EVOLUTION OF JURISPRUDENCE AND HOW IT IS DIFFERENT FROM THE PRESENT LEGAL SYSTEM: WITH SPECIAL EMPHASIS ON VARIOUS SCHOOLS OF THOUGHT

Garima Singh*

ABSTRACT

The article explores jurisprudence and the evolution of the law. It deliberately examines how various schools of thought differ from one another, with special emphasis on the natural school of jurisprudence. This article traces the historical development of law from primitive cohabitation to the complex legal frameworks of modern society, emphasising the pivotal role of jurisprudence as the systematic study of legal principles. Derived from the Latin "jurisprudentia", meaning "knowledge of law," jurisprudence has evolved significantly across different cultures and periods, giving rise to diverse "schools of thought" that categorise distinct ideologies about law and morality. The article provides an in-depth analysis of two prominent schools: the Analytical School (Legal Positivism), the Natural School and Legal Realism. The Analytical School, rooted in the separation of law and morality, asserts that legal validity is determined by social facts rather than inherent moral content. This section examines the contributions of key proponents such as Jeremy Bentham and John Austin, who posited law as the command of a sovereign, and later thinkers like H.L.A. Hart, Hans Kelsen, and Joseph Raz, who refined positivist theory by introducing concepts like primary and secondary rules, the "pure theory of law" with its "Grund norm," and the "source thesis". This article clarifies the complexity of legal research and the continuous discussion about the meaning, application, and function of law in human society by analysing these opposing but significant schools. The field of jurisprudence is dynamic and changing in the modern era, facing numerous new issues and developments brought about by globalisation, technological advancements, and changing social values. Even though the fundamental schools of thought, historical, analytical, natural,

*BBA LLB, FOURTH YEAR, GURU INDRAPRASTHA UNIVERSITY.

philosophical, realist, and sociological, continue to offer crucial frameworks, modern jurisprudence interacts with them and deals with completely novel phenomena.

Keywords: Jurisprudence, Legal Positivism, Grundnorm, Legal Realism.

INTRODUCTION

The newly emerging laws are the result of the long foundation stone of human cohabitation. The evolution of man from uncivilised creatures to the present modern society was not a task of one or two days; it took centuries for man to become civilised. Each century has brought many new minds with new ideologies. The study that early ancient societies used to do revolved around survival and cohabitation, which later evolved to the king and his rule. The modern sphere of this study and civilised cohabitation is now what we call a lawful modern society where every person has their unique role, individual rights, and their duty toward their nation.

Just like how scientists study nature and life through science, a mathematician studies equations through math; similarly, the law is studied through jurisprudence. Jurisprudence is not a modern concept; it has its roots in ancient times. While the term jurisprudence has been derived from the Latin term *"jurisprudential",* meaning the knowledge of law or the study of law, it originated from the early Roman civilisation, which is now studied worldwide by law students, scholars, and researchers. The concept of jurisprudence has evolved differently at different places over different periods. These differences under common ideologies have been adopted by various scholars as schools of jurisprudence. There are various schools of jurisprudence.

SCHOOLS OF JURISPRUDENCE

The evolution of studies and the emergence of various ideologies about law and morality led to the formation of different perspectives and followings among the jurists. Jurists with common ideologies were classified into the same schools of thought. There are various schools of jurisprudence; the prominent ones are listed below:

- Analytical School
- Historical School
- Natural School
- Philosophical School
- Realist School

- Sociological School

ANALYTICAL SCHOOL

Legal positivism law command of sovereign legal positivism is a school of jurisprudence that holds that law is a set of rules and principles created by human beings, and its validity is determined by social fact rather than its moral content. Legal positivism insists on a clear separation between what the law is and what the law ought to be It In contrast, 2 natural law theorists believed laws must be aligned with moral principles. The existence of law and its content depend on social facts such as acts of legislation or judicial decisions, or customs, rather than morality, free will. The existence of law is one thing: its merit and demerit are another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard is a different enquiry.

Jeremy Bentham (1784-1832): Law should be understood as a command of the sovereign, but Bentham places strong emphasis on the principle of utility, that is, greater happiness for the greatest number of people. He strongly advocated for the codification of laws, criticising the unwritten and judgmental common laws of England. He believed that reward as well as punishment should be used to encourage law-abiding behaviour. He turned reward into a positive sanction and punishment as a negative sanction upon people. Jeremy Bentham was the first one to analyse what law is. He divided his study into 2 parts, namely:

1. Examination of law as it is: expositorial approach.
2. Examination of law as it ought to be: sensorial approach.

Though John Austin's work was heavily reliant upon Jeremy Bentham's findings, he focused merely on the concept of examination of law as it is and disregarded the concept of law as it ought to be.

John Austin (1790-1859): He aimed to transform law into a true science. To do this, he believed it was necessary to urge the human law of all moralistic nations and to define key legal concepts in strictly empirical terms. According to him, the law is a social fact and reflects relations of power and obedience. This 2-fold view that first law and morality are separate, and secondly, all human-made positive laws can be traced back to human lawmakers, is known as legal positivism. Laws are rules that he defines as a command created more precisely as a law

general command issued by a sovereign to the members of an independent political society and backed up by credible threats of punishment or other adverse consequences.

HLA Hart (1907-1992): According to Hart, law is not just a command but a complex system of rules, some of which confer power and enable the legal process. Hart maintained a distinction between law and morality; he didn't entirely separate the two, he merely recognised that morality could reflect society's moral values. He argued that certain moral rules, such as the prohibition against violence or theft, are necessary for any society; however, he held that beyond this minimum, laws could widely and need not align with morality.

His major critique moved beyond Austin's "command theory" by introducing the distinction between primary and secondary rules.

1. Primary rules - These are substantive rules that govern behaviour, such as criminal law, contract law and law of torts. They are rules of obligation that stipulate what individuals must or must not do.
2. Secondary rules - These are procedural or institutional rules that provide a framework for the operation of primary rules.

Kans Kelson (1881-1973): He developed the *pure theory of law,* seeking to separate law from both morality and empirical fact. He saw law as a hierarchy of norms, each driving validity from a 'higher norm', ultimately resting on a 'basic norm'. Legal norms are "ought" statements, not "is" statements; they prescribe conduct rather than describe fact. He rejected the idea of sovereignty as the source of law; instead, the basic norm is the ultimate source of legal authority. According to him, legal validity depends on conformity with the basic norm, not on moral or imperial criteria.

Explanation: Grund norms are fundamental norms that give validity to all the norms.

Joseph Raz (1939-2022): Further developed Hart's idea, focusing on the authority of law and the "source thesis". Lose authority comes from its ability to provide reasons for action that are independent of moral reasoning. The source thesis holds that the existence and content of law can be determined by reference to social facts alone without recourse to moral arguments. The importance of the legal system being identifiable by there are sources (legislation, precedents), not by its moral contents.

HISTORICAL SCHOOL

The historical school talks about the evolution of law; it is concerned with how law reached its present form. Advocated by individuals such as Friedrich Karl von Savigny, the Historical School of Jurisprudence maintains that law is "found, not made." According to this school, a society's changing customs, traditions, religious beliefs, and economic needs all influence the development of its laws, which in turn reflect the distinct "Volkgeist" or collective spirit of its members. Its main objective is to investigate the historical foundations and evolution of legal principles, emphasising how the law changes with society and is inextricably linked to a country's unique historical and cultural trajectory.

Friedrich Carl von Savigny (1779-1861): Savings contribution towards the historical school remarks its significance to date. He gave the "*Volkgeist Theory*". This theory suggests that law is the general will and consciousness of the people. Law grows with the growth of people and dies away as a nation loses its nationality. He used nationalism in his theory because he wanted German uniform code to unite the country and make uniform laws throughout the country. Major critics of his theory were, he was pessimist about reforms he gave more importance to customs than to legislation. He later shifted towards promoting Roman laws instead of old German laws and customs. He didn't acknowledge the exceptions to his theory that sometimes the general will is not the absolute source of customs, but powerful people influence customs example, ancient laws that legalised slavery, etc.

Sir Henry Maine (1822-1888): He gave status to contract theory, identifying distinct stages in the evolution of law:

Law by Divine Command - Initially, laws were perceived as royal edicts, believed to be divinely inspired by a goddess of justice. The ruler, seen as above the law, commanded absolute obedience.

Customary Law - In the subsequent phase, the authority previously held by the king or judge transitioned to council heads, with priests emerging as the custodians of legal knowledge. This priestly class asserted a monopoly over legal understanding, preserving the customs of their lineage or caste, which became law for those bound by kinship, particularly before the advent of writing. This stage highlights custom as a key development beyond early judgments.

Priestly Monopoly of Legal Knowledge - This phase saw the priestly class solidify their control over legal interpretation and enforcement. They claimed an exclusive memory of customary rules, given the absence of written records, thereby influencing the king's authority in both legal and religious matters.

Codification - The final, and arguably ultimate, stage is marked by codification. With the emergence of writing, scholars and jurists challenged the priests' exclusive legal authority, advocating for written legal codes. This development aimed to make law accessible and break the priestly monopoly on legal administration.

Maine categorised societies into two types based on their legal development:

1. **Progressive Societies:** These are societies that advance beyond the codification stage, continually developing their laws through innovative methods. Maine identified three such methods:
    a. **Legal Fiction:** Mechanisms that allow existing legal rules to be applied to new situations without formally altering the rule itself.
    b. **Equity:** Principles of fairness and justice applied to modify or supplement strict legal rules.
    c. **Legislation:** The formal enactment of new laws by a governing body.
2. **Static Societies:** In contrast, these societies cease spontaneous legal development once their primitive laws are codified. They do not progress beyond the fourth stage of codification, maintaining their legal framework without significant modification.

LEGAL REALISM

Realists see the world as it is. Their thoughts are a combination of the analytical school and the sociological school of jurisprudence. It is a movement in jurisprudence that emerged in the early 20th century, particularly prominent in the United States. It is not simply a set of abstract rules and principles, but is rather defined by decisions made by judges. It seeks to understand the law as it is operating in practice, and it emphasises the role of judges and their decisions in shaping legal outcomes. It contains that the law is, in fact, subjective and malleable. 8 personal experiences suggest that judges, biases, and societal influence play a significant role in their

decision-making process. It is an approach to the law that recognises how all individual interpretations and applications of legal rules are impacted by the social, economic, and political forces in play rather than seeing law as an absolute or fixed entity based on abstract rules. Realists argue that law is not a set of abstract rules but rather is shaped by the actual practice of the court, the experience and biases of judges and the broader social, political and economic context in which law operates. *The main features of legal realism are hereinbelow:*

Law in action and not just law in books: legal researchers emphasise that the law is as it is, practical and enforced, not just as it is written. The focus is on how the law is applied in real-world situations rather than its abstract/theoretical formulation.

Role of judges: their decisions are influenced by personal experiences, beliefs, biases and societal factors rather than being mere mechanical applications of preexisting law.

Indeterminacy of legal rules: Realists argue that legal rules are often vague and open to multiple interpretations. As a result, judicial decisions cannot be predicted solely by reference to statutes or precedents, but much depends on the judge's discretion and interpretation.

Empirical approach: Legal realism advocates for a scientific, empirical structure of law using methods like those of natural science. It calls for examining how courts decide cases relying on observation and evidence rather than abstract reasoning.

Separation of law and morality: Realists maintain a distinction between what the law is and what it ought to be, focusing on the descriptive rather than the prescriptive aspect of law.

Oliver Holmes (1841-1935): He is also known as the "*father of legal realism*". He emphasised that, "the life of the law that has not been logic, it has been experience". He introduced the "Bad man theory" According to this theory, law should be understood from the perspective of a person who is only interested in the practical consequences of legal rules, like lawyers, their clients, etc. He asserted that judges' decisions are shaped by "*felt necessities of the time*", prevailing moral and political theories and their own biases.

John Chapman Grey (1839-1915): He was the founding father of realism. He believed that the court, rather than the legislature, constituted the most significant source of law. Argued that judges played a pivotal role in giving life to the words of statute, it is the quote that puts life into the dead words of the statute. Types of realism: American realism & Scandinavian realism.

SOCIOLOGICAL SCHOOL

Roscoe Pound (1870-1964): He was the father of the sociological school of jurisprudence. He defined law as a tool for balancing conflicting interests within society. He gave the "*social engineering theory*". He contends that the legal system must maximise societal resources to establish justice and order, much like an engineer's design systems to operate effectively with constrained resources. As such, the legal system must balance conflicting interests within society to achieve harmony. He believed that the law must be studied in the context of its effect on society, not merely as an abstract set of rules. Law, according to Pound, is a means for balancing competing interests and achieving the goals of societal harmony. According to him, law evolves in 5 phases:

1. One inventory of interest
2. Selection of interest
3. Demarcation of limits
4. Mechanisms of protection
5. Principles of valuation

He also suggests 5 jurial postulates,

1. Freedom from aggression
2. control over property
3. Good faith in transactions
4. Duty of care
5. Containment of harmful activities

Eugene Elrich (1862-1922): He gave the "theory of living law"; this theory is against the theory of legal positivism. According to him, the functions of law and the life of society should be in correspondence. Legal positivism is not possible with a change in legislation, jurisprudence, or judicial decision, but only when society accepts the law, and there are reforms in society related to the implementation of these laws. The theory of living law means that law must be practised in society and not state-made law. Law is derived from society; the centre of gravity of all the legal developments is not legislation or judicial decision, but in society itself. It refers to rules and norms that govern people's behaviour in society, especially in associations like family, religious groups, irrespective of whether they are written in statute. He further classified law as "*law in books"* and *"law in action"*. Law in books refers to official laws,

statutes, and court decisions. Whereas law in action refers to how people behave and resolve their disputes, according to this theory, judges should observe society and recognise living law when deciding cases; they should not blindly apply rigid statutory rules that don't match social realities. This theory gives judicial discretion a central role in legal interpretation. This theory was criticised for not making a distinction between legal norms and other social norms. It also overlooks the fact that sometimes legal rules change their practices prevalent and accepted in a society.

Emile Durkheim (1858-1917): His theory centres around the idea that law is a reflection of the collective consciousness of society and evolves with change in social solidarity. According to him, the law is a mirror of society. The types of law that dominate society depend on the types of social solidarity. *Social solidarity*: **Leon Duguit (1859-1928)** developed it based on the principle of social solidarity, arguing that the purpose of law is to promote independence and cooperation among individuals in society. According to him, man has a social duty to act in a way that such way contributes to the well-being of society. Durkheim further identified 2 types of solidarity:

Mechanical solidarity is based on the similarity of religion and custom; people are morally united, and violations of the law are seen as a crime against the entire society. Example tribal communities, etc.

Organic solidarity, based on differences and interdependence, in this people perform specialised roles, the law aims to restore balance within the society, and not to punish any individual. Example modern industrial societies, etc.

NATURAL SCHOOL

There are certain laws which are immutable and eternal; these laws are a constant body of permanent, unaffected human belief and attitude.

Based on a priori posteriori, the knowledge that is acquired independently of any experience is called a priori knowledge, and a posteriori knowledge, also called empirical knowledge, is derived from experience. Development of natural law theories can be divided into 4 time periods.

1. Ancient period.

2. Medieval period
3. Renaissance period
4. Modern period

Ancient Period: The prominent jurists of this period were Secretes, Plato, and Aristotle. Plato was the student of Secrets, and Aristotle was further taught by Plato, just as Napoleon was taught by Aristotle.

Plato: He gave the doctrine of forms/idealism. He emphasised that forms are transcendence (the idea of exceeding or going beyond the limitations of ordinary legal frameworks or specific situations), archetypes that exist independently of the physical world, independent of the human mind, space and time. Goodness, rituals, honesty, art forms that are eternal and immutable because they are given to all men in equal measures, so that men can have a sense of justice.

Aristotle (384–322 BCE): He emphasised that man is part of nature in 2 ways:

1. He is part of the creatures of God.
2. He possesses an active reason by which he can shape his will.

By his reason/a rational man can discover the eternal principle of justice. He defined natural justice as "that which everywhere has the same force and does not exist by people thinking this or that". Explanation: Here, Man's reason, being part of nature, the Lord discovered by reason, is called natural justice.

Divine law: anybody of law that is received as coming from a transcendent source, such as the will of God or the gods, is divine law.

Dark Ages (5^{th}-10^{th} Century): St Augustine of Hippo (354–430): The union of the divine is the end of law, and to attain this end, the physical instincts of the body should be suppressed. Nature must lead and corrupt man, and therefore it should be overcome and destroyed. If human laws are contrary to the law of God, they are to be disregarded.

Medieval Theories: Thomas Aquinas (1224/25–1274): His views about societies are like Aristotle According to him, law is an ordinance of reason for the common good made by him who has the core of the community and promulgated. He classified law into 4 broad categories, namely:

1. Law of God
2. Divine law (law of superstitious)
3. Human law (positive law)
4. Natural law (which is revealed through the reason of man)

Thomas Aquinas pleaded for the establishment of the authority of the church over law. According to him, it is the church that will tell the interpretation of divine law. Human law cannot be superior to divine law. In emphasis of his viewpoint, he stated that there exist 2 cities, (1) the city of God, which has perfect law, and (2) the city of man, which has imperfect law.

Hard Natural law: Law is strongly grounded on the idea that natural law is divine, and that law must not be separated from morality. According to the heart, natural law and unjust law are not a law.

- It emphasised moral absolutism,
- that law and morality are inseparable,
- law must have no interference by government.
    1. **Thomas Aquinas**: A law must align with divine reason(rationality); otherwise, it is unjust and invalid.
    2. **Fuller**: Law has an inner morality that must be followed to be valid.
    3. **John Finnis**: Law must promote the common good, fairness, justice and good conscience.

Soft Natural Law: It doesn't drive the essence of morality from nature; it is derived from the philosophy of nature and the reason of humans.

- It emphasises on complete correctness of the law.
- Acceptance of morality, but does not demand absolute morality to be a just and valid law.
- Interphase that morality must be flexible.
- It focuses on the practicality of law.

Robert Dorkin: Law must be based on social rules rather than morality alone.

NATURAL LAW AND POLITICAL PHILOSOPHY

Thomas Hobbes (1588–1679): His work is Major League about the social contract theory; he was very much inspired by the work of Roscoe Pound. Natural law teaches the need for self-preservation, and the law and government must protect order in security. He is a supporter of absolutism. According to him subject has no right against the sovereign.

Social Contract Theory: An agreement among individuals within a social group to abide by certain rules and laws.

Absolutism: Former of government with concentrated power like a monarch.

He supported the absolute theory of sovereignty, utilitarianism, individualism, and materialism, all are inspired and interwoven in Hobbes' theory.

John Locke (1632–1704): He pointed out that during the Middle Ages church remained supreme, and then came the Renaissance period, which strongly advocated for sovereign rule. He gave a new interpretation to 'social contract' and 'natural law'. Man, under this contract, did not surrender all his rights but only a part of them, namely, to maintain order and to enforce the law of nature. So as long as the government fulfil this purpose, the laws given by it are valid and binding, but when it ceases to do that, its laws have no validity, and the government may be overthrown. He spotted individual liberty over sovereign authority. The theory of laissez-faire in the 19th century was inspired by his review.

Jean-Jacques Rousseau (1712–1778): The Social Contract is not a historical fact, but a hypothetical construction of reason. Before this contract, man was happy and free, and there was equality among the men. By social contract, Man United fathers the preservation of their rights of freedom and equality, for this surrender their right not to a single individual sovereign but to the community of which Russo gives the name, 'general will'.

General Will Theory: The existence of the state is for the protection of freedom and equality state and its laws are both subject to the general will, which creates the state. If government and law do not conform to the General will, they are to be overthrown. Rousseau further emphasised community and people's sovereignty.

Decline of Natural Law: Legal positivism contributed to the decline of natural law. Natural lawyers have been unable to prove the instances of law that are not moral but are invalid. Non-

cognitivism of ethics has also led to the decline of natural law. This means that moral reasoning may not be rational since one cannot correctly determine what is right or wrong for all. The decline of natural law can also be seen due to the rejection of the social contract theory. The decline of religion from the state has also caused a decline in natural law.

PRESENT SITUATION OF LAW AND JURISPRUDENCE

Jurisprudence, the philosophy of law, is a constantly evolving field that engages with foundational theoretical questions while actively responding to contemporary global shifts. At its heart, perennial debates persist between legal positivism, which views law as a societal construct, and natural law theory, asserting law's intrinsic connection to universal moral principles. These discussions are enriched by normative approaches that examine law's ultimate purpose and its role in achieving fairness. However, the modern legal landscape is profoundly shaped by the rapid advancement of technology. This has opened new areas of jurisprudential inquiry concerning digital evidence, the integration of advanced algorithms in legal procedures, data privacy, and the potential for distributed ledger technologies in legal contexts. Globalisation has further intertwined legal systems, prompting discussions on international law and the alignment of regulations across jurisdictions. Moreover, critical perspectives, including feminist and indigenous legal theories, are challenging established frameworks and championing the rights of underrepresented communities. Emerging domains like environmental law and the legal aspects of climate change are also gaining significant prominence. While persistent issues such as case backlogs and barriers to legal access remain, the discipline is increasingly adopting interdisciplinary methodologies, drawing knowledge from various fields to comprehend and influence the dynamic nature of law.