# A critical study on the contributions of sir henry maine

Whereas Savings and his followers invoke history in the name of tradition, custom and nation against the belief n conscious and rational law making, the second movement, which one might call philosophical histories, develops a definite legalphilosophyfrom the evolution of history. L The exponents of the historical school of Jurisprudence take social institution in their sequence with primacy to primitive legal institutions of society. Thus the school does not attach importance to relation of law to the state but gives primacy to the social institutions in which the law develops itself.

While the analytical school pre-supposes the existence of a well developed legal system, the historical school concentrates on the evolution of law from the primitive legal institutions of the ancient communities. The task of Historical school is to deal with the general principles governing the origin and development of law and with the influences that affect the law. The 19th century analytical positivism pioneered by Austin, Hart and Keelson in England described law as a coercive command issued by the sovereign devoid of moral or cultural values.

They regards law as a creation of arbitrary creation whose sanctions are not embedded in its historical past but emanate from the state authority. It treats law as a command of the state which the subjects are bound to obey, the disobedience of which would lead to penal consequences. The revolutionary ideas generated by positivistic legal thinking had a 1 Legal theory by W. Friedman, fifth edition, page no. 209, universal law publishing Co. Ltd. , New Delhi devastating effect as they failed to meet the needs of the people.

Consequently, it led to the emergence of new approach to the study of Jurisprudence based on history and historic conception of law. Historical Jurists banished ethical considerations from resurgence and rejected all creative participation of Judge and Jurist or law-giver in the making of law. They propounded the view that all universal ideal principles of by historical study. Frederick Pollock, one of the ardent supporters of historical school firmly believed that morals, as such were out of the domain of Judge or Jurist. It is, however, a different matter that even customs immemorial should not be opposed to morality.

Vic in Italyћ Nonentities in France, Burke in England and Hugo and Herder in Germany heralded a new era in the development of legal theory and viewed law as legacy of the past and product of customs, traditions and beliefs prevalent in different communities. The historical Jurists believe that law has biological growth and it has not evolved in an arbitrary and erratic manner. According to Sir Henry Maine, Nonentities (1689-1755) was the first Jurist who adopted historical method of pursuing the study of legal institutions and came to the conclusion that " laws are the creation of climate and local situations".

He did not probe further into the relationship between law and society but pointed out that law must keep pace with the changing needs of the society. Four Stages of Development of Law The supporters of historical school of Jurisprudence have traced the evolution and development of law through four major stages. They are as follows: l . Divine Law- In the beginning law originated from Themes, which meant the Goddess of Justice. It was

generally believed that while pronouncing the Judgments the King was acting under the divine inspiration of goddess of Justice.

Themes were the awards pronounced by the Goddess of Justice (Themes) to be executed by the King as a custodian of Justice under the divine inspiration. Thus the King was merely the executor of Judgment of God. The dooms of Anglo-Saxons pertain to this category of segments or commands. 2. Customary Law- Next, the recurring application of Judgments led to uniform, practice which crystallized into customary law to be followed in the primitive societies. The importance of customs as a source of law has been underlined by Sir Henry Maine when he observed that 'custom is to society what law is to state'. . Priestly class as a sole representative of customary law In the next stage of development of law, the authority of the King to enforce and execute law was usurped by the priestly class who claimed themselves to be learned in law as well as religion. The priestly class memorized the rule of customary law cause the art of writing had not developed till then. They applied and enforced the customary law. 4. Codification - The era of codification marks the fourth and perhaps the last stage of development of law.

With the discovery of the art of writing, a class of learned men and Jurists came forward to denounce the authority of priests as law- givers. They advocated codification of law to make it accessible and easily knowable. This broke the monopoly of priestly class in matters of administration of law. The ancient Hindu code of Mann, Hebrew Code, Solon's Attic Code, Twelve Tables in Rome, the codes of Hamburg etc. Re some of the examples of such law codes. Anthropological investigations into the nature of primitive and

undeveloped systems of law are of modern origin and might be regarded as a product of the Historical school.

Pride of place will here be accorded to Sir Henry Maine (1822-1888), who was the first and still remains the greatest representative of the Historical movement in England. It is not easy to place Amine's contributions to the theory of law. He began his work with mass of material already published on the history and development of Roman law by the German historical school, and he was able to build upon that and also to bring to bear a more balanced view of history than is found in Savings. Maine however went further. He was learned in English, Roman, and Hindu laws and also had the knowledge of Celtic systems.

In thisrespecthe parts company with the German historians. Instead of stressing the uniqueness of national institutions, he brought to bear a scientific urge to unify, classify and generalize the evolution of different legal orders. 2 Comparative method of study for the purpose of a project on law was found useful by the scholars of Historical school. The scope for comparative approach to study of law as immensely widened with the advances in legal literacy and exchange of legal knowledge between various countries.

To quote an illustration, the 42nd report (1971) of the Law Commission of India on the reforms in the Indian Penal Code drew heavily on the comparative material from several continental countries such as US criminal law and other sources. The material available for comparative study of law may vary in form and include Code, law books, reports of law reform

agencies and so son. The jurists made a comparative study of legal institutions of various communities to trace the evolution and development of law. They applied comparative method in the study of law with the object of enabling the legal philosophers to construct 2 Jurisprudence by R.

W. S. Aids, fourth edition, page no. 532, 533; Buttonholer & Co. , publishers Ltd. 1976 abstract theories of law or to assist the historian in tracing the origins and developments of legal concepts and institutions. The distinguishing feature of this comparison was that it did not consist of mere description of differences which existed between the concepts, rules, or institutions of the law under examination, but also probed more deeply into the matter with a definite purpose in view. This helped considerably in unification of divergent laws.

Thus the supporters of comparative method of law did not believe in mere compilation of information about concepts, rules, etc. But they also tried to analyses the variations in the existing laws within and outside the country in order to reform their legal system. Sir Henry Maine is considered to be the fore-runner of this approach of law. 3 It is Sir Henry Amine's work which stands out as the most important and fruitful application of comparative legal research to a legal theory inspired by the principles of historical evolution. Approaches to the study of law, and history in particular, which was destined to bear abundant fruit in the years to come. 5 Studies on Jurisprudence and legal theory, by Dry. N. V. Appearance; page no. 39, fifth edition, central law agency publication Legal theory by W. Friedman, fifth edition, page no. 214, Universal law publishing Co. , Ltd. New Delhi 5 Jurisprudence by R. W. S. Aids, fourth edition, page no. 533 SIR HENRY

MAINE (1822-1888) Sir Henry James Sumner Maine born on August 15, 1822 at Roxbury in Scotland, took hiseducationin the University of Cambridge and Joined as professor of Civil Law in that University in 1847.

While professor of law at the University of Cambridge (1847-1854), Maine also began lecturing on Roman law at the Inns of Court, London. These lectures became the basis of his " Ancient law: It's connection with the Early History of Society, and it's relation to Modern Ideas (1861)", which influenced both political theory and Anthropology, the latter primarily because of Amine's controversial views on Primitive law. To trace and define his concepts, he drew on Roman law, Western and Eastern European legal systems, Indian law, and Primitive law.

Although some of his statements were modified for invalidated later research- Ancient law is noted for its general lack of reference to authorities and itsfailureto cite supporting evidence for its conclusions- his study helped to place comparative jurisprudence on a sound historical footing. A member of the Council of the Governor General of India (1863-1869), as a successor of Lord Macaulay, Maine was largely responsible for the codification of Indian law. He studied ancient law of India and drew a comparison between the Indian law and the laws of western societies.

In 1869 he became the first professor of Comparative Jurisprudence in the University of Oxford and he occupied the chair till 1877. Thereafter, he held the distinguished post of the Master of Trinity Hall, Cambridge until shortly before his death in 1888. Among other works of Maine, his books entitled Village Communities', lectures on the 'Early history of Institutions' (1875), a

sequel to his ancient Law, 'Dissertation on Early Law and Custom' deserve special mention. Maine was the recipient of remarkable number of honors, medals and distinction. His contributions to historical jurisprudence are so great that he is labeled as 'Social Darwinist' for he envisaged a social order wherein the individual is finally liberated from the feudalistic primitive Onondaga. Amine's Views on Development of Law One peculiar feature of historical method in the context of study of law is that it is not confined to pure law. Even though the material directly under study may be legal, the factual material that comes to light may transcend the exclusive legal field. It is so, because social and legal factors cannot always be reduced to water tight compartments.

Any appraisal of the precise reason for a particular law necessitates special attention to the effect of relevant social, physical, demographic and ideological variables. This view finds supports in the writings of Sir Henry Maine who lived that historical research served as a useful tool to make the present more understandable. Sir Henry Maine, through his comparative researches came to a conclusion that the development of law and other social institutions has been more or less an identical pattern in almost all the ancient societies belonging to Hindu, Roman, Anglo-Saxon, Hebrew and Germanic communities.

Most of these communities are founded on patriarchal pattern wherein the eldest male parent called Pater familial dominated the entirefamilyincluding all its male and female members, children and slaves as also the property. The word of the Pater familial was law to them, which they were supposed to follow. There were, however, some communities which followed matriarchal

pattern in which the eldest female of the family was the central authority to manage all the affairs of the family.

It is because of his kinship, namely bold relationship with the family that a person acquired status. Thus the law of person was to be determined on the basis of his status. In ancient societies, the slave, servant, ward, wife, citizen etc. All symbolized statuses which the law recognized in the interest of the community. According to Maine, Pater-familiar constituted the lowest unit of primitive communities. A few families taken together formed the Family-Group which consisted of union of families.

An aggregation of families constituted Gene which in turn led to the formation of tribes. A collection of tribes formed the community which Maine termed as commonwealth. It was in this manner that the early primitive societies evolved, their relation being regulated by the law of status which was also called as law of persons. Obviously, the individual member of the family had no individual existence than his status as a son, wife, servant etc. s the case may be. Similarly, servants and slaves had no rights in the early law.

LaWs Development through Legal Equity and According to Henry Maine, when a primitive law is embodied in a Code, there is an end o its spontaneous development and such communities are static societies. Therefore, if certain changes are desired in the law, they have to be effected deliberately with the conscious desire of development. The societies which continue development of law in this manner are called progressive societies by Maine. There are three methods by which the progressive societies

develop their laws. They are (1) Legal Fictions, (2) equity, and (3) Legislation. 1 .

Legal Fictions - Legal Fictions change the law according to the changing needs of the society without, however, making change in the letter of law, Maine defines 'legal fiction' as " any assumption conceals or effects to conceal the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified". According to Sir Henry Maine, fiction is a device to extend new rules to old situations, to new circumstances with a minimum of intellectual effect. In his opinion, a legal fiction is a very useful agency of development of law to suit intricate and nutty situations.

A legal fiction pre-supposes certain assumptions made on the basis of which the law assumes certain things to exist which do not exist in reality and thus adopts itself to new circumstances. 2. Equity - Equity consists of those principles which appeal to the conscience ofhuman being. These principles were invoked to remove the defects existing in the common law in England. The rigidity of common laws Judges forced people to approach the King for Justice. The King entrusted the task of administration of Justice to the Chancellor who was also the head of the Exchequer.

Though not learned in law, the Chancellor helped in the administration of civil Justice through principles of justice, equity and good conscience. In Rome, similar functions were performed by Praetor who tried to remedy the deficiencies in the existing civil law. Thus Henry Maine defines Equity as, " a body of rules existing side by side of the original common law, founded on

distinct principles and claiming incidentally to supersede the common law by virtue of a superior sanctity inherent in those principles".

In course of time, equity became a system of law which reached maturity and impoliteness and finally the Judicature Act, 1873 amalgamated the common law courts and the chancery courts (I. E. Equity courts) in the High Court of Justice and it was provided that in case of conflict or variance between the law of equity and the common law, the rules of equity were to prevail. The property legislation of 1925 in England cause Equity to go a second transformation as it brought about a complete fusion of the systems of common law and equity into one integrated system of law.

The origin of Equity law can be traced back to the 13th century when traditional hat time suffered from three main defects, namely, (1) absence of remedy in certain cases; (2) inadequacy of remedy; and (3) excessive formalism. These defects were sought to be removed by three Jurisdiction by equity law namely, (1) Exclusive Jurisdiction, (2) Concurrent Jurisdiction, and (3) Auxiliary Jurisdiction of equity. The origin of the concept of trust, appointment of receiver to administer property of the deceased etc. Ell under exclusive Jurisdiction which provided relief to divorced women and protected the rights of inheritance of the children of the deceased person for which there was no remedy available under the common law. The remedies of the specific performance of contract, injunction etc. Came under the concurrent Jurisdiction of equity law which provided relief in matters where, a relief though available under common law, was inadequate. The examination of witnesses on commission set off (I. E. Settling different claims of same parties to litigation in a single suit) etc. Re some of the instances of

auxiliary jurisdiction of equity which sought to mitigate the rigors and rigidity of common law due to complexity of procedure. Thus it is evidently clear that equity came to supplement the common law and not to supersede it. 3. Legislation - Legislation is the most effective method of law-making. It is considered to be the most systematic and direct method of introducing reforms through new laws. The power of the legislature to make laws has been widely accepted by the courts and the people all over the world.

Legislation is the most powerful instrument of legal reform, and so great is its superiority over other methods of evolution of law that the tendency of 1 1 advancing civilization is to acknowledge its exclusive claim, and to discard the other sources as relics of infancy of law. 7 Movement of Progressive Societies from Status to Contract With the march of time the institution of Pater-families withered away and now rights and obligations were dependent on individual contracts and free negotiations between persons.

This led to disintegration of the family system and emergence of contractual relation between individuals. In other words, now the individual could take final decisions himself without depending on the head man of the family. The Banishment doctrine of Individual freedom freed slaves from the bondage of their master and now they could have rights and obligations like any other person. Thus emerged a free society with freedom of individual in various spheres of life.

The freedom of individual in economic field has been called as doctrine of laissez fairer which struck a blow to the notion of status as the basis of law. These changes in the pattern of societies led Sir Henry Maine to conclude

that 'movement of progressive societies has hitherto been from status to contract'. In India also emancipation of women from the domination f males, freedom available to individuals in social, economic, and political spheres of life, improvement on the condition of labor and workers etc. Evinces that there has been a shift of emphasis from status to contract in modern times.

The transformation of English as well as Indian society from feudalistic pattern of individualistic set up, has brought in its wake a radical change in the status of servants, agricultural workers etc. The incapacitates of Hindus in codification of Hindu personal laws in 1955-56. 8 Reversal of Trend from contract to status It must, however, be stated that with the advance of time and due the impact of industrialization, arbitration and modernization, new problems ofpoverty, unemployment, hunger, ignorance, disease etc. , have cropped 7 Studies in Jurisprudence and legal theory by Dry. N. V. Appearance, page no. 0 to 44, fifth edition, central law agency publication In modified Hindu law Kart of the family who was the eldest male member of the family, dominated his authority but the codification of Hindu law has done away with thediscrimination, inequality and subjugation of women liberating them from the domination of men. The new concepts of liberty, equality, freedom and individualism symbolize movement of progressive Indian society from status to contact. Up giving rise to inequality between individuals and group within society. Consequently, there came a counter current of reversal from contract to status in the life time of Maine himself.

It was realized that the idea of freedom of contract between powerful capitalist and starving labor class led to catastrophic consequences resulting in exploitation of workers. This led to the emergence of Trade Unionism. The

workers now formed their associations and instead of individual freedom of bargaining their wages and facilities, their Trade Unions had the power of group bargaining. That apart, several labor welfare legislation such as the Minimum Wages Act, Factories Act, Trade Unions Act, Workmen's Compensation Act, Employees Liability Act, Industrial Disputes Act, Payment of Bonus Act, Bonded Labor (abolition)

Act, Contract Labor (Regulation) Act, etc. Have been enacted to improve the service conditions and bargaining capacity of workers in order to free them from the unscrupulous industrialists and capitalists. With the increasing role of the state in a welfare state, it has assumed the functions of a regulator to secure a social order based on Justice, equality, liberty and fraternity. These progressive welfare measures have forced upon the individual worker a new kind of status where he does not bargain individually but does so collectively through associations or unions.

Commenting on this reversal from interact to status, the Chief Justice of the Bombay High Court in Parka's cotton mill Ltd. V. State of Bombay, interracial remarked: " We must not forget that we are no longer living in the age of laissez fairer and the relation between employer and employees are no longer solely governed by the principles of contract. Contractual rights and liabilities are now subject to the principles of industrial law and also principles ofsocial Justice. " With the changing role of the states, its functions have also radically changed. Now there is greater interference of the state in the individual's activities. Even the