



# RAMA UNIVERSITY

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## **FACULTY OF JURIDICAL SCIENCES**

**Course : LL.B. 1st Semester**

**SUBJECT: Jurisprudence**

**SUBJECT CODE: LLB 301**

**LECTURE: 9**

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# Lecture-9



Savigny & his theories

## Lecture- 9: Savigny & his theories

### **FRIEDRICH CARL VON SAVIGNY (1779-1861)**

Savigny was born in Frankfurt in 1779. His interest in Historical studies was kindled at the university of Marburg and Gottingen and greatly encouraged when he came into contact with great historians at the University of Berlin. He served university of Berlin as a teacher. He also acquired a lasting veneration for Roman law. His works, (i) The law of possession. (ii) The History of Roman law in the middle ages (iii) The system of modern roman law-testify his genius. He attacked the idea of codification in Germany as he knew the defects of the contemporary codes. According to him code was not a suitable instrument for the development of German law at that time. Law is a product of the people's life-it is a manifestation of its spirit. Law has its source in the general consciousness of the people.

Savigny's view of the law was first presented in his famous pamphlet "Of the Vocation of Our Age for Legislation and Jurisprudence" 1814. This pamphlet was an answer to a proposal made by a professor of civil law, A.F.J. Thibaut of Heidelberg University, to the effect that a codification of the laws and customs of the various German states be undertaken in a coherent arrangement, on the basis of Roman law and the Napoleonic code. Savigny vehemently attacked this suggestion. In his view, the law was not something that should be made arbitrarily and deliberately by a law maker. Law, he said, was a product of 'internal, silently-operating forces.' It was deeply rooted in the past of a nation, and its true sources were popular faith, custom, and "the common consciousness of the people." Like the language, the constitution, and the manners of a people, law was determined above all by the peculiar character of a nation, by its "national spirit" (Volkgeist). In every people, Savigny pointed out, certain traditions and customs grow up which by their continuous exercise evolve into legal rules. Only by a careful study of these traditions and customs can the true content of law be found. Law in its proper sense is identical with the opinion of the people in matter of right and justice. In the words of Savigny,

"In the earliest times to which authentic history extends the law will be found to have already attained a fixed character, peculiar to the people, like their language, manners and constitution. Nay, these phenomena have no separate existence, they are but the particular faculties and tendencies of an individual people, inseparably united in nature, and only wearing the semblance of distinct attributes to our view. That which binds them into one whole is the common conviction of the people, the kindred consciousness of an inward necessity, excluding all notion of an accidental and arbitrary origin.

Thus, in the view of Savigny, law, like language, is a product not of an arbitrary and deliberate will but of a slow, gradual, and organic growth. The law has no separate existence, but is simply a function of the whole life of a nation. "Law grows with the growth, and strengthens with the strength of the people, and finally dies away as the nation loses its individuality."

### **LAW DEVELOPS LIKE LANGUAGE**

In all societies, it is found already established like their language, manners and political organisation. These all are stamped with a national character. They are the natural manifestations of popular life and by no means product of man's free will. Law, language, customs and government have no separate existence. The organic evolution of law with the life and character of the people develops with the ages and in this it resembles language. As in the latter, there can be no instance of rest; there is always movement and development of law governed by the same power of internal necessity as simple phenomenon. Law grows with nation, increases with it and dies at its dissolution and is a characteristic of it. The following passage in his essay, 'Vom Beruf' states in nutshell the fundamental thought of the historical school;

“These phenomena- law, language, custom, government have no separate existence, there is but one force and power in people bound together by its nature, and only our minds give them separate existence. What makes it a single whole is the common conviction of the people, the like feeling of inner necessity which all attributes a contingent and arbitrary origin.... The organic evolution of law with the life and character of people develops with the ages, and in this it resembles language. As in the latter, as in law, there can be no instant of rest, there is always movement, and development of 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.”

### **EARLY DEVELOPMENT OF LAW IS SPONTANEOUS: LATER ON IT IS DEVELOPED BY JURISTS; -**

About the development of law, Savigny says that in the earlier stages law develops spontaneously according to the principle of internal necessity. After the society has reached a certain stage of civilization, the different sides of national activities, hitherto developing as a whole, divide in different branches and are taken up by specialists and jurists, linguists and scientists. In the hands of specialists, these subjects become richer in ideas, more complete and technical. Law, like other subjects now assumes a double existence, “on the one side a general national life, on the other the distant science of jurists. The relation of law to the general life of the people might be called its political elements, its connection with the juristic science, its technical element. The correlation of these two elements varies with the elements of life of people but both participate more or less in the development of law.”

### **SAVIGNY WAS OPPOSED TO CODIFICATION OF GERMAN LAW:**

Savigny’s contention is that codification is highly dangerous because it checks the natural and unconscious growth of law. Instead of the law being changed by a spirit operating silently and almost imperceptibly, we have the violent and capricious act of a law giver. He quotes with approval the hard saying of Bacon that codification should not be undertaken except in an age in which civilization and knowledge surpasses that in which the laws were made which it is now proposed to codify. In the strength of this view he protested against codification, which would imprison the development of law in an iron cage, he protested against *nature* and its entire works; he sought to secure free course for the flood of people’s thought, flowing “with pomp of waters unwithstood.”

In his tract on the vocation of the age for legislation and jurisprudence, which marks the beginning of the historical school of law, Savigny manifestly attacked the three phases of the 18th century legal thought, namely, the natural law philosophy, the identification of law with morals and finally the rise of centralized absolute governments in western Europe in the 17th and 18th centuries. But he attacked them as he saw them; particularly the results of the third in legal

thinking as they have fused with the Byzantine conception of law, drawn from the corpus juris and handed down from the 12th century academic idea of the statutory authority of Roman law in the Western Europe of that time.

### **LAW IS A CONTINUOUS AND UNBREAKABLE PROCESS:**

Savigny sees a nation and its state as organism which takes birth, matures, declines and dies. Law is a vital part of that organism. Law grows with the growth and strengthens with the strength of the people. It dies away as the nation loses its nationality. Nations and their law go through three development stages. There are principles of law which are not found in legislation but are a part of “national conviction”. These principles are implicitly present in formal symbolic transactions which command the high respect of the population, form a grammar of the legal system of a young nation and constitute one of the system’s major characteristics.

### **THE HISTORY OF ROMAN LAW AS EXAMPLE:**

As an example of this process he presents the history of Roman law, a comparison of its early simple foundations with the complex and technical law of the Pandects.

### **PRINCIPAL DOCTRINES OF SAVIGNY'S THEORY**

The main proposition of the historical school, as expounded by Savigny and some of his followers may be summarized as here under;-

#### **1. LAW IS FOUND, NOT MADE:-**

A pessimistic view has been taken of the power of human action. The growth of law is essentially an unconscious and organic process. Legislation, thus, is of subordinate significance as compared to custom, because the statute is always unyielding and takes less account of the circumstances of the individual cases.

2. Law develops from a few easily gasped legal relations in primitive communities to the greater complexity of law in modern civilization, popular consciousness can no longer manifest itself directly, but comes to be represented by lawyers, who formulate the technical legal principal. But the lawyer remains an organ of popular consciousness, limited to the task of bringing into shape what he finds as raw material. Legislation appears at the last stage; the lawyer, therefore, is a more important law making agency.

#### **3. LAWS ARE NOT OF UNIVERSAL APPLICATION:-**

Each person develops its own legal habits, as it has its own peculiar language, manners and constitution. Savigny here has insisted upon the parallel between language and law. Neither is capable of application to other people and countries. The Volkgeist manifests itself in the law of the people; it is, therefore, essential to consider the evolution of Volkgeist by legal historical research.

4. As laws grow into complexity, the common consciousness is represented by lawyers who formulate legal principles. But the lawyers remain only the mouthpiece of popular consciousness and their work is to shape the law accordingly. Legislation is the last stage of law making and, therefore, the lawyers or the jurists are more important than the legislator.

### **SUMMARY:**

Savigny's theory can be summarized as follows;

That law is a matter of unconscious and organic growth. Therefore, law is found and not made.

Law is not universal in its nature. Like language, it varies with people and age.

Custom not only precedes legislation but it is superior to it. Law should always conform to the popular consciousness.

As laws grow into complexity, the common consciousness is represented by lawyers who formulate legal principles. But the lawyers remain only the mouthpiece of popular consciousness and their work is to shape the law accordingly. Legislation is the last stage of law-making and, therefore the lawyers or the jurists are more important than the legislators.

### **CRITICISM AGAINST SAVIGNY'S THEORY**

Savigny while advocating the role of evolution and growth in the development of law his approach towards law was vitiated in the following manner;

1. He laid excessive emphasis upon the unconscious forces which determine the law of a nation and ignored the efficacy of legislation as an instrument of deliberate, conscious and planned social change. In modern developing societies like India legislation is being created, enacted and used as an important instrument of social change and social reform. As he underestimated the importance of legislation and took a pessimistic view of human power for creation of law to bring about social change so he is criticised for his juristic pessimism

2. Savigny emphasised the national character of law. While advocating national character of law he entirely rejected the study of German law and took inspiration from Roman law.
3. Volkgeist itself is an abstract idea as indeterminable and vague as the natural law itself.
4. He did not encourage law reform including codification of law.
5. His theory of law and society postponed the emergence of modern sociological school because most of the sociologists like Durkheim, Ehrlich, Kohler, Weber, etc. were confounded by the spell of Savigny's Volkgeist which postponed the study of scientific appraisal of society in terms of its ends and goals.

#### **SAVIGNY AND AUSTIN- COMPARISON**

It is interesting to note that the two great jurists expounded two different legal theories in England and Germany somewhat contemporaneously. Besides striking differences there are some common features in their legal theories: these are;-

1. Both Austin and Savigny are against the rationalism and universalism of the natural law philosophy.
2. Austin and Savigny's legal philosophy is a reaction and protest against the priori method of the natural law. Both of them consider law as a scientific or factual reality based on a posteriori method.
3. Both of them are comparative jurists-Austin basing his law on the study of Roman law and English law and Savigny propounding his thesis too on the basis of German law and old Roman law which had been to Germany in sixth century A.D.
4. Both are concerned with the nature of law rather than its functions.



### SELF-TEST QUESTIONS

S.N O	Question	Option (a)	Option (b)	Option (c)	Option (d)
1	Who wrote 'The law of possession' Book	Savigny	Pollock	Maitland	Sir William Holdsworth
2	Who said that law develops like language	Savigny	Pollock	Maitland	Sir William Holdsworth
3	Who said that laws are not of universal Application	Savigny	Pollock	Maitland	Sir William Holdsworth
4	Who propound Volkgeist theory	Savigny	Pollock	Maitland	Sir William Holdsworth
5	Both Austin and Savigny are against the rationalism and universalism of the natural law philosophy	True	false		

**Answers: 1-(a),2-(a), 3-(a),4-(a),5-(a)**