

Welcome students to this lecture series in law. Today I'm dealing with Legal Theory or Jurisprudence and the topic I'm dealing with is Historical schools. I am Miss Ruby Luis, Assistant Professor from G. R. Kare College of Law, Margao. In today's topic, that is Historical schools, we will be looking at the introduction and the different exponents of the Historical schools. That is, Montesquieu, Edmund Burke, F.K. Savigny, George Puchta, Gustav Hugo, Sir Henry Maine. From today's lecture you will be able to understand legal theory in its true sense. Comprehend the theories of the exponents of the Historical school. Analyze the views of the Jurist belonging to the Historical school and gain knowledge of the historical school.

Introducing Historical schools to you. Historical school gives primacy to social institutions in which the law develops itself. It concentrates on the evolution of law from the primitive legal institutions of the ancient communities. The task of the historical school is to deal with the general principles governing the origin and development of law. Historical jurists banished the ethical considerations from jurisprudence. They did not believe in the ethical and moral values, they believed in things which were practiced, they propounded the view that all universal ideal principles to which positive law must conform were not principles of morals and ethics, but were principles of customary action. So they did not believe that everything that comes from God or all laws and principles which have universal applicability come from morals and ethics. But they believed that they have a customary force. The Historical school emerged as a reaction to legal theories propounded by analytical positivists and the Natural law Philosophers. The historical jurists believe that law has a biological growth and it has not evolved in an arbitrary or erratic manner.

Now the first exponent of the Historical school that is Montesquieu, we'll see what he has to say. He was the first jurist to adopt the historical method of pursuing the study of legal institutions. He opined that laws are creations of climate and local situations. He pointed out that law must keep the pace with the changing needs of society. He said that the law cannot be stagnant, but it has to keep changing as per the requirements of the society. The credit of laying down the foundation of the Historical School of Jurisprudence in France goes to Montesquieu, he was of the view that there is nothing like good and bad in law.

After Montesquieu, we look at Edmund Burke, he is considered as a very important exponent of the Historical school. He considered evolution of law as an organic process and an expression of common beliefs, faiths and practices of the community. He emphasized on customs and traditions for the growth in law. He highlighted that customs and traditions are the ones who are responsible for the growth of law and not the age-old primitive and ethical values. He upheld the significance of English customs, habits and religions in the evolution of law. He appreciated the role of judges in the development of the society. Because the judges were the one who would interpret the law correctly and give a judgment which would be a proper reason based judgment.

After Edmund Burke, we're studying F. K. Von Savigny. He owes a lot to the Historical school. He completely rejected the Natural law theory. He said that morals and ethics cannot be the only thing on which the law is based. He opined that law evolves according to customs, traditions, culture and human sentiments. He believed that law is a product of general consciousness of the people and the

manifestation of the spirit. What he wanted to say is that each person has a conscious of his own, and he is the one who's going to decide. As for the customs, traditions, cultures and the humans are sentiments that is what is going to be the manifestation of his true spirit. He propounded that like language law also develops. It is not stagnant, it is dynamic. It has to keep changing and in the early stages there's a lot of development of law and this is a spontaneous process. Law is a continuous and unbreakable process. Now let's look at the characteristics of Savigny's theory. He says that law has an unconscious growth. That means law doesn't know whether it's growing or not, but definitely there is a static growth in law, the basis of law is found in Volksgiest, which means people's consciousness or will. Savigny has given a lot of importance to the consciousness or will of the people. He says that law is not universal in nature, but like language it will vary from person to person just like how we have different languages in different places. Similarly, he wants to tell us that laws will be different keeping in mind the culture and the traditions of the people, for example, there will be different laws of marriage in the English countries, and there may be different laws of marriage in the Indian culture. With growing complexity the popular consciousness is represented by lawyers. Lawyers and jurists are important in the process of development of the legal system. Jurists are important because they lay down the different theories of law and lawyers are important 'cause they interpret the law and are putting it into practice. Judges are also important because they're giving us the final picture of how the law is.

After F. K. Von Savigny, we have George Puchta, he was the famous disciple of Savigny and he improved Savigny's theory and presented it in a better logical form. He began from human race that is right from the beginning and traced the development and evolution of law. He started it in different stages, that is right from the beginning of the human race, from there to the development and then to the evolution of law. According to him, neither the state nor the people alone were the source of law. It is a combination of both of them. He opined that law comes into existence as a result of conflict between general and individual will.

After him, we have Gustav Hugo. He was a German exponent of Historical jurisprudence. He observed that law is not a result of legislation nor is it a command. He says that it is not a command as he does not agree with the Analytical school which emphasizes on "Law is a command and it comes from sovereign. So he says that law is not a result of legislation, nor is it a command. He pointed out that law, like language and habits of people, forms itself and develops as suited to the circumstances. The essence of law is its acceptance, regulation and observance by the members of the society. So he says that no command, or legislation can formulate a law, it is actually the acceptance and observance of the society which gives law its binding effect.

Next is Sir Henry Maine, who is rightly known as the Social Darwinist. He developed the concept of social order, wherein the individual is finally liberated from the federalistic bondages, maybe of slavery of being under the landlord or maybe under an employer, who actually exploited the other. Through his comparative research, he concluded that the development of law and other social institutions has been almost the same in all ancient societies. He has enumerated stages of development of law, where he talks about Divine law, Customary law, the Priestly class and finally Codification. In Divine law, he says that as we spoke in Natural law theory, laws originated from God, and the King was acting under his

divine inspiration. Under the Customary law, we say that uniform practice crystallizes into a customary law, the Priestly class, was actually governed by the priest, and finally Codification which is the art of writing, the jurist advocated for codification.

All the exponents in the Historical school have given a lot of importance to customs, traditions and practices. So the historical school works on these principles.

For today's lecture, I have referred to Freeman on 'Lyod's introduction to Jurisprudence', Salmond on Jurisprudence, V.D. Mahajan on Jurisprudence and Legal Theory, Dr. N. K. Jaikumar on Lectures in Jurisprudence and Dr. N. V. Paranjpe on Studies in Jurisprudence and Legal Theory.

Thank you.