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# Historical School of Jurisprudence: An Intriguing Province

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## ABSTRACT

*The research paper in focus travels through history to learn about the development and rise of the Historical School of Jurisprudence in France, Germany, England and India. It touches upon various aspects of the school, such as its relevance in developing law and as well its use as a tool for judicial interpretation, unearthing its clear departure from the Natural School and the Analytical School in Europe, and finally casting some light on the criticisms it received from various scholars. One cannot refute its importance within the confines of the court and outside, thus seeking to create a balanced approach to understanding the depths of this intriguing province.*

**Keywords:** Jurisprudence, Continental Rationalism, Savigny, Hindu law, Maine.

## I. INTRODUCTION

*“Schemes should not be made for the future without assimilating the lessons of the past,” so warned Edmund Burke.*

Learning lessons from the history, so not to repeat the same old mistakes, is taught to us since generations. Therefore, the province of historical jurisprudence becomes a prerequisite to understanding law and custom. The historical school of jurisprudence is inter-disciplinary in nature. Historical events influence and at times, change the course of law and vice versa. Therefore, doctrinal research methodology has been put to use to carry out the current research work, which is undertaken with the following aims and objectives:

- To comprehend the vast and intriguing province of historical school of jurisprudence;
- To understand its potential as well as its utility in the courts and outside;
- To employ its methods in law-making and further research.

Various relevant books, research papers, articles, blogs and websites of law, history, sociology, etc. were perused and referred to, so that justice can be done with this vast topic. Due and consistent importance has been given to research ethics and integrity, thus giving due credit to the scholars and authors, in footnotes and bibliography. An attempt is made to focus on the

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evolution of the historical school of jurisprudence in various countries, its utility and four-fold purpose and suggestions are provided towards the end, which indicate that it is yet to be explored to the fullest as a domain and subject of research.

## II. GENESIS/ORIGIN

Law as a body of knowledge cannot survive in isolation. Law needs to be studied with various other subjects and their intersectionality. There are various schools of Jurisprudence, viz. Natural School, Analytical School, Realist School, Sociological School, Historical School and others. Among these, the most interesting and intriguing one is the Historical School of Jurisprudence, which has its origin and basis in the human history itself.

Historical school advocates that law as a branch of study has developed from social norms, customs, conventions, traditions, religious practices, folklore, human relations and necessities. Thus, according to the proponents of this school, there exists a strong relation between law and the developing needs of society. Law cannot be stagnant. It evolves with the evolving times and the changes in the human society. Historical events influence and at times, change the course of law and vice versa.

Every human society is different from every other. To cite an example, the Oriental or Eastern societies are very different in their culture, language, traditions, food habits, religious practices, rites and rituals, climatic patterns, values and public morality than the Occidental or Western world. Thus, societal needs are specific for particular communities or societies, and therefore the social norms and behaviour will also be very specific to that particular society. These social norms adhered to for long spans of time and this behaviour consistently observed and followed collectively and continuously in that community gains value and becomes a '*Custom*', which has the force of law. Thus, this school of jurisprudence takes a departure from the notion that law is universal and divine, viz. Natural Law (*lex naturalis*) and also from the notion that law is born out of statutory authorities, whose authority is unquestionable, viz. Analytical or Positive School of Law. Thus, the emphasis in Historical School of Law, is laid upon Manmade law (*lex humana*) or the law needed by particular human societies as per their history and customs.

The Historical School as a school of thought in jurisprudence and approach to study law developed in the eighteenth and nineteenth centuries. The proponents of this school believe that law stems from the history of a community or people in a region or Nation-State and that law cannot in a spontaneous, arbitrary or haphazard manner. The roots of the historical school lie deep in the Roman Law.

### III. FACTORS RESPONSIBLE FOR THE RISE OF THE HISTORICAL SCHOOL

The eighteenth century saw the expansion of rationalist ideas, because the Enlightenment centred on 'Reason' as the primary source of authority and legitimacy. Plenty philosophers of the period drew knowledge and inspiration from earlier philosophical contributions, most notably those of *René Descartes (1596-1650)*. He was a French philosopher, mathematician, scientist and the primary modern rationalist.

He thought that only knowledge of eternal truths (not only the truths of mathematics but also the foundations of the sciences) could be attained by reason alone. He further believed that, while the knowledge of physics required experience of the world, aided by the scientific method and argued that reason alone determined knowledge, autonomously without use of the senses. In fact, a famous dictum of his, *cogito ergo sum*, or "I think, therefore I am," is a conclusion reached *a priori* (i.e., prior to any kind of experience on the matter). The simple meaning is that doubting one's existence, in and of itself, proves that an "I" exists to do the thinking. He rightly laid the foundation for the 17th-century Rationalism in Continental Europe, which was later on advocated by *Baruch Spinoza* and *Gottfried Leibniz*.

Since the Enlightenment, rationalism is usually associated with the introduction of mathematical methods into philosophy, as seen in the works of Descartes, Leibniz, and Spinoza. This is commonly called "*Continental Rationalism*", because it was predominant in the continental Europe.

Thus, the Governmental operations, law and every aspect of human life was influenced by reason and rationality, thus becoming devoid of any morality or cultural values. Natural law, law based on deliberations and universal principles, as well as Legislations based on Positive law, which were rationally derived, and coercively imposed, without taking into consideration social, historical and other factors started to make the human society soul-less as in the words of *Prof. H.L.A Hart* as "*Gun-men situation*." The jurists and philosophers started to think in a novel way for finding solutions to the problems which existed at that time. They turned to history and historic conception for guidance, that gave birth to the Historical school of law.

There was also a movement against Napoleonic conquests of Europe and as an aversive response to *Thebaut's* proposal for codification of German laws. Therefore, the Historical school of law emerged as a strong reaction and opposition to Natural law and Positive law schools and as a result of extreme degree of nationalism in the Continental Europe.

#### IV. FINDINGS AND ANALYSIS

The findings of this study are truly fascinating and profound, which induce one to look at historical jurisprudence and the customs from plentiful angles. The way the historical school catapults and transits from one phase to another and from one country to the next is very interesting. Although every proponent of this school might not agree or concur with each other, the French, German, English, American and Indian views add colour to the various facets of this school. Historical perspectives can help in development and enforcement of various laws, schemes, rules, etc. of our country.

##### **Basic tenets of the Historical School:**

- This school focusses on custom as the most important source or primary source of law.
- This school considers law to be the legacy of the past and the product of customs, traditions, religious beliefs prevalent in different human communities.
- This school states that law has a biological growth, over a period of time, and not an arbitrary, spontaneous or artificial birth.
- Law cannot be of universal application, as it needs to solve particular problems of particular societies. Thus, each society or Nation-State develops its own culture, customs, manners, Constitution and domestic law.
- Law grows on the general consciousness of the people i.e., “*Volksgeist*”. The consciousness begins from the very inception of the society.
- Law develops on the standards of society which have stood and passed the test of time.

#### V. MAJOR PROPONENTS OF THE HISTORICAL SCHOOL

##### **In France:**

As far as France is concerned, *Montesquieu (1689-1755)* is said to be the founder of historical school of jurisprudence through his classic work “*De l'esprit des lois*” (*Spirit of the Laws*) in 1748. Montesquieu was the first jurist to talk about the Historical lens of looking at and studying law, and came to the conclusion that laws are the creation of climate and local situation. He did not elaborate further into it or develop it into a systematic branch of study, but stated that law must keep pace with the changing needs of the society.

##### **In Germany: Volksgeist as a Source of Law**

*Friedrich Carl von Savigny (1779 -1861)* is considered to be the ‘*Father of the Historical School of Jurisprudence*’ and *Germany* is said to be the ‘*cradle of Historical School*’. In fact,

he is considered to be the father of modern jurisprudence in Germany.

Savigny developed a systematic new branch of the study of law viz. the Historical School on the basis of his concept of *Volksgeist*<sup>2</sup>. He believed that one can understand what law truly is only if one studies the inter-relationship of law and society or the spirit of the people of society. In his understanding, the nature of any particular system of law was reflected in the spirit of the people who evolved it. Thus, he considered that the laws of any nation should reflect the 'national spirit (*Volksgeist*)'.

Savigny draws parallels between local language and law; neither local language nor local law can be applicable to other (foreign) people and countries. He felt that a proper legal code could only be an organic system grounded on the true rudimentary principles of the law as they have been developed over a span of time. The idea that the nation's legal system is influenced by its history, culture and character of its people is still applicable.

The concept of *Volksgeist* as explained by Savigny influenced many jurists who later on developed the Sociological School of Jurisprudence and Evolutionary theories of life sciences, which are the likes of *Charles Darwin*, *Alfred Russel Wallace* and *Roscoe Pound*<sup>3</sup>.

The disciple of Savigny in Germany, namely, *Georg Friedrich Puchta*, reinforced the ideas of Savigny and continued to contribute to the Historical school of Jurisprudence with an in-depth study focusing on the interrelation between individual interests and collective will of the society.

However, Savigny also saw huge criticism of his theories in Germany and abroad. Savigny was heavily influenced by Roman law and did not agree on having a uniform law for Germany. At that time, Germany (Kingdom of Prussia) had laws which were derived from Roman laws and did not have a uniform legal code or proper legislations. Thus, this view of his proved to be less than desirable, at that period of time, which lead to delay in the codification of German laws.

Savigny's view that custom is the major source of law cannot always hold true, as there are various other sources of law as well. Customs, which may be old and followed since times immemorial, might in reality turn out to be violative of human rights. *Lord Dennis Lloyd*<sup>4</sup> emphasized that Savigny underrated the importance of modern legislations in the human society. Sometimes, a nation might uphold a wrong or immoral or unjust custom, which needs

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<sup>2</sup> Friedrich Carl von Savigny, *Zeitschrift für geschichtliche Rechtswissenschaft (Journal for Historical Legal Science)* (1814), (1 ed.). Heidelberg: Mohr und Zimmer. doi:10.11588/diglit.11451

<sup>3</sup> Lewis A. Grossman, 'From Savigny through Sir Henry Maine': *Roscoe Pound's Flawed Portrait of James Coolidge Carter's Historical Jurisprudence*, American University, WCL Research Paper No. 2009-21, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1407623](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1407623)

<sup>4</sup>Dennis Lloyd, Baron Lloyd of Hampstead, *The Idea of Law* (1964), Baltimore: Penguin Books Inc., 1964, Pp. 363

to be struck down by passing a suitable legislation. There are also various other sources of law that have little or no connection with people's consciousness or their will, but are needed to be followed. Sometimes, customs completely opposed to each other exist in different parts of the same Nation, which can hardly be said to be the *Volksgeist* or as reflecting the spirit of the people.

Savigny might have focussed more on homogenous societies, where custom could be the same and of huge importance amongst its people. On the contrary, custom loses its importance in a heterogenous society where, there are different groups of people living and interacting with each other, and thus, in such complex societies, simple uniform customs may not be found.

One can also understand that in today's global village, there needs to be some kind of uniformity in laws and laws need to be constructed on universally accepted norms and ideas, rather than the custom of few countries. Hence, the need for Public International Law comes into the picture, where most countries of the world can enter into treaties and agreements for maintaining peace and harmony on one hand and enabling mutual trade relations and technology transfer on the other. Even when we say this, we cannot deny that the foundations of Public International Law can be found in its primary sources like customs and conventions.

### **In England:**

*Sir Henry Maine (1822-1888)* is considered to be the major proponent of Historical School of Jurisprudence in England. In his book '*Ancient Law*<sup>5</sup>', he explains, "*The movement of progressive societies has hitherto been a movement from status to contract.*" Thus, he believed that law and society developed "*from status to contract*", that is in the ancient world individuals were tightly bound by status to traditional groups, while in the modern one, they are free to enter into valid agreements and form associations with anyone they choose.

Sir Henry Maine made a comparative study of the legal institutions and laws of various communities across the world including the ones in India. His large volume of work made improvements to the Historical school and yielded fruitful results.

According to Maine law develops through stages. There are 4 stages to the development of law-

- In the first stage, law was made by the King, who pronounced law in the form of commands. "*Rex non potest peccare*" or "*The King can do no wrong*" was followed as the King is supposed to be acting on behalf of God and that law is not mere law but

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<sup>5</sup> Sir Henry James Sumner Maine, *Ancient Law: Its Connection with the Early History of Society, and Its Relation to Modern Ideas*. London: John Murray, 1861.

divine law. The people would be at the whims and fancies of the King or Queen who ruled.

- In the second stage, there is decline of power and a small group of people have control over a country, which can be understood to be military rulers or oligarchy. Maine explains that the laws of the oligarchies then developed into customary law.
- In the third stage, the knowledge and administration of law go into the hands of the priests and minorities, because the original lawmakers have lost their power. This is the third stage.
- The fourth stage is the codification stage, in this stage, all the earlier laws are now codified.

If a comparison is made between Savigny's theory and that of Sir Henry Maine's, the latter's work is much balanced and forms the basis of the latter schools of jurisprudence. Sir Henry Maine talks about legal fictions, equity and legislations. This is the major difference that Maine recognized the importance of legislation but Savigny did not.

Savigny delved into the antecedent times gone by, in order to understand the current laws, and to determine the law for times yet to come. On the other hand, Sir Henry Maine used the study of legal history only to comprehend events of the past, but never to predict the future.

Maine is also criticized for oversimplifying the nature and structures of early societies and law into four stages. Law is very dynamic and cannot be made limited to a frame or compartmentalized.

### **In America:**

*James Carter*, an American jurist argued that law came to the existence even before the political revolution or consciousness. Therefore, according to him, law needs to be identified with the customs of any given society, diving to the core of social history and values of any particular time. Thus, he focused on the historical evolution and development of law.

### **In India:**

The Sanskrit equivalent of custom is '*sadachara*', which means '*the approved usage or the usage of a virtuous man.*' To put it succinctly and precisely, in the words of the ancient Hindu law-giver *Manu*, "*Immemorial custom is transcendent law.*" Although customary law is always secondary to the Indian Constitution and statutory laws of the country, its necessity and significance cannot be overruled.

If one tries to understand the origin of law and its development across the ages, it would not be possible to do so without wearing the historical lens. To explain let us dive into this illustration: ‘*Yajnavalkya Smriti*<sup>6</sup>, written by *Yajnavalkya* gives a clear distinction between law on one hand and morality or religion on the other. Thus, the ancient Hindu jurists understood very early in time that law and governance of the State should be kept separate from morality and religion. Here, one can draw parallels between the argument by English jurists like *John Austin* and *Jeremy Bentham* regarding this separation of law from religion, Church, morality etc. However, the Hindu jurists proposed these ideas much ahead in time than the Westerners, thus showcasing their intellectual advance and understanding the complexities of human nature and legal issues.’ Although the ancient Hindu jurists were by no means any legislature, their authority was based on their deep scholarship, knowledge, wisdom and the respect which they commanded by their writings. Therefore, one may infer that the ancient Indian Jurisprudence is deeply associated with historical school of jurisprudence.

Even during British rule in India, *Sir Henry Maine* studied the ancient Hindu law applicable to the Hindus in India. Ancient texts, treatises and scriptures are important sources of Hindu law. Shrutis, Smritis, Digests and Commentaries by scholars as well as custom govern the premises of Hindu law and are extremely vital even in today’s times, despite Hindu law being largely codified into modern systematic legislations.

In the words of *John Dawson Mayne*, a follower of *Sir Henry Maine* and author of books on Hindu law and jurisprudence, “*A belief in the propriety of the imperative nature of a particular course of conduct, produces a uniformity of behaviour in following it; and a uniformity of behaviour in following a particular course of conduct produces a belief that it is imperative to do so. When from either causes or from both causes, a uniform or persistent usage has moulded the life and regulated the dealing of a particular class of community, it becomes a custom.*”<sup>7</sup>

The courts in India have stressed upon the significance of ancient Hindu sources as well as custom as relevant for deciding cases and understanding Hindu jurisprudence. However, in modern law before a custom can be enforced by the court, it is necessary to prove the existence of a custom.

## VI. THE HISTORICAL SCHOOL ALSO SERVES A FOUR-FOLD PURPOSE

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<sup>6</sup> ‘*Yajnavalkya Smriti*’ (Sanskrit: याज्ञवल्क्य स्मृति) is the ancient Hindu Code of *Yajnavalkya*, dated between the 3rd to 5th-century CE.

<sup>7</sup> *John Dawson Mayne, Hindu Law and Usage* (pp.63-64), Higginbotham & Co., 1906, <http://www.raoinseattle.com/library/17%20Indian%20Law/Mayne%20JD%201878%20Hindu%20Law%20and%20Usage.pdf>

- The doctrine of stare decisis, whereby a court refers to a precedent and takes help of history to decide a case at hand, requires the historical application of mind by the judiciary.
- History plays important role in Constitutional law; whereby historical evidence reveals that the framers of the Constitution of India intended to achieve certain goals.
- On one hand, lawyers take the help of historical ideas, notions, concepts, stories to support a particular argument in the court of law; on the other hand, it helps as a tool of judicial interpretation of statutes by judges and to support certain legal and judicial conclusions.
- The historical method is extremely important as a legal research methodology.

The Apex Court of India observed in "*Byram Pestonji Gariwala v. Union of India & Ors.*"<sup>8</sup> that the Indian legal system being the product of the history. Therefore, it is deeply rooted in the soil of our country and at the same time nourished by our culture, rituals, tradition, language, sharpened by quest for social justice and our genius.

## VII. CONCLUSION AND SUGGESTIONS

To briefly conclude, it may be stated that jurisprudence deals with fundamental theories and principles of law. "*Without laws man differs not at all from the most savage beasts,*" so declared *Plato*, the Greek philosopher of the ancient past. Just as law cannot be divorced from history, it also cannot be divorced from ethics as well as sociology. Historical school of Jurisprudence acts as a connecting bridge between law and many importance concepts and historical events that shape our Cognito-legal thinking.

The route of the historical school though extremely useful, is certainly not free from its own drawbacks and pitfalls. The scholars, viz. Savigny and Maine have considered '*Custom*' as far more superior to the Law of the State. Therefore, in spite of criticisms, the jurists of historical school have continued to contribute to its development, as law has to be historically conditioned and reinforced. To cite an example, *Fredrick Pollock* was one of the supporters of the Historical School in England.

Thus, if Savigny's approach is conventional in import, Sir Henry Maine's work had a truly liberalizing effect. Therefore, Sir Henry Maine's work influenced the development of comparative legal studies in India and England. Customary practices continue to evolve with changing times. One can extrapolate from the current research that, although custom at its best

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<sup>8</sup> AIR 1991 SC 2234

can be one of the many sources of law, it cannot be the only one.

The ancient Indian Jurisprudence is deeply associated with historical school of jurisprudence. The ideas proposed by Hindu jurists like *Manu* and *Yajnavalkya* are indeed immortal and are studied and researched upon even today.

Therefore, historical jurisprudence and the customs must be looked at from plentiful angles. Every State can achieve huge feats of success in social, intellectual, material as well as moral development, only if it learns from its history. Thus, historical perspectives can help in policy development of the Indian State as well as in planning and implementation of welfare schemes and also in research.

Although the historical school continues to be taught at colleges of law, it is not excavated and explored as a subject of research to the fullest till date, which must be done at the earliest. There is a paucity of new generation researchers looking forward to enter this domain. That is exactly why the students should be motivated by their professors for the said purpose. In order to know it completely, one has to delve deep into it with years of research and dedication. Only then one can truly taste its nectar. The Historical School of Jurisprudence is an intriguing province indeed!

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