HISTORICAL SCHOOL OF LAW

STUDY OF ROMAN LAW:

1. Derived inspiration from the roman law

2. Post glossators commenters attempted to relate roman law with problem of the day.

3. This was conceived in Germany in 15th and 16th century contain historical approach in its embryonic from.

HISTORICAL SCHOOL:

1. SALMOND,"That branch of legal philosophy which is termed historical jurisprudence is the general portion of legal history .it bears the same relation of legal history large at analytical jurisprudence bears to the systematic exposition of the legal system. Historical jurisprudence is the history of the 1st principles and conceptions of legal system.

2. G.LEE."Historical jurisprudence deals with law as it appear in it various arms at its several stage of development .but historical jurisprudence is at a mere branch of anthropology except in so far as any science which deals with human life may be regarded as a department for these studies ..it does not to attempt to set forth all law and custom which may be found in ancient and savage tribes as well as in civilized nation of every time.

3. PROF..DIAS POINT out the historical school arose at contemporaneously with the analytical school at the beginning of the 19th century and would be regarded as manifestation of reaction against natural law theories as it had been germinating long before then.

MONTESQUIEU:

1. According to sir henry Maine, Montesquieu was thee first jurist who followed the historical method.
2. "law are the creation of climate, local situations accident or imposture"

3. He did not lay down any philosophy underlying the relation between law and society, but his suggestion was a step in direction of new thinking.

**HUGO:**

1. Law, like language and manners of the people, forms it and envelopes as situated to the circumstances.

2. The essence of law is its acceptance regulation and observance by the people.

**HARDER:**

1. Herder rejected the universalizing tendencies of the French philosophy and stressed the unique character of every historical period, civilization and nation.

2. Every nation possesses its own individual character and qualities and none is intrinsically superior to others.

3. The originality and influence of herder was due to this belief that different cultures and societies developed the own values rooted in their own history and each society being left free to develop in its own war.

**CONTROVERSY ON THE CODIFICATION OF GERMANY:**

1. During French denominations, code Napoleon remained in force in many parts of Germany.

2. After restoration of the national government, the problem of codification drew the attention of the people.

3. Many jurists were in favor of promulgating a new code incorporating the excellences from foreign law also because neither the old code nor the customary law were adequate enough to fulfill the needs of society.

4. The main supporter of codification was Thibaut of Heidelberg profession. He was inspired by the French code, the movement of national unification of Germany also gave
him impetus.

5. Thibaut project involved two assumptions

- the law should be made by enactment just by the legislator wills it to be
- Code could be framed enunciating legal principles which would not require any modification and would be perfect and all comprehensive and shell is applicable to all places and times.

6. In this thesis "vom beruf" Savigny vehemently opposed both the assumptions and laid down propositions which became the thesis of historical school.

A.K. VON SAVIGNY:

1. He was born in Frankfurt in 1779. Regarded as founder of historical school.

2. In 1803 appeared his first major work “the law of possession “in which he fraud the process by which the original roman doctrines of possession had developed into the doctrine and actions prevailing in contemporary Europe.

3. He studied about the development of roman law in medieval Europe and published between 1813 and 1831 in six volumes " the history of roman law in the middle ages"

4. In the "the system of modern law" he analyzed roman and local laws .he was not opposed to reform but maintained that reforms which went against stream of a nations continuity of doomed .his warning the that legislators must look before the leap into reform.

5. According to Savigny. "law is a product of the times, the germ of which likes the germ of state. Exists in the nature of men as being made for society and which developed from their germ various forms, according to the environing influences which play upon it."

6. the essence of his thesis is found in his work of 1814 entitled on the vocation of our time for legislation and jurisprudence"

7. For law as for language there is no moment of absolute assertion. It is the subject to the same movement and development was every other popular tendencies and this every
development remains Ander the same law of inward necessity a sin its earliest stages.

8. "Law grows with growth and strengthens with the strength of the people and finally dies away the as the nation loses nationality.

9. "Law is henceforth more artificial and complex since it has a twofold life -As part of the aggregate existence of the community which it does not to be and secondly as a distinct branch of knowledge in the hand of jurists.

10. The nature of any particular system of law was a reflection of the spirits of the people who evolved it .this was later characterized as this the "volksgeist "by Puctita ,a disciple of Savigny .all law is the manifestation of common consciousness .law is not of universal application .its varies with people and ages..

11. Savigny rejected natural law to him a legal system was a part of the culture of people .this volksgeist was a unique, ultimate and often mystical reality which was linked to the biological heritage of people.

12. custom is the main source of law and its precedes legislation

13. Savigny successfully used his folksiest theory to reject the French code and the move to codify law in Germany.this result was that Germany law remained 1900 Roman law adapted to germen condition with injection of certain local ideas.

14. Savigny was not only a theorist but as a historian led him to the hypothesis that all law originated in custom and only much later was created by the jurist activity.

15. Savigny see a nation and its state as organism which is born. Matures declines and dies .law is a vital part of that organism.

CRITICISM:

1. PROF.DIAS observed the idea of volksgeist certainly suited the mood of the German people, but is acceptable in a limited way but savigny extrapolated it into sweeping universal’s treated it as a discoverable thing but even in a small group, people hold on different ways on different subject and the "sprit" does not exist .it appear to the historical
sense of savigny described him as he adopted on a priori preconception.

2. The volksgeist theory minimizes the influences which individuals, sometimes of alien role have exceeded upon legal development. There are always me who by their superior genius are able to give legal development a new direction.

3. PROF. DIAS points out that influence of volksgeist is at the most a very limited one. in modern times the function of volksgeist is that the of notifying and adapting rather than creating. There is less evidence today of the creative force of the volksgeist and none of its influence over the whole body of law. Savigny's theory of volksgeist makes sense only to a limited extent in continuum.

4. Dias further points out that the law in sometimes used deliberately to change the existing idea. It may also be used to further inter state co-operation in many spheres.

5. Dias maintains that many institution have originated not in volsgeist but in the convenience of a ruling oligarchy. this applied to the institution of slavery. it is not clear at all who the volksgeist whose exist to determine the law.

6. Importance rule of lie sometimes develop as a result of conscious and violent struggle between conflicting interests within the nation and not as a result of irreceptible growth.

7. The view of the Savigny was that volksgeist formulates only the rudimentary principles of a legal system and could not provide all the necessary details therefore when a society become more complex, a special born of person is called into being consisting of lawyers whose task was to reflect accurately the present Geist. Dias points out that this is nothing but a fictions assumption to cover up an obvious weakness its thesis which was not related to reality in any way.

8. The view of Savigny was that legislation was subordinate to custom and at all times it should conform to the volksgeist. Savigny did not oppose legislation or reform by codification at appropriate time future but this attitude was generally that of permission. this view of Savigny was that codification should be precede by "an organic" progressive, scientific study of law. By which he meant a historical study. Savigny was over
conscious in this matter. According to Ikallur, the doctrine of Savigny had the tendency “to hang tradition like betters upon the hands of reformatory enterprise.

9. Lord Lloyd also point out that Savigny under related the significance of legislation for modern society.

10. Sir Henry Maine tightly pointed out that a progressive society has to keep adapting the law it is fresh needs and legislation has proved in modern times. The essential mean of attaining that end .if the legislators had been obliged to with the public mind to give clear guidance as to each future step. The history of law reform during the last century would have been deprived of most of its achievements.

11. Paton points out that some custom are not based on instinctive sense of the right in the community as a whole but on the interests of a strong minority.

12. Paton contends that the creative work of judge and jurists was treated rather too lightly by Savigny. It is dangerous to regard the judge as a mere passive representative of volsgeist.

13. Paton also points out that limitation plays a great part then the historical school admits .he says that Savigny encourage "juristic pessimism" which means that legislation must accord with the instinctive sense of right or it was doomed to failure .conscious law reforms was to be discouraged.

14. Another crisitism against Savigny was that he was “so occupied with the source of law that he almost forgot the stream “he overlooked the forces and factors which influence and determine the growth of law.

**SAVIGNY CONTRIBUTION:**

1. Savigny is considered as the greatest jurist of 19th century .the view of I hearing was that with appearance of Savigny earliest work in 1803 "Das Rheut des Bestizes" modern jurisprudence was born.

2. His theory came as a powerful reaction against his 18th centuary nationalism and
principles of natural law. The view of alien is "the historical moment in jurisprudence may be called the revolt of fact against fancy"

3. The view of Prof. Dias is that on the whole, the work of Savigny was absolutely corrective to the method of natural lawyers. He did undoubtedly grasp a valuable truth about the nature of law but it ruined by over interphases.

4. The great truth in the theory of volksgeist is that a nation legal system is greatly influenced by the culture and character of the people.

5. It was after Savigny that the value of historical method was fully understood. His method was followed by Sir Henry Maine, Lord Bryle and many others.

6. 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 codification was delayed for a long time.

PUCHTA:

1. Puchta was Savigny's disciple and also a great jurist of historical school

2. His ideas are more logical and improved. He started from the origin of human race and traced the development and evolution of law.

3. The idea of was brought out due to the conflict of individuals will and general will. Then state comes into existence, which delimits the sphere of individuals and develop into tangible and workable system.

4. neither the people nor the state alone is the source of law.

5. the 1st is the cause instrumentalist and the 2nd is the cause principal is of law. the origin of law is ante cent to state, but there is no law before the creation of the state.

PUCHTA'S CONTRIBUTION:

1. gave the two-fold aspects of human will and origin of state.
2. Putcha improved upon the views of Savigny and made them more logical.

SIR HENRY MAINE:

1. He was born in 1822 and was educated in the Pembroke College, Cambridge.

2. In the words of Sir Fredrick Pollock, "entered the university is an unknown young man, he left is marked as among the most brilliant scholars of his time".

3. Maine began his work with a mass of material already published by the German historical school. He inaugurated the comparative approach to the study of law and history which was destined to play an important role in the years to come.

4. Maine published his first work Ancient Law in 1861, which he stated his broodiest general doctrines. His other important works are Village Communities in 1871, Early History of Institutions in 1875 and Dissertations Early Law and Custom in 1883.

5. According to him, law develops in 4 stages:
   - Commands of ruler believed to be in divine inspiration.
   - Commands crystallize into customary law.
   - Knowledge and administration of customs goes into hands of minority usually of a religious nature, due to weakening of original law makers.
   - Times of codes (Solan’s artic code or Twelve Tables in Rome)

6. Societies which do not progress beyond the 4th stage which closes the era of spontaneous legal development are called static societies by Maine. Their legal condition remains characterized by what Maine states are status.

7. Maine refers to a few progressive societies of history, for instance, the Romans and nations of nation of modern Europe which progressed beyond the phase of codes and status relationships because they’re steered by conscious desire to develop and improve.

8. The 3 agents of legal development that are brought to bear upon the primitive codes are
in the historical sequence legal fiction, equity and legislation.

9. Maine has defined legal fiction as “any assumption which conceals the fact that a rule of law has undergone alteration; its letter remaining unchanged, its operation being modified”.

10. By the use of legal fictions, law is altered in accordance with changing needs while it is pretended that it remains what it was.

11. The legal fiction of Maine has been considered as sort of clumsy self-deluding kind of legislation. There are overtones of this view in Maine himself. However this view of fiction is unjust and distorts the role it has played in the development of law.

12. Modern legislature with broad competence in law making is in the position to correct oversight with curative legislation. No such recourse was available in primitive societies. According to rim, the association of law and religion is a comparatively later development. However, Maine is defended on this point by hoevel.

13. Another limitations of Maine theory was that it was not meant “to apply to personal conditions imposed otherwise than by natural incapacity”.

CONTRIBUTION OF MAINE:

1. The view of Dr. Friedmann is that the work of Maine stands out as the important and fruitful application of comparative legal research so a legal theory inspired by the principles of evolution.

2. Pospisil write about Maine’s contribution as “he blazed a scientific trail into the field of law, a field hitherto dominated by philosophizing and speculative thoughts”.

3. Maine presented a balanced view of the history of law. His conclusions were based upon a comparatives study of different system of law.

4. His greatness lies in the fact that he had preached a belief in progress and that contained the germs of sociological approach. Many like Maitland, Vinogradoff and Lord Bryce were immensely influenced by his writings.