

SAVIGNY AND
HENRY MAINE'S
CONTRIBUTION
TO HISTORICAL AND
ANTHROPOLOGICAL JURISPRUDENCE

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What is Jurisprudence?

To know the contribution of the great jurist Savigny and Henry Maine's in Historical and anthropological Jurisprudence first of all we should know the meaning of Jurisprudence.

In practically speaking every jurist has his own notion of the subject matter and proper limits of jurisprudence, but his approach is governed by his allegiances, or those of his society, by what is commonly referred to now a days as his "ideology". No doubt such ideological factors are frequently implicit rather than openly avowed, thus Holmes's description of them as "inarticulate major premises". Nonetheless, they are to be discerned in jurist theories both past and present. It has been said that "traditional theories in jurisprudence reflect the old "ideologies", as we may readily see in such theories as those of natural law or of utilitarianism. It may be though, that lawyers, whether their philosophical learning, have through their training and environment more in common than divides them.

The Relevance of Jurisprudence

The hard headed and pragmatic attitude of common lawyers to the law and the absence of any philosophical tradition informing legal education or the practice of law in common law countries have tended to provoke skepticism toward theory among judges, legal practitioners and even academic lawyers a scepticism which may be shared by law students. This has been considerably reinforced by the fact that it is only in comparatively recent times that legal education has established itself as an acknowledgement discipline in English universities. Law was previously thought under an apprenticeship system whereby the knowledge of law was picked up in the course of legal practice without any systematic instruction. The lawyer

was expected to apply himself to the problem of his client without pausing, either as student, practitioner or even judge, to explore or speculate upon the law was about, what was or should be the role of the law and the lawyer in the society, whether it was capable of responding to contemporary needs.

Very different has been the tradition of civil law countries where universities were founded for the purpose of educating for the professions, especially that of law. The academic approach to legal education with its more philosophic and rationalistic orientation, thus become an essential feature of the civil law. An academic tradition, as against training by apprenticeship, is more likely to inspire more philosophical attitudes and less impatience with “mere theory”.

What is role of Jurisprudence?

The role/ Job of Jurisprudence are to supply an epistemology of law, a theory as to the possibility of genuine knowledge in the legal sphere. But how is such knowledge is to be acquired what are its sources? Can its methodology be compared with that of natural science or of, what have come to be called, the social science? IS objective knowledge possible or must it be distorted by our values and biases?

Meaning of Historical Jurisprudence

- of or relating to the study of history; "historical scholars"; "a historical perspective"
- having once lived or existed or taken place in the real world as distinct from being legendary; "the historical Jesus"; "doubt that a historical Camelot every existed"; "actual historical events"
- belonging to the past; of what is important or famous in the past; "historic victories"; "historical (or historic) times"; "a historical character"

Historical Jurisprudence

Positivists and naturalists tend to converge in the area of historical jurisprudence. Historical jurisprudence is marked by judges who consider history, tradition, and custom when deciding a legal dispute. Strictly speaking, history does not completely fall within the definition of either positivism or natural law. Historical events, like the Civil War, are not legislative enactments, although they may be the product of governmental policy. Nor do historical events embody eternal principles of morality, although they may be the product of clashing moral views. Yet, historical events shape both morality and law. Thus, many positivists and naturalists find a place for historical jurisprudence in their legal philosophy.

In the seventeenth century, leading English jurists introduced into the Western legal tradition a new philosophy of law, later called historical jurisprudence, which both competed with and complemented the two major schools of law that had opposed each other in earlier centuries, namely, natural law theory and legal positivism. The basic tenet of the historical school is that the primary source of the validity of law, including both its moral validity and its political validity, is its historicity,

reflected especially in the developing customs and ongoing traditions of the community whose law it is. Historical experience is thought to have a normative significance. This theory was adumbrated by Edward Coke, developed by John Selden, and articulated by Matthew Hale, who integrated it with the two older theories. In the late eighteenth and early nineteenth centuries, the three theories split apart and the historical school emerged as an independent legal philosophy.

Although historical jurisprudence, which predominated in Europe and the United States in the late nineteenth and early twentieth century, has been ignored or repudiated by most contemporary American legal philosophers, it continues to play an important role in the thinking of American judges and lawyers, especially in constitutional law and in areas of law in which common law tradition still prevails. Although the foundations of historical jurisprudence were laid in preceding centuries, its full-fledged articulation only emerged in the context of the English Revolution of 1640-1689, for whose ideals of judicial independence and parliamentary supremacy Coke had fought-in the name of history-both on the bench and in the House of Commons, and in which Selden and Hale played important roles. Historical jurisprudence had important connections both with Puritan theology and with developments in the natural sciences. In legal science, it was reflected particularly in the development of the doctrine of precedent. In the eighteenth century, it was given expression in the writings of William Blackstone and Edmund Burke, and in the nineteenth century it was finally established as a separate school of jurisprudence by the great German jurist Carl Friedrich von Savigny.

Jurisprudence by V.D. Mahajan

Meaning of Anthropology

- It is study of human race especially of its origin, development, customs and beliefs.
- The social science that studies the origin and social relationship of human being.
- **Anthropological Jurisprudence**

Anthropological jurisprudence, which first developed as a specialized discipline in the nineteenth century, it has challenged many of the paradigms of the positivist view of law and, most relevantly for this study, has produced the various theories of legal pluralism, The legal pluralist approach. This section discusses its other major contributions to the study of non-state justice systems and also highlights its current limitations.

The evolutionist school dominated legal anthropology. It was believed widely that all societies passed through clear and inescapable stages of development, distinguished by increasing complexity, and this was extended to include stages of legal development. Various legal systems were studied and compared with the aim of charting a general evolutionary direction, from a primitive to a civilized state. The ethnocentric bias was such that Western European states represented the highest stage of development—a belief that was very convenient for the imperialistic policies of the European powers.

Since the late nineteenth and twentieth century's, there have been three separate periods in the development of the field of legal anthropology. The first was the publication of the major empirical monographs before the 1960s that were mainly

historical, ethnographic descriptions of a single ethnic group and were concerned with seeking to understand whether all societies had law or its equivalent. A small number of monographs, including Maine's *Ancient Law* (1861), Malinowski's *Crime and Custom in a Savage Society* (1967) and Llewelyn and Hoebel's *The Cheyenne Way* (1941), provided the baseline for the discipline.

- **Law and Anthropology**

One of Holmes's many pieces of advice was to the effect that "if your subject is law, the roads are plain to anthropology", and it was "perfectly proper to regard and study the law simply as a great anthropological document". Yet until the early part of the twentieth century it was common to view "law" in a rigid and narrow way. Primitive peoples without formal legal codes, courts, policeman or prison were thought to lack anything that might be dignified by the appellation "law". It was conceded that they had custom, which it was assumed, was a characteristic of earlier or tribal society. And often custom was conceived of as absolutely rigid, complete conformity being enforced by the overwhelming power of group sentiment, amply forfeited by religion and magic. Nor was it doubted that in some way "custom" was inferior to "law".

Savigny contribution to historical and anthropological jurisprudence

- Friedrich Carl von Savigny (1779-1861) was the founder of the older, romantic branch of the German historical school of law. He was born in Frankfurt am Main of an ancient and wealthy noble family from Lorraine, and his selection of an academic career was unusual for a member of his class. He began that career at the University of Marburg in 1800, teaching Roman law, and became professor of Roman law at Landshut in 1808. Two years later, at the suggestion of Wilhelm von Humboldt, he was appointed professor at the newly founded University of Berlin, where for three decades he had a most successful and influential career in legal teaching and research. From 1842 until the German revolution of 1848 he was Prussian minister for the revision of legislation.
- In the academic year 1802/1803, Savigny gave a lecture on legal methodology at Marburg, which shows him still poised between rationalistic and historical jurisprudence. (His student Jacob Grimm recorded this lecture.) However, the lecture contains some of the basic principles of his later doctrine, for example, that jurisprudence must be empirical and that it should be a synthesis of historical and systematic treatments of the law. He first applied these early theories in *Das Recht des Besitzes* a treatise that immediately established his reputation as one of the leading professors of civil law. What contemporary legal scholars saw as the particular significance of the treatise was the way Savigny took from the sources of ancient Roman law the leading principles of the law of possession, demonstrating the superiority of the Roman principles over the modifications that this law had undergone in Continental jurisprudence since the Middle Ages.

- Savigny's famous pamphlet *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (1814) was published as an argument against the popular demand for the codification of German civil law on the model of the French and the Austrian codes. The pamphlet established the doctrine and program of the early historical school of law. In this pamphlet, as well as in his introductory essay (1815) to the first volume of the *Zeitschrift für geschichtliche Rechtswissenschaft*, founded as the organ of the school in 1815, Savigny outlined a new theory of the creation of law, culminating in a strictly genetic conception and analysis of law. Taking off from the ideas of Montesquieu, Burke, and Justus Möser, he asserted that positive law is not a product of reason. From its true basis, the common beliefs of a particular nation, it develops in a continuous, "organic" process as do a nation's language and customs; it is the result of silent, anonymous, and irrational forces, of an implicit consensus, not of an intentional creative effort. Law is, therefore, of the same nature as custom; it is determined by the whole past of the nation and by its peculiar character (what was later called the *Volksgeist*), and it cannot be changed arbitrarily by legislation. Instead, Savigny advocated the reform of jurisprudence by means of historical research, holding that a strictly genetic study is the only way to conceive and develop contemporary positive law.
- While some of Savigny's contemporaries (Thibaut, P. J. A. von Feuerbach, Gönner, and especially Hegel and his school) rejected his doctrine, the historical school of jurisprudence dominated German universities for nearly half a century. Its program of historical research, though neither wholly nor rigorously fulfilled, made the history of law a scientific discipline, by basing it on the idea of evolution. Savigny's own chief contribution in this field was his *Geschichte des römischen Rechts im Mittelalter* (1815-1831), which deals with the history

of the sources, the literature, and the teaching of Roman law from the fifth through the fifteenth centuries. It initiated the modern study of medieval jurisprudence and has served ever since, corrected in many respects but unequaled, as the standard work on the history of medieval jurisprudence in Europe. Savigny also wrote a number of historical monographs, mainly on ancient Roman law (collected in his *Vermischte Schriften*).

- In the field of legal dogmatics, Savigny's doctrine re-created, by reviving the study of ancient Roman law, a common field of legal study in the individual German states the "modern Roman law," or Pandects. His most important dogmatic works, *System des heutigen römischen Rechts* (1840-1849) and *Das Obligationenrecht als Theil des heutigen römischen Rechts* (1851-1853), show that the theories that he had put forward in 1814 and 1815 about the nature of law had not produced a radical change even in his own legal dogmatics. His early theories had been provoked by his reaction, influenced by romanticism, against the natural law theories of the French Revolution and of liberalism generally. Later, however, he not only retained the fundamental doctrines of the rationalist jurisprudence of the eighteenth century in his dogmatic teaching but actually made these doctrines the backbone of his legal system. Both of Savigny's works are based on fundamental notions of German natural law theory as well as on Kant's legal philosophy. Within the framework of these categories, Savigny transcended Roman law in many respects, adapting it to modern requirements or developing new solutions, many of which have become influential in German and other legal science; for example, his doctrines of contract and corporation, and particularly his system of private international law—which, like the systems of Story and Mancini, counts among the classic theories in this branch of law.

In the general consciousness of people live positive law and hence we have to call it people`s law. It is by no means to be thought that it was the particular member of the people by whose arbitrary will, law was brought forth in that case the will of individual might perhaps have selected the same law, perhaps however and more probably very varied laws. Rather is it the spirit of a people living and working in common in all the individuals, which gives birth to positive law, which therefore is to the consciousness of each individual not accidentally but necessarily one and the same. Since therefore we acknowledge an invisible origin of positive law we must as to that origin, renounce documentary proof, but this defect is common to our and every other view of that origin, since we discover in all peoples who have ever presented them self within the limit of authenticated history an already existing positive law of which the original generation must lie beyond those limits. There are not wanting proof of another sort and suitable to the special nature of the subject matter. Such a proof lies in the universal, uniform recognitions of positive law and in feeling of inner necessity with which its conception is accompanied. This feeling express itself most definitely in the primeval assertion of the divine origin of law of status, a more manifest opposition to the idea of its arising from accident or the human will is not to be conceived. A second proof lies in the analogy of other peculiarities of people which have in like manner an origin indivisible and reaching beyond automatic history, for example social life and above all speech. In this is found the same independence of accident and free individual choice, the same generation from the activity of the spirit of the people working in common in each individual in speech too from its sensible nature, all this is more evident and recognizable than in law. Indeed the individual nature of a particular people is determined

and recognized solely by those common direction and activities of which speech as the most evident obtain the first place.

The form however in which law lives in the common consciousness of a people is not that of abstract rules but as the living institution of the institution of law in their organic connexion, so that whatever the necessity arises for the rule to be conceived in its logical form. This must be first formed by a scientific procedure form that total institution. That form reveals itself in the symbolical acts, which displays in visible sharps the essence of the jurial relation and in which the primitive laws express themselves more intelligibly and thoroughly than in written laws.

- **People (Volk)**

The generation of law has been preliminary posited in the people as an active, personal subject. The nature of this subject will not be more accurately defined, if the examination of the jurial relation, remove by abstraction, all its special content, there remains over as a common nature, the united life of a plurality of the men, regulate in a definite manner.

- **Customary Law**

This name may easily mislead us into the following course of thinking. When anything whatever needed to be done in a jurial relation, it was originally quite indifferent what was done, accident and arbitrary will any how settled the decision. If the same case presented itself a second time, it was easier to repeat the same decisions that to deliberate upon a new one and with fresh repetition; this procedure of necessity appeared more convenient and more natural .Thus after a while such a rule

would become a law as had originally no greater claim to prevail than an opposite rule and the cause of origin of this law was custom alone.

- **Legislation**

If we enquire first as to the contents of written law, they are already determined by the mode of derivation of the law giving power, the already present people's law supplies those contents or what is the same thing, written law is the organ of people's law. If one were to doubt that, one must convince the lawgiver as standing apart from the nation, he however rather stands in its centre, so that he concentrates in himself their spirit, feelings needs, so that we have to regard him as the true representative of the spirit of the people.

- **Juristic Law**

It is natural consequence of development of nation that as culture progresses, special activities and acquirements should separate and thus form separate occupations of the different classes. Thus also law, originally the common property of the collective people, by the more extended relations of active life is developed in so special manner that it can no longer be mastered by the knowledge uniformly spread among the people. Then is formed a special order of a person's skilled in law who as an actual part of the people, in this order of thought represents the whole.

- **Relation between sources of law**

From the previous exposition it follows that originally all positive law is people's law and that side by side with this spontaneous generation, comes legislation enlarging and propping it up. Then by the progressive development of the people, legal science is added, thus in legislation and the science of law two organs are furnished to the peoples law, each of which simultaneously leads its independent life. If lastly in later times, the law forming energy departs from the people as a whole, it continues to live in these organs. Then since the largest and the most important parts of the old peoples law have been incorporated into legislation and legal science, that law shows itself very little in its original shape but nearly appears through their medium. Thus it may happen the peoples law may be almost hidden by legislation and legal science in which it lives on, and that true origin of existing positive law may be easily forgotten and misunderstood.

Jurisprudence by Salmon Freedman
Jurisprudence by V.D. Mahajan
Jurisprudence by Lloyd
<http://en.wikipedia.org/wiki/judisprudence>

- **Henry Maine's contribution to historical and anthropological jurisprudence**

Sir Henry Maine, in full Sir Henry James Sumner Maine (born August 15, 1822, Kelso, Roxburgh, Scotland—died February 3, 1888, Cannes, France), British jurist and legal historian who pioneered the study of comparative law, notably primitive law and anthropological jurisprudence.

While professor of civil law at the University of Cambridge (1847–54), 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 Its Relation to Modern Ideas* (1861), which influenced political theory and anthropology, the latter primarily because of Maine'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 or invalidated by later research *Ancient Law* is noted for its general lack of reference to authorities and its failure to 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 (1863–69), Maine was largely responsible for the codification of Indian law. In 1869 he became the first professor of comparative jurisprudence at the University of Oxford and, in 1887, a professor of international law at Cambridge. He was knighted in 1871. His other books include lectures on the *Early History of Institutions* (1875), a sequel to his *Ancient Law*. Maine was the recipient of a remarkable number of honours, medals, and distinctions. He was also known for his extensive writing in popular periodicals.

The earliest notion connected with the conception, now so fully developed, of a law or rule of life, are those contained in the Homeric words “themis” and “Themistes”, it is well known, appears in the later Greek pantheon as the goddess of justice, but this is a modern and much developed idea, and it is in a very different sense that themis is described in the Iliad as the assessor or zeus, it is now clearly seen by all trustworthy observers of the primitive condition of mankind that, in the infancy of the race, men could only account for sustained or periodically recurring action by supposing a personal agent. Thus, the wind blowing was a person and of course a divine person, the sun rising, culminating and setting was a person and a divine person the earth yielding her increase was a person and divine. As, then, in the physical world, so in the moral. When a king decided a dispute by a sentence, the judgment was assumed to be the result of direct inspiration.

Even in the Homeric poems we can see that these ideas are transient, parities of circumstance were probably commoner in the simple mechanism of ancient society than they are now and in succession of similar cases awards are likely to follow and resemble each other. Here we have the germ or rudiment of a custom, a conception posterior to that of them sites or judgments. However strongly we, with our modern associations, may be inclined to pay down a priori that the notion of a custom must precede that of a judicial sentence, and that a judgment must affirm a custom must precede that of judicial sentence and that a judgment must affirm a custom or punish its breach, it seems quite certain that the historical order of the ideas.

- **Customary Law**

The important point for the jurist is that aristocracies were universally the depositaries and administrators of law they seem to have succeeded to the prerogatives of the king, with the important difference, however, they do not appear to have

pretended to direct inspiration for each sentence. The connection of ideas which cause the judgment of the patriarchal chieftain to be attributed to super human dictation still shows itself here and there in the claim of divine origin for the entire body of rules, or for certain part of it, but the progress of thought no longer permit the solution of particular disputes to be explained by the supposing an extra human interposition. What the juristical oligarchy now claims is to monopolize the knowledge of the laws to have the exclusive possession of the principal by which quarrels are decided. We in fact arrived at the epoch of customary law. Customs or observances now exist as a substantive aggregate and are assumed to be precisely known to the aristocratic order or cast.

Conclusion

The various jurists have contributed to the jurisprudence and their work helped to develop the law and society as a whole. In the case of Savigny and Henry Maine's they have contributed to Historical and Anthropological Jurisprudence, The study helps to improve the society and rectify the mistakes of the past, it is always said that past teaches the lesson in present and help to improve the future.

The Great jurist Savigny and Henry Maine helped the world as whole and leading to systemize the law their contribution is the milestone in the Jurisprudence.

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