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Historical Foundations of Law

SHREY SHALIN[1]

ABSTRACT

Historical School of Jurisprudence was never seen as a separate branch of Jurisprudence until a few centuries ago when it was craved out of the tussle between Natural theory and Positivist theory. There came a time in 18th when propounders of Historical School of Jurisprudence laid down a firm emphasis on development of law being a social phenomenon which took place over years. Montesquieu was the first one to come up and his theories of Historical School. Yet, it is Saviginy who came to be known as Father of Historical School. Sir Henry Maine and Puchta also had a role to play in development of this school. These Jurists had given a due importance to Roman Law to generalise the development process and cite examples. These Jurists saw the changing world. They saw the transition from a conservative Monarch society to a Liberal Democracy. They played their part in the revolution by bringing in new form of ideas about Freedom. International Law or "Law among nations" during that time was a debate topic whose essence could be seen in literary sources. This school has played a major role in development of the Western legal system and especially the English legal system. Within the same Historical school, there existed only few points of conformity between legal philosophers. However, the criticism is a tool which leads to possible rectification and development. These jurists used to refer Historical School of Jurisprudence as Historical Foundations of Law.

I. INTRODUCTION

The title speaks about 3 terms namely "Historical", "Foundations" and "Law". These three words first needs to be defined. The term "Historical" as per definition given by Cambridge dictionary says that it is *"connected with or studying or representing things from past*".[2] Other dictionary use more or less give the same connotation. Moving to the word "Foundation" as per Oxford dictionary this means "*a principle, an idea, or a fact that something is based on and that it grows from".*[3] The third word from the title is a tricky one. "Law" has been defined in various schools of Jurisprudence as per the principle, foundation or the basic ideology it is

[1] Author is a student at Chanakya National Law University, India.

[2] Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/historical, (last visited Aug. 13, 2021).

[3]Oxford Learners Dictionary, https://www.oxfordlearnersdictionaries.com/definition/american_english/foundation, (last visited Aug. 13, 2021).

 [ISSN 2581-5369]

governed by. The main schools of Jurisprudence being Natural School, Positivist School, Sociological School, Realistic School and Historical School. However when Jurists use the term Historical Foundations of Law – They confine themselves to Historical School of Jurisprudence and same approach would be followed by researcher in course of this paper. Definition and theories of Law by major Jurists and their Critics would be highlighted.

Theories by Jurists and Political Philosophers like Montesquieu, Savigny, Sir Henry Maine, George Friedrich Puchta would be main highlight of the paper. Savigny has made major points as to development of Law, its growth, the value of custom and a comparison between importance of Legislation and Judiciary. On the other hand Sir Henry Maine has talked about two notions being *notion of order* and *notion of force* while defining law.

(A) Hypothesis

Historical Approach to Jurisprudence is independent of other schools of Jurisprudence

(B) Research Methodology

The researcher will do doctrinal type of research in which he will go through the primary as well as secondary sources. The researcher through this methodology will be able to get an adjacent picture of the problem in question. The doctrinal method helps in doing a comparative study of the topic. This methodology helps in getting idea of Historical Foundations of Law with reference to Jurisprudence. This helps in getting the bird's eye view of the subject.

(C) Aims and Objectives

a. To trace back the origin of "Law" as per Jurists of Historical School
b. To understand the basic theories given by various Jurists of Historical School
c. To analyze and make a critical observation into theories formed by propounders of Historical School

(D) Research Questions

a. Distinctive point between Custom and Law?
b. Is Law really "unconscious" and "organic" growth?
c. Why is Judiciary superior to Legislators as per Historical School

(E) Limitation

Since, The Researcher itself is a student having limited access to scholarly websites and sources during COVID times as to when the Research paper is being written. The access to limited data and movement during the lockdown period would possess difficulty in making the paper comprehensive. However, the best of efforts would be presented by the researcher and best

 [ISSN 2581-5369]

usage of the limited available resources would be done.

(F) Sources of data

Primary Sources – Books – The Spirit of Laws, Ancient Laws

Secondary Sources – Websites, Articles, Papers

(G) Method of Citation

- Bluebook 20th Edition

II. HISTORICAL SCHOOLS OF JURISPRUDENCE

Time and history shows that morality is relative and what may be right in one circumstance or time might become morally wrong. Take an example of murder which morally is wrong in ordinary circumstances but what when it is done to save oneself from a crime or say it is done to defend one self and is used as Right to self-defence.[4] Let's take another example – Child marriage in India was never thought to be immoral until few years back when scientific studies proved that mental and sexual maturity is very much required to safeguard public health and suddenly the very same act has turned out to be seen as immoral by the introduction of Child Marriage Restraint Act.[5] A famous saying is that history repeats itself and if it is true, things could be learnt from the past and that is when Historical school of Jurisprudence comes into picture. It can help the society understand right and wrong or consequences and results of an action based on things which has already taken place well before in time. Therefore, The whole of Justice may be balanced based on our previous experiences in history.

Historical Jurisprudence has played a major role in development of Western legal system from twelfth century onwards and also a critical role in development of English legal system in the seventeenth and eighteenth centuries and it finally emerged as an Independent branch of legal philosophy in a debate between positivism and natural theory. Savigny who is known as father of the historical school of Jurisprudence believed that Law, like language, is an integral part of the common consciousness of the nation, organically connected with the ideas and norms reflected in a people's historically developing traditions, including its legal tradition.

It is interesting to note that in the latter half of the nineteenth century, Savigny's arguments found acceptance both in Europe and in the United States. Indeed, historical jurisprudence became the dominant school of legal theory of law in the United States in the late nineteenth

[4] The Indian Penal Code, 1860**,** § 102, No. 45, Act of Parliament 1860 (India)
[5] Child Marriage Restraint Act, 1929, No. 19, Act of Parliament 1929 (India)

 [ISSN 2581-5369]

and into the first decades of the twentieth century, both among legal scholars and in the courts.[6]

III. MONTESQUIEU

Montesquieu gives description of his idea about historical approach in his book ***"The Spirits of Laws"*** in French which has been translated and re-published.[7] He was a French Judge and Political Philosopher. His legendary book which shall be discussed has influenced drafters of the founding fathers of the U.S. Constitution.

(A) Into mind of Monstesquieu

To understand a great work one must examine the basics before diving deep into the topic and that is what we will be doing here. The preface just like preamble in the constitution introduces a person into mind of the author. Montesquieu in his **preface** thanked to be ***born at time when he was subject of a government as Plato thanked the almighty to be born at the time of Socrates.***[8] As a student The great philosopher Plato wrote about teachings of Socrates and indirectly made him subject of his writings which can be said to have made him an immortal being and the same happens with Montesquieu. He thanked almighty to give him birth at the time when government was already in existence which subsequently becomes subject of his book.

He talks of how ***he spent 20 years in writing the book which shall not be judged by reading it in hours.*** After spending 20 years in writing a book – A person would expect not to be judged in few hours of reading. Further elaborating on the topic Montesquieu says how much he has thought before completing the book and it needs to be given time and needs to be internalised. It has often been said that first impression is the last impression but is it entirely true? When reading an academic writing. One's mind keeps on revisiting the same till a reasonable conclusion has been achieved and to say the least it takes days. For book of Montesquieu ranging over 700 pages it could take more. Therefore, he doesn't want to be judged quickly.

He has laid down ***"the first principles, and found that the particular cases follow naturally from them, that the histories of all nations are only consequences of them; and that every particular law is connected with another law, or depends on some other of a more general extent."***[9] The principles as to him has not been drawn from prejudices but from nature of

[6] Harold J. Berman, The Historical Foundations of Law, Public Law & Legal Theory Research Paper Series Research Paper No. 05-3 5, 6 (2004)
[7] BARON DE MONTESQUIEU, THE SPIRIT OF LAWS (1748), Translated by Thomas Nugent (1752), Batoche Books (2001).
[8] *Id* at 14.
[9] *Id* at 15.

things. Montesquieu has relied on connecting things and making a chain for bringing out great truths.

Montesquieu here means that his historical approach follows a trend where he first defines a principle and cases have followed up naturally from them. In his analogy – The history of all nation are consequences of these principles and every law depends on another law to some extent. A prejudice can make an entire research useless therefore Montesquieu argues that his principles have been derived from nature of things. The sequential pattern to reach on a conclusion and making a chain is his style of writing the book. This could be observed when having a look his chaperization of the book.

He also mentions that he will **"*ensure that every nation will find reasons on which its maxims are founded and this will be the natural inference*" He believes that he will succeed if he gives "*every person to reasons to love his prince, country, laws and render him more sensible to love his nation and the government of the blessings he enjoys.*"** He also mentions that he will succeed when he ***"persuades those who command, to increase their knowledge in what they prescribe; and those who obey to find a pleasure resulting from obedience."***[10] As any great academic writer Montesquieu believes he can only become immortal when his book has been understood by whom for it has been written i.e. subjects of the king, the kind himself and make them understand more the essence of law, nation, government, country and the similar.

(B) Book 1. Of Laws in General

The paper is confined to examining the Historical approach adopted by Montesquieu and most of the relevance lies in the Chapter 1 which has been described above in the topic as "Of laws in General" He begins by describing that all necessary relations arising from nature give rise to laws be it the beasts, almighty, man or other likewise. The reason he finds as to why all the things are not arbitrary is Law. Law according to him is relation subsisting between one thing and another, and then between another to some other signifying that Law is the connecting force.[11]

Montesquieu believes that any world without constant law would inevitably perish. According to him a particular motion or an act must give rise to a fixed and invariable relation. He believes in the fact that there was always a just and an unjust even before commencement of positive laws by intelligent being and the sense of justice had prevailed. He talks on how the nature has created every men equal and wants them all to behave in a particular way according to Natural

[10] *Id* at 16.
[11] *Id* at 18.

 [ISSN 2581-5369]

Laws but the Intelligent beings as per Positivistic approach want them to behave in some other way and have created hurdles for natural law. So, at times both the nature of laws collide with each other. Nature does not conform to physical world. Positive Law is always connected to knowledge whereas Natural Law is connected with sense of pleasure. Man though created by God and Nature changes the established principles and law according to his wishes and desires. A Man with infinite intelligences can do many errors too. A man can forget his creator. Therefore, God has also created religion to remind him of his duties. A man shall also not forget himself. So, we see Law of morality and philosophy. Duty to society shall also not be forgotten by a man. Therefore, Legislators have formed political and civil laws to confine him to his duties.[12] This forms the basics on which Montesquieu has derived his historical approach and based his theory on.

(C) Of the Laws of Nature

In order to understand laws, one must consider man coming before establishment of society and laws of nature could be the best as they derive their force from frame and existence. The men believed that the creator and nature has power. He would speculate and investigate about ideas and knowledge about things around him. In this case a man would not consider himself to superior or equal but rather consider himself to be inferior and would be apprehensive of everything as he knows about nothing. No danger of attacking another; **peace would be first law of nature.**

According to Montesquieu, Hobbes was wrong in assuming the idea of dominion, empire as it is so complex and depends on many other notions. Men would go armed only when they fear of war and want to go for self-defence and this would not come because of men are weak but because there comes a sense of his **wants** and **second law of nature** would prompt him to seek for **nourishment.** Marks of fear would lead men to associate and then the association from opposite sexes shall lead to the **third law of nature.** Advantage of advanced knowledge leads a person to live in a society which is given by mankind and therefore a new motive of **uniting** forms **fourth law of nature.**[13]

(D) Of Positive Laws

When a man enters into a state of society sense of weakness ceases and state of war commences. Each society wants its victory in state of war and wants to take advantage of another society. Then it gives rise to two different kinds of laws – One is law of nations in a planet where there

[12] *Id* at 20.
[13] *Id* at 21.

 [ISSN 2581-5369]

are a lot of nations and then there arises another law which talks about the governor and the governed which is known as politic law and then comes another law as they stand to relation between each other and is known as civil law.

Law among nation is founded on the principle that different nations want peace and do good to one another and at the time of war – little injury. The purpose of war is victory, purpose of victory is conquest and purpose of conquest is preservation. The law of nations is not believed to be formed on true principles. No society can survive without polity or civil constitution. Political power cannot be concentrated on a single person as when he falls then his brother or likewise comes in and then someday somebody from another family takes the throne. Thus, power comprehends to union of several families.

Law in general as per Montesquieu is human reason and civil and political law is the place where particular cases of human reason has been applied. They should be adapted in such a manner that law of one nation suits person from another nation too. ***They should be in relation to the nature and principle of each government who they form. They should be in relation to climate of each country, to quality of its soil, to its situation and extent to the principal occupation of the natives, to the religion of the inhabitants, to their inclinations, riches, numbers, manners and customs***. Thus Montesquieu contents that they all have relations to each other and as to their origin. This according to him forms something he calls Spirit of Laws and what he intends to examine in whole of his book.[14]

(E) Conclusion to Montesquieu

Montesquieu begins by talking about law of different beings and things and starts from their origin from the state of nature. It could be the Almighty or could be motion of the particles but when the planet comes to existence. A man is weak and stays in peace but gradually his wants start coming up for which he forms association and then forms a society where law of nature from natural instincts end and the positive law begins deriving its source from society which then forms a nation and laws governing the relation between nations comes out to be Law among nations popularly known as International Law which in true sense is not a law as per John Austin and then the political and civil laws comes in. As per Montesquieu Legislators should have a basis for forming these kinds of laws which he brings out to be conformity with other laws, form of government, climate, religion of people and other connected things to their origin. Thus, This could be said to be Historical approach as Montesquieu starts from the basics of nature and how law already was present in the nature and we just have moulded it to reach

[14] *Id* at 22.

 [ISSN 2581-5369]

our benefits. It all has been done through rudimentary phase. It feels like Montesquieu is connecting the dots between Natural Law and Positivist Law through his Historical Approach and his approach seems reasonable to answer the shift from on nature of law to another as to from natural to man-made law.

IV. SAVIGNY

Savigny contested that existing body of knowledge can be analysed through research into Historical origins and modes of transformation. He was a German scholar and a Jurist. He advocated that the meaning and content of existing bodies of law be analysed through research into their historical origins and modes of transformation.[15]

(A) The Approach

Savigny got famous from his views published in pamphlet 'On the vocation of our Age for legislation and jurisprudence'. As per Savigny, Law was required to be product of forces working in society and not the deliberate action of legislation. He valued Roman Law because it was made over in centuries before being codified in the form of XII Tables. He pointed out how much Roman law was embedded with the German Laws and it was his efforts which made German Law a subject of academic study.

Savigny believed that Law is like language which evolves and is shaped by religions, traditions, customs, habits etc. of the people and thus has a national character embodied. Law of any particular system as per Savigny was refection of spirit of people who evolved it and he termed it as Volkgeist law, Therefore as per him Law is manifestation of common consciousness, Legal development thereby is not possible either by deliberate law making by political agencies or on the basic of natural law or reason. Savigny emphasised on importance of looking at origin of legal rules and not their reasons. At beginning, Law is simple and easily understandable by everyone. As it keeps on developing, A stage comes when silently operating forces of what he calls Volkgeist proves to be inadequate and that is the time when role of Lawyer comes in who become vehicle of common consciousness of the people. They represent the popular spirit and give shape to law and legal institution by developing their technical aspect. Stone says that Law constitutes of two elements as per Maine's theory which is Political element and a Technical element. In primitive societies, Volkgeist constitutes of Political element whereas in developed societies constitutes of Technical character and when both of them meets, it becomes a good time to introduce Codification.

[15] BRITANNICA, https://www.britannica.com/biography/Friedrich-Karl-von-Savigny (last visited 21 Aug 2021).

 [ISSN 2581-5369]

(B) Criticism of Savigny's view

Savigny has been criticized by many jurists. Allen believed that all the customs were not outcome of common consciousness of the people rather interest and will of the strong and powerful minority of a ruling class. has been criticized by many jurists. An example here could be of the Slavery which was prevalent in many parts of the world including developed countries including France and Britain. There are also some customs like Law of Merchants which developed in cosmopolitans and has nothing to do with national feelings and character.

As per Professor Stone Savigny laid excessive emphasis on unconscious forces determining law of the nation while he ignored efficiency of the law as being instrument of bringing out a planned change. Legislation in modern developing societies like that of Sati Pratha Abolition Act, Child Marriage Restraint Act, Special Marriage Act in India has helped a lot in developing the Indian society.[16]

V. SIR HENRY MAINE

Sir Henry Maine was a British Legal Historian and Jurist. He had taught in University of Cambridge. He pioneered the study of comparative law, notably primitive law and Anthropological Jurisprudence.[17]

(A) Into the minds of Maine

Confining oneself to the book ***"Ancient Laws"***. One needs to look into **preface** first to understand the aims and objectives (if any) of the book. Maine talks on how one must start from the earliest ideas of mankind and hoe they have influenced and has relations with modern thoughts. He gives the preservation of Roman law credit for completion of the book and illustrations made. He also says that his intension is not to treat Roman law itself as Jurisprudence. He gives emphasis on Chapter 3 and Chapter 4 and says that they are most important in this book. We will be confining ourselves likewise there on those two chapters. **Law of Nature and Equity and The Modern History of the Law of Nature**.[18]

(B) Law of Nature and Equity

Maine says how older laws were superseded by a principle with intrinsic superiority and is known as Equity. It is being used regularly in days but was very well present in ancient times during Roman Laws and even the Court of Chancery in English Law has derived its name from

[16] Prof. B. Hydervali, Historical Understandings of Law, 7, 4, https://epgp.inflibnet.ac.in/Home/ViewSubject?catid=20
[17] BRITANNICA, https://www.britannica.com/biography/Henry-Maine (last visited 21 Aug 2021).
[18] HENRY SUMNER MAINE, ANCIENT LAWS 1 (John Murray 1861).

Equity. Equity of Rome is believed to be a very simple one It has been found in roots of many human thoughts. According to Romans Civil laws were made by man but Law among nations was more important as it governed the whole mankind. Natural reason was the element which governed it. It was styled as Jus Naturale or the Law of Nature and its ordinances are governed by Natural Equity (Naturalis aequitas) as well as natural reason.[19]

The uniqueness of Roman Empire was that it was full of aliens or foreigners. It gave protection to oneself and from any external attack. The Ancient Italy which was disturbed due to robbers had its people settled in Roman Empire where they were imposed with heavy taxes, never given posts which had sovereign powers delegated or the capacity to sue for any contract. In modern legal system, this kind of phenomenon is absent as laws have developed and the population of natives of any country stays more than that of the foreigners. A slight disturbance in ancient Roman empire could have cause overthrow of the government and this often resulted in changes in rights and duties of the foreigners. A common system for determination of an act was very much required and the foreigners need not be adjudicated on the basis of law of land but rather Jus Gentium was formed which was common between all nations and it was observed by Romans to be followed in different tribes of Italy. It was kind of custom which needed to be followed again and again and therefore, we see the first traces of International Law in the ancient Roman Empire. Foreigners were given advantage of their own laws and Jus Civile was undermined. For a long time it was followed and contradictions started arising when Greek theory of Law of Nature was applied to practical administration of the Law common to all nations. Modern states follow the principles of Jus Feciale which is law of negotiation and diplomacy. Now a days, modern states are governed by the Law of Nature and the impression of Jus Gentium has considerable share in producing the modern theory.[20]

The Greek philosophers considered important to live by the theory and laws of nature as it was nature who had created man and man was bound to compass. Later Roman lawyers got influenced and believed that Jus Gentium was nothing but lost code of Nature. Romans soon applied Natural Law theory for its legal improvement. The point between Jus Naturale and Jus Gentium is found to be Equity. Now what could be equity is a pertinent question asked by Philosophers. Is it "equality". No argues Maine and defines it as symmetrical order created first in physical world and then in moral world. It can be said to be a process as one of "levelling". The power then from a single person was distributed among various elected persons and as part of the process. The "Praetor" was given the supremacy over law. The Praetor was the great

[19] *Id* at 13.
[20] *Id* at 17.

 [ISSN 2581-5369]

equity judge as well as the great common law magistrate. Maine also argues that there were a lot of common features between both Roman and English legal system.[21]

(C) The Modern History of the Law of Nature

The Law of nature confused the past and the present. It was "mixed bag of thought" which has been characterised as infancy of speculation. The laws in progressive Greek developed at a faster pace than the society which dissociated itself from cumbrous forms of procedure and needless terms of art and soon ceased to attach any superstitious value and replaced it with rigid rules and prescription. The pure questions of law were always argued which could influence the minds of the judges. It was not able to produce durable system of Jurisprudence. The rigidity of primitive law arising out of religion was a problem which had chained human race down. Maine writes ***"I know no reason as to why the laws of the Romans should be considered superior to the laws of Hindus unless Natural law had given it a type of excellence different than the usual one."*** To make a good law – The objects of the law is needed to be brought before the society and this is the reason as to why Bentham had succeeded and had influence in England. He gave a clear rule of reform. Bentham made good of the society take precedence over any other object. Good of the society was not philanthropy as per Maine but their sense of simplicity and harmony. Thus here Maine derives Bentham's theory of good to the maximum people from ancient Roman civilization's established rule of simplicity and harmony. It is often debated as to theory of Natural Law was used for good or the evil.[22]

It's influence could be found on every kind of sources and special ideas as to law, politics and society. The law of the Nature was re-enforced as it gave equal place to all provincial and municipal boundaries; it disregarded all distinction between noble and burgess, between burgess and peasants; it gave the most exalted place to lucidity, simplicity and system. It made no distinction.[23]

At the end of half of the eighteenth century, critical point to Natural Law was reached. Maine criticised Montesquieu for his book and writing and calls his writing to be merely imaginary but also praises him to talk about Natural Law for the first time and apply Historical approach. Maine goes on saying that within a century many philosophers had influenced minds of the people like Montesquieu, Bentham, Voltaire, Locke, Rousseau and others. They were guiding force for the law to be changed. It was then brought out that it is not Law of Nature but rather State of Nature which became primary subject of contemplation. Maine argues that it Historical

[21] *Id* at 20.
[22] *Id* at 22.
[23] *Id* at 23.

 [ISSN 2581-5369]

Method of Inquiry can have speculative error until and unless guided by evidences. Philosophers need not go into speculative delusion while working on Historical Approach. Philosophy of State of Nature fell low as it had lost plausibility, popularity or power. It had influence of a prejudice or bias conscious or unconscious. While the thought on State of Nature was in force it brought French Revolution. Thus Roman influence on French Revolution as per Maine is a lot. The preposition we speak almost daily and has influenced many of the constitutions "All men are equal" was already present in Roman era where it was written as "aequales sunt". Thus it can be said as per Maine that modern legal system has faced the same difficulties as was faced by Romans centuries ago. The Law of Nature gave birth to modern International Law and modern Law of War. The Assumption that Natural Law is binding on states inter se could be found on teachings of the Romans. "Law of Nations" itself was founded on the principles of Roman Law of Jus Naturale. If the society of nations is to be governed by Natural Law, All men shall be treated equally. All independent communities and nations – howsoever big or small shall be treated equally and this is what happens actually in International Law. Th war between nations to acquire territory has been found in modes of acquiring property Jure Gentium. The part of International Law which refers to dominion is pure part of Roman Property Law. Sovereign's in International Law are respected in the same manner as members of a group of Roman proprietors were. It resolves into "Sovereignty is territorial". Maine disagrees with a lot of writers on International Law claiming it to be founded on principles of equity and common sense.[24]

The theory of International Law as per Maine assumes commonwealths to be in state of nature, relative to each other. There is also a fundamental assumption that all of them are independent to each other. If there is a higher power howsoever slightly it may be connecting them then it introduces a notion of positive law excluding the idea of natural law. There also exists an entire department of International Jurisprudence born out of Roman Law of Property suggests Maine.[25]

(D) Conclusion to Sir Maine

Maine in his entire writing stays connected mostly with Roman Law and in his important chapters describes how important Law of Nature has been in shaping modern laws especially referring to International Law. He criticizes Montesquieu for his speculations and considers it speculative delusion. Maine argues how at first there existed Natural Law and then Positive

[24] *Id* at 28.
[25] *Id* at 30.

 [ISSN 2581-5369]

Law came and due to inequalities being a part of it made Natural Laws come back. The writings of great philosophers had shaped French Revolution and American Constitution. It provided people with new thought processes on how State of Nature was and should be. However, Things to be noted is that Maine never went prior to Roman Law and rarely talks on how it itself was born as something so complex could not come up upon its own. Another thing is that although at the time of Sir Maine, most of the countries were not free and were on the verge of gaining independence. Modern legal system has again been over taken by positive laws with some influence of Natural Laws. Rest of Maine's thoery has described law to be formed in **four phases** where the **first one** is **Laws made by King** under the inspiration of divine power. **King is believed to be working under inspiration of Goddess of Justice**. The second stage comes out when **Customary Laws** steps in and when directives of King is followed by Dominant class. The third step is when a **small group of persons** which at that time were priests claim to have knowledge over law and commands it. The fourth and final step is **Codification** when the law is codified and administered. According to Maine the 'static' societies do not progress beyond this stage. Whereas the most distinctive feature of 'progressive' societies is that they further develop the law through fiction, equity and legislation.

VI. FRIEDRICH PUCHTA

Friedrich Puchta was a German Jurist and a disciple of Puchta. He modified the theory given by Savigny. He also agreed with Savigny that the genesis and unfolding of law out of the spirit of the people was an invisible process. He says "What is visible to us is only the product, law, as it has emerged from the dark laboratory in which it was prepared and by which it became real". His investigations in the popular origin of law convinced him that customary law was the most genuine expression of the common conviction of the people, and was for this reason, far superior to legislation. He considered explicit legislation useful only in so far as it embodied the prevailing national customs and usages.[26] The main concept of Puchta's ideas was that "neither the people nor the state alone can make and formulate laws". Both State and individual are the sources of law. Puchta considered customs to be superior to legislation and believed that for a law to be more successful, it needs to be in conformity with the prevailing customs. For example – Child Marriage restraint Act[27] was passed decades ago and yet there are people in India marrying their young children at the age of minority. When it comes to the practice of

[26] Prof. B. Hydervali, Historical Understandings of Law, 9, 2, https://epgp.inflibnet.ac.in/Home/ViewSubject?catid=20

[27] Child Marriage Restraint Act, 1929, No. 19, Act of Parliament 1929 (India)

 [ISSN 2581-5369]

giving dowry as a custom – People have been doing it in parts of India despite legislation to stop the practice.[28] Puchta believed that for a legislation and custom both hold value to be the sources of Law.

VII. CONCLUSION

Thus, it can be concluded that although Historical branch of Jurisprudence was not seen as a separate branch of legal theory until a few centuries ago and it was carved out as a new Legal theory of Jurisprudence in the debate between Natural law and Positivist Law. Thus as of now – **Hypothesis stands true that "Historical Approach to Jurisprudence is independent of other schools of Jurisprudence."** It has had a systematic growth over years and as per Savigny – First through Political element and then by Technical element through lawyers. He also believed that national character has a great influence on Laws of the nation. As per Maine, Development of Law went through four stages and as per Montesquieu Natural theory led to the development of Positivist Law and how laws need to be connected to the climate, religion, financial conditions and likewise of the people in the country. He has been criticized by Sir Maine for being in "speculative delusion". The work of lawyers and jurists is considered more important than legislatures as it is the last stage in development of law and they go into the minute details and add "Technical element" as per Savigny. As per Maine historical pattern have been repeated and International Law also known as "Law among Nations" is nothing but derived from old Roman Laws. The writings of these great Jurists have had a lot of influence on constitutions and in thought process from people around the world. They have played an active role during French Revolution and framing of American Constitution. Puchta as a disciple of Savigny has also tried to modify thoughts of Savigny and add the role of legislation in conformity of custom for a good law to be formed. One more striking feature found in writings of these great Jurists is the fact that they have relied heavily on Ancient Roman Laws. Was there never a law prior to Ancient Roman Laws or have our historians not been able to trace it down still remains a pertinent question. As much advancement goes ahead. We will be able to find more traces of our past and the history. Who knows there could come a finding of laws on which Ancient Roman Laws itself were based. However, The beauty of writings of these great Jurists remains in the fact that they have not claimed it to be the earliest law but have merely used it as an example and have generalized the basic concepts of their theory to meet expectations of the upcoming future. The commonality between all of the Jurists was that they found answers and development of modern legal system as an organic and developing

[28] Dowry Prohibition Act, 1961, No. 28, Act of Parliament 1961 (India)

 [ISSN 2581-5369]

process based on Historical pattern and origin. Thus, As per propounders of Historical approach it can be said that – Law is nothing but a process and result of organic and systematic growth over the course of history.

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