NOSHIRVAN H. JHABVALA

THE ELEMENTS OF JURISPRUDENCE

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JURISPRUDENCE

By

NOSHIRVAN H. JHABVALA, B.A., LL.B.
Advocate (O.S.), High Court, Mumbai

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PREFACE TO THE TWENTY–THIRD EDITION

We are happy to place before the student community the fully revised twenty-third edition of this popular book. In this book, an attempt has been made to present a rather abstract subject in a more concrete, practical and illustrative format.

University Questions have been indicated at appropriate places in the margin.

We are confident that this edition will continue to enjoy unrivalled popularity among law students.

— Publishers

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INTRODUCTION

[**NOTE.**— Jurisprudence deals with law from the *philosophical point of view*, and is therefore sometimes described as an abstract subject which is difficult to grasp. This is, however, a misconception. No doubt, this subject is more "abstract" than, say, the law of contracts *or* the law of torts. Nevertheless, Jurisprudence *does* have a practical application, inasmuch as it may be said to be the foundation of *all* branches of law.

Students are advised first to go through the book cursorily before beginning its study. They are also advised to study the first three Chapters *after* studying a few other Chapters of the book.]

[B. U. = Bombay University. P. U. = Pune University.]

THE SCIENCE OF JURISPRUDENCE

'Jurisprudence' defined

Jurisprudence is a subject which materially differs from other branches of law to be found in a legal syllabus. Most other legal subjects involve a study of legal principles, which are then to be applied to concrete, practical situations. In Jurisprudence, the task at hand is *not* to derive laws from authorities, and apply them to given problems; rather, the concern is to reflect on the nature of legal rules and on the true meaning of legal concepts. Thus, whereas the law of contracts deals with the rights which one party to a contract has against the other, in Jurisprudence, one studies the *underlying meaning* of the term *'right'* and the different *kinds* of legal rights.

Discuss the nature, purpose and value of Jurisprudence.
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Jurisprudence is thus 'the study of fundamental legal principles'. "*Juris*" in Latin signifies *legal*, and "*prudentia*" means *skill or knowledge*. Thus, in a very wide sense, the term connotes the basic knowledge of law. *Holland* describes Jurisprudence as "the formal science of positive law", and *Allen* as "the scientific synthesis of the essential principles of law".

Discuss the nature and scope of Jurisprudence.
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(a) In a general *sense*, the term *"jurisprudence"* includes the *entire* body of legal doctrines. In this sense, it includes knowledge of the law. But *law* here means *civil law*, the law of the land. Jurisprudence, in this sense, is of *three kinds* :

What is Jurisprudence ? Analyse the scope of its subject-matter.
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(1) *Legal exposition*, the purpose of which is to set forth the contents of an actual legal system as existing at any time.

(2) *Legal history*, the purpose of which is to set forth the historical process whereby any legal system came to be what it is or was.

(3) The *science of legislation*, the purpose of which is to set forth *the law as it ought to be*. This aspect of jurisprudence deals with the *ideal* future and purpose of law.

What is meant by jurisprudence ? Explain its relevance to the administration of justice.
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(b) Jurisprudence in *the technical sense* is different from jurisprudence in the generic sense. In the *technical sense, it is the science of the first principles of the civil law.* It deals *not only* with the outlines of the law, *but also* with its *ultimate conception.*

Three branches of Jurisprudence

Jurisprudence, in the technical sense, is divisible into the following *three branches* :

(1) Historical Jurisprudence.— The Historical School of Jurisprudence deals, *in the first place,* with the general principles governing the origin and the development of the law, and with the influences that affect the law. It deals, *in the second place,* with the origin and development of those legal conceptions and principles, which are so essential in their nature as to deserve a place in the philosophy of law.

(2) Analytical Jurisprudence.—Analytical jurisprudence deals with the present. Its purpose is *to analyse the first principles of the law* as they exist in a legal system.

(3) Ethical Jurisprudence.— The Ethical *or* Philosophical School of Jurisprudence deals with the first principles of the ethical significance and adequacy of law. It expounds the first principles of law *as they ought to be.*

An analysis of these three branches of jurisprudence represented by the three schools is given below. However, *three more schools,* which are of more recent origin, will also be considered, *viz.,* (4) the Comparative School, (5) the Sociological School, and (6) the Synthetic School.

The six schools of Jurisprudence

(1) The Historical School of Jurisprudence.— The *task of* the historical school *is to deal with the general principles governing the origin and development of law, and with the influences that affect the law.* This school points out to the history of the first principles and conceptions of the legal system. From this school of jurisprudence, one can know the *origin, sources,* and *development* of law, together with the origin and the development of different societies.

Explain the historical theory of law.
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According to Sir Henry Maine, *Montesquieu* may easily be considered as the *first jurist* of this school, who in his *'Esprit des Lois'* (Spirit of the Laws) has made a very great contribution to human knowledge. According to him, all laws should have the basis of historical observations. His *only defect* was that he paid too much importance to the accidental and external causes in the framing of the laws, and thus failed to see the importance of the qualities of the human nature or race which go to make and develop the law. Even then, Montesquieu's contribution to this school is great, for other jurists after him utilised the observations and have approached the problem in its correct perspective.

The German Historical School followed the empirical method, and from historical observations, formulated legal principles. According to *Hugo,* law is *not* the result of legislation; nor is it a command as the Austinian School makes it out to be; nor is it a matter of social contract, — *but* it is the *result of the habits and ways of the people themselves, acquired through necessities, accidents and other pleasant and unpleasant processes.* It is only when a community accepts a rule or command for a long period, and that rule becomes a recognised habit of the members to accept it as law,- that law in its proper sense evolves.

According to *Savigny*, "The organic evolution of Law, with the life and character of a people, develops with the ages; and in this it resembles language. As in the latter, so in the Law, there can be..... no rest; ..... there is always movement and development; Law is governed by the same power of internal necessity as simple phenomena. Law grows with a nation, increases with it, and dies at its dissolution, and is a characteristic of it". *Law thus becomes the result of the genius of the people.*

James Carter, an American Jurist, maintained that law existed even prior to political consciousness, and hence, it *cannot* be created by human agency and *cannot* be changed or abrogated by human action. In short, he identified law with *custom*. The Historical School thus made *history* as important as *reason* in the development of law. Its only *defect* is that it has identified law with custom, which is actually *not law*, but, at best, *quasi-law*.

(2) *The Analytical School of Jurisprudence*.— The Analytical School is positive in its approach to the legal problems in the society. It is *not* concerned with the ideals, and takes the law as given by the State, whose authority it does not question. The legal system is thus made water-tight against all ideological instrusions, and all legal problems are couched in terms of legal logic. Its purpose is only to analyse the first principles of law— without reference either to their historical origin or development or to their ethical significance or validity.

The Analytical School has made several important contributions, which can be summarised as follows :

1. Positive law and ideal law have been kept strictly distinct. It has thus analysed the concept of civil law and established its relationship with other forms of law.
2. All positive law is deduced from a clearly determinable law-giver, *e.g.*, a sovereign.
3. This school also lays down the essential elements that go to make up the whole fabric of law, *e.g.*, State sovereignty and the administration of justice.
4. It also takes into account the *legal* (as opposed to the historical) *sources*, which are the sources from which the law proceeds. The most important legal sources are *legislation*, *judicial precedents* and *customary law*. The Analytical School investigates the claim of each of these sources from which law proceeds.
5. It inquires into the scientific divisions of the whole fabric of law, *i.e.*, how law has come to be divided into different departments and the *reason* behind these divisions.
6. It also analyses the concept of legal rights, together with the division of rights into various classes, and the general theory of the creation, transfer, and extinction of rights, together with the investigation into the theory of legal liability — both civil and criminal.
7. This school also considers such other allied problems which directly or indirectly affect the fabric of law, such as property, possession, obligations, contracts, trusts, incorporation, intention, motive and negligence, and many more which deserve our attention.

8. It favours codification of law, and regards law as a conscious enactment or command with legal sanction behind it.

The works of *Bentham*, *Austin* and *Salmond* are all based on the analytical school of jurisprudence.

(3) *Ethical or Philosophical Jurisprudence.*— This school seeks to investigate the *purpose* for which a particular law has been enacted. It is *not* concerned with its historical or intellectual content. In this approach, the purpose and end of law is the maintenance of peace and order with the help of the physical force of the State, *i.e.*, with the theory of justice in its relation to law. Ethical jurisprudence points to the reasonableness and soundness of law, and through law, of justice.

This school of jurisprudence seeks to answer such questions as "What are the principles on which the existing law is based ?", "Are these principles in keeping with rules of natural justice "?, "If not, how can the position be improved" ? *etc.*

This School of Jurisprudence essentially deals with the following matters :

(a) The concept of law,–and hence of justice.
(b) The relation between law and justice.
(c) How justice is maintained in a society through its system of law.
(d) The distinction between law and morality,–and how each can contribute to the ends of justice.
(e) The fundamental legal concepts and principles which have ethical significance.

The greatest contributors to the Philosophical School were *Bacon, Grotius, Spinoza* and *Kant.*

Under ethical jurisprudence, one therefore comes across *the general theory of justice in its relation to law.* It is *not* concerned with the detailed criticism of the actual legal system, *or* the detailed construction of an ideal legal system, *or* with the science of legislation.

It does *not* follow, however, that in studying the analytical aspect, the ethical or the historical content of law is completely excluded. As *Salmond* rightly says : "For the total disregard of the ethical implication of the law would tend to reduce analytical jurisprudence to a system of rather arid formalism; and the total disregard of historical origins and development would be inconsistent with the adequate explanation of those principles and conceptions with which it is the business of this science to deal."

The Ethical School of Jurisprudence is prevalent throughout Europe, while in England, it is the Analytical School that predominates.

(4) The Comparative School of Jurisprudence.— The Comparative School of Jurisprudence is essentially concerned with the comparative study of the systems of jurisprudence in the different countries of the world. By acquiring the knowledge of the legal systems of other countries — civilised or uncivilised—one gets a better insight into the legal system of one's own country. The Germans have successfully adopted this method. *Ihering*, as a representative of this school, regards laws as an efficient means to an end, which should be for the good of humanity.

According to *Salmond,* what passes as comparative jurisprudence is *not* a separate branch of jurisprudence, which is co-ordinate with the analytical, historical and ethical jurisprudence. It is merely *a particular method* of that science in *all* its branches, *i.e.,* a study of the resemblances and differences between different legal systems. One system of law is compared with another, either for the purpose of *analytical jurisprudence,* in order to comprehend the conceptions and principles of each of those systems, or for *historical jurisprudence,* in order that one may better understand the course of development of each system, or for the purpose of *ethical jurisprudence,* in order that one may better judge the practical merits of each of them. Otherwise, apart from such purposes, the comparative study of law would be futile.

(5) *The Sociological School of Jurisprudence.*— This school is comparatively modern, and it devotes itself to the *study of law as a social phenomenon,* and tries to examine the consequences of law on human beings in civilised societies. To understand the scope of this school, one has to examine how sociology can influence the legal system in a particular country.

By 'sociology' is meant the study of man in society, and in studying man, the sociologist studies the law, *not* as it is understood by the lawyer in his professional capacity, *but* in so far as law actually governs the behaviour of an ordinary citizen.

Sociological jurisprudence deals with the study of social consequences of law and with the observation of sociological phenomena. In its important branch called *Criminology,* Sociological Jurisprudence studies the phenomena of crime, the mind of the criminal, the causes of crime, the remedies therefor, the effect of punishment, and so on.

(6) *The Synthetic School of Jurisprudence.*— The Synthetic School is *the most recent school of jurisprudence* founded in India in 1955 by an eminent Indian jurist, *Dr. M.J. Sethna.*

This school of jurisprudence attempts to arrive at a harmonious blend of all the other Schools of Jurisprudence, and, in the words of its founder, Dr. Sethna, "..... the jurists of the twentieth century should turn their attention more and more to synthetic jurisprudence..... It is no use regarding jurisprudence as merely analytical or merely historical. Jurisprudence should be, at the same time, analytical, historical, comparative, philosophical and sociological."

This approach of Dr. Sethna is seen in his *synthetic definitions* of legal terms like "law", "crime", "person" *etc.,* and in his exposition of the Subjective-Objective Theory of Negligence. (See the Chapter on Negligence.)

(A further discussion of the *Synthetic School* will be found in the next Chapter.)

Jurisprudence and Sociology

Jurisprudence is the study of the entire body of legal principles. According to Salmond, *jurisprudence* is the knowledge of law. In this sense, all law books can be considered as books of jurisprudence. Among the

phenomena studied by sociologists is law, and it is here that sociology is intimately connected with jurisprudence. Jurisprudence is a science of law. But the attitude of the sociologist is different from that of the lawyer. The lawyer, in his professional capacity, is concerned with the rules that man ought to obey. He is *not* interested in knowing how, and to what extent, these rules actually govern the behaviour of the ordinary citizen. A text-book of the law of torts or contract states the rules relating to torts and contracts, but does *not* attempt to state *how often* torts and breaches of contract are committed. The lawyer is essentially interested in those who frame the rules and execute the same in a given society of which he is an active member.

"Sociological jurisprudence provides a solution in case of conflict of interests." Discuss.

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There is a separate branch of sociological jurisprudence which is based on sociological theories, and is essentially concerned with the influence of law on the society at large, particularly social welfare. The sociological approach to the legal problems is essentially different from the approach of the lawyer. Taking the aspect of crime in society, one finds that the causes of crimes are, to a very great extent, sociological, and therefore, in order to understand the *pros* and *cons* of the commission of crime in society, one *must* have a knowledge of society.

Sociology has further helped jurisprudence in its approach to the problem of prison reforms, and, has suggested ways and means of preventing social wrongs. Until very recently, judges and legislators had to gauge the effect of punishment in general, and also of such specific punishments as flogging and hanging, with popular opinion or private impressions as their only guides. Now, very precise data is available through the efforts of criminologists, who use scientific methods (case-work and statistics) to determine the actual effect of punishment upon the incidence of crime in the community, as well as the effect of various methods of dealing with crime.

Every law-reformer is necessarily interested in the sociology of law. A very recent example in this direction is the wide-spread indignation against *hanging* as the extreme form of punishment and its consequent abolition in several countries of the world. Experts have now compiled statistics to examine whether abolition of this extreme penalty has any effect -- desirable or undesirable -- on crime in those places where it has been abolished. An even more recent instance is the introduction of punishments like flogging and maiming in some so-called "civilised" quarters of the world.

From the above discussion, it will be seen that behind all legal aspects, there is something *social*. The causes of crime are partly sociological, and a sufficient understanding of sociology will enable legislators in formulating prison reforms and better means and instruments for the prevention of crimes. Topics like motives, aims and theories of punishments and the efficacies of the various types of punishments and Dr. Sethna's theory of compensation 'for drying up the springs of criminal desire' all draw considerable assistance from the science of sociology. The birth and growth of sociology has, therefore, given a new orientation to the science of jurisprudence.

The Sociology of Law

Sociological Jurisprudence should be carefully distinguished from what is called the *sociology of law.*

Sociology of law differs mainly from sociological jurisprudence in that "it attempts to create a science of social life as a whole, and to cover a great part of general sociology and political science." Here, the emphasis is on *society,* whereas sociological jurisprudence concentrates on *law,* and considers society in relation to law. The sociology of law is thus a branch of sociology dealing with law and legal institutions in the light of sociological principles, aims and methods.

Paton, in his *Textbook on Jurisprudence,* is of the view that the relationship between law and social interests may usefully be studied by jurisprudence for *three reasons. Firstly,* it enables us to understand better the evolution of law. Giving an analogy, he says that the attempt to explain the law on a purely logical basis (to the exclusion of social interests) is equivalent to interpreting a graph of the vibrations in a speeding motor-car, without taking into account the surface of the road.

Secondly, although man's view of ethics and of his social needs have changed over the centuries, nevertheless, the element of human interest provides a greater substratum of identity than does the logical structure of the law. Thus, although German law adopted the *subjective theory* of contract, and English law has preferred an *objective approach,* yet each has been forced to adapt its theoretical basis to the needs of modern commerce.

Thirdly, although the view of certain jurists (like *Kelsen)* that the jurist should not discuss the question of social interests, is attractive, inasmuch as it encourages an impartial approach to jurisprudence, yet, such a study *is* essential to the lawyer to enable him to properly understand the legal system.

Jurisprudence and Economics

Economics is the science of wealth, and as such, has a very close relationship with the science of law. Behind many crimes, it has been found that *economic crisis* is very often the *main reason.* It is the fundamental right of every individual to live well, and if he is denied that right, he resorts to all sorts of anti-social activities. So many economic problems arise from day to day, and the law-giver is called upon to solve these problems. The aim of economists is to improve the standard of life, so that the people at large can develop their personality. Jurisprudence teaches the legislators how to make good laws for promoting social and economic welfare.

Both economics and jurisprudence, therefore, aim at the betterment and the greater good of the citizens in a particular society. Thus, there are laws relating to workmen's compensation, factory laws, law limiting hours of work (and thus giving sufficient leisure to the working–class people), laws relating to labour, insurance, maternity welfare, bonus, leave facilities and other concessions given to workers, so that they may feel that they have an equal right of enjoying their lives to their own satisfaction. Likewise, there are also laws for the benefit of poor agriculturists, *e.g.,* Agricultural Debtors Relief

Acts, the Zamindari Abolition Acts, Acts preventing fragmentation and sub-division of agricultural holdings, and Acts for the regulation of agricultural labour. Jurisprudence, as a science of law, is therefore intimately linked up with the science of economics. *Both help each other in furthering the welfare of the society.*

Jurisprudence and Psychology

The application of the psychological clue to the riddles of human society has become the fashion of the day, observes *Earnest Baker.* It must be recognised that no human science can be discussed properly unless one has a thorough knowledge of the human mind. One must have a proper perspective of the science of psychology, in short, of human nature.

Psychology has been defined as a science of mind and behaviour, and as such, is very closely related to jurisprudence, that is, the science of law. In the study of criminal jurisprudence, there is a very great scope for the study of psychological principles in order to understand the criminal mind behind the crime. What is it that makes a criminal ? What is a criminal personality ? Why are crimes committed in a particular society ? How does the human mind work ? Is it mere pain that deters, or is it mere pleasure..... wicked pleasure, that goads the man to commit a crime ? Is it the pleasure-pain theory *or* is the purpose-motivation theory that is the real cause of crime ? Why should we have punishments at all ? Do these punishments deter a person from perpetrating a crime ? All these are very interesting and fruitful questions in which psychology and jurisprudence are closely inter-linked, so that each helps the other in solving the problems of crime in society.

In criminology, psychology always plays a very important part. Understanding the criminal and fathoming into the deep recesses of his so-called "criminal mind" is an important part of the lawyer's duty. To a law-abiding citizen, laws are essential, and cannot be considered to be something super-imposed against his will. In fact, laws may be considered as the will of the people. Therefore, laws must be formulated in such a way that they exhibit the rational and the social nature of man. And this understanding of human nature involves a knowledge of psychology.

It is the duty of the law-giver, therefore, to understand men, and *not* to pass judgments and say that men ought to do, or ought not to do, a particular thing. Psychology can help the law-maker considerably in the approach to the problems, of not only *making* the law, but also of *executing* it. At the same time, it must be noted that psychology has its own limitations, and the law-maker must, therefore, be very cautious in considering psychological clues for the solution of legal problems.

Ethics and Jurisprudence

Ethics has been defined as the science of human conduct. How men behave, and how they are actually behaving, and what should be the ideal human behaviour, are all considered by the science of ethics. Thus, there is the *ideal moral code* and the *positive moral code.* The *former* belongs to the province of natural law, while the *latter* deals with rules of positive or actual

conduct. What is public opinion as to good or proper human conduct is a matter for ethics to consider. Public opinion no doubt varies considerably from place to place, from time to time, and from people to people. "It changes in the furnace of social evolution, social culture and social development. What may be a rule of good morality at one time may be a bad moral today." (*Dr. Sethna*)

Jurisprudence is related to positive morality, in so far as law may be considered as the instrument through which positive ethics tries to assert itself. Divine morality does *not* require any sanction of the law. Positive morality is *not* dependant upon the good actions of good men only. Positive morality requires a strong coercive influence for the maintenance of a public conscience — what public opinion and the culture or moral enlightenment of the citizens in the locality demand. There is, therefore, a separate branch of ethical jurisprudence, which tries to examine the existing ethical opinions and standards of conduct in terms of law, and makes suggestions for the necessary changes to be brought about in the system of law, so that it can properly depict the public conscience.

There are many ethical rules of conduct which are *not* necessarily considered as *crimes* under our system of jurisprudence. The law takes no notice of trifles, and therefore, although it may be immoral to tell a lie, a simple lie is *not* considered to be a crime. There are many acts which are unethical, but *all unethical acts are not necessarily criminal.* One has also to consider the problem of laws which society considers to be undesirable. Again, all that is prohibited by the law of the land is not necessarily immoral. Law exists for purposes of public convenience or expediency. For the purpose of enforcing certain ethical conduct, ethics depends upon law through the instrumentality of the police, the law courts, judges, and the system of courts and punishment. Legislation must always be based on ethical principles. Law must never be divorced from human values, and no law can be a good law if it is not based on sound ethical principles.

Ethics, as a science of human conduct, lays down rules for the ideal human conduct based upon higher and nobler values for life. Laws are meant for regulating human conduct in the present, and for subordinating the individual's requirement of the society at large. A jurist, therefore, must be familiar with the science of ethics, because he *cannot* criticise a law or a piece of legislation, *unless* he examines that law through the instrumentality of ethics.

"In the mirror of a community's laws are reflected its culture, its ideology and its miranda. On the high level of its laws is perceived the glory of a country's civilization,-the depth of its positive ethics. Hence the relationship between ethics and jurisprudence." (*Dr. Sethna*)

Purpose of Jurisprudence

It is essential for a lawyer, in his practical work, to have a knowledge of jurisprudence, as such study (i) serves to train the mind into legal ways of thought, and (ii) affords a key to the solution of many provisions of civil law, which would otherwise appear to be singular and unaccountable. Without such knowledge, no lawyer, however practically eminent, can really

measure the meaning of the assumptions upon which his subject rests.

Uses and Value of Jurisprudence

It is sometimes said that jurisprudence is a subject without any practical applicability. What possible value, it is asked, can there be in an abstract, theoretical subject like jurisprudence ? The answer to this question is simple. Just as the mathematician investigates the number theory, *not* with the aim of seeing his finding put to a practical use, *but* by reason of the fascination which it holds for him, so also the writer on jurisprudence may well be impelled by nothing more than its intrinsic interest.

However, jurisprudence is not without its practical value also. It has been rightly said that *Jurisprudence* is the eye of the law, and this statement may be best illustrated by stating in short, the main uses of Jurisprudence, as follows :

(i) A study of those fundamental principles which are common to *all systems of law* is of great advantage in the study of a *particular system of law.*

(ii) For the practical work of the legislator and the advocate, the knowledge of the fundamental principles which are adopted by society to adjust the relations between man and man is absolutely essential. The aim of jurisprudence is to formulate these principles and to supply the foundations which the science of law demands, but of which the art of law is careless.

(iii) A study of jurisprudence is of immense advantage to the closely allied science of legislation, which concerns itself with what the law *should be.*

(iv) Jurisprudence also has an educational value, since the logical analysis of legal concepts sharpens the lawyer's own logical technique, which is one of his invaluable assets.

English and Foreign Jurisprudence

There has been considerable difference between the juristic thought and literature of England and that of the Continent. There are several reasons for this difference. *Firstly,* the English word 'law' means law, and nothing else, but the corresponding term in the Continental languages means not only law, but also right or *justice. Racht, droit* and *deritto,* all have double significance. This difference in the meaning of words is partly responsible for the difference between the juristic thought and literature of England and that of the Continent.

Secondly, the term jurisprudence in English would only mean theoretical or general jurisprudence, while in the Continental languages, it would include the whole of legal knowledge. Due to these reasons, and probably also due to the pragmatic approach of the English lawyers, Jurisprudence in England has been mostly *analytical,* while in the Continental countries, it is an integration of *analytical* and *ethical* jurisprudence.