Course Name- B.A.LL.B 6th sem
Subject- Jurisprudence
Teacher- Mrs. Aakanksha
Concept- Historical school

HISTORICAL SCHOOL OF JURISPRUDENCE

The historical school antedates the work of Kelsen, but the reason for postponing discussion of the historical thesis is that, in opposition to the doctrine of the pure science of law, the historical school considered law in direct relationship to the life of the community and thus laid the foundation on which the modern sociological school has built. The eighteenth century was an age of rationalism; it was believed possible by arm-chair deliberation to construct a universal and unchangeable body of laws that would be applicable to all countries, using as a premises the reasonable nature of man. The historical school in part was a result of the surge of nationalism that arose at the end of the eighteenth century. Instead of the individual, writers began to emphasis the spirit of the people, the Volksgesit. In 1814 a programme for the school was enunciated by Savigny. The central question was 'how did law come to be?' Law evolved, as did language, by a slow process and, just as language is a peculiar product of a nation's genius, so is the law. The source of law is not the command of the sovereign, not even the habits of a community, but the instinctive sense of right possessed by every race. Custom may be evidence of law, but its real source lies deeper in the minds of men. 'The living of law' is the secret of its validity. In those matters with which he is directly concerned every member of the community has an instinctive sense as to what is right and proper, although naturally he will have no views on matters which are beyond his experience. Thus the mercantile community will have an intuitive appreciation of the rules that should govern bills of exchange, a peasant of the doctrines that should be applied to agriculture. Such is the approach of the historical school, and it naturally led to a distrust of any deliberate attempt to reform the law. Legislation can succeed only if it is in harmony with the internal convictions of the race to which it is addressed. If it goes farther, it is doomed to failure.

The contribution of the historical school to the problem of the boundaries of jurisprudence is that law cannot be understood without an appreciation of the social milieu in which it has developed. The slow evolution of law was stressed and its intimate connection with the particular characteristics of people. Ever since Savigny wrote, the values which jurisprudence can gain from a proper use of the historical method have been well recognised, and in England Maine and Vinogradoff have kept the interest in these problems alive. Writers of legal history such as Pollock and Maitland or Sir William Holdsworth have provided surveys whose value for the jurist lies in the clear demonstration of the close connection between the common law and the social and political history of England.
In particular the historical school destroyed forever the shibboleth of immutable rules of law, discovered by abstract reason; they demonstrated that just as in the case of the human body, transplants of legal systems or constitutions may be defeated by the immunological reaction of the receiving country

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" (Volkgiest). 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 phenomenons 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 naturrecht 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 Volkgiest manifests itself in the law of the people; it is, therefore, essential to consider the evolution of Volkgiest 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.Volkgiest 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 Volkgiest 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.

GEORGE FREDRICK PUCHTA 1798-1856
Puchta was not only a disciple of Savigny but also a great jurist of the Historical School. His work is considered to be more valuable as he made improvements upon the theory of Savigny by making it more logical. He started from the evolution of human beings and traced the development of law since that period. According to him, the idea of law came due to the conflict of interests between the individual will and general will. That automatically forms the state which delimits the sphere of the individual and develops into a tangible and workable system. Puchta agreed with his teacher that the genesis and unfolding of law out of the spirit of the people was an invisible process. "What is visible to us is only the product, law, as it has emerged from the dark laboratory in which it was prepared and by which it became real." His investigation on the popular origin of law convinced him that customary law was the most genuine expression of the common conviction of the people, and for this reason, far superior to legislation. He considered explicit legislation useful only insofar as it embodied the prevailing national customs and usages.

The contribution of Puchta lies in the fact that he gave twofold aspects of human will and origin of the state. It is true that there are some points of distinction between Puchta and Savigny but mostly they are similar. On some points, Puchta improved upon the views of Savigny and made

them more logical.

JOSEPH KOHLER (1849-1919)

A theory of law which contains components of a sociological character but which may also be explained as an attempt to revive some of the ideas of Hegel was advanced by the German jurist Joseph Kohler. Kohler taught that human activity was cultural activity, and that man's task was "to create and develop a new abundance of forms which shall be as a second creation, in juxtaposition to divine creation." The law, he pointed out, plays an important part in the evolution of the cultural life of mankind by taking care that existing values are protected and new ones furthered. Each form of civlisation, Kohler said, must find the law which best suits its purposes and aims. There exists no eternal law; the law that is adequate for one period is not so for another. Law must adapt itself to the constantly changing conditions of civilisation, and is the duty of society, from time to time, to shape the law in conformity to new conditions. Kohler is neo Hegelian. He was much influenced by the Hegelian legal theory. He conceded to the Hegel's idea of universal civilisation but did not agree with the view that there is an eternal law of universal body of legal institutions uniformly suited to all the societies. He emphasized that human society is ever changing and progressing and law is a means to respond favourably to these changes. He says that there is no eternal law. Pound observes that Kohler's formation of the jural postulates of the time and place is one of the most important achievements of recent legal science.

Kohler advocated a synthesis and reconciliation of individualism and collectivism in legal control. Egoism, he maintained, "stimulates human activity, urges man on to constant effort, sharpens his wit, and causes him to be unremitting in his search for new resources." An attempt by the legal order to uproot or combat egoism would therefore be foolish. He pointed out, on the other hand, that social cohesion is also necessary, in order that humanity may not fall apart, and turning into a collection of individuals and the community lose control over its members. Nothing great can be accomplished, in his view, except by devoted cooperative effort. "the individual should develop independently but the tremendous advantage of collectivism should not therefore be lost."

An eminent American jurist, Dean Pound, considers that Kohler's "formation of the jural postulates of the time and place is one of the most important achievements of recent legal science". The natural law of the most philosophical school loses its rigidity and becomes charged with a charging or growing content being conceived as something relative and not as something that shall stand forever.

SIR HENRY MAINE 1822-1888

Maine made a comparative study of legal institution of various communities and laid down a theory of evolution of law. His method was a great improvement upon historical school and yielded fruitful results.

Maine mad every valuable contribution to legal philosophy by way of historic comparative method. He was an erudite scholar of law. He started his career as Regis Professor of civil law in the University of Cambridge at an early age of twenty five. He was law member in the council of the Governor General of India between 1861 and 1869. This provided him an opportunity for the study of Indian legal system. From 1869 to 1877 he occupied the chair of historical and comparative jurisprudence in Corpus Christi College, Oxford. After that he held the distinguished post of the master of trinity Hall, Cambridge.

The founder of English historical school of jurisprudence was Maine. His important works are

Ancient Law 1861, Village Communities in the East and West 1871, Lectures on the Early History of Institution, 1874, and Dissertation on Early law and Custom, 1883. Maine made a significant contribution to law by indicating that there has been a parallel and alike growth and development of legal institution and law in the societies of the east and west up to a certain stage.

DEVELOPMENT OF SOCIETIES

Sir Henry Maine through his comparative study came to a conclusion that the development of law and other social institution has been more or less as an identical palta 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 the Pater familias dominated the entire family. There were some communities which followed matriarchal pattern in which the eldest female of the family was the central authority to manage the family affairs.

According to Maine, Pater familias constituted the lowest unit of primitive communities. A few families together formed the family group. An aggregation of families constituted gens which in turn led to the formation of tribes and collection of tribe formed the community. The individual member of the family had no individual existence then his status.

Maine arrived at his often quoted conclusion that "the movement of the progressive societies has hitherto been a movement from Status to Contract." Status is a fixed condition in which an individual finds himself without reference to his will and from which he cannot divest himself by his own efforts. It is indicative of a social order in which the group, not the individual, is the primary unit of social life; every individual is enmeshed in a network of a family and group ties. With the progress of civilisation this condition gradually gives away to a social system based on contract. This system is characterized by individual freedom, in that "the rights, duties and liabilities flow from voluntary action and are consequences of exertion of the human will." A progressive civilisation, in the view of Maine, is manifested by the emergence of the independent, free, and self-determining individual as the primary unit of social life.

Maine's "status to contract" doctrine is by no means his only outstanding contribution to jurisprudence. He has enriched our knowledge and understanding of legal history in several aspects. Very interesting, for example, is his theory of law and lawmaking. He believed that in the earliest period law was created by the personal commands of patriarchal rulers, who were considered by their subjects to at under divine inspiration. Then followed a period of customary law, expounded and applied by an aristocracy or small privileged class which claimed a monopoly of legal knowledge. The third stage was marked by a codification of these customs as the result of social conflicts. The fourth stage, according to Maine, consists in the codification of strict archaic law by the help of fiction, equity and legislation; these instrumentalities are designed to bring the law into harmony with a progressing society. Finally, scientific jurisprudence weaves all these various forms of law into a consistent and systematic whole. Not all societies, said Maine, succeed in passing through all these stages, and their legal development in its particular aspects does not show a uniform line. Maine merely wished to indicate certain general directions and trends of development in the evolution of law. Modern research has shown that, on the whole, he has succeeded remarkably well in tracing some of the fundamental lines of a natural history" of the law.

Maine's comparative analysis of legal evolution was supplemented in the early twentieth

century by the historical studies of Sir Paul Vinogradoff. English historical research also produced such ripe fruits as Pollock and Maitland's' History of English Law before the time of Edward I and Holdsworth's History of English Law, as well as a host of specialized treatises and monographs. What is lacking up to this day is a history of English law which closely correlates legal developments with the general political, social and cultural history of England.

DEVELOPMENT OF LAW

LAW MADE BY THE RULER UNDER DIVINE INSPIRATION OR DIVINE LAW OR DOOMS OR THEMESTERS:

In the beginning, law originated from themes which meant the Goddess of justice. It was generally believed that while pronouncing justice the king was acting under the divine inspiration of Goddess of justice to be executed by the king as custodian of justice under divine inspiration.
Themesters are the awards pronounced by judges as divinely dictated to him. Themesters are not laws but judgments or dooms. The king happened to be the administrator of judgments -of course he was not the maker of law as the themester were divinely inspired by Goddess of justice.

CUSTOMARY LAW: The next stage was reached when the office of the king or judge was inspired by the councils of chiefs. The priest became the depositories of law who circumscribed the king's power and claimed the sole monopoly of knowledge. Therefore, the priestly class attempted to preserve the customs of the race or caste intact. Since the art of writing had not been invented so customs of the community became law for the people who were united by blood relationship. Thus we notice a particular important phenomenon. Maine's theory of legal development conception of customs emerging posterior to that themester or judgments.
KNOWLEDGE OF LAW IN THE HANDS OF PRIEST: In the next stage of development of law, the authority of the king to enforce and execute law inspired by the priestly class claimed themselves to be learned in law as well as religion. The priestly class claimed that they memorized the rules of customary law because the art of writing had not developed till then.

ERA OF CODES (CODIFICATION): The era of codification marks the fourth and perhaps the final 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 priest class in matters of administration of law. most important codes of the era were Twelve Tables of Rome, Manu's code which were mixture of moral, religion and civil laws, Twelve Tables in Rome, Solon's Attic code, Hebrew Code, the Codes of Hammurabi etc.

TYPES OF SOCIETIES

According to Maine, there are two types of societies, Progressive Societies and Static societies

According to Henry Maine, when the primitive law has been embodied in a code, there is an end to its spontaneous development and such communities or societies which do not progress or go beyond the fourth stage are called static societies.
Those societies which go beyond the fourth stage as developing their laws, by new methods are called progressive societies. There are three methods by which progressive societies

develop their laws. They are;

LEGAL FICTION: According to this method, legal fictions, changes the law according to the changing needs of the society without aiming any change in the latter of law.
Maine defines legal fiction as any assumption which conceals or affects to conceal the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified. Legal fiction satisfies the desire for improvement but at the same time they do not offend the superstition, fear and dislike of change. At a particular stage of social development they are invaluable expedients of social progress for overcoming the rigidity of law.

EQUITY: Equity consists of principles which are considered to be invested with a higher sacredness than those of the positive law.
Equity belongs to a more advanced stage than fictions. The interference with the law is open and avowed. It is a body of law existing by the side of the original civil law, founded on distinct principles claiming incidentally to supersede the civil law by virtue of a superior sanctity inherent in these principles.

LEGISLATION: Legislation is the most effective method of law making, it is considered to be the most systematic and direct method of introducing reform 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.