

論説

An interim report on Savigny's methodology and his founding of a modern historical jurisprudence

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Introduction: Our focus and I . Savigny's main concern in legal methodology

The current legal framework is considered to need some reform in today's global society, mainly due to changes of social structure or, more specifically, due to a certain fragmentation of legal systems. Here we are asking what role legal scholars could play and with what methods¹⁾. For our current reflection, the ideas proposed in the first half of the nineteenth century by the German scholar, Friedrich Carl von Savigny, are undoubtedly still an important paradigm and they have been as a whole waiting for our historical assessment.

As is commonly known, Savigny proposed a wide-ranging legal theory which was constructed on the basis of the social structure of his time. In his later work *System des heutigen Römischen Rechts* [System], the law-making function is emancipated from the monopoly of the State's legislative power and is directly based on the people, and not only the State's legislative power but also legal scholars are recognized as a people's organ for making law. In the case of a society where the legal system as a whole was once received from outside, the strict acknowledgment of this originally nonnative law is required for legal scholars to accomplish in a certain strict manner of interpretation. Besides this work, legal scholars, representing the people, are charged with legal creation or innovation, reflecting the requirements of their society. All these aspects of Savigny's theory are derived from his constant concern to exclude arbitrariness and contingency from legal practice, and this main concern is

strongly connected to his vision to establish the private individual person's liberty in social life through the private law. Private law, according to Savigny, should have a systematic structure and be based on very peculiar principles as to social organization²⁾. Besides, he demonstrates a particular idea of private international law in the last volume of his *System*, through which not only the pluralistic structure of global society composed of several independent legal orders but also each individual's liberty could be well established at the same time.

The points which draw our attention in Savigny's ideas are that legal scholars are expected to play not only a role of stable legal interpretation and legal innovation within a State but also another role of realizing the universal private international law, and that, in addition to these practical tasks, they should combine their legal practice with historical research into the law. This last aspect of Savigny's thought is regarded as the foundation of historical jurisprudence in the modern era.

Our main question here is how these several aspects are connected with each other in Savigny's thought, especially what relation his proposal of historical jurisprudence has with other aspects, e.g. his theory on sources of law and his methodology of jurisprudence. In other words, our study here is going to focus mainly on the reason why Savigny proposes historical jurisprudence. For a comprehensive assessment of his historical jurisprudence, we need to take into consideration his historiographical works on some concrete subjects to make clear some characteristics of his historiography. These researches, however, exceed the limit of this short interim report due to the limited num-

1) Cf. W. TWINING, *GLOBALISATION AND LEGAL THEORY* (2000), and W. TWINING, *GENERAL JURISPRUDENCE* (2009).

2) Regarding some socio-anthropological characteristics of Savigny's *System*, H. Harata, *An Interim Report on Savigny's System of the Modern Roman Law* (unpublished manuscript, on file with the author).

ber of Savigny's works that can be treated here as primary sources³⁾⁴⁾.

The sources taken into consideration in this article range from the beginning to the middle of the nineteenth century. It is not easy to clarify what concerns and problems Savigny addressed in each period during that half century and how and why these changed. However, if we could say he always held some particular concern, it would be the problem of how to exclude arbitrariness from legal practice as much as possible⁵⁾.

This main problem relates to Savigny's fundamental concern with establishing a legal framework for protecting the private individual person's liberty in a society⁶⁾. For this, Savigny says, a civil procedure as one form of public decision-making process in a State is indispensable⁷⁾. Therefore the exclusion of arbitrariness from such a public decision-making process as civil procedure is an im-

portant problem⁸⁾ for him.

Some kinds of arbitrariness, of course, are recognizable in several situations in a society, e.g. an individual's assertion, the State's intervention in a procedure, arbitrary workings by jurists and so on⁹⁾. At least in his *Methodologie 1802/1803*, Savigny's concern seems to have focused on excluding arbitrariness from the interpretation of law as objective existence¹⁰⁾¹¹⁾.

Jurisprudence as science to II . interpret the Roman law sources

According to Savigny's idea, we perceive the law as having an objective existence through our interpretation of sources¹²⁾. For this interpretative operation, a certain strict scientific method is necessary¹³⁾. He calls this legal science (*Rechtswissenschaft*).

3) Savigny's works mainly referred to in this article [and brief citations of them] are the following. *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (1814) [*Beruf*]; *Über den Zweck der Zeitschrift für geschichtliche Rechtswissenschaft* (1815) [*Zweck der Zeitschrift*], in *Vermischte Schriften*, vol. 1, ch. VI (1850); *Geschichte des römischen Rechts im Mittelalter* [G.R.R.M.], vol. 1 (2d ed. 1834), vol. 4 (2d ed. 1850); *System des heutigen Römischen Rechts* [*System*], vol. 1 (1840), vol. 8 (1848). Savigny's manuscripts, published in *Friedrich Carl von Savigny: Vorlesungen über juristische Methodologie 1802-1842* (Aldo Mazzacane ed., 2d ed. 2004), are the following, including Grimm's notes: Entwurf 1801 [Entwurf 1801]; Plan zu einem Cursus des Civilrechts (1802) [Plan 1802]; Methodologie Winter 1802 [Methodologie 1802/1803]; Grimm's note on this lecture [Grimm 1802/1803]; Einleitung zu den Institutionen 1803/1804 [Inst. 1803/1804]; Grimm's note on this lecture [Grimm 1803/1804]; Methodik (1803/1804) [Methodik 1803/1804]; Einleitung zu den Institutionen 1808/1809 [Inst. 1808/1809]; Methodologie Zweyter Versuch. Sommer 1809 (als Einleitung der Pandekten) [Methodologie 1809]; Einleitung zum Pfandrecht 1810 [Pfandrecht 1810]; Nachträge zum zweyten Versuch der Methodologie 1811 bis 1842 [Pandekten 1811, 1812, 1813/1814, 1816/1817, 1817/1818, 1818-1820, 1821-1824, 1824/1825, 1825/1826, 1828-1833, 1827-1842].

4) Due to limited space in this article, individual references to many previous studies on Savigny's thought have had to be omitted, instead of indicating relevant passages and parts of sources. Therefore this article considers itself as still remaining in "absolute[m] Zustand der Wissenschaft" (Methodologie 1809 [37v] p. 215).

5) Grimm 1802/1803 [5], [6] pp. 139-40. Methodologie 1809 [44v] pp. 222-23. Pfandrecht 1810 [62r]-[62v] pp. 247-48. Pandekten 1813/1814 [71r] p. 263. Pandekten 1821-1824 [81r] p. 272. *System*, vol. 1, pp. 91-92, 212-13.

6) *System*, vol. 1, pp. 52-55, 331-32. Grimm 1802/1803 [4] p. 139. Cf. Grimm 1802/1803 [6] pp. 140-41.

7) *System*, vol. 1, pp. 23-26. Cf. Grimm 1802/1803 [5] p. 139.

8) Methodologie 1802/1803 [2v] pp. 91-92 (Grimm 1802/1803 [4]-[6] pp. 139-40).

9) Grimm 1802/1803 [5], [6] pp. 139-40. Cf. *System*, vol. 1, p. 206.

10) Grimm 1802/1803 [5] p. 140. Cf. *System*, vol. 1, pp. 206-07.

11) This concern arose against the backdrop of the contemporary situation of legal interpretation or more generally legal practice. Methodologie 1802/1803 [3r] p.92 (Grimm 1802/1803 [6] pp. 140-41), [5v] p. 94. Cf. Methodik 1803/1804 [183v] p. 205; *Beruf*, p. 48; *System*, vol. 1, pp. 201, 318-26.

12) Methodologie 1802/1803 [4v] p. 93 (Grimm 1802/1803 [10] p. 143).

13) Methodologie 1802/1803 [2r] p. 91 (Grimm 1802/1803 [1] p. 137). Cf. Grimm 1802/1803 [5] p. 140; Methodik 1803/1804 [184v] p. 208; Inst. 1808/1809 [157r] p. 209; *System*, vol. 1, pp. 206, 207, 227.

Judging from what we observe in his writings, Savigny's initial concern, in terms of excluding the arbitrariness from legal practice, seems more limited than in his later discourse. It is very likely limited to the problem of how to recognize the law from the Roman law sources in a non-arbitrary way. Since these sources are initially presupposed as objects to interpret, his problem might be to deduce a legal system directly from them¹⁴⁾¹⁵⁾¹⁶⁾. At least, in the initial period, he does not explicitly refer to any historical distance between a legal system deduced from Roman law sources and that of our contemporary positive law.

For this strict understanding of Roman law sources, Savigny, in his *Methodologie* 1802/03, indicates two characteristics to be realized in legal science. One is historical and the other is philosophical¹⁷⁾. These two are distinct but interconnected as inevitable elements for understanding the law as ob-

ject¹⁸⁾. An interpretation of an individual rule in sources, realized by such a collaboration of these two elements, is regarded as the reconstruction of the true thought of the rule¹⁹⁾.

As already discussed in his *Methodologie* 1802/1803, the so called *interpretatio ex legis ratione*, viz. a deduction from an assumed reason of a rule, is excluded from the interpretation by Savigny²⁰⁾²¹⁾. Since the interpretation in a strict sense should be a reconstruction of the true thought already contained in a rule, Savigny refused any deduction, extensively or restrictively, from a hypothetically assumed reason outside of the rule itself. This kind of deduction is somehow based on arbitrary supposition, not on any objective existence²²⁾.

The history and the system play very important roles for reconstructing the true thought contained in legal sources. As any rule is a product of a certain historical mo-

14) But it is not clear how Savigny initially assessed the idea he himself criticized later (*Beruf*, p. 115), according to which a natural law could and should be deduced from Roman law sources. For more comprehensive assessment of Savigny's idea including legal sources other than Roman law, it is necessary to take into consideration his other works and manuscripts. E.g. *F. C. von Savigny, Landrechtsvorlesungen 1824* (Ch. Wollschläger ed., 1994).

15) *Methodik* 1803/1804 [182v] p. 203. In his *Methodologie* 1802/1803, the task of jurists seems to be limited to understanding the objectively existing law. *Methodologie* 1802/1803 [4v] p. 93, [14v] p. 107. Cf. *Methodologie* 1809 [48r] p. 226. But, as to the analogy accepted as part of their workings, see also *infra* note 84.

According to Grimm 1802/1803 [6] p. 140, Savigny thought at that time that judges could and should only apply the rules concretely described by legal scholars. *But cf. infra* note 88.

16) The Roman law sources as positive law are regarded as fixed principally in the *Corpus Iuris Civilis* as Justinian's legislation, although there are some historical changes and stratifications within the Roman law sources. *System*, vol. 1, pp. 1-2, 12-13, 66-67. As to conflicts and incoherences among rules included in the *Corpus Iuris Civilis* and their treatment, see *System*, vol. 1, pp. 268-73, 276-83.

17) *Methodologie* 1802/1803 [2v]-[3r] pp. 91-92. *Inst.* 1803/1804 [102r]-[102v] p. 198. These two elements are also expressed as the dichotomy between "exegetisch" and "systematisch". *Entwurf* 1801 [88] p. 87. *Plan* 1802 [457] p. 88. Cf. *Pandekten* 1827-1842 [96r] p. 287; *System*, vol. 1, pp. 213-16.

18) *Methodologie* 1802/1803 [3v] p. 92 (Grimm 1802/1803 [7], [8] pp. 141-42), [5r] p. 94 (Grimm 1802/1803 [10], [11] p. 144), [7r], [7v] p. 96 (Grimm 1802/1803 [17] p. 150). *Inst.* 1803/1804 [102v] p. 198. *Methodologie* 1809 [39v] p. 217, [46r] p. 224. *System*, vol. 1, p. 214. Cf. Grimm 1802/1803 [12] p. 145.

19) *Methodologie* 1802/1803 [4v] p. 93 (Grimm 1802/1803 [10] p. 143), [5v]-[6r] pp. 94-95. Cf. *Methodologie* 1809 [39r] p. 217; *Pandekten* 1811 [174r] p. 251; *System*, vol. 1, p. 213.

20) In Savigny's *System*, the usage of reason (*Grund*) of a rule is recognized in a limited and cautious way. *System*, vol. 1, pp. 220-21, 224-25, 228, 233-40.

21) In Savigny's *System*, it is permitted as part of interpretation to modify and correct the text of a rule expressed in a legal source with its reconstructed true thought. *System*, vol. 1, pp. 222, 230-40. In this interpretative operation, the problem is how to find the true thought possibly different from the text of a rule in a non-arbitrary way.

22) *Methodologie* 1802/1803 [14r] p. 107 (Grimm 1802/1803 [34], [35] pp. 163-64). *System*, vol. 1, p. 321. Cf. Grimm 1802/1803 [9] p. 143; *Methodologie* 1809 [44v] p. 223; *System*, vol. 1, pp. 217-18, 324.

ment, it is necessary to consider each rule's historical context²³). Besides, since all rules are regarded as part of an existing unitary entity that is the legal system, it is necessary to place each rule in its appropriate position within the system²⁴). Then, a system as a whole, with some diachronic changes and developments, needs to be understood with historical stratifications²⁵).

For Savigny's methodology with these several aspects, the system has always held an important and central position²⁶). The system has always been considered to have an organic unitary character²⁷), different from such other kinds of entity as compilations of rules²⁸). Theoretically speaking, Savigny thinks, it is free to choose with which concepts and structure to construct a system²⁹). The form of a unitary system is based on philosophy³⁰). However, he declines at the same time to construct any system by purely philosophical speculation alone, because this kind of construction is arbitrary and lacks legal reality³¹). Avoiding this arbitrariness in constructing a legal system, Savigny sets the written texts of Roman law sources as real basis. From these objective texts, which reflect some legal reality in a certain historical

context, Savigny claims to deduce basic concepts and principles and to construct a legal system with them. And a study of etymology is thought useful³²) for a comprehensive perception of the *Corpus Iuris Civilis* with internal historical stratifications.

When Savigny says that history is a new idea of science³³), we can understand it as in opposition to the general tendency to treat and interpret the Roman law sources in an ahistorical way³⁴). What attracts our attention, however, is the fact that the historical aspect still remains within the Roman law sources in Savigny's *Methodologie* 1802/1803³⁵), and that the history of Roman law is incorporated into legal methodology due to its usefulness for understanding the *Corpus Iuris Civilis* as valid positive law³⁶). The historical relationship between the past and the present time, which comes clearly to the fore later, is still not emphasized. The historicity incorporated in the methodology at the time of writing *Methodologie* 1802/1803 has an antiquarian sense focused on the etymology³⁷) within Roman law.

23) *Methodologie* 1802/1803 [5r] p. 94, [7v] pp. 96-97, [10r] p. 101 (Grimm 1802/1803 [8] p. 142). As to relationship between the history of legal system and that of state and people, *Methodologie* 1802/1803 [4r] p. 93, [10r] p. 100.

24) Plan 1802 [457] p. 88. *Methodologie* 1802/1803 [6v]-[7v] pp. 95-97 (Grimm 1802/1803 [17] p. 150, [20] pp. 151-52).

25) *Cf. System*, vol. 1, pp. 215, 231, 264, 274-83; *Methodologie* 1809 [47r] p. 225, [50r] p. 227.

26) Entwurf 1801 [88] p. 87. Plan 1802 [458] p. 89. *Methodologie* 1802/1803 [3r] p. 92.

27) "eines organischen Ganzen" in *Methodologie* 1802/1803 [6r] p. 95. *Cf.* Grimm 1802/1803 [13] p. 145.

28) Plan 1802 [458] p. 89. *Methodologie* 1802/1803 [12r] p. 104. *See infra* note 101.

29) *Methodologie* 1802/1803 [12v] p. 105.

30) *Methodologie* 1802/1803 [17r] p. 113 (Grimm 1802/1803 [44] p. 171). *Cf.* *Methodologie* 1802/1803 [12v] pp.104-05 (Grimm 1802/1803 [31] p. 161).

31) *Methodologie* 1802/1803 [12r] p. 104, [12v] p. 105 (Grimm 1802/1803 [32] p. 161). *Methodik* 1803/1804 [182v] p. 203, [183r] p. 205. *Cf. Beruf*, p. 30.

32) Plan 1802 [457] p. 88. *Methodologie* 1802/1803 [13v] p. 106 (Grimm 1802/1803 [33] p. 162). *Cf.* *Methodologie* 1802/1803 [4r] p. 93.

33) *Methodologie* 1802/1803 [4r] p. 93.

34) *Methodik* 1803/1804 [184v] p. 207. *Cf. System*, vol. 1, pp. 92-94.

35) Grimm 1803/1804 [3] p. 200.

36) Plan 1802 [457] p. 88.

37) Plan 1802 [460] p. 89. *See supra* note 32; Grimm 1803/1804 [3] p. 200.

III. Classical Roman jurists as model for modern jurists

1 Exclusion of arbitrariness from application of law

The strict and scientific manner of interpretation of rules proposed by Savigny is expected to work in practice, combined with a stable and non-arbitrary manner to apply these perceived rules³⁸. This combination between scientific interpretation of rules and their stable application is not made clear nor sufficiently developed in his *Methodologie* 1802/1803. Instead, in his discourse after 1810, e.g. in his *Beruf* (1814), the activity of jurists in the classical era of Roman law is more explicitly introduced as model for modern jurists³⁹. The core of their work is composed of an organic system, on the one hand, and their geometric⁴⁰ or geographical⁴¹ sense of deduction from this system on the other.

Though Savigny also insists on the importance of clarifying common features among different concepts or rules and at the same time their distinctions, he does not appreciate or rather is opposed to a definition from which a mechanical and formal application is expected to be deduced⁴². Besides, though

he does not deny the importance of making a systematic order among concepts and rules, this is supposed not as just a way of memorization but of recognizing organic relations among them⁴³.

When resolving a legal case in practice, Savigny calls on jurists to start from careful observation of the legal problem in a concrete case to find its morphological form and its structural position in an organic whole of legal relations corresponding to a whole structure of legal institutions or an organic system⁴⁴. Then, once a concrete legal issue is exactly placed in a certain legal relation corresponding to an individual legal institution, the rules contained in the latter are supposed to be stably applied. In this manner, Savigny intends to realize a kind of certainty, like that realized in geometry, avoiding arbitrary application in legal practice⁴⁵.

In fact, Savigny finds this kind of scientific or geometrical certainty in the method of classical Roman jurists. In his writings after the 1810s, he insists on this kind of stability or scientificity due to an organic system and the geometrical sense of classical Roman jurists, as opposed to a mechanical and formal application of rules. That method seems to be appropriate for Savigny's concern with the exclusion of arbitrariness from practice⁴⁶.

According to Savigny's view in his later

38) *System*, vol. 1, pp. 48, 206.

39) *Beruf*, pp. 35, 118. See also Pfandrecht 1810 [62v] p. 248; Pandekten 1812 [68v] p. 260. Pandekten 1821-1824 [79v], [80r] pp. 271-72, [82r] p. 273; Pandekten 1827-1842 [95v] p. 286. Cf. Pandekten 1811 [175r] p. 251; *System*, vol. 1, p. 11 n.(b).

40) *Beruf*, p. 22. Pfandrecht 1810 [62v] p. 247.

41) Pandekten 1821-1824 [81r] p. 272.

42) Cf. *Methodologie* 1802/1803 [13v] p. 106; *Beruf*, pp. 29-30; *Methodologie* 1809 [46v]-[47v] pp. 224-25; Pandekten 1811 [175r] p. 251.

43) *Methodologie* 1802/1803 [13v] p. 106 (Grimm 1802/1803 [31]-[34] pp. 161-63). Grimm 1802/1803 [7] p. 141. *Methodologie* 1890 [47v] pp. 225-26.

44) *Beruf*, p. 30.

45) *Beruf*, pp. 29, 127-28. In *System*, he develops further explanation on this geometrical sense with the concepts of legal relation and legal institution. *System*, vol. 1, pp. 6-11. These two concepts are supposed to have an organic characteristic like a system as a whole. *System*, vol. 1, p. 262. The concept of legal institute (*Rechtsinstitute*) appears in Pandekten 1827-1842 [93r] p. 283 and [94v] p. 285.

46) Grimm 1802/1803 [7] p. 141, [12], [13] p. 145. *Methodik* 1803/1804 [184v] p. 207. See also *infra* note 103.

works, the first experience of private law in a society was in ancient Rome⁴⁷⁾, not in the classical but in the republican era⁴⁸⁾. The reason Savigny appreciates classical Roman jurists is that they related their thought densely within written texts⁴⁹⁾⁵⁰⁾. But this does not necessarily mean their superiority to their previous jurists in the republican era in terms of abilities⁵¹⁾. What is most important for Savigny is that classical Roman jurists received and kept the tradition of private law and the legal sense from the Roman republic⁵²⁾ despite of the political fall. The non-arbitrary and stable method based on their republican sense seems for him to be attractive and decisively important for the contemporary situation in Germany⁵³⁾.

2 Classical jurists' function of legal creation and its political quality

However, the wide-ranging, stable workings among classical jurists are not limited to the interpretation of rules and their application to cases. Savigny insists on the fact that they were charged not only with the perception of law derived from the past age but also with legal innovation and development in a

creative manner on the basis of perceived law⁵⁴⁾. We can find that, as Savigny considers classical jurists as model for contemporaries, the problem of legal creation or sources of law has already come into his view, alongside the problem of the non-arbitrary manner of interpretation and application.

As a matter of fact, around the 1810s, Savigny begins to emphasize the role of classical jurists and its political character⁵⁵⁾. After the decline of the Roman republic as the foundation of private law, and with the tension against the emperors' political power, jurists managed to keep private law as autonomous as possible with their republican sense, and also changed the positive legal system, taking into consideration contemporary social requirements and keeping a structural connection with the existing law, not in any drastic way like codification or arbitrary legislation⁵⁶⁾. This creative aspect of their activity became more and more explicit and important as a source of law for Savigny around 1810. Here we might be able to find an extension of the range of Savigny's view⁵⁷⁾.

47) Inst. 1808/1809 [160v] p. 211.

48) *Beruf*, p. 31. Cf. *Beruf*, p. 13; *System*, vol. 1, pp. 83-84.

49) As to the characteristics of usage of legal concepts among classical Roman jurists, *Methodologie* 1802/1803 [7r] p. 96 (Grimm 1802/1803 [15] p. 147). *Beruf*, pp. 29-30.

50) As Savigny says, the legal texts left by classical Roman jurists were compiled as a gross anthology of *Digesta* as part of the *Corpus Iuris Civilis*. It is possible for us to reconstruct the concrete thought and the common way of thinking among them. Grimm 1803/1804 [5] p. 201.

Savigny says that the *Corpus Iuris Civilis* is important for us because this compilation conveys to us their thoughts as a whole in a certain kind of systematic form. *Methodologie* 1802/1803 [7r] p. 96. Grimm 1803/1804 [5] p. 201. *Beruf*, pp. 28, 35. *System*, vol. 1, pp. 201, 208 n. (a).

He adds, however, the Roman private law had already decayed before its compilation. Inst. 1808/1809 [160v] p. 211. *G.R.R.M.*, vol. 1, pp. 25-26. Cf. *G.R.R.M.*, vol. 1, pp. 36-37; *Beruf*, p. 28; *System*, vol. 1, pp. 77, 299-304.

51) *Beruf*, p. 33.

52) *G.R.R.M.*, vol. 1, p. 25. *Beruf*, p. 32.

53) Cf. *Beruf*, p. 29; *System*, vol. 1, p. 92.

54) *Beruf*, pp. 32-33. *System*, vol. 1, pp. 84, 294-95, 297.

55) "politische Sinn" in *Beruf*, p. 31.

56) *System*, vol. 1, pp. 92, 295.

57) Due to this change or extension of his concern, the plan of his work on the history of Roman law in the medieval era was changed. See *infra* note 118.

Theory on sources of law — IV. creation of law by legal scholars

The problem of sources of law is genuinely treated in Savigny's *Beruf*, published in 1814, then in the first volume of *System* (1840) he shows his further developed thought on the matter⁵⁸). The first decade of the nineteenth century was the very period when Savigny seriously faced this problem, seeing the promulgation of the General National Law for the Prussian States in 1794, the French Civil Code in 1804, and the Austrian General Civil Code in 1811⁵⁹), needless to say involved in a controversy over the codification of German general civil law⁶⁰). It might be no more self-evident for him to consider Roman law *a priori* as positive law nor to suppose it as absolutely an object for interpretation⁶¹)⁶²). It is not strange that from this moment he begins to think of a legal system of positive law, not simply as an object to interpret but as always having the quality of somehow being an intellectual product. In this context, within the

workings of classical Roman jurists, the aspect of their legal creation has no less significance than their interpretation of law. Thence, Savigny explicitly recognized a creative task of contemporary scholars as well and made an attempt to oppose codification or more generally legislation by a State changing an existing legal situation in an arbitrary and drastic manner⁶³).

This recognition of the creative task of legal scholars is shown in Savigny's discourses on sources of law from about 1810⁶⁴). According to his idea, a positive law originally arises and develops directly in the common sense among a people (*Volk*)⁶⁵). Once this people reaches a certain stage of culture⁶⁶), it is no longer the people as a whole but a distinct group of legal scholars, representing the people, who become charged with the task to innovate and develop the existing law⁶⁷). Since Savigny is cautious about the arbitrary intervention⁶⁸) of a State through legislation on private law⁶⁹)⁷⁰), he insists on founding the private law not on the sovereign legislative power⁷¹) but directly on the people⁷²).

58) See also Inst. 1808/1809 [159r]-[160r] p. 210; Pandekten 1811 [173r] p. 250; Pandekten 1812 [65r]-[65v] p. 257; Pandekten 1813/1814 [71v] pp.263-64. Cf. Methodik 1803/1804 [183r] p. 204.

59) *Beruf*, pp. 6, 54-58.

60) *Beruf*, p. 4. See also *Beruf* (2d ed. 1828) Vorrede.

61) Cf. *Beruf*, pp. 27, 111. In later manuscripts, indicating an opposition between his idea to construct a system and the previous scholars' tendency to apply individual rules of Roman law sources directly, Savigny finds a significance of the study of Roman law in its usefulness for finding a stable practical method rather than the content of the rules of Roman law sources. Pfandrecht 1810 [62r], [62v] p.247. Pandekten 1813/1814 [72r] pp. 264-65. Pandekten 1818-1820 [78r] p. 270. Pandekten 1821-1824 [81v] p. 273. Cf. Pandekten 1824/1825 [84r]-[85r] p. 276. See also *infra* note 130.

62) Inst. 1808/1809 [157r] p. 209, [161v]-[163r] pp. 211-12. *Beruf*, pp. 37, 119. *System*, vol. 1, p. 4.

63) Cf. *Beruf*, pp. 12, 13, 17; Pandekten 1812 [65v] p. 257; Pandekten 1813/1814 [71v] pp. 263-64.

64) Inst. 1808/1809 [159r]-[160r] p. 210. *G.R.R.M.*, vol. 1, p. XII.

65) *Beruf*, pp. 8-9. *System*, vol. 1, p. 14. "Nation" is used in place of "Volk" in Pandekten 1827-1842 [93v] pp. 283-84 and *System*, vol. 1, p. 10.

66) *System*, vol. 1, pp. 45, 50. *Beruf*, p. 12. See *infra* note 167.

67) Inst. 1808/1809 [160r] p. 210. *System*, vol. 1, pp. 45, 46. See also *Beruf*, pp. 12, 13-14. *But cf.* Methodologie 1809 [48r] p. 226; Methodologie 1802/1803 [14v] p. 107.

68) *Beruf*, pp. 8, 18, 24. Cf. *System*, vol. 1, pp. 14, 17.

69) Inst. 1808/1809 [163v]-[164r] pp. 212-13. Pandekten 1812 [66r] p. 258. Pandekten 1813/1814 [71r] p. 263. Pandekten 1821-1824 [80v] p. 272. *Beruf*, p. 16.

70) As to Savigny's negative and cautious assessment of legislation in ancient Rome, *G.R.R.M.*, vol. 1, pp. 21-37. *Beruf*, pp. 16, 33-34.

71) *Beruf*, p. 6.

72) In *System*, Savigny demonstrates a more moderate view of legislation, considering both it and legal scholars as

1 Political quality of legal scholarship

As the double role of classical Roman jurists was to make the legal practice of interpretation and application non-arbitrary and stable⁷³⁾ and to innovate and develop an existing legal system according to contemporary social requirements, Savigny hopes contemporary legal scholars will play a similar double role. For the latter creative task, legal scholars inevitably gain a political quality as a representative organ of their people⁷⁴⁾. According to his vision, the legal scholarship charged with the creative role should be based on such a transparent and critical sphere as the republic among scholars keeping the republican sense⁷⁵⁾. Besides, contemporary legal scholarship should not be closed within a social class but opened to everyone⁷⁶⁾. Therefore, it takes on a republican or rather democratic quality⁷⁷⁾ in itself.

2 Divide between interpretation and creation of law

Nevertheless, Savigny doesn't reduce all aspects of workings among legal scholars just to the creation of law. In *System*, he regards the interpretation of law distinctly as perception of an existing objective legal sys-

tem, different from any creation of law⁷⁸⁾. He tries to maintain this dichotomy as strictly as possible. From his *Methodologie* 1802/1803, he always demanded the exclusion of arbitrariness from interpretation in a scientific manner⁷⁹⁾.

Of course, this divide has an importance for limiting the role of judges. Contrary to legal scholars, who are charged with both the interpretation and creation of law, Savigny limits the task of judges to that of interpretation⁸⁰⁾. So we can find here a significance of this dichotomy. On the other hand, since he recognizes the double role of legal scholars in interpretation and creation of law, a question could arise about the reason for this dichotomy in terms of their expected workings. In fact, Savigny says this distinction was not so strictly kept among classical Roman jurists.

Besides, he himself recognizes that a strict distinction between interpretation and creation of law is not always easy⁸¹⁾ as to legal scholars' activity. At first, he admits to make a reference to the reason (*Grund*) of a rule for its interpretation to a certain degree and in a certain careful manner⁸²⁾. But when the reason of a rule is taken into consideration in case of modifying the written expression of a rule on the basis of its reconstructed true thought, the perception of the reason should be accomplished separately from the written

the people's organ for creation of law. *System*, vol. 1, pp. 18, 38-40, 50-51. However, he does not fail to pay attention to the risk of intervention from a State's legislative power into the private law. *System*, vol. 1, pp. 56-57.

73) *Beruf*, p. 22.

74) *Beruf*, p. 12.

75) Cf. *System*, vol. 1, pp. 88-89 concerning the interpretative operation by legal scholars.

76) *System*, vol. 1, p. 49, where Savigny says this in a general manner. But compare it with his observation of the socio-political status of classical Roman jurists. See *infra* note 141.

77) Cf. *System*, vol. 1, p. 85 concerning the interpretative operation. As to a collaboration among different organs for legal practice as a whole, transcending the strict divide between interpretation and creation of law, *System*, vol. 1, pp. 329-30.

78) *System*, vol. 1, pp. 239, 296, 297, 326. Cf. *System*, vol. 1, pp. 46-47.

79) *System*, vol. 1, pp. 212-13, 221, 227, 274, 280, 293, 322.

80) *System*, vol. 1, pp. 323-24, 329, 330. See also *infra* note 88.

81) *System*, vol. 1, pp. 240, 329-30.

82) *System*, vol. 1, pp. 220, 224, 228, 239.

text. Then the creation of a new rule and the hypothetical reconstruction of an existing rule based on its assumed reason are not easily distinguished from each other⁸³).

Secondly, Savigny admits as part of interpretation the use of analogy⁸⁴) to fill a lacuna among the existing rules within, a system of law which is supposed to give all solutions perfectly to all possible cases⁸⁵). As to this use of analogy, the dichotomy between interpretation and creation of law seems ambiguous again. In *System*, Savigny distinguishes two different stages of analogy. One type is the shaping of a still not clarified rule in an existing legal institution within a system, through an internal similarity between an existing rule and a rule to be newly formed⁸⁶). This type could be regarded as supplementary analogy within an existing system. To the contrary, the other type is the additional analogy to construct a new legal institution on the basis of structural similarity to an existing one within a system⁸⁷)⁸⁸).

Both of these two kinds of analogy aim clearly to form a new rule or a new institution in reference to an existing system in a bid to

find a concrete solution which could not be directly and mechanically deduced from existing rules. But the additional type is difficult to regard as an interpretative operation purely within a system⁸⁹), because the newly constructed institution had no place in the previous system.

The reason, nevertheless, why Savigny admits also the additional analogy as part of interpretation is that the analogy based on the structural similarity to an objectively perceived system is different from somehow natural-law thinking which provides any rule or reason arbitrarily from outside⁹⁰). We can say that Savigny, first of all, attempts to exclude this kind of arbitrariness from legal practice. He expects to make legal practice stable through the structural or geometrical sense combined with an objectively existing system⁹¹), excluding any deduction taken from outside⁹²).

Therefore, we can also say Savigny thinks that any legal interpretation needs above all an accurate understanding of an existing system. In case of the additional analogy as part of interpretation, the perception of an exist-

83) *System*, vol. 1, pp. 233, 234-35. Savigny refuses to directly rely on a general purpose, e.g. *aequitas*, for interpretation of a rule. *System*, vol. 1, pp. 238, 240.

84) *System*, vol. 1, p. 291. Cf. Grimm 1802/1803 [37] pp. 165-66.

85) In *Methodologie* 1802/1803 [15r]-[15v] p. 108, Savigny refers to a difference between private law and criminal law in terms of interpretation. He ignores a possible sense of a lack of any corresponding positive rule as denial of changing the *status quo* or a respect of current possession. See *Methodologie* 1809 [47v] p. 226. This ignorance means that he aims at establishing the private individual's liberty directly on the basis of right ("*Recht*"), typically ownership, instead of a more complex structure based on possession. A rule deciding on which party in a case has a right is always necessary. *System*, vol. 1, pp. 208, 290. As to Code civil art. 4, *System*, vol. 1, pp. 199, 326. Cf. Harata, *supra* note 2.

86) *System*, vol. 1, p. 291. In this case the reason of a rule is taken into consideration.

87) In *Methodologie* 1809 [48r] p. 226, Savigny considers this kind of analogy not as *interpretatio* of an individual rule but as an operation based on a system.

88) In *System*, a judge, instead of being limited to a mechanical application of rules formed by legal scholars, can and should participate in the interpretative operation of rules, including the analogy. *System*, vol. 1, pp. 292, 322, 323. But see *supra* note 15. Cf. *System*, vol. 1, pp. 208, 239, 299, 329-30. As to the creation of law by courts, *System*, vol. 1, pp. 90-91, 96.

89) The gap between interpretation and creation of law both based on analogy likely depends on the degree of free leap from an existing system. *System*, vol. 1, pp. 291-92.

90) *System*, vol. 1, pp. 52, 290. *Methodologie* 1802/1803 [15r] p.108 (Grimm 1802/1803 [37] p. 166).

91) "*organische Konsequenz*" in *System*, vol. 1, p. 292. *System*, vol. 1, p. 294. *Methodologie* 1802/1803 [14v] p. 107 (Grimm 1802/1803 [39] p. 167). Cf. *Methodologie* 1802/1803 [3r] p. 92.

92) *Methodologie* 1802/1803 [15r] p. 108 (Grimm 1802/1803 [37] pp. 165-66, [39] p. 167).

ing system is a prerequisite as basis for analogy⁹³). Besides, even in case of innovating and developing legal institutions as creation of law, legal scholars need firstly to obtain this perception in order not to make their creative operation arbitrary or drastic, keeping the structural connection with the previous system. For these reasons, the system of positive law takes the central position in Savigny's vision in terms of both interpretation and creation of law.

Characteristics of the system V. of positive law and the mechanism of its procurement

In comparison with the creative activity of legal scholars considering social requirements, whose political quality we have already pointed out, legal interpretation and application as the other part of their role is expected to keep a scientific accuracy and stability. This non-arbitrariness is based on the system of positive law. As to its procurement, however, the legal system is not *a priori* nor objectively provided to contemporary legal scholars. Rather a system is an intellectual product through their interpretative operation due to interactions between individual rules and a whole system.

Here, as Savigny himself refuses the natural-law thinking that would import some arbitrary elements into law, we should ask how to avoid an arbitrariness within legal scholars' activity of procuring a system of positive law. How is it possible in Savigny's vision to dis-

tinguish the rejected natural-law thinking from legal scholars' non-arbitrary perception of a system⁹⁴)? Though Savigny insists on the transparency and openness of their workings, how is it possible to avoid the arbitrariness of legal scholarship as a whole in relation to a whole people? We might formulate in this manner Savigny's other concern which arose around 1810s.

As to the problem of how to procure a system of positive law, Savigny does not choose the option to realize it through a codification⁹⁵) by the State's legislative power. His coherent and consistent main purpose is to prevent the State's power from intervention into a private law, which will hopefully realize the private individual's liberty, and to realize the, even relatively, independent existence of private law due to the autonomous workings of legal scholars⁹⁶). For this perspective, he does not admit any drastic intervention by a State through a codification.

Besides, he is still opposed to codification, even though proponents for codification also insist on the necessity of legal stability as the main reason⁹⁷). Savigny says the codification with written texts of rules is not sufficient to accomplish any stability in legal practice⁹⁸). Codification initially and ideally intends⁹⁹) to prepare all rules in advance sufficiently to deal with all possible legal problems forever, and to leave jurists only to apply the rules mechanically to cases¹⁰⁰). He says not only that such a perfect preparation of rules is impossible¹⁰¹) but also that, even if possible, it is not desirable. Savigny rejects such a view

93) *System*, vol. 1, pp. 291-92, 294. Cf. *System*, vol. 1, p. 299.

94) *Methodologie* 1802/1803 [12r], [12v] p. 104 (Grimm 1802/1803 [31] p. 161).

95) *Inst.* 1808/1809 [158v] p. 209. *Beruf*, p. 17.

96) Cf. *Beruf*, pp. 19-20.

97) *Beruf*, pp. 5, 20.

98) *Pandekten* 1821-1824 [81r] p. 272.

99) *Inst.* 1808/1809 [158v] pp. 209-10. *Pfandrecht* 1810 [62r] p. 247. *Beruf*, pp. 5, 6. *Pandekten* 1821-1824 [80v] p. 272. *System*, vol. 1, pp. 47-48.

100) *Pfandrecht* 1810 [62r] p. 247. *Pandekten* 1821-1824 [79v] p. 271. *Pandekten* 1818-1820 [78r] p. 270.

101) *Beruf*, pp. 21-22. *Pandekten* 1821-1824 [79v] p. 271.

on legal rules, since this idea rules out the free and autonomous activity of jurists. Instead, Savigny accepts another kind of idea on legal rules which have organic relations with each other in a whole system and which preserve jurists' free work¹⁰²⁾ based on a geographical sense¹⁰³⁾ in legal practice.

Instead of codification by a State, Savigny asks legal scholars to procure an organic system of positive law. This procurement, analytically speaking, is composed of three different dimensions. The first one is to perceive the system which derives from the past and still remains valid¹⁰⁴⁾. The second is an innovation and development of law based on contemporary social requirements¹⁰⁵⁾. The third is to coordinate these different, already existing and newly produced, sources of law into a new system as contemporary positive law¹⁰⁶⁾. All these dimensions are expected to be carried out by legal scholars¹⁰⁷⁾.

Savigny recognizes the free activity of legal scholars in the second and third parts¹⁰⁸⁾. In terms of this free and somehow creative character, legal scholars always keep a political quality as a representative organ of a whole people. On the other hand, the first part of perception of the system derived from the past as materials for innovation should be accomplished in a scientific and non-arbitrary manner. This strict process of comprehension is set apart from the level of legal practice, and this process has a character of historical research or more precisely contem-

porary history¹⁰⁹⁾.

In the total view of Savigny on legal scholarship, there are two distinct levels of task; one is the level of legal practice composed of procuring a system of positive law and its application based on geographical sense and the other is the level of scientific understanding on what part of the system remains valid and works as basis for constructing a new whole system of contemporary positive law. Then the historical understanding of Roman law is needed and is placed in the latter level of work by legal scholars¹¹⁰⁾.

VI. Combination of legal practice and history

1 History of Roman law as part of contemporary history

At first glance, there seems to be no necessary relation between the history of Roman law and our contemporary comprehension of what part of the system derived from the past still remains valid. However, as we will see soon, Savigny becomes conscious of this relation and it makes him change his initial program of research on the medieval Roman law.

Savigny long held the ambition to write a history of Roman law in the medieval era¹¹¹⁾. In his *Methodologie* 1802/1803, the medieval scholarship on Roman law has significance for him just as a clue for finding a modern le-

102) *System*, vol. 1, pp. 209-11, 323. Cf. *System*, vol. 1, pp. 298, 320. See also *infra* note 108.

103) *System*, vol. 1, p. 8. See *supra* note 41.

104) *System*, vol. 1, pp. 87, 94.

105) *System*, vol. 1, pp. 90, 93, 95. As to legal scholars as organ of customary law, *System*, vol. 1, p. 90.

106) *System*, vol. 1, p. 262. As to the concurrence of different sources of law, *System*, vol. 1, p. 101.

107) "*organisch bildende Kraft der Rechtswissenschaft*" in *System*, vol. 1, p. 263. Cf. *System*, vol. 1, pp. 290, 294.

108) *System*, vol. 1, pp. 326, 329. *Zweck der Zeitschrift*, pp. 110-11. Pandekten 1812 [67v], [68r] p. 259. Cf. *Methodologie* 1809 [61r] p. 245; Pandekten 1828-1833 [90v] p. 280.

109) Legal scholars are required to take part in historical research themselves. Pandekten 1811 [67v], [68r] p. 259. Pandekten 1827-1842 [95r] pp. 285-86, [99r] p. 288.

110) Inst. 1808/1809 [163r] p. 212, [165v] p. 213. *Beruf*, pp. 119-20. *System*, vol. 1, p. 93-94.

111) *G.R.R.M.*, vol. 1, p. V.

gal methodology¹¹²⁾. Suddenly, as Savigny gained a deeper and wider, historical and philosophical, view at the period of the controversy over codification, concerning the creation of law or the problem of sources of law¹¹³⁾, the planned construction of his work on the history of Roman law in the medieval era changed¹¹⁴⁾.

Scholars had previously considered the re-discovery of Roman law in the twelfth century in Italy as a distinct phenomenon after the decline of the Roman empire. They had not taken into consideration the historical relations between contemporary law and the ancient Roman law, directly applying the *Corpus Iuris Civilis* as sources of positive law¹¹⁵⁾. Savigny as well, initially, had planned to treat the history of medieval legal scholarship since Irnerius¹¹⁶⁾. But, extending his own perspective from the technical aspects of legal scholars to the whole social mechanism of creating law, including the constitution¹¹⁷⁾, his view on the historical process from ancient Rome to modern era changed.

Even though there was an interruption of legal scholars' activities from the decline of the Roman empire up to the rediscovery of Roman law, such main characteristics of Roman law as the free constitution of a city, freedom and ownership¹¹⁸⁾ had always, even

in that disruptive period, been maintained. Therefore Savigny began to think that Roman law had historical connections with the medieval era¹¹⁹⁾ and also with his own era, which relates closely to the latter in terms of the Roman law tradition¹²⁰⁾.

Based on this understanding, the history of scholarship on Roman law and the history of legal literature, which Savigny previously considered as just a clue for finding a contemporary legal methodology, is now regarded as a fundamental part of the history of legal scholarship¹²¹⁾ or more globally part of the whole legal history¹²²⁾. Besides, Roman law, whose historical relationship with the modern era was previously ignored and was regarded just as a directly applicable source of law, is now put into historical connection with modern era¹²³⁾.

Here history has obtained a distinctive significance¹²⁴⁾. History is no longer an antiquarian inquiry for giving a legal reality to a philosophical speculation, nor a simple compilation of examples for us to arbitrarily construct a system of positive law¹²⁵⁾. It is the unique measure to lead to the true and comprehensive understanding of our current situation. It is indispensable for us to understand historically what part of a previous legal system is still valid¹²⁶⁾ and potential material for

112) Savigny says the history of legal scholarship is a useful measure to find our own legal method. *Methodologie* 1802/1803 [2r] p. 91, Grimm 1802/1803 [1] p. 137. Cf. *G.R.R.M.*, vol. 1, p. VI.

113) *G.R.R.M.*, vol. 1, pp. XI-XII.

114) *G.R.R.M.*, vol. 1, pp. V-VII.

115) *G.R.R.M.*, vol. 1, p. VI.

116) *G.R.R.M.*, vol. 1, pp. V, IX. Cf. *G.R.R.M.*, vol. 4, pp. XI-XX.

117) *G.R.R.M.*, vol. 1, pp. VII, XI.

118) *G.R.R.M.*, vol. 1, pp. XIII, XIV, 458.

119) *G.R.R.M.*, vol. 1, pp. VI, IX.

120) *Beruf*, p. 118.

121) See also, as to an organic connection within the history of legal scholarship, *Pandekten 1816/1817* [76r] p. 267; *Pandekten 1817/1818* [77r] p. 269; *Pandekten 1825/1826* [86v]-[87r] p. 278.

122) *G.R.R.M.*, vol. 4, p. XIV.

123) *G.R.R.M.*, vol. 1, pp. VII, XV.

124) *G.R.R.M.*, vol. 1, p. XIII. Cf. *Pandekten 1812* [65v] pp. 257-58.

125) "*moralisch-politische Beispielsammlung*" in *Zweck der Zeitschrift*, p. 109.

126) *Zweck der Zeitschrift*, p. 109. *Pandekten 1827-1842* [93v] p. 284.

our further legal innovation¹²⁷). For legal history as a whole, the historical research on Roman law¹²⁸) is placed in central position¹²⁹). It does not matter whether Roman law remains valid as positive law or not¹³⁰). Its historiography is necessary for legal scholarship due to its original feature as our first experience of realizing a private law in a society.

2 Law and history

Savigny, in his manifesto on historical jurisprudence (*Zweck der Zeitschrift*) and his *Beruf*, is very conscious of the significance of history not only for law but more generally for public issues including politics and the constitution¹³¹). History has, even though not directly leading to a certain concrete choice on public issues, an indirect or rather well articulated relation with public decision making¹³²). Savigny says we always need to reveal the past, otherwise binding ourselves¹³³) in our political, legal or more generally public reflection. Since the past as objectively given us is placed apart from everyone's arbitrary speculation, it is an inevitable necessity for

all of us¹³⁴). At the same time, as its understanding is emancipated from anyone's personal absolute authority, it is so freely open to everyone like in the democracy. We, standing in our current moment, recognize the historical position of our current situation through non-arbitrary historical research, and then freely decide how to change it for the nearest future¹³⁵). This free choice on political issues presupposes historical research as non-arbitrary process¹³⁶).

Here history recovers the character of contemporary history which first arose in ancient Greece with a potential of criticism against a political, even republican, decision in the democratic context.

VII. Savigny's implicit political strategy

In Savigny's vision, legal scholars are expected to have a double non-arbitrary character. One is the geometrical sense combined with a system. The other is the historical study which makes it possible for us to understand the current situation or the closest past¹³⁷). Savigny, principally keeping a dis-

127) *Beruf*, pp. 117-18. Cf. *Zweck der Zeitschrift*, pp. 110-11.

128) Pandekten 1811 [174r] p. 251. Pandekten 1812 [67r], [67v] p. 259. Pandekten 1818-1820 [78r] p. 270.

129) Inst. 1808/1809 [160r] pp. 210-11. On the history of the Middle Ages, *G.R.R.M.*, vol. 1, p. XV. On the difference between historical stratifications within Roman law and the legal history of each people, and the incorporation of the former history as part of the latter history in a people having accomplished the reception of Roman law, *Methodologie* 1809 [38v], [39v], pp. 216-17.

130) *System*, vol. 1, pp. 104-05. Pandekten 1821-1824 [80r] p. 272. As a significant outcome of historical research on Roman law, Savigny indicates the understanding of the method among classical Roman jurists. Pandekten 1824/1825 [85v] p. 277.

131) As to the principal distinction between the "geschichtlich" (historical) school and the "ungeschichtliche" (non-historical) one, *Zweck der Zeitschrift*, pp. 108-09, 113-14. See *infra* note 136.

132) *Zweck der Zeitschrift*, p. 109. Pandekten 1812 [67v] p.259.

133) *Beruf*, p. 113.

134) *Beruf*, p. 116.

135) *Zweck der Zeitschrift*, pp. 110-11, 113. *Beruf*, pp. 113, 114.

136) The crucial point in Savigny's view is whether we satisfy ourselves with discourses only directed toward finding a practical political or legal resolution or whether we find it necessary to gain historical comprehension of our current situation as a fundamental view point and then step up to a practical discourse. Cf. Pandekten 1816/1817 [76r] p. 267; Pandekten 1818-1820 [78r] p. 270; Pandekten 1821-1824 [80v] p. 272. See *supra* note 131.

Such an incorporation of historical understanding into our political or legal discourse does not necessarily mean any exclusion of practical aspect. Pandekten 1827-1842 [95v] p. 286.

137) *Beruf*, p. 48.

tance from political issues in a consistent manner, pretends to deal only with private law looking like just a technical and apolitical sphere. This attitude itself shows us his implicit attempt to realize a certain kind of social order apart from the political sphere.

First of all, Savigny aims at realizing and establishing private law as a social order to protect the private individual's liberty. For this purpose, he adopts the model of classical Roman jurists in his contemporary Germany, considering their political position in the Roman empire and their capacity and method autonomously to retain and innovate private law. He expects with this model to realize a republican, free and transparent sphere¹³⁸⁾ among contemporary legal scholars¹³⁹⁾¹⁴⁰⁾, independently from whatever form a government has.

In addition to such a republican character in legal practice, Savigny calls for historical research as a prerequisite of legal practice. Savigny goes far away from the model of classical Roman jurists, not only making legal scholarship open as to social class¹⁴¹⁾, but

also demanding such a prerequisite of history¹⁴²⁾. It means he attempts to add a further democratic quality to the republican character of legal practice¹⁴³⁾. Or Savigny might think that it is quite difficult in Germany, especially Prussia, to realize a stability or such a republican character within legal practice otherwise than by strictly demanding an accurate historical understanding¹⁴⁴⁾ of the legal system received¹⁴⁵⁾ from the past¹⁴⁶⁾¹⁴⁷⁾¹⁴⁸⁾.

The law as originally part of the republican society has regained some connections with history and philosophy in a peculiar manner within Savigny's thought. According to his vision, philosophical aspects are already incorporated in a system, and so put under the control of legal scholars in its construction and its application for practice. Therefore the original capacity of criticism of philosophy is minimized at the level of legal practice. On the other hand, history recovers its potential of criticism against the legal practice which Savigny hopes gains the republican character. Any legal discourses directly and only

138) The interpretation is also a free intellectual operation. *System*, vol. 1, pp. 209, 210.

139) *Methodik* 1803/1804 [184v] p. 208. *Methodologie* 1809 [61r] p. 245. *Pandekten* 1812 [67v] p. 259. *Pandekten* 1827-1842 [99r] p. 288. As to the authority (*Autorität*), *Pandekten* 1828-1833 [90r], [90v] p. 280.

Which interpretation as the outcome of free intellectual operation by different scholars will obtain and keep for a moment an authority depends on free and critical assessment among them. *System*, vol. 1, pp. 88-89.

The interpretation which is recognized as having an authority obtains a similar quality to a true legal source in practice. *System*, vol. 1, pp. 87, 88, 89.

140) Regarding the university as the social basis for free workings by legal scholars, *Pandekten* 1828-1833 [90v] p. 280. Savigny, *Recension von: F. Schleiermacher, Gelegentliche Gedanken über Universitäten in deutschem Sinn. Berlin 1808* (1808), in *Vermischte Schriften*, vol. 4, ch. XLII (1850). Savigny, *Wesen und Werth der deutschen Universitäten* (1832), in *id.* ch. XLIII.

He also takes into consideration some other societies, e.g. Italian cities, where private law somehow exists without any substantial backing of university. Savigny, *Über den juristischen Unterricht in Italien* (1828), in *id.* ch. XLIV.

141) As to differences between classical Roman jurists and contemporary legal scholars, *System*, vol. 1, pp. 84-85.

142) Savigny thinks Roman jurists stand very close to legal sources as objects to perceive and a relatively direct understanding is possible for them. *System*, vol. 1, pp. 298-99. See also Savigny, *Beitrag zur Rechtsgeschichte des Adels im neueren Europa*, in *Vermischte Schriften*, vol. 4, *supra* note 140, ch. XXXVI.

143) *System*, vol. 1, p. 49.

144) *Pandekten* 1812 [66v], [67r] pp. 258-59.

145) *System*, vol. 1, pp. 78-80. Cf. *System*, vol. 1, pp. 67, 71, 75, 77-78, 85, 267.

146) As to medieval Italy, *System*, vol. 1, pp. 85-86.

147) As to England, *Methodologie* 1809 [43r], p. 221. *Pandekten* 1821-1824 [81r], p. 272. Cf. *Methodologie* 1802/1803 [3r], p. 92.

148) As to France, *System*, vol. 1, pp. 202-03, 326-28.

deduced from some would-be social requirements should be considered insufficient due to the lack of historical understanding of the current situation. And any demonstration of a system of positive law without historical perception is rejected as well¹⁴⁹).

In addition to that, at the level of historical study, the philosophical aspect and the antiquarian inquiry of etymology are combined in a bid to comprehend the historical stratification of the legal system. Only on the basis of such a historical understanding of the legal system is the current system of positive law to be constructed. In this whole process, philosophy also regains its critical potential.

Besides the differentiation of two levels of workings, the scholars bearing tasks at these different levels are not considered the same. At the level of legal practice in a society, those scholars belonging thereto are exclusively charged with it as representing the people. To the contrary, the level of historical study does not have such an exclusive limitation, especially regarding the history of Roman law as our common first experience of law¹⁵⁰). Such a collaboration, or intellectual solidarity, among legal scholars of different societies in historical study potentially supports and criticizes legal practice in each society. The practice exclusively limited within a society is combined with the globally opened critical thinking based on history. Due to the dynamic and pluralistic structure of legal scholars' workings, the autonomous existence of private law in each society and eventually the protection of each private individual's liberty are hopefully strengthened.

These ideas of Savigny can be understood

as part of his attempt to realize a democratic society in a certain form and a certain way¹⁵¹). This is a theoretical implication of incorporating history into legal science in his thought.

VIII. Further questions

1 Savigny's historiography

We have made clear that, in Savigny's thought, the roles of legal scholars should be accomplished with a dual scientificity, one concerning the practice and the other the historical perception of our current legal situation. With this double scientificity, Savigny aims to exclude arbitrariness from all their activities as to private law. However, there still remain some further questions for a more comprehensive assessment of Savigny's ideas.

First of all, there is a problem of the method of historical research to be taken by legal scholars, especially regarding Roman law. According to Savigny's ideas on textual criticism or historical material criticism and on interpretation of sources, a somehow presupposed historical or systematical view or framework may affect textual criticism¹⁵²) and interpretation of individual rules¹⁵³). Besides, some philosophical assumptions can directly influence such a presupposed systematical or historical framework and, indirectly, the textual criticism and the interpretation. We need further to clarify relations between these elements in his historiography¹⁵⁴).

Secondly, there remains a problem in the

149) See also *System*, vol. 1, p. 221, which concerns the negative or denial use of subjective reason of a rule.

150) *Beruf*, pp. 39-40. Cf. *Beruf*, p. 14, 118-19.

151) As to Savigny's idea on the democracy, Savigny, *Die Preußische Städteordnung*, in *Vermischte Schriften*, vol. 5, ch. LIV (1850), especially pp. 207-09. *System*, vol. 2, pp. 331-37 (1840).

152) *Methodologie 1802/1803* [5v], [6r] pp. 94-95 (Grimm 1802/1803 [12], [13] p. 145). *Methodologie 1809* [42v] p. 221. *System*, vol. 1, pp. 242, 243, 248, 249 n.(e).

153) See *supra* note 19.

154) Regarding Savigny's general way of comprehending and describing a historical change, *Methodologie 1809*

relationship between historical research and the construction of a system of positive law. Savigny's discourses bridging these two layers are not simple. Even in cases where some social prerequisites of a previous legal institution no longer exist in a current society, that does not always directly lead to denying the validity of such an institution¹⁵⁵. It is necessary carefully to observe the complex interplay between a historiography and a construction of positive law in concrete subjects. Then it would hopefully be possible to identify Savigny's criteria for assessing which institution is still valid or what part should be taken up from the past.

Thirdly, connected with the first and second points, there remains another problem with Savigny's bias in constructing principal legal concepts or in the philosophical framework of system, through which both the historical understanding of Roman law and the construction of a system of positive law are commensurate with each other. The relations between a past legal system and our current system depend on the framework and concepts with which we describe both systems¹⁵⁶. The sharper and more peculiar the concepts used, the clearer and more crucial appears the divergence between different

systems, and the contrary as well. In our analysis on the first and the second points, we should consider Savigny's possible bias and, if any, make it as clear as possible. His bias, once clarified, would help us to understand his political attempt in more detail¹⁵⁷.

2 Social foundation of legal scholarship: A meeting point of historical jurisprudence and universal private international law

Apart from these problems concerning his historiography, there is another problem as to his total view on legal scholarship and its social foundation. Savigny prepares some defensive measures against intervention of the State's political power into private law in terms of methodology and theory of sources of law. Since a positive law, however, inevitably needs a civil procedure as a public decision making process organized by a State, it is not possible completely to exclude the State's engagement in legal practice.

As to this limit within the State's internal legal order, we can say that Savigny demonstrates in the final volume of *System* an external solution based on the pluralistic structure of legal orders in a global society as a theory

[50v] p. 228. As its examples, Savigny, *Über die Entstehung und Fortbildung der Latinität als eines eigenen Standes im Römischen Staate* (1812), in *Vermischte Schriften*, vol. 1, *supra* note 3, p. 16. Savigny, *Über das jus Italicum* (1814), in *id.* pp. 38-39, 46. Savigny, *Über die Römische Steuerverfassung unter den Kaisern* (1823), in *Vermischte Schriften*, vol. 2, p. 96 (1850). Savigny, *Über das altrömische Schuldrecht* (1833), in *id.* p. 418.

As to his view on the history of historiography, Savigny, *Der zehente Mai 1788* (1838), in *Vermischte Schriften*, vol. 4, *supra* note 140, ch. XL. Savigny, *Erinnerungen an Niebuhr's Wesen und Wirken, durch seine Briefe veranlaßt* (1839), in *id.* ch. XLI.

155) At least in *System*, Savigny is not a fundamentalist of Roman law at all. *System*, vol. 1, p. 94. He constructs a modern system of Roman law, historically considering some gap between Roman society and the current situation as basis of positive law. For example, regarding his construction of modern German contract law, see Savigny, *Das Obligationenrecht als Theil des heutigen Römischen Rechts*, vol. 2, pp. 231-49 (1853). For this, Harata, *supra* note 2.

156) As to his simplification of concept of possession, Harata, *supra* note 2.

157) This point relates also to Savigny's idea on how to resolve a conflict between rules within the *Corpus Iuris Civilis*. For resolution of such a conflict, Savigny gives priority to a systematic integration rather than a historical explanation. *System*, vol. 1, pp. 280, 286 n.(f). If this preference were literally accepted, it would lead to a system comprising apparently incoherent rules, as many as possible without any conflict, excluding a possible historical explanation according to which a rule was overridden by another rule and lost its validity. In such a highly comprising system, legal concepts become accordingly less sharp and lose their capacity of reference to socio-anthropological divergences.

of private international law¹⁵⁸). Each individual State's intervention could be avoided through a mechanism incorporated in the universal private international law, viz. the combination of plural competent forums and their *ordre public*. And this universality is expected by him to be realized and supported in the global collaboration among legal scholars in different states¹⁵⁹). So, in Savigny's vision, legal scholars are charged with a double global collaboration, one as to historical study and the other as to the universal private international law.

There arises an interesting meeting point between historical jurisprudence and universal private international law, both of which are expected to develop in the global collaboration among legal scholars. This meeting point concerns a social foundation which demands a certain kind of activity of jurists.

As to the case in ancient Rome, Savigny explains the development of jurists' activities. At the beginning, Roman law was founded directly based on Roman people's common perception as customary law. Then the rules promulgated in the Twelve Tables¹⁶⁰) referred mainly to some ritual legal forms whose accurate application was originally the task of Roman jurists¹⁶¹). Besides, praetors played a role of legal creation through their edicts¹⁶²). Later, with Rome expanding its rule over the whole of Italy, the *ius gentium* developed through the praetors' edicts in a bid to deal with international commerce with

foreigners, and then this part of the law began to be applied also among Roman citizens¹⁶³).

Of these two kinds of legal sources, according to Savigny, the Twelve Tables supported by jurists and the praetors' edicts, the latter gained greater importance from the beginning of the empire. Additionally, with the increasing amount of legislation, jurists became charged with coordinating these different kinds of sources to give a concrete decision in each case. For this coordination, a scientific treatment with abstract concepts was demanded¹⁶⁴). That was, he says, the birth of legal scholarship and it was influenced by the Greek intellectual culture¹⁶⁵).

This, albeit brief and somehow biased, outlook offered by Savigny is very suggestive. In his theoretical and historical perspective, at the first stage, a law arises with some ritual forms directly based on people's common sense. Here, even though a unitary entity of law can be conceived, any scientific operation with abstract concepts still has no place¹⁶⁶). The activities of jurists remain limited to keeping and strictly applying formal rituals. The distance between treatment of individual cases and their activities is very close there.

To the contrary, given a certain change or development of a society, jurists need to realize a legal system as a whole and apply it in a stable manner like a science¹⁶⁷). The problem is when and in which social conditions such a perception of a legal system is required. The-

158) As to the eighth volume of *System* including the theory of private international law, H. Harata, Savigny's theory on Conflict of Laws as legal framework of international pluralistic civil society (unpublished manuscript, on file with the author).

159) Savigny, *System*, vol. 8, pp. IV, 23, 30, 114.

160) *G.R.R.M.*, vol. 1, pp. 21-22.

161) *Beruf*, p. 10. *G.R.R.M.*, vol. 1, p. 22. *System*, vol. 1, pp. 45-46, 83.

162) *G.R.R.M.*, vol. 1, p. 23. Cf. *System*, vol. 1, p. 76.

163) *G.R.R.M.*, vol. 1, p. 23.

164) *G.R.R.M.*, vol. 1, p. 24.

165) *G.R.R.M.*, vol. 1, p. 24. Cf. *System*, vol. 1, p. 83.

166) *Beruf*, p. 10. *System*, vol. 1, p. 262.

167) *System*, vol. 1, p. 46.

oretically speaking, it is necessary to assume some social change from a simple situation where a law is directly based on people's common sense and mainly composed of ritual forms to another situation which requires a systematic and scientific comprehension of positive law. And this new situation is to be found in the formation of a pluralistic society with diversified sources of law¹⁶⁸), which lead jurists to coordinate them and construct a unitary system in a scientific way. In the case of ancient Rome, we might find such a social change in the period where there occurred the dichotomy between *ius civile* and *ius gentium* or more broadly its social backdrop of the municipal system in Italy¹⁶⁹).

On the other hand, the historical situation to which Savigny directly refers in the eighth volume of *System*, on private international law, is that of the imperial era¹⁷⁰). But the substantial structure he takes into consideration is the pluralistic structure of international civil society composed of independent cities that existed around the end of the republican era¹⁷¹). Similarly, it is possible to suppose that a social foundation which gives rise to a diversification of legal sources and calls for the scientific and systematic workings of legal scholars may have something to do with the pluralistic social structure of the late Roman republic¹⁷²⁾¹⁷³). Savigny's reference to the influence of Greek culture also suggests it.

Here we find a question on the possible common basis of practical aspects of legal

science based on a system and private international law, both of them concerning a concurrence of legal sources. Besides, we need further reflection on the relationship between their possible common social foundations and a social context which demands that the historiography of Greek origin should be re-incorporated in jurisprudence in our modern era.

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168) *System*, vol. 1, pp. 262, 263.

169) The reason why Savigny seems to postpone the birth of legal scholarship from the Roman republic to the imperial era is to be studied more. *Methodologie 1809* [45v] p.224. *G.R.R.M.*, vol. 1, p. 23. *System*, vol. 1, p. 101.

170) *System*, vol. 8, pp. 57-88 (1849).

171) This point can be proved by Savigny's biased interpretation of historical sources. Harata, *supra* note 158.

172) *G.R.R.M.*, vol. 1, ch. 2. Savigny, *Entstehung und Fortbildung des Latinität*, *supra* note 154, ch. II. Savigny, *Ius Italicum*, *supra* note 154, ch. III. Savigny, *Römische Steuerverfassung unter den Kaisern*, *supra* note 154, ch. XVI. Savigny, *Der Römische Volksschluß der Tafel von Heraklea* (1838), in *Vermischte Schriften*, vol. 3, ch. XXXIV (1850).

173) The plurality of legal sources after the decline of the Roman republic is not necessary in terms of the socio-political structure with the monopolized political power in the Empire. As to the leveling of legal sources, *G.R.R.M.*, vol. 1, pp. 26, 27. *But cf. System*, vol. 1, p. 77.