Criticisms of Analytical School

No legal system exists in a vacuum; hence cannot be fully understood by focusing only on the law itself. Modern trends suggest the blending of socio-economic factors in the study of jurisprudence. Analytical School conflicts with the usage of the term law as it does not include customary law, international law and constitutional law in its domain. The Analytical School disregards the moral element in law which implies that even unjust law is a law. Analytical school does not take into account legal change. It takes for granted the perfection of a legal system and proceeds to explain its fundamentals. However, change is undoubtedly a permanent factor in all walks of life.

Differences between Analytical and Historical School

Historical school in its ideal condition would require an accurate record of the history of all legal systems as its material whereas analytical school requires only the existing legal systems. Its aim is to show how a given rule came to be what it is whereas analytical school answers „why it is what it is? It uses evolutionary history and hundreds of legal systems as its subject-matter whereas

analytical school examines the available subject-matter, its structure, and rules in order to reach its principles and theories by analysis.

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