

HISTORICAL SCHOOL OF JURISPRUDENCE

Dis similarity with Natural School: Natural law school considered law as unchangeable and divine, but Historical school is based on the fact that laws of different societies are different and those laws change and develop with time just like a language does.

Similarity with Analytical School:

Both Schools:

- Are a step away from a priori approach.
- Didn't believe in the concept of Divine Law.
- Didn't believe that law is a universal Concept.
- Didn't believe that law and morality should be connected.

Historical School just like the Analytical School is a step away from the 'a priori approach' of the Natural law school but Historical and Analytical school choose different areas of law to elaborate upon.

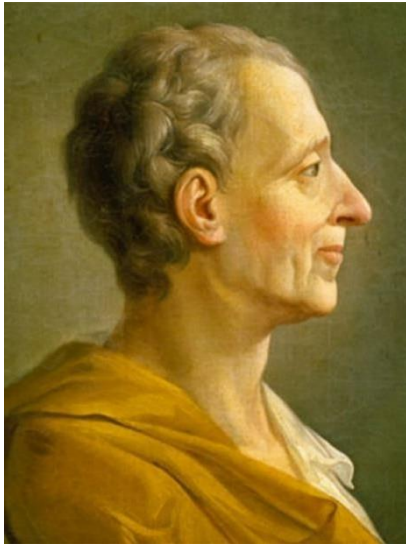
Analytical School focuses on telling what the law is,

Historical School focuses on the part as to where law came from and how It developed.

Salmond said "Just like Analytical Jurisprudence bears to the systematic exposition of the legal system. Historical Jurisprudence deals with the general principles governing the origin and development of law, and with the influence that affect the law.

Historical Jurisprudence is the history of the first principles and conceptions of a legal system"

Some famous jurists of Historical School: Montesquieu, Gustav Hugo, Herder, Edmund Burke, Savigny, Puchta, Gierke, Sir Henry Maine, Friedmann



Montesquieu

Famous work

De l'esprit des lois
(*The Spirit of laws*)

French Philosopher.

First Jurist who followed the Historical method. (Also gave the theory of separation of powers, which is implemented in many constitutions of the world)

Though he did not give any elaborate philosophy about it but he said *"Laws are the creation of climate, local situations, accident or imposture"*

He also related society and law by suggesting that law should answer the needs of the time and place and should be determined by the country's national characteristics. (Which was a new direction of thinking at his time)

Freidrich Karl von Savigny



Famous work

- ? *On the Vocation of Our Time for Legislation and Jurisprudence*
- ? *Jus Possessionis of the Civil Law*
- ? *The Roman Law of Persons as subjects of Jural Relations*

Considered Founder of Historical School

Said law is not universal, it varies with people and time.

Volkgeist Theory (General Will of People) – Law is the product of the general consciousness of the people and a manifestation of their spirit. The basis of origin of law is to be found in Volkgeist which means people's consciousness or will.

"Law grows with the growth of people, strengthens with the strength of people and dies away as the nation loses its individuality."

He used nationalism to his theory because he wanted a uniform German code to unite the country and make laws uniform. He gave more importance to Custom compared to legislation. According to him first we should do a historical study of law and codification as legislation should be done after “an organic, progressive, scientific study of the law”.

Criticism of his theory: He himself was a protagonist of the Volkgeist doctrine but he was working for the acceptance of purified Roman law as the law of Germany instead of reviving ancient Germanic laws and customs. He said that the alien law is more suitable for the country, but the argument that an alien law be volkgeist in comparison to their own customs and laws was not backed up properly by Savigny.

He was pessimistic while discussing reforms.

Allen said that sometimes the customs and laws are the will of not the people but of powerful people only. For Example, laws legalizing slavery in early times are not based on General will of people

Prof. Dias was also of the same opinion that many laws and institutions have originated not in a volkgeist but in the convenience of a ruling oligarchy.

Prof. Stone said Sometimes laws are made to abolish a custom or practise, like abolition of slavery, abolition of sati system in India

Sometimes laws are adopted from other country (most laws of India are made by britishers)

The main criticism of Savigny is that ‘will of the people’ is many a times NOT what the law is based on.



Georg Friedrich Puchta (1798-1846)

Disciple of Savigny

Mostly similar views as Savigny, he basically improved upon the work of Savigny.

Said Law is result of conflict between General and Individual Will and that is how a state is formed which delimits the sphere of individual will and finally develops into a tangible and workable system.

Sir Henry Maine (1822-1888)



Famous works:

- Ancient Law
- Popular Government
- Village Communities in the east and west
- Early History of Institutions
- Early Law and Custom

He studied many legal systems and figured out their course of evolution. He has been a Vice-Chancellor of Calcutta University in India.

Divided development of law into four stages

1. Law is made by the command of the ruler believed to be acting under divine inspiration
2. Command Crystallizes into customary law
3. Knowledge and Administration of custom goes into hands of minority usually of religious nature (like priests, pope etc)
4. Fourth stage is the stage of Codes. (solan's attic code, twelve tables in rome)

After fourth stage we can divide society into Static and Progressive society

- **Static societies** will be the ones which won't develop after 4th stage and in those societies the legal conditions are characterized by 'status' i.e. a person will always be chained to the family 'status' which will be the status of the pater familias (oldest male of the family) (just like the caste system in India, you were born a Cobbler's son, you'll remain a cobbler's son)
- **Progressive societies** would develop even after fourth stage by means of:
 - Legal fiction
 - Equity
 - Legislation

Rights and Obligations which in static societies were decided on basis of 'status' will be decided in progressive societies by an individual on basis of free negotiation on his part (contract)

“The movement of progressive societies has hitherto been a movement from status to contract”

- Henry Maine
