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**SAVIGNY'S IDEA OF VOLKSGEIST IN THE INDIAN LEGAL SYSTEM**

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**Abstract**

Friedrich Savigny is the father of the theory of Volksgeist, meaning the spirit of the people. This theory opened up a new venue in the legal area and made Savigny a pioneer of the Historical School of Law. The exemplified connection between the law and the people is the critical factor in Savigny's theory. His understanding of the legal system is that it should be influenced by the people and their historical culture and traditions. The people should be the catalyst for the formation of the law, not the law, which forms the mentality and actions of the people. This paper aims to examine the concept of Volksgeist and the Historical School of Law and its applicability in India.

*Keywords:* Constitution, Historical School of Law, Jurisprudence, Savigny, Volksgeist

**Friedrich Carl Von Savigny (February 21, 1779 – October 25, 1861)**

Friedrich Carl von Savigny, commonly called Savigny, was a highly prominent, respected and influential German Jurist in the 19th century. He was born in Frankfurt, Germany, on February 21, 1779, and completed his education at the Universities of Marburg and Gottingen. In 1810, he was hired as a Professor at the University of Berlin, and in 1848, he was appointed the Prussian Minister of Justice. Throughout his life, he researched and gained a greater understanding of Roman law. He was renowned as the founder of the Historical School of Law since he developed the concept of Volksgeist, which means spirit of people. Some of his notable work include

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1. System of Modern Roman Law, 1840-49,
2. The History of Roman Law in Middle Ages in six volumes, 1818-31,
3. The law of Possession (das recht des bestiges), 1803, and
4. Contracts, 1853.

### **The Concept of Volksgeist**

*"Law develops with the development, and remaining with the quality of individuals diminishes as the country loses its nationality."*

"Law is founded and not made"; the adage is the premise of the historical school of law. According to the Volksgeist concept, the law establishes linkages between nearby circumstances and individual states. The law is not founded by specific political systems yet to be discovered but rather by the individuals in society as per their customs, historical backgrounds, etc. The term Volksgeist is derived from "Volks", meaning people and "geist", meaning common will. The name implies that the law is a common desire of the people or, more accurately, the spirit of the people. The entire foundation of Volksgeist was that a nation's legal system is heavily impacted by its people's historical culture and customs, and its growth and development are based on their approval.

Savigny felt that the law of a particular culture exemplifies the soul of persons united by shared language, tradition, feelings, and basic history to incorporate and reproduce law. As a result, the establishment and evolution of law does not rely on human discretionary will. The law is not a false, self-aggrandizing, life-less mechanical device designed by a legal expert to be imposed from above. It is a complicated, subtle, and unnoticeable yet distinct feeling that manifests itself in the 'basic sense of internal need' that people appreciate.<sup>2</sup>

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<sup>2</sup> Neetij Rai, "Volksgeist: In view of Friedrich Carl von Savigny" [2010] SSRN EJ <[http://www.researchgate.net/publication/228277985\\_Volksgeist\\_In\\_View\\_of\\_Friedrich\\_Carl\\_Von\\_Savigny](http://www.researchgate.net/publication/228277985_Volksgeist_In_View_of_Friedrich_Carl_Von_Savigny)> accessed 10 Nov. 2021.

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The law develops per the society's requirements, lifestyle and culture. In other words, the law-making procedure should follow historical developments. According to this concept, the history of people and society at large shapes the law and helps it be studied accurately. The entire history of a nation's civilization expresses inner beliefs embedded in the collective experience of society. Throughout history, the Volksgeist has increasingly driven the development of the law.

Savigny said that the law is evolving like a language. As with every language, the law has new additions occasionally to enhance its understanding and reach. Savigny claimed that the law is a national character that not only ties people to conviction and viewpoint within a community but also evolves with the growth of society. These factors are inextricably linked. As a result, it is not a remote random event but an essential aspect of a country's 'shared consciousness.'

In 19<sup>th</sup> century Germany, a movement emerged for the codification of law, but Savigny believed that law must not be codified; instead, it should be developed based on historical knowledge. If the law were codified, there would be no room for interpretation and change; there would only be lengthy scriptures detailed to the point that their application is complex. Law develops naturally and regularly as per the needs of society and transforms into a national activity on reaching a certain level of civilization, but it will not have universal application. It is a never-ending and continuous process. However, he acknowledged that codification may be suitable when a society's culture has achieved its pinnacle. However, at that point, the law's dynamic and vitality would render a code obsolete!

Customs and practices in society are granted common consent to be practised by society at the onset. People follow it without delay, happily insured. Those who do not follow it become isolated in society, and eventually, everything has to become familiar, taking the form of the law of society.

## Criticism

Though this theory was of great importance in Germany, it was criticized by jurists of the time because the Volksgeist school of law gave rise to several profound difficulties. Some of the main criticism against Savigny's theory of law entails:

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- Savigny highlighted that the origins of the law were in the Volksgeist while also affirming that some general norms and standard rules of Roman law had universal applicability.
- Savigny's assertion that "common consciousness is the only source of the law" is invalid. Volksgeist's reasoning ignores the impact of other legal sources, such as legislation, precedent, etc., on the evolution of the law. Some places would have been left without legal provisions as there was never widespread knowledge of them. Several communities in a nation follow diverse cultures, beliefs, and so on, making it hard for a uniform law to regulate and govern them all.
- Another criticism is that, since they are adopted, they have been pursued and persevered for a long time, not because they are virtuous and have the backing of the general public.
- As Prof. Porkunove pointed out, Savigny's concept "does not establish the relationship between what is national and what is universal."

### **Applicability of the Volksgeist School of Law in India**

Owing to the separation of powers between the central and state governments, the Indian Constitution is federal, limiting the applicability of Savigny's theory. The central Government has powers on matters of national interest, and the state governments enact laws on matters of local interest. This separation of powers regarding the law's enactment in and of itself opposes Savigny's national character of law.

The Indian Constitution derives its power from the "will of the individuals," which grants the people rights over the Government.<sup>3</sup> Though this is true, some features of the Indian Constitution have been borrowed from other sources, such as fundamental rights from the American Constitution and emergency provisions from the German Constitution. This, again, contradicts Savigny's view, according to which only Volksgeist is the wellspring of the law. Furthermore,

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<sup>3</sup> Khyati Tongai, "Role of Judiciary in promoting Good Governance" (2020) 2(3) FFJLJ <<https://fastforwardjustice.com/role-of-judiciary-in-promoting-good-governance>> accessed Nov. 11 2021.

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everyone in India is subordinate to the law, be it the President, the Prime Minister, Members of Parliament, etc. Though the Government made the law, it still applies to them.

India also follows the English Common Law, such as Tort law, codified by the British and brought to India. To this day, common law is uniform throughout the country, despite Savigny's belief that received law can never be successful or develop national character.<sup>4</sup> Unlike in Germany, while India was in its infancy just after independence, the founders created a constitution rather than waiting for the people's spirit to emerge through time. However, some of Savigny's philosophies have significance to India. For example, the Preamble of the Constitution of India states, 'We the people'.

Some aspects of the Constitution are pretty detailed, while others have been left untouched, thus allowing significant legislative power according to constitutional standards. Article 13 of the Constitution acknowledges customs and practices as laws.<sup>5</sup> The Government cannot regulate these customs as they have been prevalent for a long time and intricately linked to the people's conscience. Articles relating to the conduct of religious affairs are the main provisions representing the symbol of the Volksgeist. Article 25 ensures that any citizen is free to propagate his or her religion.<sup>6</sup>

Though some customs and practices get the treatment of being enacted as a law, it is only so for some customs and practices that have the familiar spirit of the people. For example, it is often seen that people who ride bikes or scooters do not like wearing helmets. Not wearing a helmet is the familiar spirit of people in India. However, the law states that wearing a helmet is necessary while on a 2-wheeler. Another example of the same would be when Hindu kings were the rulers of the land, and the common practice was that they could engage in polygamy. This practice allowed the kings to marry multiple spouses at a time. However, in this day and age, the act of polygamy is

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<sup>4</sup> Dias RWM, *Dias Jurisprudence*, (5<sup>th</sup> ed, Aditya Books, Butterworths, 1995) 560.

<sup>5</sup> Indian Const. art 13.

<sup>6</sup> Indian Const. art 25.

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illegal as per the Hindu Marriage Act, 1955<sup>7</sup> and the Indian Penal Code, 1860<sup>8</sup>, though it is still in common consensus amongst the citizens that the male should be allowed to have multiple wives. Thereby, it is understood that the legislation has a higher pedestal than customs.

The framers of the Constitution wanted to keep the people's deliberate conscience, so they inserted Article 44.<sup>9</sup> It provides that the Government will adopt a uniform civil code throughout the country. This directive principle has granted societies the freedom to abide by their particular customs before their consciences have matured to the point that they consent to the implementation of the Uniform Civil Code.<sup>10</sup>

Savigny's main argument was that people's consciousness cannot be changed by a deliberate law-making process, as in, the law cannot shape the people, but instead, the people should shape the law. The Indian Constitution allows ample flexibility for various communities to pursue their laws. Codified personal laws exist by the state, such as the Hindu Marriage Act 1955, Hindu Adoption and Maintenance Act 1956,<sup>11</sup> etc. and Uncodified personal laws that are not codified and emanate from religious scriptures.

Historically, the concept of judicial activism has derived prevalence, but it stands to be against Savigny's theory. Judges enact laws that contradict Savigny's viewpoint using precedent, which overlooks the judges' creative functions. Like in the *Sabarimala Temple Case*, the familiar spirit of the people was that women must not be allowed into the Sabarimala Temple. However, courts went against this common will and granted women the right to enter the temple. The age-old customs that have stood the test of time are irrelevant today. Even if it is a custom and the familiar spirit of the people, a practice or norm that poses actual social harm cannot function. However, numerous rituals and customs that do not create social harm have been legalized and codified, such as 'Saptapadi,' which became law under the Hindu Marriage Act of 1955.

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<sup>7</sup> The Hindu Marriage Act, 1955, No. 25, Acts of the Parliament, 1955 (India).

<sup>8</sup> The Indian Penal Code, 1860, No. 45, Acts of the Parliament, 1860 (India).

<sup>9</sup> Indian Const. art 44.

<sup>10</sup> Shrivastav D.K., "Personal Law and Religious Freedom", (18, JILJ) 551.

<sup>11</sup> The Hindu Adoptions and Maintenance Act, 1956, No. 78, Acts of the Parliament, 1956 (India).

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## Conclusion

Savigny's concept of Volksgeist has experienced much criticism since its advent, but it has some redeeming features. The concept in and of itself has a humbling approach regarding the people, and their common consensus should shape the law. Instead of people being shaped by the law codified by an individual looking down on others. Nevertheless, it needs to realize society's and the law's development.

In the Indian context, the concept of Volksgeist has minor applications but fails to exist. The concept has no prevalence in India as the familiar spirit of the people lies in their customs, which vary from one community to another. In India, customs are given less preference than legislation and judicial precedents. Nonetheless, the people have ample space to follow their customs under the Constitution of India. However, the law, founded entirely on the human spirit, will disregard the fundamental values contained in our Constitution. The Volksgeist would be useless as citizens need the information necessary to evaluate the relevant legal system. Therefore, Savigny's theory of Volksgeist is not applicable in the Indian context.

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