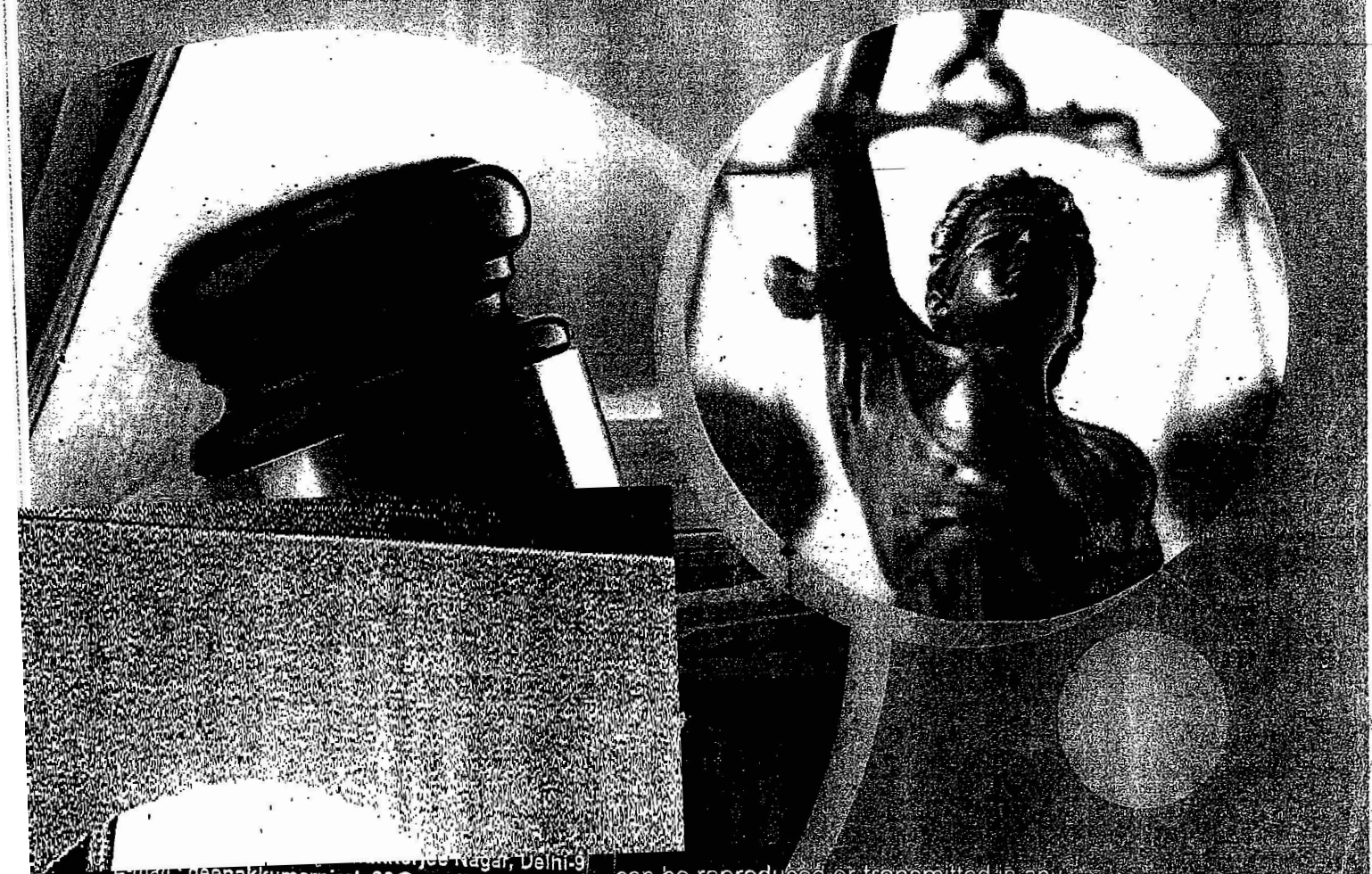
Jurisprudence



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JURISPRUDENCE

Break up of topics:

- Introduction to jurisprudence and legal theory
  - Nature of jurisprudence
  - Value of jurisprudence
  - Definitions of jurisprudence
- Definitions of law (The various schools)
  - The idealist school
  - The positivist school
  - The sociological school
- Schools of jurisprudence
  - Historical school
  - Analytical school
  - Sociological school
  - Philosophical school
  - Natural school
  - Realistic school
  - Pure theory of law
  - Anthropological school
- Sources of law
  - Custom
  - Precedent
  - Legislation
- Rights and duties
- Personality
- Ownership
- Possession
- Administration of justice
  - The concept
  - Theories of punishment

A note

Jurisprudence is one topic which is only in the prelims of the Civil Services Examination. Therefore, it is suggested to the aspirants that they should not try to get too much into the depth of the subject. There are approximately twenty questions on jurisprudence in the prelims. Broadly, the trend is that they ask you around 12-13 factual questions specifically pertaining to:

(a) Definitions and statements
(b) Jurists and their schools
(c) Books and authors
(d) Some cases (particularly pertaining to the chapter on 'Possession'), etc.

The other 7-8 questions are pure concept based questions in which your understanding of the subject matter is tested. In such questions, it is suggested that one should always go by the way of elimination. One should particularly focus upon, for such questions, those areas on which assertion-reasoning type of questions can be asked. Particularly while doing the schools of jurisprudence, one should take care of understanding the difference between the various schools.

NATURE AND VALUE OF JURISPRUDENCE

Jurisprudence is basically the theoretical aspect of the word law. In jurisprudence, we do not deal with the practically applicable pieces of statutory law; rather we try to understand the very essence of law and its various dimensions. Like in the other subjects, for example, geography, we have geographical thought as a subject of study; similarly, in law we have got "legal thought" which is called "jurisprudence". The basic questions that we try to answer in jurisprudence are – What is law?, Why should it exist?, What should be the nature and purpose of the law?, What are rights and duties and what should be their nature?, What is ownership and possession and why does law have to protect them?, etc.

Jurisprudence refers to a certain type of enquiry or investigation into law, an enquiry of a general nature the purpose of which is to bring out the underlying and essential principles of law and legal system while a typical legal subject like contract involves the study of legal rules and principles derived from authoritative sources and its application to practical situation.

Thus while the law of contract deals with right of one party to a contract against the other contracting party, in jurisprudence the emphasis is on the study of nature and underlying meaning of term 'right' and different kinds of legal rights.

As observed by **Salmond** "in jurisprudence we are not concerned to derive rules from authority and apply them to problems, we are concerned rather to reflect on nature of legal rules and underlying meaning of legal concepts and in the essential features of legal system. Thus whereas in law we look for the rule relevant to the given situation, in jurisprudence we ask for what is for a rule to be a legal rule and what distinguishes law from morality, etiquette and other related phenomenon.

Value of jurisprudence

In general, **jurisprudence cannot be applied to practical situations**. The question arises: What possible value can there be in an abstract subject like jurisprudence?

Salmond in his **"Treaties on jurisprudence"** has mentioned the following uses of jurisprudence:

1) **The value of jurisprudence lies in its own intrinsic interest**. While fascination of a subject however is no guarantee of its worth, researches into jurisprudence may well have an impact on the whole of legal, political and social thought.
2) Just as in science and Maths, progress has been largely due to increasing generalisation, in law too; generality can mean improvement. One of the tasks of jurisprudence is to construct and explain organizing concept **serving to make law's complexities more manageable and rational.**
3) Jurisprudence has an **educational value**. Logical analysis of legal concepts and study of jurisprudence can assist in combing the vice of formalism. The excessive emphasis on legal form rather than social realities and making one more aware of social function of law. Jurisprudence can influence and teach a lawyer to look around him and to create **an awareness that answers to new legal problems must be found by consideration of present social needs and realities than in wisdom of the past.**
4) Jurisprudence gives shape to practical law. It helps in shaping the practical law in a form so that it can serve the society.

Schools of jurisprudence

The schools of jurisprudence are a result of various approaches of the jurists to the problem of 'the nature of law'.

Definitions of jurisprudence

The study of jurisprudence started first among the Roman jurists. Jurisprudence has been derived from the latin word juris prudentia. Juris means legal and prudentia means knowledge or skill. Initially, jurisprudence was confused with morality. However, it was towards the 19th century that the concept was secularised. In England, it was not until the time of

... the Roman Jurist Ulpian in early 19th century that the word began to acquire a technical significance. The various attempts at defining jurisprudence have been as follows.

Ulpian (Roman jurist): "Juris prudentia est divinarum, atque humanarum rerum notitia, justic atque injustic scientia" i.e. Jurisprudence is the knowledge of things divine and human the science of right and wrong.

Paulus (Roman jurist): The law is not to be deduced from the rule but the rule from the law.

Hobbes: In 'Elementeae philosophiae' deals with the nature of national law, political government and sovereignty.

Black Stone: 'Jurisprudence is the study of science of law'.

Wurzel: "Jurisprudence was the first of social science to be born."

Bentham (1748-1832): Some important points about Bentham:

- He distinguished between examinations of the law as it is **(expositional)** and as it ought to be **(censorial)** jurisprudence.
- His theory is called a **"utilitarian individualism"** – He was an individualist. He criticised the method of law making corruption and inefficiency of the administration of justice and restraints on the individual's liberty. He said that the function of law is to emancipate the individual from the bondage and restraint upon his freedom. Once the individual was made free he himself shall be looking after his welfare. In this way he was a supporter of *laissez faire* principle of economics. He pleaded for codification and condemned judge-made law and customs etc. He was a utilitarian also. According to him, the end of legislation is the 'greatest happiness of the greatest number'. He defined utility as the 'property or tendency of a thing to prevent some evil or to procure some good'.
- The theory of **pleasure and pain**. The purpose of law is to bring pleasure and avoid pain.
- Bentham gave the concept of **"felicific calculus"** – Under this, Bentham presented a chart as per which the pleasures and pains could be calculated.
- **Friedman** in his book **"Legal Theory"** has criticised Bentham on true accounts –
  (1) Bentham's abstract and doctrinaire rationalism which prevents him from seeing an in all his complexity, in his blend of materialism and idealism, of nobility and baseness, of egoism and altruism. This leads Bentham to an overestimate of the powers of the legislator and an underestimate of the need for individual discretion and flexibility in the application of law.....
  (2) Bentham's failure to develop clearly his own conception of the balance between individual and community interests.
- Bentham wrote –
  (1) Theory of Legislation
  (2) Limits of jurisprudence defined (written in 1782 but published in 1945)
- Bentham defined law as follows –

  "A law may be defined as an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power: such volition trusting for its accomplishment to the expection of certain events which it is intended such declaration should upon occasion be a means of bringing to pass, and the prospect of which it is intended should act as a motive upon those whose conduct is in question."
- **John D Finch** in **"Introduction to Legal Theory"** has criticised Bentham as –

  "With Bentham came the advent of legal positivism and with it the establishment of legal theory as a science of investigation as distinct from the art of rational conjecture, Bentham laid the foundations of this new approach, but, far from containing the solution to problems involving the nature of positive law, his work was only the beginning of a very long and varied, series of debates, which are still going on today."

Salmond: "Jurisprudence is the science of first principles of the civil law". Jurisprudence, according to Salmond, deals with law of state consisting of rules applied by courts in

administration of justice. There are three kinds of law which govern the conduct of human beings i.e.

1. Law which emanate from theology
2. Law which emanate from morality
3. Law which emanate from a politically organised society

True law is the law that exists in politically organized society, and Salmond calls it civil law, the study of that law is the fit subject for study in jurisprudence.

Salmond broadly incorporates in his definition:

(1) Analytical jurisprudence (Salmond says that his book is primarily concerning analytical jurisprudence)
(2) Historical jurisprudence
(3) Ethical jurisprudence

He uses jurisprudence in both **generic and specific sense**. The former includes the entire body of legal doctrines, whereas the latter means only a particular department of such doctrines. In the latter sense it may be called 'theoretical' or 'general' jurisprudence. Salmond says that his book is concerned only with this jurisprudence which he defines as "the science of the first principles of the civil law".

Another classification that Salmond makes is –

(1) Expository or systematic, which deals with the contents of an actual legal system, as existing at any time, whether past or present.
(2) Legal history, which is concerned with a legal system in its process of historical development.
(3) The science of legislation, the purpose of which is to set forth law as it ought to be. It deals with the ideal future of the legal system and with the purposes for which it exists.

Dias & Hughes: "Jurisprudence may tentatively be described as any thought or writing about law, other than the technical exposition of a branch of law itself."

Austin: "Jurisprudence is the philosophy of positive law. Positive law is akin to civil law. (However, the term 'philosophy' used by Austin may be said to be inaccurate as jurisprudence confines itself to civil or man made law).

Holland: "Jurisprudence is the formal science of positive law." He further states that "jurisprudence deals with the human relations governed by the rule of law rather than the material rules themselves." A formal science means one which reflects on the nature of legal rules, the fundamental principles underlying them, the essential features of legal system as opposed to material science which deals with specific rules and concrete details. Thus in as much as jurisprudence connotes systematized knowledge of a subject it is a science. Further the term positive law refers to civil law *i.e.* law made by state for regulating human beings' conduct and enforced by the courts. Finally, the term formal as mentioned above means that science deals with the fundamental principles underlying legal rules and systems.

Allen: "Jurisprudence is the scientific synthesis of essential principles of law."

Paton: "Modern jurisprudence trenches on the fields of social sciences and of philosophy, it digs into the historical past and tends to create the symmetry of a garden out of luxuriant chaos of conflicting legal system."

Julius Stone: "It is the lawyer's examination of the percepts, ideal, and techniques of the law derived from present knowledge in disciplines other than law."

Jenk: Can jurisprudence be truly said to be a purely "formal science". Not, it is submitted, unless the word 'formal' be used in a strained and artificial sense. It is true that a jurist can only recognise a law by its form; for it is form which, as had been said, causes the manifold matter of the phenomena to be perceived. But the jurist, having got the form as it were, on the operating table, has to dissect and ascertain its meaning..... To say that jurisprudence is concerned only with forms, is to degrade, it from the rank of a science to that of a craft."

Patterson: Jurisprudence means a body of ordered knowledge, which deals with a particular species of law.

Keeton: Jurisprudence is the study and systematic arrangement of the general principles of law.

Wayne Morrison in **"Jurisprudence: from the Greeks to Post Modernism"** – "At its simplest jurisprudence may be defined as the corpus of answers to the question what is law".

Gray: The relation of jurisprudence to law depends not upon what law is treated but how law is treated. A treatise on jurisprudence may go into minute particulars or be confined to the most general doctrines and either case deserves its name. What is essential to it is that it should be an orderly scientific treatise in which the subjects are duly classified and subordinated.

Hart: Law is a system of rules – primary and secondary – the combination of which explains the nature of law and provides Key to jurisprudence. The primary rules are duty imposing rules and the secondary rules are to confer power which provide for the creation or variation of duties. The supplementing of primary rules by secondary rules is the step from pre-legal to legal world.

Books and Authors:

1. Jurisprudence – Salmond
2. Jurisprudence – E.W. Patterson
3. Elementary Principles of Jurisprudence – Keeton
4. Jurisprudence – Dias
5. Province and Functions of Law – Julius Stone
6. Elements of Jurisprudence – Holland
7. Nature and Sources of Law – Gray
8. The new Jurisprudence – Jenk
9. Concept of Law – Hart
10. Legal Theory – Friedman
11. Introduction to Legal Theory – John Finch
12. Province of Jurisprudence Determined – Austin
13. Limits of Jurisprudence Defined – Bentham
14. Law in the Making – Allen
15. Legal Philosophies – Berolzhmeir
16. Essays of Jurisprudence in Common Law – Goodhart
17. A Text Book on Jurisprudence – Paton

DEFINITIONS OF LAW

Several attempts have been made to define law but **it has been very difficult to present a universal definition. The prime reason being that different societies have seen different processes of development of law as per their diverse requirements.** Moreover, owing to the above reason different jurists have got different notions about the nature, purposes and sources of law. Therefore, we find several schools which define law from their respective precept. We may classify the definitions into three broad classes:-

(1) **Idealist definitions**
(2) **Positivist definitions**
(3) **Sociological definitions**

Idealist definitions

In this category, most of the definitions given by the Roman and other ancient jurists will fall. All these definitions present justice to be the main element of law. **Justinian's Digest** defines law as "the standard of what is just and unjust." **Ulpian** spoke of law as "the art or science of what is equitable and good." **Cicero** said that law is "the highest reason implanted in nature."

However, in the modern times, the law has been secularised and has grown into an independent branch of social science. Therefore, now the earlier theological definitions no longer hold ground. Nevertheless, "justice" still happens to be an important element in some of the modern definitions. But the concept of justice now is seen in the sense of legal justice and not an abstract justice.

Salmond defines law as "the body of principles recognised and applied by the state in the administration of justice." Salmond therefore gives emphasis upon two aspects:-

(1) It is the courts and not the legislature which will determine the true nature of law.

(2) In order to understand the true nature of law, one should understand its purpose.

Criticism

(1) **Vinogradoff** criticises **Salmond** on the ground that his definition of law proceeds from the action of the judges. It is somewhat 'like the definition of a motor car as a vehicle driven by chauffeur.' He asks: "What should we think of a definition of a medicine as a drug prescribed by a doctor?"

(2) Another point of criticism against Salmond's definition is that he confuses 'justice' with law. Law and 'justice' are not the same thing. Law is that which is actually in force whether it be evil or good. 'Justice' is an ideal founded in the moral nature of man. However, Salmond never means that law is justice but the utmost that he says is that only by law justice can be achieved. From this interpretation it appears that law has been defined by Salmond in terms of its purpose. Defining law in terms of its purpose may help in understanding the nature of law but law serves many ends and by confining it only to the pursuit of 'justice', Salmond has narrowed the field of law.

According to Salmond's definition, a rule is law because courts would recognise, apply and enforce it rather than the courts would recognise, apply and enforce it because it is law. Salmond's definition presents a picture of law in which law is subsequent to the administration of justice and thus more importance is attached to the law courts. Salmond's definition may be of some use to lawyer but otherwise it has no wider application. A definition must have, if not universal, at least very wide application and Salmond's definition is lacking in this respect. His definition is very narrow. It is applicable only to the common law of England which is judge-made law.

Positivist definition

According to **Austin**, "law is the aggregate of sovereign, to men as politically subject." In other words, law is the 'command of the sovereign.'

Thus, the command, duty and sanction are the three elements of law. The law which has these elements of characteristics is called 'positivist law'. He distinguishes 'positive law' from 'positive morality'. According to Austin, sovereign, command and sanction are the three basic and essential elements of law.

Criticisms:

(1) All law is not command.

(2) Much of the law is enabling rather than restrictive (it means it is not duty).

(3) It is not the sanction alone that makes the obedience of law possible but there are other factors also.

(4) Austin's definition does not cover customs and International law because they have not all the essentials which "law" must have according to Austin. He completely ignored the social aspects of the law and the psychological factors which secure its obedience.

Kelson: Kelson defines law as the 'depsychologized command.' Though Kelson defines law in terms of command, he uses it in a sense quite different from Austin's. By command, he simply means that it imposes a duty. Austin's 'sovereign' does not come into picture in Kelson's definition.

Sociological definition

They define law in terms of its relation with the society.

Duguit defines law as essentially and exclusively as social fact. It is in no sense a body of rules laying down rights. The foundation of law is in the essential requirements of the community life. It can exist only when men live together. Therefore, the most important fact of social life is the interdependence of men (this Duguit calls as '**social solidarity**'). The aim of the social institutions is to safeguard and further it. Only those rules can be called laws which further this end. The **basis of the validity of law** is the popular acceptance and not the will of the sovereign. The sovereign is not above the law but is bound by it. The law should be based on social realities.

Ihering: Ihering defines law as 'the form of the guarantee of the conditions of life of society, assured by State's power of constraint.' There are three main implications of this definition:

(1) Law is treated as only one means of social control.
(2) Law is to serve social purpose.
(3) It is coercive in character, in other words the obedience to law is secured by the state through external compulsion.

Ehrlich: He includes in his definition all the norms which govern social life within a given society. This definition goes to include even those fields where the law no longer remains law, but becomes sociology.

Pound: Pound defines law as 'a social institution to satisfy social wants'. It lays down a constructive scheme for the study of law in the context of social problems.

Realist movement (applicable in U.S.A.) which is considered to be a part of the sociological approach, defines law in terms of judicial proposes. **Holmes J.**, the father of Realist Movement, says that 'the prophesies of what the courts will do, in fact, and nothing more pretentious, are what I mean by law.' **Jerome Frank, Lewellyn, Cardozo** to this belongs to schools. According to them, the formal law is simply a guess as to what the courts would decide and the law is that what the courts actually decide.

In the ultimate analysis all the definitions have to be seen together. The combined effect of all the definitions is as follows:

(1) Law presupposes state. There may be law even without the state, as the primitive law, but law, in modern sense of the term, implies state.
(2) The state makes or authorises to make, recognises or sanctions rules which are called law.
(3) For the rules to be effective there are sanctions behind them.
(4) These rules (called law) are made to serve some purpose. The purpose may be a social purpose, or it may be simply to serve some personal ends of a despot.

HISTORICAL SCHOOL

In this Historical school, the basic presumption is there is a link between the society and law. The law grows as per the needs of society. The societal necessities are specific for particular society and, therefore, accordingly the behaviour of society is also specific to that particular society. This behaviour is based upon particular society. As the necessities of society vary, the behaviour also varies. One it is found that a particular behaviour has been consistently practiced in society and followed because of legal compulsion such a behaviour will be said to have value at customary law. It is the customary law at which existing law come into the society. Though the basis theory of Maine, Puchta are not have essentially the same element, essential premise is same.

The historical school approach to law originated in the beginning of 19th century. **Savigny** is considered to be its chief exponent. The basis of historical approach lies in Roman law. **MONTESQUIEU** anticipated historical school and stated that "laws were creation of climate, local situation, accident or imposture." Maine calls him the first jurist who proceeded on historical method.

Burke warned that "schemes should not be made for the future without assimilating the lessons of past." According to him, law is a product of a gradual and organic process.

Hugo – Became starting point of historical school "In the earliest times to which authentic history extends, the law will be found to have already a fixed character peculiar to the people like manners, language and constitution. None of these phenomena have separate existence; they are but the particular faculties and tendencies of the individual people, inseparably united in nature and only wearing the semblance of distinct attributes to our law".

Germany is said to be the cradle of historical school.

During French Revolution Napoleon code was in force. In about 1814, a proposal had been mooted for a code by **Thebaut of Heidelberg**. He felt that law should be codified and that the code should contain all legal principles.

The view of Thebaut was stoutly opposed by SAVIGNY in an essay – "On the vocation – **Vom Beruf (1814)**

The factors for the rise of historical school –

(1) It was a reaction against the plea for **universality of law** as suggested by the natural school.

(2) It was a reaction against **rationalism** which suggested that what is relevant is the requirements of the present and there should be no reference to the past.

(3) The Napoleonic Conquests in Europe had given rise to an extreme degree of **nationalism**. This helped in the growth of historical school. The historical school also takes pride in the national customs and practices.

(4) It was the reaction against Thibaut's (of Hiedelberg) proposal for **codification**. The historical school suggested that by codifying, law would become static and a law which is derived from local customs cannot be codified.

Savigny's Theory:

Savigny wrote the following books:

(1) On the vocation – vom beruf
(2) Law of possession
(3) History of Roman Law in Middle Ages
(4) The system of Modern Roman Law

According to Savigny:

- Law has its source in the general or common consciousness of the people. This common consciousness is called the **Volksgeist**. The nature of any particular system of law is a reflection of the spirit of the people who evolve it; law is the product of people's life and a reflection of people's spirit; it can be understood only by raising the history of the people.
- Law is not a product of man's free will. Law, language, customs, government have no separate existence. There is but one force which empowers the people and it underlies all these constitutions. Law like language, develops with the life of the people, it grows with and strengthens with the strength of the people and finally dies away as the nation looses this nationality.
- Law has a national character. A nation according to Savigny is a community of people linked together by historical, geographical and cultural ties.
- Law is a matter of unconscious growth, that is, it is not made deliberately. Any law making should therefore, follow the course of historical development
- As law grows 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 lawyer or the jurist is more important than the legislator.
- Thus, according to Savigny's theory, law is a matter of unconscious and organic growth. Therefore, law is found and not made. Further, law is not universal in nature. Like language, it varies with people and age. And, custom not only precedes legislation but it is superior to it. Law should always conform to the popular consciousness i.e. Volksgeist.

to the defects of contemporary codes. Secondly in matters on which there is no Volksgeist, a code might introduce new and unadaptable provisions. Thirdly, he argued that codification could never cater exhaustively to all problems that arise in the future and hence was not a suitable instrument for the development of law. Fourthly, he argued that codification would highlight the loopholes and weaknesses of the law and so encourage evasion. Codification in Savigny's view, should be preceded by 'an organic, progressive, scientific study of the law', by which he meant historical study. Reforms should await the results of the historians' work. The legislators should look before they leap into reform.

In essence, the theory of Savigny –

1. Law, language, custom and government has no separate existence.
2. The organic development of law, with the life and character of people develops with and in this it resembles language.
3. Law grows with a nation, increases with it and dies at its dissolution.
4. Custom Precedes legislation and is superior to it should conform to consciousness of people. Custom may be evidence of law, but its real source lies deeper in the minds of men.
5. Law is not of universal application and varies with people and ages.
6. Lawyers are voices of popular consciousness and their function is to mould law.
7. Instead of the individual, emphasis was laid on spirit of people – Volk geist (source of law).

Criticism of Savigny's Theory

(1) **Inconsistency in the theory** – On the 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 Beselor, Eichorn, and Gierke.

(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.

(3) **Customs not always based on popular consciousness** – 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 of 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.

(4) **He ignored other factors that influence law** – Another criticism against Savigny is that he was "so occupied with the source of the law that he almost forgot the stream". He overlooked the forces and factors which influence and determine 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 conflicting interests within a society.

(5) **Many things unexplained** – Certain invariable traits, like mode of evolution and development noticeable in all the legal systems of the world are left unexplained in 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'.

(6) **Juristic pessimism** – According to Pound, Savigny encouraged 'juristic pessimism'. According to his theory, legislation must accord with popular consciousness. Such a view will not find favour in modern times. No legal system would like to make compromise with abuses only because that people are accustomed to it. It is rightly said