



Joachim Rückert

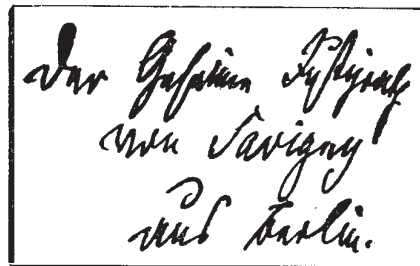
*Professor, J.W. Goethe-Universität*

# Friedrich Carl von Savigny, the Legal Method, and the Modernity of Law\*

Two very famous elements of the European history of law are connected by the title of this article: modernity and Savigny.

‘Modernity’ is a big word. It appears impressively in the all-encompassing singular, as ‘modernity’ and not ‘modernities’, and it divides our complete history into the modern and pre-modern, or the modern and the old. The old may be forgotten. In speaking of modernity as an ‘unfinished project’, it is strictly the future that is examined; only there can completion be expected. It was the famous German philosopher Jürgen Habermas from Frankfurt who has stressed this perspective since 1980 in argument against several so-called post-modernists, such as Wittgenstein, C. Schmitt, and Lyotard as well as such conservatives as Foucault, Bataille, Derrida, and Nietzsche, again and again. Therefore, it was he who elaborated the formula ‘modernity — an unfinished project’ into a well-known *topos* for many of the battles to come against a new conservatism.

‘Savigny’, too, is a big word. Savigny was the most famous lawyer not only of his epoch. His name has surpassed those of many luminaries of past centuries and the current one. Even today he occupies an important place in every legal, many biographical, and even some of the major literary encyclopaedias. He may enter the discussion with ease and is now able to announce himself simply with his ‘calling card’, as becomes clear.



Savignys card to Goethe, announcing his visit in 1832.\*<sup>1</sup>

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\* Lecture given in Tartu in March 2006.

<sup>1</sup> O. Liebmann (ed.). Die juristische Fakultät der Universität Berlin von ihrer Gründung bis zur Gegenwart in Wort und Bild ... Berlin 1910, p. 85.

Two celebrities are good for a starting point but ‘do not a summer make’ — as we say when the swallows return in spring: A single swallow does not make a summer. One hopes they’ll finally return soon, together. So, how may we make these two celebrities meet? What do they have in common? Why Savigny? What can be learnt from them for the modernity of law? Allow me to make my small and modest contribution to this.

## 1. The modernity of law

What is meant by this formula — to what texts, people, legal thoughts, and figures does it refer? I shall call some elements to mind to illuminate the connection to Savigny.

The ‘project of modernity’ notion combines two messages: one of a historical nature and the other of a practical kind. Modernity is seen as a historical process, and its completion is a practical task. Therefore, the method is to connect proper cognition and proper action in one single project.

Seen from a historical standpoint, the view is one with its origins in the time of the Enlightenment, which was nearly before all else an enlightenment of the old legal world. It may be summarised thus, in brief: enlightened philosophers, in the form of thinkers such as Voltaire, Hume, and Kant; enlightened criminal law through the work of Beccaria and Feuerbach; enlightened public law such as the Virginia Bill of Rights, the *Declaration des Droits de l’Homme et du Citoyen*, and the US Constitution of 1787 and the French Constitution of 1789; enlightened private law in the *Code Civil* and the Austrian *Allgemeines Bürgerliches Gesetzbuch* of 1804 and 1811; and in the work of jurists such as Cambacères and Portalis in France, Zeiller in Austria, Bentham in England, and jurists in the German *Reich* (Hugo, Hufeland, and Thibaut, as well as, perhaps, Savigny, too).

What is the message of these names and laws? It is that of (1) the emancipation of man from his self-created dependence, in keeping with Kant, the message of autonomy and freedom as a native right of all mankind; (2) the law’s independence of religion and morals; (3) law as a guarantee for preservation of both, of the common and individual freedom; (4) law as a common and equal imperative; (5) civil rights for all men instead of rights only for states and nations; and (6) so-called eternal peace. This becomes more concrete when the various sections of law are examined. This consideration turns first to criminal law.

Enlightened criminal law is moulded by the following nine elements: (1) the law to punish humans by humans only, not in the name of God or pure reason; (2) the general form of written law as an essential protection with regard to foreseeable and equal treatment; (3) the strict commitment to written law in imposition of the hazardous evils called punishment now and then; (4) precise and specific written laws; (5) exclusive codification to create the latter; (6) fair trial before punishment, with only limited reasons for arrest, and with the abolition of torture; and (7) public and oral trial, and the social prevention of crime. In brief, the aim was to allow punishment only as a necessary and utmost evil.

For public law and the system of judicature the main task was to create inalienable human rights, as proclaimed in 1776, which are independent of state, guaranteeing liberty and property, as well as to secure them in different ways: through constitutions as solemn written texts, by separation of powers, via strict commitment of the judiciary to the law and independent courts and judges, through the priority of the constitution and special constitutional courts with judicial control, and by equal chances of participation in legislation through popular assemblies and parliaments as far as possible. Another task was to control the administration by creating administrative law and protection through courts. In short, the aims are human rights, a constitutional state, rule of law, and judicial control.

In private law, personal freedom was to be created by shaking off the traditional impositions from above — at first by making private law independent from dangerous public law and then by casting off the shackles of status and profession, by abolishing the personal distinction among a serf or farmer in the countryside, a citizen in commerce and trade, and a nobleman in military and civil service. Furthermore, private autonomy should be strengthened by cancelling so-called *Preistaxen*, referring to obligations to conclude a contract; by cancelling prohibitions of contracting, compulsions of approval, and tight privileges in the law of contract; then by abolishing the feudal bindings of property and the trappings of religion and of politics and clans with respect to the rights of domestic relations and inheritance. In brief the doctrine of individual private autonomy was the main purpose.

For enlightened jurisprudence the most important point was human autonomy, with independence gained first from religion, morality, morals, politics, and philosophy, those old companions of law. It was most important to create both, a legal subject of its own and a related legal method. Therefore, ‘positive’ law (a word newly in vogue) — meaning human, visible, and specially institutionalised rules — was emphasised. But this did not refer just to legal rules in the modern sense of the term. Since there existed no codifications of private law but a long chain of Roman, domestic, and Canon law, the analysis and formation of the law as an independent unified entity had to be the main purpose. To manage this, the positive law could be dealt

with in either a practical–juridical or a scientific way. In any case, law was to be presented as a system — the second word to enter the vogue, in about 1800 — instead of as, polemically spoken, a mere ‘aggregate’. A system was said to be a unity structured by principles (see, for example, Kant). One matter of serious debate was where the unity of the positive law originated: from the outside (e.g., the arranging mind) or the inside, the subject itself. The difference between so-called external, or formal, and internal, or material, systems still separates the main concepts of law and its method — for example, in German legal theory with Larenz and Kelsen. What role does Savigny play here? We again return to the ‘Why Savigny?’ question.

## 2. Why Savigny?

Today’s German and European jurisprudence has left behind nearly all of Savigny’s texts. Textbooks on private law and legal methods, and sometimes even decisions, only remind us of his theory of the four interpretation canons: the theory of the grammatical, logical, historical, and systematic element of every legal interpretation. This is not much but is at least something, since the other authors of Savigny’s era, and even indeed of the entire 19<sup>th</sup> century, are paid even less attention. Only in the history of science and in very cultured speeches is there more memory to find.

But is Savigny of crucial importance for the modernity of law? Was his contribution so fundamental that it is worth remembering? Should we not be better served by taking a glance at the ‘modern’ Rudolf von Jhering, the preacher of the motto ‘the purpose creates all law’, and his contemporary Karl Marx? This sounds modern. Or should we look at Eugen Ehrlich, the father of the sociology of law, or at Feuerbach, the father of modern criminal codes, or at the really radical modernists like the Königsberg-Kantians Theodor von Hippel and Christian Morgenbesser, whose books survived censorship only by accident? In 1798 we read it in *Beiträge zu einem republikanischen Gesetzbuch* — the terms for ‘republican’ and ‘code’ are the modern key words in this title.

There are important reasons to devote oneself sincerely to these authors, but there are some good reasons attending Savigny as well. Living in 1779–1861, he joined the debates in the deciding phase of the first crucial steps into the modernity of law. The battles were fought a little later. In the final part of the 19<sup>th</sup> century, modern constitutions and codes were established nearly all over Germany and Western Europe; there were even general and equal voting rights in the *Reich* (1871); there was a fundamental free private law; there were strict codes of criminal law and procedural law; and a far-reaching independent administration of justice was attained. The project of modernity had thrived at a profound level in law (even in family law and labour law), but it had not so deeply established itself in society and politics.

In addition, Savigny lived in a centre for the German development, in Berlin, and in the state of Prussia, which was more vigorous than others and clearly displayed the problems accompanying the modernisation of the state, economy, and society.

Those crucial struggles and centres for achievement always deserve our special interest, because they show above all the motives and connections of a certain problem — e.g., the modernity of law. Savigny therefore is part of the decisive group of comrades in arms in the fight for the modernity of law. Accordingly, he is of great interest where this topic is concerned.

At least, when it comes to the subject itself, one can make a discovery with Savigny. The only prerequisite involves ridding oneself of at least three prejudices and misunderstandings. These are:

- (1) the Left Hegelian and Marxist point of view, that Savigny was just a juridical reactionary;
- (2) the opinion that he only wanted to preserve conservatively what had become obsolete already;
- (3) and, especially, the view that his theory of legal method had become obsolete and useless.

The two political prejudices I shall deal with only in brief at the end of this lecture, as I would like to examine the last point a little more closely. This is even more relevant because how this otherwise most remembered work, his theory of interpretation, is misunderstood proves paradoxical as well as instructive. Savigny is going to be shown to be much more modern than is generally assumed.

### 3. Savigny, the legal method, and the legal decision

At first sight, Savigny's texts on legal method seem to come from another world with regard to their language and subject. His classical German is deceptive when it comes to the unknown meanings of his words. And, most importantly, legal method as a methodical decision, as we know it today, does not interest Savigny to begin with. Two examples inspire today's understanding.

#### 3.1. Legal method as method of decision

Nowadays, instructions for the correct solution of a legal case, for the application and interpretation of law, for the theory of argumentation, for the assessment of interest, for the judicial decision — all words of today — are to be found in books with titles bearing phrases such as 'legal method'. In the centre of their attention is the judicial decision. Two examples may prove this. My choice was moulded not by originality but by significance.

Some years ago, a highly detailed portrayal was published, whose name translates to *Legal Methods: From Classical Rome to the Present*.<sup>2</sup> The author, known as a civilian lawyer, indicates — already in the first sentence of his book — that he considers legal method to be "methods of thinking, leading to the 'correct' resolution of cases"<sup>3</sup>. For him the entire history of jurisprudence is transformed into a practical instruction, especially for the correct interpretation of law and the so-called canons mentioned above. That is, the grammatical, historical, logical, and systematic arguments are elements of any decision, in the author's view.

My second example originates from Germany's favourite book on legal methods, which replaced the 'method of scientific jurisprudence' of Karl Larenz from 1960: the short and precise textbook *Juridical Method* by a famed public lawyer from Erlangen, Reinhold Zippelius. The first edition was published in 1971, the ninth in 2005. Zippelius introduces his theme in a more general manner than most other authors do, by stating that "[t]he subject provides the method" (p. 1). But even for him legal rules do not revolve around the 'discovery of the world', as it were, but, as he emphasises, arise out of the 'order of the actions', because law first was 'rule of conduct', 'rule of action', and 'command'. Law of this kind is decisive, he says, for the "'entry' into the solution of a legal case" and the "updating of the law". Put briefly, law reaches its aim only with what he calls concretisation and application. Accordingly, the problems of deciding a case are the main subject. This theory of legal method provides a more philosophical foundation than others but looks equally for a practical perspective and for methods of decision. Now we remember and see illustrated the difference in the books' titles: 'jurisprudence' no longer appears in titles of textbooks on legal methods as it did for Larenz's *Method of Scientific Jurisprudence*. It vanished with regard to legal method. But not with Savigny. We may now turn naturally to the question of his famous legal method as scientific method.

#### 3.2. Legal method as scientific method

Savigny's texts do not contain a special chapter relating to legal method in its practical meaning. He nevertheless solves cases but, obviously, in a different way. Savigny's starting point is a different one. It is the study of law and the scientific analysis and formation of law.

With regard to the study of law, Savigny held special lectures in 1802/03 and 1809, named — as we read on the title page — 'Legal Methodology', or in the lecture catalogue 'An instruction to the self-study of jurisprudence'. Unfortunately, it is nowadays known well under the misleading title 'Legal Method', which was chosen in 1951 for the first printed edition by Wesenberg, published in 1952. There are considerable differences between 'legal methodology' and today's 'legal method'. Legal method is the way to decide things legally, while legal methodology is the way of studying law. These days, neither study nor practice would distinguish between the two subjects, since the 'study' of law serves as lengthy preparation for the state examination, which is nearly completely based on decision upon cases legally.

Studying in Savigny's sense means something completely different. Studies shall instruct jurists in how to work scientifically and independently. This is what Savigny wanted to teach. Even legal practice should become scientific. Very significantly, Savigny was called a 'machine of studies' — which is reported by

<sup>2</sup> P. Raisch. Vom Nutzen der überkommenen Auslegungskanonens für die praktische Rechtsanwendung. Heidelberg 1988.

<sup>3</sup> *Ibid.*, p. 1.





Friedrich Carl von Savigny. Drawing by Ludwig Emil Grimm, 1809.<sup>\*4</sup>

his poet friend Brentano, who could observe Savigny's diligence in Marburg and felt rather neglected as a friend.<sup>\*5</sup> Everything revolves around the study of law and not around its practice of deciding cases. We are able to see the study machine with the eyes of the painter L. Grimm. We understand as follows: The method and science of law are placed in the centre, and in a different way from the approach of today. Savigny's 'method' developed a concrete "new view for science"<sup>\*6</sup>, as he stressed in 1809, and therefore differed strongly from the tradition. The new word '*Rechtswissenschaft*' (legal science) occurs constantly from 1802 to 1842. It became a buzzword in a way, and a model for the entire 19<sup>th</sup> century and beyond.

'Method' is very important in the works of Savigny as "the direction of the mental power to make every scientific work succeed", as he emphasises in 1802 right at the beginning of his lecture on legal methods. Literary models, from those applied by Roman lawyers to the models of the present, are the source of this method — and they are the only aid. Savigny does not try, as jurists usually did and still do, to develop a set of practical rules for the application of general legal provisions. The reason for this is a theoretical one, originating from the theory of the possibility of judgement, as developed by Kant. I shall return to the latter. Even if the expression 'legal method' does occur once in 1802<sup>\*7</sup>, for Savigny it is identical with scientific method.

The legal rules and the legal imperatives result here from fundamental continuity, which is recognised by Savigny's new so-called 'truly historical method'. This method does not collect examples for decisions but works out legal evolutions with the character of inner necessity. Savigny explains this as follows: the "historical treatment in its true sense, that is the contemplation of legislature as being self-moving and self-growing during a certain period of time", is now the decisive moment.<sup>\*8</sup> This phrasing co-ordinates the

<sup>\*4</sup> See A. Stoll. *Der junge Savigny*. Berlin 1927, after p. 398.

<sup>\*5</sup> A. Stoll. *Friedrich Carl von Savigny. Ein Bild seines Lebens mit einer Sammlung seiner Briefe*. Vol. I. Berlin 1927, p. 176.

<sup>\*6</sup> F. C. von Savigny. *Vorlesungen über juristische Methodologie 1802–1842*, issued and introduced by A. Mazzacane 1993, p. 88 (= 1802, fol 4r) (the citation refers to the original text; its foliation is annotated in the second, 2004 edition as well).

<sup>\*7</sup> *Ibid.*, p. 88 (= 1802, fol. 3v).

<sup>\*8</sup> *Ibid.*, p. 88 (= 1802, fol. 4r).

method of law and the subject of law — the treatment and the being. Both are understood in a new way. The new historical work must neither tell nor elegantly collect facts and dates, nor may it put these in a pragmatic (causal or functional) order, as was done before. Its subject was meant to be something self-growing. The word ‘self’ is crucial and changes a great deal. If ‘legislation’ is understood as something self-growing, then it is thought of as being without an actual legislator, as something *quasi* subjectless and purely internal — that is, as being a procedure carrying itself out in the legislature. The lawyers then work on ‘law itself’, even if working on legal texts. The legal text, accordingly, is just a manifestation of law itself. Consequently, Savigny later stresses, legal rules only pronounce the juridical ‘thought’, “to make it objective and preserve it”.<sup>9</sup> This changes everything. It is now the objectively existing thought behind the legal text that becomes decisive. The rule itself only expresses this thought in a more or less appropriate manner.

This law behind the legal text is for Savigny a ‘system’, and he wants to examine it as constantly moving through time. With this, it gains — even though open during the passage of this time — the desired completeness as a codification does but, as he says, in “a different way” and with an inner unity instead of external casuistry and in a manner independent of chance and contingency.

‘Truly historical’, as Savigny repeated often, therefore referred to a legal method that is juridical as well as scientific and is not oriented toward the decision of cases — a method integrating the insight into reality and into its worth. Consequently, we have to ask as jurists whether this is a legal method that does not involve decision.

### 3.3. Is this a legal method without decision?

Savigny wants to recognise the law as a scientific matter and understands it as a continuity that ‘truly’ exists as something objective and historical. Therefore, one is tempted to say, the lawyers’ process of decision is completely transformed into a process of cognition. Accordingly, Savigny was part of a truly pre-modern objectivist position. As the reader knows, to recognise the law as a truth was part of the pre-modern theories of natural law, regardless of whether their foundation was a recognition of nature, God’s creation, human nature, reason, or something else. But it would be wrong to place Savigny in this context. His message is of interpretation and legal hermeneutics.

### 3.4. Interpretation as legal method — interpretation, not application

Savigny knows and accepts the juridical work of deciding. Where and how Savigny positions this work is best explained with regard to a *locus classicus*, which was in our day hardly ever understood, let alone ever found. Obviously, Savigny’s 124 pages relating to this subject and published in 1840 have never been read properly to the end, and their systematics were never taken seriously. I am talking about Savigny’s explanations for the four interpretation canons. As already mentioned, they are nowadays the most loved and cited showpieces of his major work *System of the Present Roman Law (1840–1848)*. Even though Savigny has been quoted only rarely in dogmatic textbooks since the 1930s, and not by chance since this date, the timeless elegance of his description of the four elements of every interpretation is still highly appreciated. The way he emphasised that the four elements have to be tied together and that with this the ‘thought inherent in the law’, as it were, could and should be reconstructed is praised as well.<sup>10</sup> However, hand in hand with this praise comes a criticism: Savigny’s recommendation was in reality absolutely worthless, since it was impossible to decide, without referring to a rule of priority, which of the four elements should be the decisive one in the event of a conflict. In addition, the highly important teleological element was said to be missing. The interpretation therefore remained arbitrary, the elements useless in the end.

This criticism is thoroughly misleading. It is biased by today’s thinking on decisions and does not pay attention to the original way in which Savigny understands the task of the canons. They serve as an aid in completely understanding the legal texts only when these are of what he describes as “good condition”.<sup>11</sup> Thought and expression meet in this ‘good condition’ anyway. Both can be understood only at a rough and approximate level, depending on the use of all four elements. This is what matters to him at this point. We learn that Savigny starts with general hermeneutics of law, which commences not with the traditional special case of opaque legal texts but with the understanding of law itself. It is not the pathology of law, the opaque

<sup>9</sup> *Ibid.*, p. 89 (= 1802, fol. 4v).

<sup>10</sup> F. C. von Savigny. *System des heutigen Römischen Rechts*. Vol. I. Berlin 1840 (reprinted Aalen 1981), p. 222.

<sup>11</sup> *Ibid.*



legal text, the lacunae in law, the unclear case, and so on that are most important to him; rather, it is the law as a whole in its good condition and its normal recognition. Indeed, at this point there cannot occur any conflict with regard to the interpretation, since thought and expression harmonise perfectly. Rules of priority or hierarchy are therefore not necessary and are, in fact, pointless.

But what about teleology and hierarchy? One has to continue reading and then finds passages referring to the interpretation “of legal texts in a poor condition”. Savigny’s text is, as we have to bear in mind, strictly systematised. The table of contents illustrates this very well.<sup>\*12</sup> It is this second part that refers to the important cases of indefinite or wrong expression of law as well as to the problems of lacunae. Savigny calls this activity *Rechtsfortbildung*<sup>\*13</sup> — just as we might do. It proves problematic to translate this formula into English — the concept of updating of the law doesn’t fit, as it belongs to the world of law-making, whereas the idea of *Fortbildung* applies to a mixture of continuation and creation. It is a matter of German philosophy — untranslatable perhaps but, I hope, understandable. In any case, Savigny creates special rules concerning how this work should be accomplished. Here he commences with a subject that is said to be absent today: rules of priority. He refers to a ‘hierarchy’ of aids to interpretation<sup>\*14</sup> and allows — bound to this context — teleological arguments as well. However, he does restrict them, because it would be too easy to play the spirit against the letter of the words and thereby exceed one’s judicial competence and the bounds of loyalty. At this point, we now can see more clearly that Savigny fully recognises the unavoidable element of decision as part of a lawyer’s work. And we understand also that he does not offer merely a theory of interpretation of legal provisions. He provides much more — general juridical hermeneutics of texts at all. At this point we meet the borders of interpretation, carrying us forward to consider the constitutional domain.

### 3.5. The constitutional dimension of Savigny’s legal method

As decision for Savigny is as inevitable as it is dangerous, he finally tries to master it from a constitutional perspective. At this time, in 1840, he had been a judge for years, with experience of much activity in the so-called ‘court of revision and annulment or cassation’ for the Prussian Rhineland. On the basis of these experiences he proposed the concentration of the delicate *Fortbildung* in one special supreme court, comparable to the French court of revision and cassation.<sup>\*15</sup> He gave as reasons for this institutional solution the fact that with regard to legal texts in a ‘poor condition’ it was impossible to impose clear limits between interpretation and overcoming, or between simple understanding of the law and independent activity. One seems to hear the voice of the experienced man who had been a Prussian judge since 1819 and was to be a minister in 1842, who could not easily chat anymore. Jakob Grimm complains about the latter after 1842, when the minister and state counsel adorned with gold braid visited him occasionally between the meetings. We see experienced professor and judge Savigny pleading for a solution that combines administration of justice and constitutional law, expressed in a modern way: a procedural solution.

With this we have reached the first answer to modernity: Savigny betrayed neither the modernity of law with his beloved teleology nor the certainty of the law, nor did he abandon the commitment of the judges. His solution simply prevented three major illusions of a juridical optimum. Savigny did not believe in the blessing of a king of judges, in the strict *bouche de la loi* as Montesquieu wrote, nor did he hold stock in *référé législatif* and sharp prohibitions of interpretation and commenting as in the ALR of 1794 or believe in the friendly People’s Courts as Georg Beseler did.<sup>\*16</sup> And he didn’t say a word about the illusions of his opponent in regard to codification, Anton F. J. Thibaut. Thibaut had emphatically stated in 1801 that the lawyer should be obliged to interpret poor legal texts in a most restricted way, to force the legislature to improve the written law.<sup>\*17</sup> This was rather consistent but completely illusory, as we know after 200 years of modern legislation, and Savigny recognised that immediately. We are now able to note with respect that Savigny resolved the problem of juridical decision in a very clear and realistic way. And, above all, he embeds it in a scientific analysis of the law itself as well as in the institutional mastering of the remaining difficulties in dealing with legal texts of ‘poor condition’ by a special court.

<sup>12</sup> *Ibid.*, p. viii.

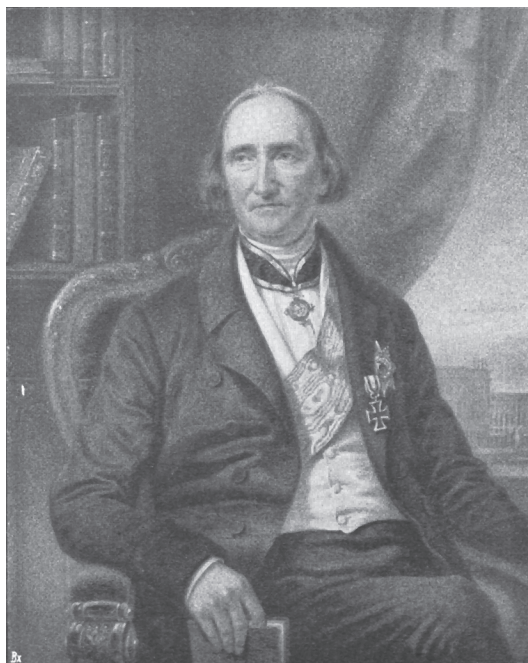
<sup>13</sup> *Ibid.*, pp. 18, 238, 291 et seq.

<sup>14</sup> *Ibid.*, pp. I 225, 228 et seq.; J. Rückert. *Juristische Methode und Zivilrecht beim Klassiker Savigny (1779–1861)*. – J. Rückert (ed.). *Fälle und Fallen in der neueren Methodik des Zivilrechts seit Savigny*. Baden-Baden 1997, pp. 25–70.

<sup>15</sup> F. C. von Savigny (Note 10), pp. 330, 327.

<sup>16</sup> G. Beseler. *Erlebtes und Erstrebtes. 1809–1859*. Berlin 1884, appendix, p. 1843.

<sup>17</sup> A. F. J. Thibaut. *Versuche über einzelne Theile der Theorie des Rechts* (1801). Vol. 2. 2<sup>nd</sup> ed. Jena 1817 (reprinted Aalen 1970), p. 173.



Savigny in official dressing, painted by Franz Krüger, 1855.<sup>\*18</sup>

Therefore, it was in one way correct to assert that Savigny did not deal with the moment of decision. He always emphasised that the main juridical task is to recognise the principles and rules in general, not to offer concrete rules for the solution of cases, as would a method aiming to give primary practical instructions. At the same time, it is misleading that Savigny even claimed to be ‘practical’ with energy. How is this possible?

### 3.6. ‘Truly historical method’ as ‘really practical method’

Savigny stressed the practical element in the winter of 1818 in a very strong way. For this we have to thank his opponents from Heidelberg, who founded the most lively, even today, journal *Archive for the Civil Law Practice* in 1818. Right at the beginning of his lecture in the winter of that year, Savigny dealt with the new demand for a practical method. He admitted that the study of Roman law had nearly always been based on ‘the material’. As he puts it, “that is the rules of law, that originated from Roman law as final results and which the judicature can use immediately”. Following Savigny, these ‘results’, which one could call case rules nowadays, “were their final aim, and even though the scientific requests were neglected, the practical need was satisfied — at least apparently — for a good deal”.<sup>\*19</sup> The critical words ‘were their final aim’ relate to “most [lawyers] of all times” — that is, nearly the entire tradition before him.

Savigny thinks of himself, in contrast to them all, as the promoter of real modernity of law.

As his own solution Savigny emphasises, not surprisingly, his famous ‘historical method’. Completely different from the practical method of the ACP’s programme just mentioned was the other one, that one, in his words, “which is called historical”.<sup>\*20</sup> But a surprisingly clear and firm Savigny insists that his historical method was, as he puts it, the “really practical” method.<sup>\*21</sup> Savigny therefore claims that the more self-aware formula is the better one for a truly practical method. He supplies the following reasons: His solution was better because it was impossible in any case to gain material completeness with regard to the legal rules<sup>\*22</sup>, “not just because of the quantity, but especially because of the constantly growing diversity of cases”.<sup>\*23</sup> Therefore, complete casuistry, as was aspired to by the Prussian Code of 1794 with its approximately 20,000

<sup>18</sup> See e.g. O. Liebmann (Note 1), p. 80.

<sup>19</sup> F. C. von Savigny (see Note 6) p. 195 et seq. (= 1818, fol. 78r).

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*, p. 197 (= 1821, fol. 80r).

<sup>22</sup> *Ibid.*, p. 197 (= 1831, fol. 99r), (e.g., pp. 215, 211).

<sup>23</sup> *Ibid.*, p. 211 (=1827, fol. 94v).



paragraphs, seemed to be hopeless for Savigny. The Prussian Code thought of itself as part of the project of modernity. It was an attempt to, in the words of Savigny's description from 1814, "contain in advance a decision for every possible case. The opinion was, as if it were possible and good, first to know every single case by experience and then to solve it by using the decisive rule of the code."<sup>24</sup> Savigny's rejoinder to this opinion was that one was obliged to "learn the method of finding rules, not the rules themselves"<sup>25</sup>, that it was useless to accumulate case rules. Further, he added that, whereas completeness as was aspired to by the Prussian Code was impossible, the finding of 'leading principles' was the decisive and possible task. Because, with regard to these leading principles, a "completeness of a different kind"<sup>26</sup> could be achieved in reality. This, he stressed, was the only possible way to master the diversity according to rules and was the future of the principles.

What do these statements of Savigny prove about his modernity? He does not strike out against the enlightening and modern idea of binding the lawyers to the rules of law. On the contrary, he pleads for another and a better way to reach this goal.

Savigny very well recognises the moment of decision and the vital role of most concrete case rules for the sake of jurisprudence. But this is secondary to him; indeed, he shows that it is even misleading to try to achieve certain law by travelling this road. In contemporary language, we might say that the lawyer cannot be a directory, but he can learn the grammar of the network and give reliable information — if the network has a grammar. It is exactly this that Savigny assumed to be true for the law. For him, it consists of 'natural' legal relations foremost. Today, contrary to this, we usually dissent, holding a view that law is, rather, a sum of legally relevant human acts of decisions, and we consider all law to be contingent, and in this sense positive. Thus, we end up running anew into an old problem. Since scientific analysis and formation of law usually aims for a certain duration and stability of its results, major problems are created by this contingency, up to the famous text on the 'worthlessness of jurisprudence as a science' (written by the Prussian attorney Kirchmann in 1847–48). We cannot have the cake of security, stability, and justice as well as eat in every contingent moment. At this point, we should begin to wonder about our familiar models of application of law, subsumption, and judgement.

### 3.7. The model of application of law, subsumption, and judgement

At the start of this paper, I announced a far-reaching theoretical consolidation. The time is ripe for it. Savigny's sceptical position with regard to casuistic case rules and codified solutions contains a fundamental scepticism relating to the favourite model of application of rules. According to this, rules are sufficient by being binding, and it is necessary only to subsume the cases; the more casuistic and exact these rules are, the better. Savigny's scepticism with regard to those ideas about law and the application of rules has many well-grounded theoretical underpinnings. Their basis is the problem of power and ability of judgement, as it was analysed by Immanuel Kant at that time.<sup>27</sup> Kant's conclusion was that it is impossible to create rules that connect recognition and action by applying general sentences to concrete situations, since doing so has always demanded additional rules stating whether the general sentence fits the concrete case or not — and this leads to infinite recursion. Therefore, only some technical or pragmatic rules are possible at this point. Our methods of deciding cases are all pragmatic. We use such rules nearly every day in legal practice. All pragmatic jurisprudence therefore can be understood just in a technical pragmatic way, at least as long as the model of application moulds jurisprudence. But if it is understood as the task recognising the already existing rule in a traditional or practised behaviour, one does not apply abstract terms in a subsuming way. On the contrary, the starting point there is of given rules and not decisions, and we develop these 'naturally', from one group of cases to another. The perfect example of such a juridical proceeding has always been the customary law. It is developed from given conduct. Therefore it is possible and important for Savigny to state that every law arises in a way as customary law.<sup>28</sup> His favourite examples are the law on bills of exchange and that on bid price (that is, the law of currency).<sup>29</sup> Both indeed originate in events that have neither been created by legal provisions nor been planned but are the results of a spontaneous, gradually growing order.

<sup>24</sup> F. C. von Savigny. *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*. Heidelberg 1814, various reprints, critical edition in F. C. von Savigny. *Politik und Neuere Legislationen*. Materialien zum "Geist der Gesetzgebung". H. Akamatsu, J. Rückert (eds.). Frankfurt am Main 2005, p. 21.

<sup>25</sup> F. C. von Savigny (Note 6), p. 211 (=1827, fol. 94v).

<sup>26</sup> F. C. von Savigny (Note 24), p. 22.

<sup>27</sup> I. Kant. *Kritik der Urteilkraft*. 3<sup>rd</sup> ed. 1799 (original work: Berlin 1790).

<sup>28</sup> F. C. von Savigny (Note 24), p. 13.

<sup>29</sup> Compare K.-P. Ott. *Geld- und Geldwerttheorien im Privatrecht der Industrialisierung (1815–1914)*. Ökonomische Wechsellagen in der sogenannten Begriffsjurisprudenz. Berlin 1998.

Another example introduced by Savigny is found in the way he develops the long-missing first principle of the law of unjust enrichment, which is valid even today. His way of looking for principles by examining major consented cases and groups of cases is especially characteristic of Savigny<sup>30</sup>; in particular, the way he moved from the given material to the general rule was specific to his legal method as legal science.

Therefore, it is not simply historical, political, or ideological reasons that have induced Savigny not to stress the search for immediate results and immediate rules for cases. There have been also carefully considered theoretical reasons, which led him to his 'scientific treatment' of the law. In his eyes, this was the only path toward a better juridical security, a modern value to which he accorded great import. Savigny did not feed the illusion that it was really possible to calculate in terms of concepts, as a famous sentence of 1814<sup>31</sup> might suggest. Nevertheless, legal certainty and security, understood as continuity in legal practice, were favoured principles of Savigny, too.

### 3.8. Summary in ten points or even in three terms

We may now offer a summary. In its three-term form, it consists of Savigny key words: science, system, and positive law. What they mean together can be stated in 10 points:

- (1) Savigny presents very well a legal method for single cases, but it is very different from our method.
- (2) It is decisively a scientific and cognitive method and is less practical-decision- and case-oriented, in the present sense.
- (3) This difference fundamentally changes the fundamental legal concepts and legal work.
- (4) Law becomes able to be treated as an academic object with an 'inner system', which is essentially independent from concrete statutes and judicature. Case rules are only the smallest units in this wide-ranging system.
- (5) It is only the 'truly historical method' that identifies the right continuities and the 'leading principles', and that can develop this inner system.
- (6) The inner system and the leading principles secure together the aspired-to completeness. They are the real guide that is to be used in order to solve the always endless number of cases. Therefore, the scientific approach is superior to a mere case-distinguishing approach for legal practice.
- (7) Acknowledging 'imperfect' legal texts, Savigny assigns the problem of deciding cases not the highest but the lowest priority. A careful method of teleology might have a legitimate place here, but only here, for 'imperfect' texts.
- (8) Savigny's starting point is the 'healthy condition of norms', not an imperfect, pathological state. In this 'healthy' condition, the legal rules simply result from the words and circumstances themselves. The law is just there as customs are. His attributes are inner coherence, system, and principle. There is no need for rules conflicting with interpretations here.
- (9) Savigny's method is part of his general legal hermeneutics, which includes the solution of single cases but has its origin in another starting point, being born of natural conditions and not out of conflict.
- (10) Savigny explained his solution in very general terms. In that, he was able to offer, and accepted, participation far more than other jurists did in the philosophical and general political discussion of his time. His solution was neither non-progressive nor Jacobinic (as the Vienna government had suggested in 1819). In terms of political history, it was the position of a reform conservative.

<sup>30</sup> J. Rückert. Dogmengeschichtliches und Dogmengeschichte im Umkreis Savignys. – Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanische Abteilung 1987 (104), pp. 666–678.

<sup>31</sup> F. C. von Savigny (Note 24), p. 29.

## 4. The modernity of law in Savigny's legal theory

We may now set forth several conclusions concerning the modernity of law as related to Savigny's conceptualisations in his legal theory.

1. Savigny shares fundamental targets of legal modernity. These targets are the universality, security, stability, and autonomy of law. On the basis of these principles, he defines the role and the duties of jurists in legal science and practice. Loyalty to norms in the process of interpretation is most important for Savigny. He has no illusions about the remaining free play with 'imperfect' statutes. He has no illusions on the question of how to develop the law either. His solution for a hard case is, consequently, focused on the constitution of the courts. Like that of today, it is an institutional procedural solution. He does not turn to judge-made law as a new, elegant source or to teleology, which would cast him into a circular argument. Both solutions extend the competence of the legal profession, which runs counter to the modern concept of egalitarian participation. Very appropriately, Savigny distinguishes clear law, which does not ask for special competencies, and hard cases, which absolutely refer to judge-made law and teleology. In this way he also recognises the constitutional implications of methodology. He subscribes to the following very modern formula: questions of legal method are questions of constitution. Hence, Savigny's approach here is perfectly in line with the project of modernity.

2. Even his famous antipathy where codification is concerned is less contradictory to modernity than one might suppose.

Savigny is a master of differentiation. He surely was against codification as a perfect tool for private law. His scepticism and criticism were justified to a certain extent, especially in the realm of modern private law as the competence of individuals. The parties have to practice and to formulate good private law as habit, custom, or common usage. It must be an open law for new needs. All of these points contradict a systematic and complete fixation and pre-setting. Nevertheless, he accepted the importance of fixed rules for procedural law and, above all, for criminal law. This was nothing else than the project of a modern procedural and criminal law.

3. Savigny's accent of legal academia, or, as one might more readily say, legal science, is a harder point to address. In his opinion, legal science is the only way to achieve true law and an accurate legal practice. His project of 'legal science' was modern in its structure. He emphasises the importance of principles and leading principles in the existing and 'healthy' condition of law. Savigny prefers to ascertain these principles instead of just solving hard cases. He takes the undisputed rules and cases as the legal standard. The method applied at present has proceeded down the other path, to case-distinguishing, judge-made law, with casuistic and selective statutes.

But the key question is that of what is more suitable for the project of modernity. The analysis of principles and the application of systematic thinking are defences against arbitrariness even where the single case decision is concerned. Every comparison of older textbooks on private law from the 19<sup>th</sup> century to the 1960s (leaving aside the Nazi era) with a newer book reveals the increasing confusion in language, systems, creation of norms, and orientation. Thus, theory becomes the slave of the legal practice in a legal environment that favours case law. Surely, systems and principles are not able to prevent every arbitrariness, but they do make it difficult for the courts to abuse the methods of interpretation. On our European continent, only informal statutes on instances and organisation are binding on practice in the courts. There are no principal rules and habits for precedents as in Common Law and English case law. Furthermore, the application of principles that are embedded in the existing positive law preserves the connection of law and the autonomy of its users. This connection might be preserved even against a statute. This was a current conflict in Savigny's time, as when the monarch's statutes or decrees were under dispute. Today, a conflict between the democratic legislation and civil society seems unimaginable, because both describe the same subject. In the end, Savigny's recourse to a 'true law' besides the 'statute' has a Jacobinic and very modern touch indeed. We recognise here a democratic right to resist an unconstitutional government or power.

4. Savigny's project even contains modern elements in substance. His concept of law is based on his famous idea of the 'spirit of the people' (*Volksgeist*). That means that it perceives the law more as a spontaneous order than as a planned and implemented structure. In this respect, the enlightened project of modernity seems to be ambiguous and undetermined. The codes and not the customs are its ideal law. This law, planned by an authority, does not serve only to order and to channel approved matters; it also serves to shape society and direct it further against all unwelcome ideas. For this reason, the relation between the pivotal point of the project of modernity and its implementation comes under pressure. Human autonomy is the pivotal point, but the implementation can be directed against this autonomy of the individual, as the history of the 20<sup>th</sup> century proved. Today, democracy shall relieve the tension. Savigny does not choose this option. At least he



charges the lawyers with looking at the ‘spirit of the people’, which is the self-aware life of law. This was a first step toward democratic modernity and by no means a little step of the time.

5. Finally, I wish to turn now to some standard critical arguments in respect of Savigny and modernity.

#### (1) Savigny’s rejection of codes

Savigny’s rejection of the French *Code Civil* and the Austrian General Civil Code (ABGB), the two most liberal codes of the day, is well known. But he mainly criticised the technique of codification. Savigny shared the aims of completeness and security of law, but he had other tools in mind. He wanted to achieve these aims through legal science — namely, by learning the legal principles of the existing law. Abstract systematic, comprehensive casuistic approaches and ‘mechanical security’<sup>\*32</sup> were not his means. Savigny’s method was most suitable for private law, which has been in a non-codified state for centuries and always needs the technique of non-positive roles.

As regards contents, in 1814 Savigny turned against the “indescribable power, which the mere idea of uniformity [of the law in one country] [...] exercised for such a long period in Europe”.<sup>\*33</sup> However, this did not relate to the equality of human beings. He was particularly critical of the technical weaknesses, which caused “huge legal uncertainty”, in his opinion.<sup>\*34</sup> He did not criticise important modern principles of the *Code Civil* like equal legal capacity or the freedom to act. The same is true for the Austrian code. In his ‘System’ of 1840, Savigny declared all men equal before the law.<sup>\*35</sup>

Criminal law and constitutional law were more problematic areas. Savigny’s view on the ‘true’ law behind the legal provisions clashed with the urgent necessity of secure and precise criminal norms, which he described as “an external fact, determining the rights of the citizens” (1802, unpublished).<sup>\*36</sup> Surprisingly, but consequently, Savigny very early on advocated legislation for criminal law. Unpublished but fairly well-established sources prove that. Savigny lectured on this in 1816–17 before the Prussian crown prince, who was his private student<sup>\*37</sup> (1816–1817, unpublished). He defended and implemented his position when this later king appointed him in 1842 as minister of legislation. The famous Prussian criminal code of 1851 and the German Imperial Criminal Code of 1871 were the results. Hence, Savigny pleaded for codification in the field of criminal law. Despite his general denial of codification, his position on criminal law is not inconsequential. In the concrete case of criminal law and in the tradition of the Enlightenment, the urgent need for legal security outweighs the disadvantage of fixing norms. Furthermore, Savigny’s criminal code is milder than Feuerbach’s ambitious and famous Bavarian code of 1813. Savigny’s code postulates the principle of *nulla poena sine lege* as well (§ 2).<sup>\*38</sup> Some scholars even ascertained it to be the “spirit of the liberal Rechtsstaat”.<sup>\*39</sup> We see that Savigny’s rejection of codes is not general and contains very modern elements.

#### (2) Savigny’s rejection of contract theory

As is general knowledge, Savigny condemned the prevailing contract and sovereignty theories in constitutional law. He claimed that the state was an “integrated whole by nature” (*Naturganzen*), no ‘machine’ as the theory of the Enlightenment declared it, and that it was a “corporeal stature of the living community of people” (*leibliche Gestalt der lebendigen Volksgemeinschaft*), not a mere instrument (1840).<sup>\*40</sup> In Savigny’s conception, the people and their law were not constituted but only a “visible and organic emergence” (*sichtbare und organische Erscheinung*).<sup>\*41</sup> For him, the concept of ‘people’ described an organic substance, not a political subject. The concrete monarch, the concrete people, the concrete legislator, and jurists are only the ‘organ’ of the ‘true law’. They had only to “recognise and to pronounce the law, which existed irrespective of them”<sup>\*42</sup>. On the other hand, they had sometime helped to constitute it.

In comparison to Savigny’s approach, here the project of modernity is more radical and accredits complete sovereignty only to a concrete nation. Savigny did not choose this solution, because he had in mind the bloody tyranny of the popular government during the French Revolution.

<sup>32</sup> F. C. von Savigny (Note 24), p. 5.

<sup>33</sup> *Ibid.*, p. 41.

<sup>34</sup> *Ibid.*, p. 81.

<sup>35</sup> F. C. von Savigny (Note 10), p. 2.

<sup>36</sup> J. Rückert. *Idealismus, Jurisprudenz und Politik bei Friedrich Carl von Savigny*. Ebelsbach 1984, p. 126.

<sup>37</sup> J. Rückert. *Juristische Methode und Zivilrecht beim Klassiker Savigny*. ... p. 57; J. Rückert (Note 36), p. 164; A. F. Berner. *Die Strafgeseztgebung in Deutschland vom Jahre 1751 bis zur Gegenwart*. Leipzig 1867 (reprinted Aalen 1978), p. 236.

<sup>38</sup> J. Rückert. Das “gesunde Volksempfinden”. Eine Erbschaft Savignys. – *ZSGerm* 1986 (103), p. 240 et seq.; V. Krey. Keine Strafe ohne Gesetz. Einführung in die Dogmengeschichte des Satzes “nullum crimen, nulla poena sine lege”. Berlin 1983, pp. 90, 21.

<sup>39</sup> V. Krey (Note 38), p. 21.

<sup>40</sup> J. Rückert (Note 36), pp. 312, 328; F. C. von Savigny (Note 10), pp. 14, 15.

<sup>41</sup> F. C. von Savigny (Note 24), p. 13.

<sup>42</sup> Compare K.-P. Ott. *Geld- und Geldwerttheorien im Privatrecht der Industrialisierung (1815–1914)*. Ökonomische Wechsellagen in der sogenannten Begriffsjurisprudenz. Berlin 1998.

Savigny seemed to reject the principle of freedom when he reformulated it as a principle of ‘true’ freedom (1815) and criticised non-positive basic rights (*Urrechte*).<sup>\*43</sup> Yet he argued in favour of a free private law in principle, which can be described as liberalism in private law.<sup>\*44</sup> He preserved freedom for private law but not for public law. As a portrayal of positive law in Prussia and Germany for the year 1840 this seems to be adequate and realistic. Savigny was fully aware that the boundary between a free private law and a less free public law was a crucial question. But on this point he was not very clear. On account of this lack of accuracy, Savigny’s distinction was too open for the enlightened project of modernity. We see that Savigny’s rejection of contract theory had its foundation in dangerous elements for his time, not in a generally divergent position.

### (3) Savigny’s metaphysics?

At first glance, Savigny’s objective-idealistic approach to metaphysics does not appear to fit into the project of modernity. He uses his metaphysics to secure the existing law against rational and planned changes by legislation. Savigny’s metaphysics represents a double concept of law — ‘a law within the law’ — even within the sphere of positive law. His metaphysics also represents a juristic thinking, which creates ambivalence but also a shelter for tradition against the future and containment for the concept of freedom. In contrast and far away from Savigny, the project of modernity ties up with Kant’s subjective idealism.

Yet Kant’s project is not completely free of metaphysics, even if one thinks in terms of Habermas’s juristic ‘inalienabilities’. Evidently, the project of modernity has to set its first starting point itself, just as other projects do. And, indeed, it began with human autonomy for the first time. The project of modernity must not fall back beyond this starting point and must not choose another outset. But this choice at the beginning can only be based either on an indisputable/imperative solution or on empirical/logical arguments. The ‘first promoter’ choice must be described as metaphysics. In this light, two forms of metaphysics are seen to be simply juxtaposed one with the other.

I hope this work has provided the reader with a clear sense that the standard critics of Savigny do not offer proof against the modernity of the key elements of his jurisprudence. In the end, we see a great deal of modernity in Savigny’s legal theory, which this work has been an attempt to illuminate, in demonstration against some very misleading simplifications made today. In this way, I hope, we’ll not only learn history but learn from history.

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<sup>43</sup> J. Rückert. Dogmengeschichtliches und Dogmengeschichte im Umkreis Savignys. – Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanische Abteilung 1987 (104), pp. 666–678.

<sup>44</sup> F. C. von Savigny (Note 24), p. 29.