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# LAW AN EVOLUTIONARY PROCESS

## COMMENT ON SAVIGNY

AUTHORED BY - RAMANDEEP KAUR<sup>1</sup>

### **Abstract**

This article delves into the intersection of Charles Darwin's theory of biological evolution and its profound influence on legal thought, particularly within Anglo-American jurisprudence. Friedrich Karl von Savigny's historical school of jurisprudence in the nineteenth century pioneered the idea of legal evolution, positing that law is an adaptive system responding to environmental changes. The article explores various evolutionary theories of law, distinguishing between social, doctrinal, economic, and socio-biological approaches. It highlights Savigny's significant contributions and the critiques of his theories, noting the inconsistency, limited scope, and oversight of other influential factors. Ultimately, the article underscores the enduring relevance of evolutionary ideas in shaping modern legal systems and the necessity of considering historical context in legal development.

**Keywords:** Law, Evolutionary Process, Friedrich Karl von Savigny, Historical School of Jurisprudence, Legal Evolution, Social Theories of Legal Evolution, Biological Evolution, Jurisprudence.

### **Introduction**

This Article begins to fill that void by considering how the most influential idea of the last century, Charles Darwin's theory of biological evolution, has affected the way lawyers think about law. The fountain head for Anglo-American theories of legal evolution of the "social" variety was the nineteenth century German "historical school" of jurisprudence, founded by Friedrich Karl von Savigny. Rather, legal evolution means only that the law continually adapts to changes in the environment. By making assumptions and developing a formal, mathematical model of common law evolution, Cooter and Kornhauser prove that evolutionary pressures arising from settlement decisions by litigants "are insufficient to cause the legal system to adopt and retain the best legal rule without the help of judges. Keller introduces his socio- biological

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theory of legal evolution by quoting Holmes, and announcing that he is planning on "asserting and maintaining" Holmes' implication "that law is evolutionary. Except for Brown's comment, Keller's theory of legal evolution attracted surprisingly little attention even though it anticipated many of the themes of sociobiology which were to create a storm of intellectual controversy half a century later.

The government of the United States was constructed upon the Whig theory of political dynamics, which was a sort of unconscious copy of the Newtonian theory of the universe. In our own day, whenever we discuss the structure or development of anything, whether in nature or in society, we consciously or unconsciously follow Mr. Darwin. Woodrow Wilson (1908).<sup>1</sup>

Law is a scavenger. It grows by feeding on ideas from outside, not by inventing new ones of its own. How borrowed ideas -- not political and social theories, but abstract ideas borrowed from other disciplines -- affect the law is a topic scholars have overlooked. This Article begins to fill that void by considering how the most influential idea of the last century, Charles Darwin's theory of biological evolution, has affected the way lawyers think about law.<sup>2</sup>

Today the idea that law "evolves" is so deeply ingrained in Anglo-American legal thought that most lawyers are no longer even conscious of it as a metaphor. We speak of the law "adapting" to its social, cultural, and technological environment without the slightest awareness of the jurisprudential tradition we are invoking. The central purpose of this Article is to bring to light the evolutionary tradition in Anglo-American jurisprudence, which underlies many of our assumptions about law.<sup>3</sup>

The first step will be to trace the metaphor of biological evolution as used by legal writers who have influenced American law. Reviewing evolutionary theories of law has several purposes. The first is essentially archival: to reclaim from obscurity and to evaluate several evolutionary theories of law which have either been forgotten or misunderstood. But there is also a second, more subtle goal: to define and thereby to create an evolutionary tradition in jurisprudence with a cumulative power that transcends the individual works.<sup>4</sup>

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<sup>2</sup> E., & Elliott, D. (1985). The Evolutionary Tradition in Jurisprudence. *Columbia Law Review*, 85, 38. <https://doi.org/10.2307/1122404>.

<sup>3</sup> *ibid*

<sup>4</sup> *ibid*

It was considered that the theories about the nature and sources of law to be “evolutionary” if they propose that the law is shaped by its environment in a way that is analogized explicitly to the theory of evolution in biology namely, the theory, usually attributed to Charles Darwin, that the forms of living things are shaped by environmental conditions, not by the design choices of a Creator. By referring to legal theories as “evolutionary,” it does not mean to imply, however, that they are based on a correct understanding of evolutionary theory in biology. My central concern is the effect that evolutionary ideas have had on legal thought, not whether the lawyers got their biology right.<sup>5</sup>

Necessarily omitted from this review is the much larger body of legal theories that express parallel thoughts but without explicit reference to the biological theory of evolution. Nor is it possible in a work of this length to undertake the more basic anthropological inquiry into how lawyers and judges use evolutionary metaphors. Instead, the focus here is on formal theories of law based on self-conscious analogies to evolutionary theory in biology.<sup>6</sup>

It is possible to subdivide theories of legal evolution into four basic groups, which are basically known as the social, the doctrinal, the economic, and the socio- biological approaches to legal evolution. These four categories represent different schools of evolutionary thought; each draws a different analogy between biological evolution and law.<sup>7</sup>

## **SOCIAL THEORIES OF LEGAL EVOLUTION**

The "social" approach to legal evolution is the oldest of the four. It is characterized by the assertion that law is not an autonomous system, but an integral part of the social life of a community. In these theories, it is not so much the law that evolves, as it is society. As the language, culture, political system, and economic structure of society evolve the law changes with them.<sup>8</sup>

### ***Savigny***

The fountain head for Anglo-American theories of legal evolution of the "social" variety was

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<sup>5</sup> *ibid*

<sup>6</sup> Gouvêa, D. (2015). Explanation and the Evolutionary First Law(s). *Philosophy of Science*, 82, 363 - 382. <https://doi.org/10.1086/681603>.

<sup>7</sup> Deakin, S. (2014). Legal evolution: integrating economic and systemic approaches.. <https://doi.org/10.2139/SSRN.1934738>.

<sup>8</sup> Pandey, S., & Spoorthi, B. (2023). Understanding the Social Consequences of Legal Developments in India. *Technoarete Transactions on Advances in Social Sciences and Humanities*. <https://doi.org/10.36647/ttassh/03.02.a001>.

the nineteenth century German “historical school” of jurisprudence, founded by Friedrich Karl von Savigny. The historical school proposed that, rather than building on abstract speculation about states of nature, jurisprudence should study the historical foundations of law. Savigny, a professor of Roman law at the University of Berlin from 1810 through 1842, wrote several multi-volume treatises on Roman legal history, but his influence on Anglo-American jurisprudence rests primarily on a minor political tract, published in 1814, and translated into English in 1831 under the title of the *Vocation of Our Age for Legislation and Jurisprudence*.<sup>9</sup>

Savigny advocates "an organically progressive jurisprudence," an idea that struck a responsive chord for English and American lawyers. They interpreted Savigny as defending the common law, as opposed to civil law codes. Savigny's argument, however, is not actually a brief for the common law method. Savigny wrote to attack a proposal that all the German principalities should adopt one unified code of laws following the overthrow of Napoleon. He claimed that the present age was "not qualified to frame a code" which would establish the law for all time. Drawing on Roman legal history, Savigny argued that legal systems pass through several stages before they reach a period in which codification is appropriate. Early nineteenth century Germany, according to Savigny, had not yet reached the stage of mature legal development necessary before codification would be successful.

Savigny's theory of stages of legal development is built on a self-conscious analogy to evolution in nature, albeit the pre-Darwinian understanding of evolution which lacked the concept of natural selection: "In recent times, the view has become common that in the beginning all societies lived in an animalistic state, and from there have come to a tolerable existence through gradual evolution, and finally to the heights upon which we now stand." The word which Savigny uses again and again to describe legal change is *Entwicklung*, which in context should be translated as "evolution."

Savigny attacks the proposal to codify German law as an outgrowth of the spirit of radical change which swept across Europe following the French Revolution, claiming that, in a "blind rage for improvement, sense and feeling of the greatness by which other times were characterized, as also of the natural evolution of communities and institutions, all, consequently, that is wholesome and profitable in history, was lost." He sees this spirit of radical change as

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<sup>9</sup> Kirkby, C. (2018). *Law Evolves: The Uses of Primitive Law in Anglo-American Concepts of Modern Law, 1861-1961*. *American Journal of Legal History*. <https://doi.org/10.1093/AJLH/NJY020>.

reflecting a false, positivist jurisprudence: "According to this theory, all law, in its concrete form, is founded upon the express enactments of the supreme power." Savigny proposes that law is not the arbitrary creation of government officials, but an integral part of the "spirit of a people," what we would now call "culture." According to Savigny, law and culture evolve together.

But this organic connection of the law with the essence and character of a people manifests itself also over time, and here also it is to be compared to language. As with language, so too the law does not stand absolutely still for even an instant, but undergoes the same movement and evolution as every other aspect of a people, and this evolution is subject to the same law of internal necessity as every earlier development, therefore, the law grows forward with a people, constitutes itself out of them, and finally becomes extinct as a people lose their individuality.<sup>10</sup>

Although Savigny does not present any evidence to support his theories, he does identify two distinct forces which he maintains underlie the evolution of law. Law is first developed by custom and conventional morality, next by jurisprudence, everywhere, therefore, by internal silently-operating powers, not by the arbitrary will of a law-giver."

Savigny's theory was revolutionary for its suggestion that law was not the intentional creation of governors, but somehow evolved out of the common spirit of a people. Nevertheless, by modern standards Savigny's work seems hopelessly metaphorical and unscientific. Savigny is vague about the mechanisms which cause law to evolve (and indeed, about what the concept of legal evolution really means). Moreover, he never explains why the codification movement which he opposed was not as "natural" an outgrowth of the spirit of the people as any other change.<sup>11</sup>

### **Criticism of Savigny's Theory**

Savigny's thesis has been criticized on a number of grounds:

- 1) Inconsistency in the Theory:** he emphasized on the national character of law but at the same time he recommended a method by which the Roman law could be adapted to

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<sup>10</sup> Steward, J. (1949). CULTURAL CAUSALITY AND LAW: A TRIAL FORMULATION OF THE DEVELOPMENT OF EARLY CIVILIZATIONS. *American Anthropologist*, 51, 1-27. <https://doi.org/10.1525/AA.1949.51.1.02A00020>.

<sup>11</sup> Toews, J. (1989). The Immanent Genesis and Transcendent Goal of Law: Savigny, Stahl, and The Ideology of the Christian German State. *American Journal of Comparative Law*, 37, 139. <https://doi.org/10.2307/840445>.

modern conditions and advocated for the acceptance of Roman law as the law of Germany. On one hand, he asserted that the origin of law is in the popular consciousness, and on the other hand, argued that some of the principles of Roman law were of universal application. Savigny's view of adopting principles of Roman law was vehemently opposed by Beseler, Eichhorn, and Gierke. Later on, the national consciousness grew and the Code, which was promulgated afterwards, incorporated more and more German ideas and principles.<sup>12</sup>

- 2) **'Volksgeist' Not the Exclusive Source of Law:** Savigny's view that popular consciousness is the source of all law is not true. Sometimes, an alien legal system is successfully transplanted in another country. Sometimes, a single personality greatly influences a legal system who, in no way, can be said to be a representative of popular consciousness. There are many technical legal rules which never existed and nor have any connection with popular consciousness.<sup>13</sup>
- 3) **Customs not always based on popular consciousness:** Savigny's view that customs are waste on popular consciousness of community as a whole is also not perfectly sound, many customs originated only for the convenience of a powerful minority as slavery. Many customs are adopted due to imitation and not on the ground on their righteousness or any conviction of the community. Sometimes, customs completely opposed to each other exist in different parts of the same country which cannot be said to be reflecting the spirit of the whole community.<sup>14</sup>
- 4) **He Ignored Other Factors That Law:** Another criticism "so occupied with the source of the law that he almost forgot the stream". He overlooked the forces and factors which influence and determined the growth of law. The creative function of the judge has also been ignored in Savigny's theory and the contribution of the jurist has been taken very lightly. Many rules, in modern time, are the result of a conscious effort. For example, the law relating to trade unions is an outcome of a long and violent struggle between interests within a society.<sup>15</sup>
- 5) **Many Things Unexplained:** Certain invariable traits, like mode of evolution and development noticeable in all legal systems of the world are left unexplained in

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<sup>12</sup> Bris, D. (2019). Testing Legal Origins Theory within France: Customary Laws versus Roman Code. *Journal of Comparative Economics*, 47, 1-30. <https://doi.org/10.2139/SSRN.2359261>.

<sup>13</sup> Rai, N. (2010). *Volksgeist: In View of Friedrich Carl Von Savigny*. Social Science Research Network. <https://doi.org/10.2139/SSRN.1695389>.

<sup>14</sup> Countryman, E., & Thompson, E. (1993). Customs in Common. *William and Mary Quarterly*, 50, 610. <https://doi.org/10.2307/2947373>.

<sup>15</sup> Peari, S. (2014). Savigny's theory of choice-of-law as a principle of 'voluntary submission'. *University of Toronto Law Journal*, 64, 106 - 151. <https://doi.org/10.3138/UTLJ.1203>.

Savigny's theory. Legal developments in various countries show some uniformity to which he paid no heed. Prof. Korkunove says: 'it does not determine the connection between what is national and what is universal'.<sup>16</sup>

- 6) **Juristic Pessimism:** according to Pound, Savigny encouraged 'juristic pessimism'. According to his theory, legislation must accord popular consciousness. Such a view will not find a favour in modern times. No legal system would like to make compromise with abuses only because people are accustomed to it. It is rightly said that savigny's theory had tended to hang traditions like fetters upon the hands of reformative enterprise. 'It discouraged creative activity and legal reform. His statement was simply to watch the unfolding of laws from popular consciousness with folded hands'.<sup>17</sup>

### ***SAVIGNY'S CONTRIBUTION***

Savigny is considered by many to be the greatest jurist of nineteenth century. Ihering said that with the appearance of savigny's earliest work 'Das Recht Des Bestizes' in 1803 modern jurisprudence was born.

#### ***1. His Theory Reaction Against A Natural Law Theories***

His theory came as a powerful reaction against 18<sup>th</sup> century' rationalism and principles of natural law', the advocates of which tried to establish a legal theory of universal application without any consideration of time and place. Prof. Allen rightly says that 'the historical movement in jurisprudence may be called the revolt of fact against fancy'. The view that the source of law is the institutive sense of possessed by the community in negative the conception of the unitary sovereign whose command is law. He made the' juristic world perpetually conscious of the iceberg quality of law, with its present pinnacle concealing and denying the hidden nine-tenths of it's past'.<sup>18</sup>

#### ***2. His Main Thesis Still Unimpaired***

The great truth that the theory of Volksgeist contains is that a nation's legal system is greatly influenced by the culture and character. Savigny was mainly occupied with how law becomes and whether it tends, or what the conscious effort can make it to tend, and his thesis in this respect still substantially holds good.<sup>19</sup>

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<sup>16</sup> Halsted, J. (1969). Friedrich von Savigny: Of The Vocation of our Age for Legislation and Jurisprudence.. [https://doi.org/10.1007/978-1-349-00484-3\\_17](https://doi.org/10.1007/978-1-349-00484-3_17).

<sup>17</sup> İşsevenler, O. (2022). Of the Ageless Vocation for Legislation and Jurisprudence. Türkiye Adalet Akademisi Dergisi. <https://doi.org/10.54049/taad.1183563>.

<sup>18</sup> Crowe, J. (2016). Natural Law Theories. Philosophy Compass, 11, 91-101. <https://doi.org/10.1111/PHC3.12315>.

<sup>19</sup> Raude, K. (2022). Der Volksgeist bei Jacob Grimm. . <https://doi.org/10.5771/9783465144274>.

### 3. *Theory in Hands of National Socialists*

It was the misfortune of this theory of historical school, later on, influenced many jurists. It was after Savigny that the value of the historical method was fully understood. Apart from his followers in his own country and Lord Bryce, and many others who made studies of various legal systems on historical lines and purged them of many of the exaggerations of Savigny's theory and traced the course of evolution of law in various societies. Pollock, Maitland, Holdsworth and Holmes in their works pointed out that the course of development of common law was determined by social and political conditions of particular time.<sup>20</sup>

### 4. *Seeds of Evolutionary and Sociological Theories*

Warning against hasty legislation: The view that the law is closely connected with the people and it closely evolves contained the germs of future sociological theories. That is why Savigny is called by some as Darwinian before 'Darwin and a sociologist before sociologist.' After Savigny, Ehrlich stressed the importance of the study of 'living', which, he said, is different from the dry skeleton of law, that is, law, in its formal shape. Savigny sounded a note of warning against hasty legislation and the introduction of revolutionary ideas and aspirations based on abstract principle. His influence in Germany was great and the codification was delayed for a long time.<sup>21</sup>

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1. The source of the metaphor is 2 F. Pollock & F. Maitland, *The History of English Law* 561 (2d ed. 1899).
2. Campbell, *Variation and Selective Retention in Socio-Cultural Evolution in Social Changes in Developing Areas: A Reinterpretation of Evolutionary Theory* 19, 26-27 (H. Barringer, G. Blanksten & R. Mack eds. 1965).
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<sup>20</sup> Karsten, P. (1991). The "Discovery" of Law by English and American Jurists of the Seventeenth, Eighteenth, and Nineteenth Centuries: Third-Party Beneficiary Contracts as a Test Case. *Law and History Review*, 9, 327 - 381. <https://doi.org/10.2307/743651>.

<sup>21</sup> Small, A. (1923). Some Contributions to the History of Sociology. Section II. The Thibaut-Savigny Controversy: Continuity as a Phase of Human Experience. *American Journal of Sociology*, 28, 711 - 734. <https://doi.org/10.1086/213550>.