

## APPLICATION OF VON SAVIGNY'S THEORY IN THE INDIAN ASPECT

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### INTRODUCTION

The theory and study of law are known as Jurisprudence. It examines the origins and tenets of the law. Law is an extremely complicated subject. Each individual has a different perspective on it. Everybody has a different understanding of the law. For instance, a lawyer sees the law as the resolution to every conflict. The average person is aware that the law is there to punish them. The historical school of jurisprudence was said to have developed as a response to the natural school of jurisprudence and gained popularity at the same time as an analytical school in the 19th century. The historical school of jurisprudence claimed that the law is an exaggerated expression of social tradition, economic requirements, and interpersonal relationships. the backers of this institution.

### SAVIGNY'S THEORY

#### Background:

Frankfurt was the birthplace of Friedrich Carl von Savigny in 1779. His passion for history was sparked at the Universities of Marburg and Gottingen, and it was further stoked by encounters with eminent historians at the University of Berlin. Additionally, he has taught at the University of Berlin. The majority of Savigny's works are

- (i) The Law of Possession, in which he described how the ancient Roman principles that still dominate in modern Europe were created. He examined the evolution of Roman laws in
- (ii) The History of Roman Law in the Middle Ages. He examined the Roman and local laws in the system of contemporary laws
- (iii). Although he wasn't opposed to improvements, he believed that they do not oppose the continuity of the country.

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Legislation passed without taking into account the complex history and culture of the community is likely to cause more issues than it will help to address, according to Savigny's essay "On the Vocation." In terms of the law, Savigny presented the theory of evolution much earlier than Darwin. He claimed that tracing the evolution of the legislation was possible. Savigny's idea, according to some jurists, encouraged people who support racial prejudice and religious disputes at the same time as they fight against foreign denominations.

### **Contents of Savigny's theory:**

Savigny's theory was summed up by Friedmann and it is as follows:

The law cannot be created artificially; it is discovered. Law is inherently organic, and it develops in both prehistoric and modern societies in many manifestations of popular awareness and beliefs, customs and traditions, habits and practises, which ultimately lead to people's law or folksiest. Because the law is Sui generis—a representation of its inherent ego or spirit—it cannot have universal applicability.

### **Volkgeist as a source of law:**

The law cannot be created artificially; it is discovered. Law is inherently organic, and it develops in both prehistoric and modern societies in many manifestations of popular awareness and beliefs, customs and traditions, habits and practises, which ultimately lead to people's law or folksiest. Because the law is Sui generis—a representation of its inherent ego or spirit—it cannot be legitimate everywhere. As a source of law, the Volkgeist According to Savigny, laws are a manifestation of peoples' spirits and the result of their shared consciousness. Savigny believed that the foundation of all laws. According to Savigny, laws are a manifestation of peoples' spirits and the result of their shared consciousness. Savigny believed that the human spirit serves as the foundation for all laws. It is possible, to sum up, Savigny's influence on the growth of historical education as follows:

**A) Law has a national character, develops like language, and unites people as a whole because of their shared awareness:** Law grows as society does, drawing authority from society, and finally withers away as a nation loses its sense of identity. Law is spontaneously developed in its early stages before being developed by judges: The development of law initially follows the internal needs of the community, but as the community advances in civilization, the various national activities cease to develop as a whole and divide into distinct

branches that can be studied further by experts like lawyers, linguists, scientists, etc. In addition to serving as a general national life regulator, the law also serves as a separate academic field with a focus on the study of the legal system.

**B) Savigny disagreed with the idea of codifying German law:** Since Germany was then divided into several smaller states and its law was crude, immature, and inconsistent, Savigny opposed the codification of German law on the French model at the time. He believed that after Germany is united and there is only one law and one language used throughout the nation, German law may be codified. Volk Geist's common consciousness at the time was not sufficiently evolved. According to Savigny, the steady growth of the law would allow for the codification of law. He added that historical practises should serve as the foundation for law rather than arbitrary legislation.

**C) Law is a never-ending process that cannot be stopped:** Savigny saw the development of the Volkgeist as a constant, unstoppable process constrained by shared cultural heritage and values. He thinks that the codification of the law might prevent it from developing further. Because it limits how the law or a specific legal system can grow, the codification of the law is extremely harmful.

**D) Administration for Roman law:** Roman law was supported by Savigny in the structure of German law, and he identified Volkgeist in the Romanized German Customary Law. Savigny saw Roman law as a necessary tool for the creation of a united legal system in Germany.

## CRITICISM

- Savigny entirely refused to adopt the idea of codification because he was of the view that codification of law hinders the growth of law. The lawgivers according to him are fierce and may introduce the law which interferes with the spirit of common people.
- In this theory, it is very difficult to determine who are the Volk and whose Geist have become the law. It was not problematic but in recent times because of the increase in diversity and multicultural and multilingual nations. It is very difficult to make it clear that evolved law is part of the spirit of people. Additionally, it occasionally disregarded the minority class of society's citizens, who are only expected to adhere to laws created by the majority of the population. This theory is not a uniform theory

that can be applied equally in society and thus has led to the exploitation of the people.

- He was against the Codification of law which was the most accepted form of modern legislation.
- The idea that customs are always founded on popular consciousness is unacceptable.
- The Volkgeist thesis ignores the influence of other sources of law, such as legislation precedent, etc., on the development of law. Many traditions, such as slavery and bonded labour, persisted due to the self-serving motives of individuals who did not hold positions of power.
- In the name of Volkgeist, Roscoe Pound condemned Savigny for his legal pessimism since it prevented legal reform and modernization. He noted that no judicial system would want to follow the widespread wrongdoings and traditions merely because people are accustomed to them. Savigny introduced legal reforms as a result, ignoring the visionary function of law. Savigny's Volk Geist helped to manifest to give the way for promoting their ideologies such as Marxism, fascism, etc
- Savigny ignored the important role that is played by Judiciary, which is considered to have a strong influence on the law.

## INDIAN ASPECT

In his view, legislation is not an arbitrary act of the legislature, but rather the product of the will of the people. The legislator must have an understanding of the general will of the populace when passing the law. Law is discovered because it results from human unconscious progress and cannot hence be developed. Savigny applied this approach to the German legal system's codification. He viewed the State as an organism with three phases: life, growth, and death. Here, as the populace grew stronger, the rule of law would get weaker and eventually disappear as the nation lost its national identity. Savigny claims that there are three stages in the evolution of law. First off, the law contains a political element. Every legislation and nation must start here. The 'technical' element of legal competence is incorporated in the following stage together with the political component. The timing is right to codify the rules since following this stage, one observes the nation's deterioration and slowly fading away. This theory tends to presume a sense of cohesion among the people and the constant demand for unity, which is one of its main flaws. It is true that throughout Savigny's period, Germany and other countries saw a growing sense of public unification, but

not all countries experienced this phenomenon. Since there is no guarantee of collective consciousness in small groups as well, it becomes challenging to apply this theory in such a situation.

Furthermore, this approach tends to contradict the opinions of society's most knowledgeable lawyers. Individual jurists who would have been in a good position to provide their useful views on law are utterly neglected because of the dependence on the collective consciousness. The fact that the people's collective will may not always be the best for society is, in my honest opinion, the largest disadvantage. If it were the case, the legal doctrine would not have advanced as much. The widespread patriarchal and sexist practices that were supported by the general will of the populace in ancient society would have been maintained. If Volksgeist had been followed precisely, something like slavery, which was pervasive in the community and was overwhelmingly supported by the general population, might not be said to have been eradicated. This is the Volksgeist theory's major flaw in my opinion. Having grasped the fundamental tenet of Savigny's theory, we would now like to attempt to link some of the characteristics with the current legal system, placing particularly in India.<sup>1</sup>

**The National Character of Law:** Savigny only discussed the law's national character. This law, which would result from the people's choice, ought to have the quality of bringing the country together. But in India, we have a federal system of government. This is characterised by a split of authority between the Centre and the State in both the legislative and administrative spheres. The goal is to maintain (to a certain extent) provincial autonomy while promoting the national interest. This goes a long way against Savigny's concept.

**Elected Representatives:** The fundamental definition of the word "democracy" is a form of government where the people of the nation have the final say. In our nation, the people who ultimately pass the laws are those who are chosen by the electorate. The overall pulse of the nation can undoubtedly be sensed through the elections. Since the people determine who will make the laws, it is safe to claim that this process does take the collective will of the people into account.

**The Source of the Law:** We must keep in mind that Savigny believes that Volksgeist is the only source of law. Nothing else is important; only the people will be. If the Indian

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<sup>1</sup>Mr Saikat Mukherjee, 'The theory of Volksgeist' <<https://www.legalserviceindia.com/>>

Constitution is to be analysed, the majority of its provisions are drawn from other international legal frameworks. While the Emergency provisions were adopted from the German Constitution, Part 3 on Fundamental Rights was copied directly from the American Constitution. Savigny likewise held the view that a law that has been received cannot ever become a part of the system, however, Savigny was wrong because the British brought many laws from England to India and codified them. These have been of great use to us and have helped us greatly. But once more, this goes against what Savigny and his theory favoured.

**The public's will might not be "good":** As was previously mentioned, society may not always benefit from the people's collective will. People might not always wish to advance for the betterment of themselves. The Sati practice and slave trading were previously supported by a common will. The 'Volksgeist idea' would never have permitted us to advance and abolish such regulations if it had been applied literally. It is crucial to understand that the collective awareness of the people won't always be accurate, hence in India, this hypothesis won't hold.

**India is a cultural diaspora:** It is very impossible for the general population to ever agree on any issue. This is mostly a result of the diversity of the Indian population. Our constitution permits us to hold divergent opinions, but Savigny's thesis may prevent that from happening. It starts with a consensus and moves forward from there.

**The Legislature is supreme:** The law of the land is ultimately what matters, even though the Indian legal system does respect conventions and traditions to a large extent. This law was established by the legislature and supersedes all else, along with the Constitution. Another issue with Savigny's idea is that he claimed that custom was the ultimate source of law, which is not necessarily true of India. Savigny's hypothesis can only be partially applied to India. Given the separation of powers between the federal and State governments, the Indian Constitution is more like a federal one. They both behave separately as a result in their respective realms. Under the Union list, the Union/Central Government has authority over issues of national interest, and under the State list, state governments have the authority to create laws about issues of local interest. This division of legislative authority between the federal and state governments goes against Savigny's theory of the national character of law.

However, Savigny's theory<sup>2</sup> does seem to apply to India up to a point. The Preamble of the Indian Constitution describes the country as a "Sovereign, Socialist, Secular, Democratic Republic." The phrase "popularity based" demonstrates that the Constitution has established a system of government that derives its authority from the "will of the people." The Preamble further declares that the Indian people are a definite ace of the Republic and have embraced and established the Constitution of India. Accordingly, the real power is in the hands of Indian citizens, both at the national and state levels.

Although Indian Constitution indicates that the source of the Indian Constitution is the people of India yet there are many provisions that have outer sources, for instance, the German Constitution's emergency provisions and the American Constitution's fundamental rights are both borrowed. This makes it evident that Savigny's theory—which holds that only Volksgeist is the wellspring of law—is at odds with reality.

The English, who governed India and brought and applied their laws here as well throughout the 19th and 20th centuries, are responsible for many of the current laws, including the tort law, provisions governing the restitution of marital rights, the Contract Act, and much other significant legislation. They incorporated English law into Indian law, which was to the Indian's great advantage. The codification of law was responsible for bringing national legal consistency. Savigny, who held that a received law could never be successful or take on a national character, was opposed to this viewpoint. Additionally, he passionately resisted legal codification. But Savigny's theory is refuted by the existence of a recognised Common Law and the effective operation of the Codes in India.

Under Savigny's theory, the law always originates from the general public's consciousness. However, numerous doctrines are actively opposed to it in India today, such as the Untouchability Abolition Act and the Dowry Prohibition Act, which were consciously imposed by policymakers. Such laws don't necessarily represent the national consciousness. Judicial activism is a recent development that runs counter to Savigny's notion in India. By using precedents, judges are enacting laws, contrary to Savigny's theory, which disregarded the judges' independent judgement.

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<sup>2</sup> Applicability on India, <<https://blog.ipleaders.in/savignys-theory-law-applicability-india/#:~:text=It%20was%20the%20codification%20of,vehemently%20opposed%20codification%20of%20law>> Accessed on 22<sup>nd</sup> April 2023

## CONCLUSION

After reviewing Savigny's idea, we can conclude that, in his opinion, the will of the people is the law. According to Savigny, the law derives from people's conventions, traditions, and free will and is crucial for the creation of laws, lessening the significance of the sovereign. He also believes that the basic foundation of the law is found in the rigorous and in-depth study of conventions and tradition. Many practices that were common in the past but are now viewed as bad include racial discrimination, slavery, and others. Although he received harsh criticism from many jurists, Savigny's work served as the cornerstone for the development of modern-era jurisprudence.

The Savigny theory is appropriate in India but also significantly deviates from judicial rulings and legal requirements. Take our constitution as an example. It was written by a small group of people, but the phrase "we the people" signifies that it was ratified by every Indian citizen. However, it doesn't demonstrate any selfishness or human rights violations. Therefore, we can detect Volkgeist in our preface. And to some extent, the Volk Geist thesis holds in India because numerous factors must be taken into account while enacting or adopting legislation.

Our constitution contains numerous clauses that may conflict with one another or promote the minority's agenda over that of the majority. For instance, **Article 14** discusses everyone's right to equality. Regarding religious freedom, **Article 25**. The rights of religious groups and denominations are outlined in **Article 26**. Given that it forbids discrimination based on sex, caste, or religion, we can claim that **Article 15** is Volkgeist. The Indian Supreme Court ruled in the **Shirur Mutt Case** that all practices and rituals that are essential to religion fall under the definition of religion. Savigny's main defence was that a deliberate legal system cannot change people's consciousness. As a result, our Constitution provides ample latitude for localities to uphold their legal systems. Additionally, the constitution's authors stipulated in **Article 44** that the State shall work to establish a unified civil code throughout the nation. This has given communities the freedom to uphold their laws till their consciousness has developed and matured enough for them to agree to the establishment of a standard civil code.