

# School of Contemporary Jurisprudence

**Ajit Ravi**

C.C.S University Meerut

## **Abstract**

the role various eminent Jurists to establishment of present Democratic and Judiciary System, how was there thought differentiated into various School of Jurisprudence. What is the ideology of School of Contemporary Jurisprudence, on which ground it's differed from previous School of Jurisprudence.

## **Introduction**

In present scenario, Mankind has been well aware about Fundamental rights, Human rights, concept of State, Civil law, Criminal Law, through which has formed the Constitution of State, Parliament/legislative assemble, Judiciary System, etc. in this research paper, we have trying to find out role of various Jurist in formation of present Civilisation establishments. Find out the what is ideology of School of Contemporary Jurisprudence, and basic difference between previous ideologies of Jurisprudence.

Jurists have tried to give a clear-cut definition of what law is. They have examined this discipline from vastly different angles since jurists wanted to understand what constitutes law in different ways. However, they were unable to reconcile the difference in the approaches and were thus unable to arrive at a hard-and-fast test to determine what to categorize as 'law'. As a result, as of now, there is no universally accepted definition of the law.

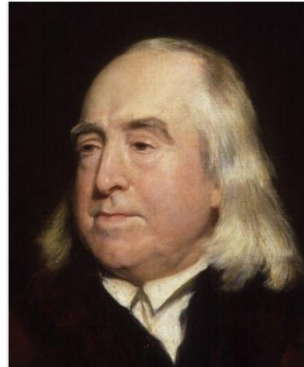
Instead, we study the different definitions of law given by various jurists to arrive at a better understanding of this discipline. Jurists and scholars have been classified into broadheads that comprise the various schools of jurisprudence for our convenience. This helps us understand their diverse approaches better and aids us in understanding the evolution of legal philosophy.

There are number of 7 major schools of law - Analytical school, Historical school, Sociological school, Philosophical school, Realist school, Natural and recently Contemporary School of Jurisprudence.

## **1. School of Analytical Jurisprudence [1] –**

The Analytical school of law emerged as a reaction against the Natural school of law. It focused on creating a system of law in line with scientific and empirical methods and is also called the 'imperative' or 'positive' school of jurisprudence. It places emphasis on the will of the sovereign or that of the State, which further dictates what the law is. This will is enforced on the people through a system of punishments. Major scholars of this school are –

### a. Jeremy Bentham



According to Bentham, is known as Father of Jurisprudence the law is the will of the sovereign. It lays down the conduct that should be observed by a person or a class of persons who are subjected to its power. The law does not have any relation to morals and ethics. Here the sovereign is superior and does not owe obedience to any other. However, it can limit its power through external agencies (like international treaties). Thus, its power is not absolute.

He also made a reference to sanctions and the need for the sovereign to impose them. However, unlike Austin, he also talked about the positive sanctions which reward those who obey the law, along with Austin's punishments to those who don't.

Bentham also gave a 'Principle of Utility, which gave a yardstick for measuring each law. It said that a law was good if it maximized the good for the maximum number of people. This takes only the consequences of the act into consideration, not its intent. This concept led to the foundation of the theory of utilitarianism.

### b. John Austin

Austin defined law as the command of the sovereign backed up by sanctions. He claimed that law was an expression of the sovereign's power and it was backed up by coercive methods, especially the threat of sanctions, to keep the political inferiors under its control.

He delinked law from morality, saying that instead of law being based on ideals of morality, it derives its authority from the power of the political superior. He also claimed that law-making by the judiciary is unavoidable and is in the people's interest.

## 2. School of Historical Jurisprudence [2] –

This school talks about law being a culmination of years of Historical development and places emphasis on both the commands and customs as being a source of law. Two main proponents of this school are –

### a. Friedrich Carl von Savigny



He was a German philosopher, who is also called the ‘founder of Historical jurisprudence’. He developed this theory to combat increasing acceptance of the ideas of the French Revolution. His theory laid emphasis on “popular consciousness” (*Volkgeist*, as he called it). He believed that this popular consciousness was the most authentic expression of the will of the people and it evolved with society. The legislation, according to this theory, was valuable only if it respected social norms and customs.

### b. Sir Henry Maine

Sir Henry Maine developed the ‘Historical comparative’ or ‘anthropological method’ to study the law, claiming that law developed through various stages:

1. Kingly rule- Commands given by the King
2. Customary law- Commands turn into customs
3. Administration of customs goes to a minority group- Like priests
4. Codification- Law gets codified

According to him, static societies stop at this stage, but progressive societies go beyond-

- Fiction- The operation of the law changes, while its letter remains the same.
- Equity- Ethics start playing a role and start governing the law.
- Legislation- It is obligatory (based on obligations) and derives its authority from a body of persons.

After this, in progressive societies, individuals’ standing which was determined by status, i.e. caste, gender, etc. now stops playing a role. The free will of all comes in. An individual becomes more important, as evidenced by their ability to contract out of their own free will.

### 3. School of Sociological Jurisprudence [3] –

This school views laws primarily in terms of their relationship with society and having no independent existence of its own. It places emphasis on studying the law ‘in action’ instead of in isolation. The main proponents of this school are-

#### a. Roscoe Pound



Pound viewed the law as a method of ‘social engineering, where the law is used to balance out competing interests. These interests were categorized into individual interest, public interest and social interest. He also laid down five jurial postulates, allowing more to be added as and when the need arises. These were:

1. Criminal law- No one should commit intentional aggression upon another.

2. Patent law- A person who has created something has the right to own it.
3. Law of contract- Men shall act in good faith in all transactions.
4. Law of Tort- Men must not act in a way that could cause unjustified risk of harm to another.
5. Strict liability- All harmful things must be kept within their boundaries.

#### **b. Leon Duguit**

This theory viewed the law as a ‘social fact’ that is present because people live in a society. The people living in a society are interdependent on each other and often have common needs. The social function of the law was to maintain social solidarity, which Leon regarded as a basic fact of human society.

The theory claims that an individual’s rights by themselves do not hold any merit and the only right they do have is to perform their duty. In other words, he accords a low status to the rights of an individual, unless they are for the good of the entire society. No one should do anything to harm social solidarity.

A State is simply a group giving commands backed by force. Its actions are legitimate only if they encourage social solidarity and if not, the people should revolt against it. He judges all activities and institutions using the yardstick of the good they do to social cohesion and how much they help in maintaining social solidarity.

#### **4. School of Philosophical Jurisprudence [4] –**

According to this theory, the purpose by which a law is made is significant. Law is a means to ensure justice in the society. Morals and ethics have a major role to play in jurisprudence, especially since a sense of right and wrong is intrinsic to the law. This sense of morality helps people decide the course of action which would help maintain law and order in the society and is concerned with a better future.

Most scholars under this school are also of the view that restrictions on people’s liberty are justified only if they promote the freedom of others in society. The ostensible purpose of the law here is that it has the function of protecting human liberty. The end game here is human perfection.

Some noteworthy supporters of this theory are:

##### **a. Immanuel Kant**

German philosopher Immanuel Kant, in his essay “Lectures on Ethics” drew a hard line between law and ethics. He viewed both of these as two distinct concepts. The purpose of ethics was to crystallize noble ideals and lay down the model conduct of humans, which relates to the internal aspect of human behaviour. On the other hand, the law regulates the external aspect of human behaviour and tries to instil a sense of ethical behaviour among the people even if it involves the use of force.

He supported the social contract theory which claimed that the State was the result of a pact between men and society. Thus, the people living in the society had a duty to obey their political superior. A Republican Representative State, without heredity, based on birth and one that protects free speech can help achieve a “united will” of everyone in the society. This is to be reflected in the legislation formulated by the political superiors. It also entailed the view that one could speak out against the laws but were also forced to obey them. Hence, no rebellion is ever justified.

##### **b. Hegel**

Drawing inspiration from Kant, Hegel too accorded a lot of importance to the value of liberty in his theory. He used the idea of ‘evolution’, saying that whenever a new idea is put forward, in time, opposition to it

comes up too. A battle between the ideas takes place and as a result, a middle ground (that might lean on either side) develops. This middle ground is accorded a higher position. He also asserted that the idea of freedom and liberty has prevailed throughout history. Thus, it is pre-eminent.

He talks of a “collective moral will” which is objective and has universal applicability. His theory endorsed the view that morals and the law are both interlinked and law works towards an ‘ideal’ future of the legal system.

## **5. School of Realist Jurisprudence [5] –**

As part of the Sociological approach, the Realist school is among the most recent schools of law to have come up. It gives great importance to the law laid down by judges and concentrates on systematic observation of the process of law-making and working of the law. This school acknowledges that it is more concerned with what law should be, instead of what it actually is. It concentrates upon the social impact of laws, looking at the legal decisions made by jurists. It is divided into two subtypes: American Realism and Scandinavian realism.

Some prominent jurists from this school are –

### **a. Jerome Frank**

Part of the American school of Realism, Jerome Frank believed that judges should evolve the existing law and not just stick to the letter of the law, rules and precedents. He claimed that law is not certain, that is just a common “legal myth”. We can only be sure of what a law is, after judges interpret it.

He talks of two different types of Realists- the ‘facts sceptics’ who hold the view that legal uncertainty is primarily in the letter of the law and look for consistency in the judiciary’s decisions to mitigate this problem. The other type is “rules sceptic”, who contend that legal uncertainty is because of the different facts of each case. The latter is more probable since usually, cases do not dispute the letter of the law and the contention is the facts of the cases.

### **b. Karl Olivecrona**

An important proponent of Scandinavian Realism, Karl Olivecrona examined legal theories from a Philosophical point of view. He placed emphasis on the actual working of the law. It says that judges can give any creative interpretation of the law and make the law. He claimed that law was simply a “social fact” that has persuasive value for judges while they’re reaching a decision.

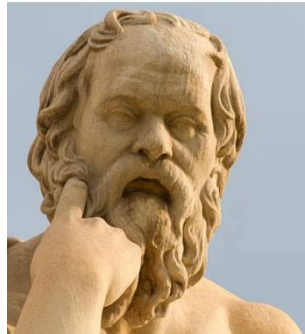
There is no “binding force” of the law, as it is of no use in a case where a person commits an offence that goes undetected. He further explains that law has a coercive force, but only on the minds of the people. A newly born baby knows nothing of the law at first but later learns little by little about it by observing the conduct of others. This baby develops a sense of right and wrong, that is informed by the law. The law informs morality, not the other way round and that morality convinces a person to do or refrain from doing certain things.

## **6. School of Natural Jurisprudence [6] –**

The Natural school is also called the ‘Divine’ school of law due to its close relationship with theology and the concept of a natural state of affairs created by a superpower. It talks about a higher law that is ‘natural’ or ‘divine’, and this determines the fate of the laws made by people. All laws are measured by the yardstick

of conformity to this Natural law and morality is closely linked to laws in this theory. Expression of the will of the law-makers, if it violates this Natural law, will lose its character and not be considered law. This theory of the law is one of the oldest and has been classified using four time periods- ancient, medieval, renaissance and modern. It re-emerged because of the growing support for positivist theories and was a reaction against them. This school focused on the ends that law means to achieve, rather than its letter.

#### a. Socrates



**Socrates** (c. 470–399 BC) was a Greek philosopher from Athens, who is credited as the founder of Western Philosophy and among the first moral Philosophers of the ethical tradition of thought. An enigmatic figure, Socrates authored no texts and is known mainly through the posthumous accounts of classical writers, particularly his students Plato and Xenophon. These accounts are written as dialogues, in which Socrates and his interlocutors examine a subject in the style of question and answer; they gave rise to the Socratic dialogue literary genre. Contradictory accounts of Socrates make a reconstruction of his philosophy nearly impossible, a situation known as the Socratic problem. Socrates was a polarizing figure in Athenian society. In 399 BC, he was accused of impiety and corrupting the youth. After a trial that lasted a day, he was sentenced to death. He spent his last day in prison, refusing offers to help him escape.

#### b. Plato

Plato was an innovator of the written dialogue and dialectic forms in philosophy. He raised problems for what later became all the major areas of both theoretical philosophy and practical philosophy. His most famous contribution is the Theory of forms, which has been interpreted as advancing a solution to what is now known as the problem of universals. He is also the namesake of Platonic love and the Platonic solids. His own most decisive philosophical influences are usually thought to have been, along with Socrates, the pre-Socratics Pythagoras, Heraclitus, and Parmenides, although few of his predecessors' works remain extant and much of what we know about these figures today derives from Plato himself.

Along with his teacher, Socrates, and his student, Aristotle, Plato is a central figure in the history of philosophy. Unlike the work of nearly all of his contemporaries, Plato's entire body of work is believed to have survived intact for over 2,400 years.

Although their popularity has fluctuated, Plato's works have consistently been read and studied. Through Neoplatonism Plato also greatly influenced both Christian (through e.g. Augustine of Hippo) and Islamic philosophy (through e.g. Al-Farabi). In modern times, Alfred North



Whitehead famously said: "the safest general characterization of the European philosophical tradition is that it consists of a series of footnotes to Plato."

### c. Aristotle -

Aristotle (384–322 BC) was an Ancient Greek philosopher and polymath. His writings cover a broad range of subjects spanning natural sciences, philosophy, linguistics, economics, politics, psychology and the arts. As the founder of the Peripatetic school of philosophy in the Lyceum in Athens, he began the wider Aristotelian tradition that followed, which set the groundwork for the development of modern science.

Little is known about Aristotle's life. He was born in the city of Stagira in northern Greece during the Classical period. His father, Nicomachus, died when Aristotle was a child, and he was brought up by a guardian. At seventeen or eighteen years of age he joined Plato's Academy in Athens and remained there until the age of thirty-seven (c. 347 BC). Shortly after Plato died, Aristotle left Athens and, at the request of Philip II of Macedon, tutored his son Alexander the Great beginning in 343 BC. He established a library in the Lyceum which helped him to produce many of his hundreds of books on papyrus scrolls.

### d. St. Thomas Aquinas

According to St. Aquinas, laws are the means to achieve certain ends and how to achieve the ends by the given means is decided by the legislator. Humans have flaws and yet, a desire to constantly improve with the goal of achieving perfection. Divine law is laid down by a superhuman legislator and people must try to conform to it for progress and for avoiding doing morally wrong acts.

He divided laws into:

1. Human law/ Positive law
2. Law of scriptures/ Divine law
3. Natural law- Part of divine law
4. Law of God

Aquinas advocates for positive law following the laws of the scriptures. He bestows the church with the authority to decide whether a law is good, based on its conformity with divine law.

### e. John Locke

According to Locke, before the conception of a State, humans lived in a peaceful state of nature. In this state of nature, a man possessed all the rights nature could give him. Men were born with the right to life and liberty. Men also had a right to property but lacked the means and organization to protect this right. Thus, they entered into a social contract to form a political society. He laid down various Natural rights of man. These include-

1. Right to health (life)
2. Right to liberty
3. Right to estate

Through a majority vote, inalienable rights may be taken away or limited by the State. The state performs the role of a facilitator and would make laws on the basis of public opinion. If the state fails to perform this function and acts unjustly, the people can replace it by revolt and revolution.

## 7. School of Contemporary Jurisprudence [7][8][9][10][11] –

Contemporary Jurisprudence emphasises upon democracy and justice. The theory of Contemporary Jurisprudence has been designed for targeting, how to empower the democratic structure, and increase the efficiency and effectiveness of Judicial systems. This is the first School of Jurisprudence of 21st century, which awarded the intellectual capability of the three-level democratic system and centralized judicial system to Mankind. Contemporary Jurisprudence is considering as 5th School of Modern Jurisprudence. The main scholar of this School –

### a. Deepak Sharma



Recently, an Indian jurist Mr. Deepak Sharma (often called as father of Contemporary Jurisprudence) propounded the School of Contemporary Jurisprudence. He has challenged the cardinal principle of the current Judiciary and Democratic Jurisprudence.

Theory -

1. Parliament /Legislative Assembly could not be considered as the representative session of the public, because the personal interest of an elected person (M.P / MLA) never is the same as collective interest of the public. He propounded the three levels of democratic structure against public- Parliament, he propounds the three level Representative sessions as Public – Society Representation – Parliament/Legislative assembly. He propounded that some group of people have common interest for their economic survival, such type of group called as Society, therefore any representative person from such society. Therefore, common interest of such representative shall be same of such society group, he further propounded that if Parliament and society representation both shall participate in the law-making process jointly, thereafter degree of democracy must be increased.
2. Judiciary system – School of Contemporary Jurisprudence also challenged the cardinal principle of current Judiciary system, as
3. Judges/ bench never be considered as independent Judiciary body, on the ground, that Court can't be treated as independent Judiciary body because of various functionality of court/ Judges run under the control of state/Nation.
4. A **Just in trial (J.I.T.)** is the world's first centralized trial proceeding provides the edge of public representation in Judiciary. J.I.T. is considered 25 times faster and 20 times more transparent against the current Bar- Bench trial proceedings system.

### Other main features of Contemporary Jurisprudence –

1. All types of law have been divided into five types and their codification process through joint session of Parliament and society representative session.



2. Degree of Democracy (details are not still available in public domain).
3. Developing stage of Judiciary system of any state (details are not available in public domain).

From all the above statements, it's true that the School of Contemporary Jurisprudence awarded a new edge of intellectuality about the next stage of Jurisprudence to Mankind.

The entire structure of our democratic and Judiciary system shall be affected due to Contemporary Jurisprudence because of cardinal principle of our Democratic and Judicial system has been idle challenged upon initio by the concept of School of Contemporary Jurisprudence.

### Conclusion –

1. The Human Right basic concept has been arrived from Natural School of Jurisprudence.
2. The Concept of State has been deprived from Sociology, Natural and Analytical School of Jurisprudence.
3. The Concept of Judiciary mostly deprived from Realistic School of Jurisprudence.
4. The Concept of various law as Society law as Criminal, Civil etc has been deprived from Sociology School of Jurisprudence.
5. The Concept of Relationship and precedents has been mostly deprived from Historical School of Jurisprudence.
6. That the School of Contemporary Jurisprudence more emphasis upon to enhance degree of democracy, the ideology of Contemporary Jurisprudence has been differ from previous School of Jurisprudence.
7. The School of Contemporary Jurisprudence challenged the cardinal principal of present Democratic and Judicial structure on valid Grounds.

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