ANALYTICAL SCHOOL AND ITS RELEVANCE IN THE MODERN WORLD

Aditi Pandey, Alliance University

ABSTRACT:

Analytical School was a school which had a lot of impact and changed the way law was looked at by the general public. Before this school came into prominence, the Church and the Kings were the one in control and their sayings were the one which were taken into consideration and considered as law. The divine or natural law governed the people, where it was assumed that people were inherently good and that sayings of the God were absolute and cannot be questioned. When the various jurists questioned this idea, this positivist school of jurisprudence was the one which laid down the various definitions and dimensions of law which are still considered as the basis of many statutes, law and legal research till date. This paper attempts to look at the history as well as ideas laid down by the most prominent thinkers of this school in an attempt to see how relevant it is in the modern times. There theories are also subject to some criticism, this paper will also analyse them to see what extent of credibility they hold when the current legal system is taken into consideration.

Keywords: Positive Law, Primary and Secondary Rules, Pure Theory, Austin and Bentham

INTRODUCTION:

Jeremy Bentham was the first to talk about the utilitarian and positive law theory in his book "The Limits of Jurisprudence Defined". Although he was the founder of this particular school of thought, Austin who was his disciple and student is regarded as the father of this school as he was the one who carried this idea forward, codified it and implemented in the minds of the people. Other jurists such as Salmond, Holland, H.L.A Hart, Gray and Hans Kelsen are also acknowledged for their contribution in this particular school.

In the 19th Century the positivist movement came into rise as the ideologies of the Natural School were being questioned and were not in consonance with the dynamic times. As Prof Dias observes, this school considers law 'as it is' and not 'as it ought to be'. The main objective of this particular school was to analyse law as it actually exists in the legal system, without taking the morality and natural aspect into consideration. The thinkers of this school gave importance and highlighted the power of the sovereign in determining what the law is. Hence it was also called as the imperative school of jurisprudence. The legal maxim '*Ubi civitas ibi lex'* meaning where there is State there will not be anarchy can be used to describe the principle this school operates and believes in. The reason why this school does not take morality or justice into consideration is because they believe that law should be objective and if they are included it will not be objective anymore.

Analytical School also attempts to define the words and phrases which have a relevance in the legal field and can help to determine and portray a relationship between law and the State.

Following are the main jurists who have attempted to define law and laid down their own theories regarding the field of law:

1. JEREMY BENTHAM (1748-1832)-

Jeremy Bentham divided law into two parts i.e. the expository and censorial approach. Expository approach refers to what the law is, without its moral or immoral character and the censorial approach is concerned with the science of legislation and refers to what the law ought to be. He was one who was against the idea of judge made law and believed in the imperative theory where command of sovereign is considered as the law. This theory cannot be applied in

recent times as if we look at cases like *'Vishaka & Ors vs. State Of Rajasthan & Ors'*[1] where the judge made a law and gave guidelines with the objective to prevent sexual harassment faced by women at their work place. The judiciary is given more freedom nowadays as they are able to make laws relating to subjects the legislature doesn't have the time, knowledge or expertise to entertain and this can be seen under Article 50 of the Constitution which gives power to Supreme Court to make decisions which will be binding on the whole territory of India.

Bentham was also a supporter of the utilitarian theory which takes about pain and pleasure of the people where pain refers to 'all things that are bad or evil' and pleasure denotes 'everything that is good'. He believes that the competent authorities must make laws that bring pleasure and not pain to the community at large. Happiness is of importance but it is constantly evolving and is subject to change due to various factors such as:

- Intensity
- Duration
- Certainty
- Nearness
- Fecundity
- Purity
- Extent

Bentham believed that if people are given maximum happiness, they will contribute better to the society. He also agreed on the idea of having a Laissez-Faire State where people have a lot of freedom as well as freewill do whatever they want and consider best for themselves.

In his book 'Limits of Jurisprudence Defined' he states that when there is maximum happiness and maximum liberty, the society at large will be benefited as people have a better mind -set and will aim to present their best selves while making sure all their expectations are met as

[1] Vishaka & Ors v. State Of Rajasthan & Ors AIR 1997 SC 3011

well. According to Bentham justice occurs when there is social happiness and harmony among the people and certain rights of certain individuals are protected at the same time.

Bentham's idea was subject to criticism as it does not take into consideration the rights of individuals along with the society at large, there is no equilibrium maintained and there is a high chance of infringement of some kind taking place. The idea of Laissez-Faire sounds good only to a certain extent where, it is actually beneficial in the long run as some kind of restriction and limitation by an authority is required.

2. JOHN AUSTIN (1790-1859)-

John Austin is known as the father of this school of jurisprudence and his positive law and command theory was and still is the basis of many theories that have been developed by other jurists and thinkers over time. In his book 'The Province of Jurisprudence Determined' he defines law as "a rule laid down for the guidance of an intelligent being by an intelligent being having power over him". This supports the command theory where law can be defined as the command of the sovereign backed by some kind of sanction. This essentially means there is a superior political authority which is vested with the power to make their orders and commands the basis of human behaviour and binding on all the citizens.

Austin propounded the positive law theory which talks about how this particular individual law should be separated and not be influenced by positive morality and ethics. He also mentions the importance of considering law as it is and not law as it ought to be.

The imperative law theory developed by him separates law into two groups:

1. Law improperly so called-

This is the natural and universal law which is applicable and governs all the people of the society as a whole. It is quite vague and general in nature. This type of law was not recognized by Austin as he was a positivist.

2. Law properly so called-

This type of law is made by a superior authority and it is only applicable and binding on particular individuals or group of people. This is further divided into divine law which is made

by God and man made law which is made by the superior political authority. This positive law is more structured, defined and specific when compared to previous type of law.

The sovereign theory of law developed by Austin says that there are three elements which constitute to make the law i.e. Law = Command + Sovereign + Sanction.

Command refers to the orders and rules which had be laid down by the superior authority and was bound to be followed by all the inferior people under the control of this authority. Commands can be of two types: general and particular where general commands are for the society as a whole and particular commands are for a specific set or group of people.

Sovereign here refers to any individual or group of individuals who have the political authority to influence the behaviour and acts of the majority. They act as a source of law and are not bound by commands of authority higher than them. Sanction is any type of physical force which is used in the effective administration of justice. This follows the theory of punishment where if the command of the sovereign is not followed and law is violated, as a result there will be some kind of consequence imposed on the perpetrator.

Austin's theory is often criticised on the grounds that it is repetitive and caused a lot of confusion in the minds of people. Hart although being part of this school said that the division between law and morality is incorrect as in real life both them are interlinked and have a connection when they are applied. His theory rests on the fact that all the people are bound to follow the law made by the authorities as they fear punishment such as fine or imprisonment, in reality this might be the case only for some people and it is better not to generalise. Custom's which are the backbone and the roots of various statutes such as Hindu Marriage Act or Muslim Personal Law (Shariat) Act, is ignored by Austin in his experiment and theory about law.

Austin gives importance to parliamentary sovereignty, this is impractical and not applicable in India where judge made law also plays a major role in the working of the legal system. His theory also gives excess power to the sovereign which is not ideal and was restricted in the case of '*I.C. Golaknath and Ors. vs State of Punjab and Anrs.*'[2].

[2] I.C. Golaknath and Ors. vs State of Punjab and Anrs. 1967 AIR 1643

3. HOLLAND (1835-1928)-

Holland was a follower of Austin and he believed in the positive law theory which was propounded by the thinkers of this school. He believed that jurisprudence is the formal science of positive law having some kind of legal consequences and that "law is the general rule of external human action enforced by sovereign political authority". The law making usually does consider the public opinion and also attempts to predict what kind of consequences these rules might have on society in general. The rules of the law are the ones which govern the people and determine their behaviour as well as form the basis of their relations. Although Holland believed in the sovereign theory of Austin, he said in actuality the scope was much broader. He criticized what Austin said about jurisprudence being a particular science and said that the science of jurisprudence is general and applicable to all. This view can be applied in current times where laws of other nations are often taken into consideration and inspire the law makers in making of the law in another nation. If we look at Indian Constitution, various provisions such as fundamental rights, parliamentary form of government, DPSP have been taken from the laws and ideologies followed by other countries.

Salmond, Gray and Buckland critiqued the separation of particular science made by Holland and said that Austin was right in this matter. They all believed this separation was unnecessary and this opposition did not lead to any kind of valid conclusion. Buckland further stated that law and its philosophical aspect is not mechanical in nature and is bound to develop and grow over time. If we look at the judgment of *'Navtej Singh Johar vs Union Of India'*[3] or *'Shayara Bano vs Union Of India And Ors.'*[4], this criticism is apt because they are proof that what rules and ideas people followed have changed and need to be modified to fit the mindset of the general public. Dias and Hughes were against the idea of generalizing the idea of law as they believed it was more of a social structure that differs and upon the traditions, environment and population of a country. This is a valid criticism as what law may work for one place will not work for the other. For example the Indian Constitution takes its fundamental rights from the US Constitution, but the fundamental right to carry arms was not adopted. The Indian law makers considered the fact this right will not work and is capable of causing chaos in a diverse

[3] Navtej Singh Johar v. Union Of India AIR 2018 SC 4321
[4] Shayara Bano v. Union Of India And Ors. (2017) 9 SCC 1

and highly populated country like India where each individual has their own, strong opinion about certain subjects which can lead to clash of opinions.

4. SALMOND (1862-1924)-

Although belonging to Analytical School of Jurisprudence Salmond did criticise the view of the other jurists (to some extent) and also had ideologies of his own which differed in nature. Salmond opposed the concept of any king made law and gave a lot of importance to law made by the judicial authorities. In his book 'Jurisprudence or Theory of the law' he describes law as "the body of principles recognized and applied by the state in the administration of justice". This definition tells us that whatever the court deems as law should be considered as law and the acknowledgement of these rules by the court is essential in order for them to be considered as valid and binding on the general public. Jurisprudence as defined by Salmond's words is the science of the civil law. In this context civil law is the law of the land as operated and ordered by the courts, this includes any kind of official guidelines, precedents or statutes which have developed from the court while they were performing their function of administrating and providing justice to the aggrieved party. The courts will look into the facts and circumstances of each case along the evidence brought before them and analyse what kind of decision to make and if there is any need for them to intervene and alter the law for the greater benefit.

Salmond was of the opinion that law is not proper and valid unless it has been derived and received the ascent of the judged sitting in the courts of law. He also claimed that law can only shape and play a role in influencing the external behaviour of individuals. The internal mind set and consciousness of any person depends wholly on themselves and the law can only prevent them from acting upon any negative or violent thoughts which could arise in the minds of the people, this tells us that he does not take into consideration the idea of morality to a large extent.

Vinogradoff criticises the civil law theory stated by Salmond on the grounds that it makes the court exceed the power given to them. In general when the 'Doctrine of Separation of Power' is followed, the three organs of the government i.e. Legislature, Executive and Judiciary cannot intervene upon the sphere allocated to the other. Judiciary's main role is to interpret the law and when it is given power to make the law (which is the function of the Legislature) it contradicts the idea of separation of power and there is chance of arbitrariness and exceeding the capacity which is expected from them. Salmond's theory also did not take into account that

aspect of law such as custom and conventions which are not oart of and not made by any kind of courts or judicial bodies.

In India we can see some aspect of Salmond's theory as provided under Article 142 of the Constitution, where the Supreme Court is conferred with the power to pass any decree and have it enforced among the public. Although there is no express provision granting courts with the power, certain decisions taken by them such as '*Kesavananda Bharati ... vs. State Of Kerala And Anr'*[5] and *'Justice K.S.Puttaswamy(Retd) vs. Union Of India'*[6] are of such high importance and impact that it must be followed by all. As the Legislature does not have the time nor the expertise in certain area of law, many times the order of the courts act as the law when that particular matter is concerned.

Although court made precedents play an important in nations such as the United Kingdom where there is excessively common law, India being a mix of both civil and common legal system, gives priority to statutory and codified law which is made is by the Parliament.

Salmond's theory is the one which highlighted how law should be looked at the way it is and not how it ought to be.

5. H.L.A HART (1907-1922)-

Professor Herbert Lionel Adolphus *Hart* rose to prominence when he published his book "Concept of Law" in 1961 which criticised Austin's theory. He highlighted the importance of language to understand the science of law and also believes that a legal system consists of rules but there may be certain cases where there is a dispute between the meanings of these rules. Positive law theory says that there is a sovereign which gives a command and that command is backed by some kind of sanction or penalty. H.L.A Hart was against this idea as he believed this does not explain whether that command in general will apply to its framers as well, some authorities may not be answerable to the sovereign and it does not distinguish between habit and rule.

Hart's main objection with Austin's theory was that it did not take into account various imperatives and did not consider the external factors of a regulation, therefore making it vague

[5] Kesavananda Bharati ... v. State Of Kerala And Anr AIR 1973 SC 1461
[6] Justice K.S.Puttaswamy (Retd) v. Union Of India (2017) 10 SCC 1

and inapplicable. He believed in the idea of duty over coercion and said that the people will respect the sovereign as it a higher political authority and will follow the orders given by them as they have a sense of responsibility. He states that obligating and coercing people to not commit a crime is most likely not going to give them the expected result and that communication is the key to maintain control over the people.

H.L.A Hart states that "where there is a law, their human conduct is made in some non-optional or obligatory" and in and attempt to distinguish rule-governed behaviour from habitual behaviour he talks about primary and secondary rules. Primary rules lay down the norm, they tell citizens what to do and what not do. They are the basic, duty imposing rules. Secondary rules are those power conferring rules which give private or public bodies power to alter and modify the primary rules. There are some rules within secondary rules which are used to determine whether a legal system is valid or not. First is rule of adjudication where they can handle disputes that come before them, second is rule of change where they modify the law if needed and lastly is the most vital and important rule of recognition. This third rule is the criteria and determines the validity of the other rules. In an efficient legal system there should be both primary and secondary rules, where the former is followed by citizens and latter is followed by the judicial authorities.

Ronald Dworkin criticised this rules on the grounds that principles are a necessity for morality, justice and fairness. He said a proper legal system would have both rules and principles that govern the people. This criticism is valid on the ground as these principles have an overriding effect and can supersede these rules. In the case of '*Maneka Gandhi vs. Union Of India'*[7] the even though the Act allowed her passport to be taken as principle of natural justice this decision was considered arbitrary and hence she was given a chance to present her case.

Hart's primary and secondary rules can be seen in seen in Indian Constitution where under Article 32 and 226 courts have power to settle disputes which come before them and under Article 368 where the Parliament can ammend the law. This power is in limitation where they cannot alter the basic structure of the Constitution and the Supreme Court decides case to case what is included in the basic structure.

[7] Maneka Gandhi vs. Union Of India 1978 AIR 597

6. HANS KELSEN (1881-1973)-

Hans Kelsen was an analytical positivist who was regarded for his pure law theory. He came up with this theory as there was confusion in the field of law and the various legislations had resulted in some kind of inequality. This pure theory of law was uniform and universally applicable. In his book "Pure Theory of Law' he talks about law should be devoid of any social sciences or external factors such as ethics, morality, politics, sociology, etc.

Kelsen defined law as normative science where the rules and regulations are based on some kind of norms which have been laid down in the system, he was against natural law theory which talked about humans being inherently good and the divine law governed the people and influenced their behaviour. Norm here refers to any kind of direction that authorizes and validates a certain act. This can be seen in his definition that "law is the *body of norms which stipulates sanction".*

In addition, he also believed in the hierarchy of norms where one norm is derived and is valid on the basis of a higher and more superior norm. The most superior norm is known as the Grundnorm and every other law is based and cannot be contrary to this norm. In India, the Constitution is the Grundnorm as it difficult to lays down the principle way of behaviour among the people and provisions of every other statute like Indian Penal Code or Transfer of Property Act cannot be violative of the Constitution. As long as this Grundnorm is effective it is considered as valid and it is usually assumed that it is legitimate and trustworthy.

Kelsen agreed with Austin's positive law theory to a certain extent where he admits that law is command of the sovereign. He rejected the other parts of the theory on the grounds that there is a psychological factor between State and the people and also according to him, the law operates on norms and remedy is provided through the norm. For example: According to Kelsen's theory the reason committing theft is bad because it is laid down in a norm (IPC) and if someone commits theft they will be subject to the consequences provided in another norm. He believed in an objective consideration where we consider law as it is and not law as it ought to be.

This theory is subject to some criticism. Pure theory of law is not practically applicable as in some way or the other ethics, morality and justice have to be taken consideration into while

framing the law. The concept of Grundnorm is quite vague and it based on principles of history, ethics and morality itself.

CONCLUSION:

Analytical School has contributed a lot in the field of jurisprudence and law through the theories which have been derived and developed by the thinkers of this school. Each theory has its pros and cons and is subject to some sort of criticism. To conclude, some aspects of this school can be applied to the modern world but as they are quite extreme in nature applying these theories absolutely will not be practical and can cause a lot of disturbance in the legal system.

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