

BASIC CONCEPT OF SAVIGNY'S VOLKSgeist

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ABSTRACT:

Savigny, a prominent German jurist through his concept of Volksgeist introduced a new dimension in the legal arena. Savigny, also known as the pioneer of Historical school of law through his concept of Volksgeist explains the need to understand the interrelationship between law and people. Law and people cannot be isolated from each other and this is well explained by Savigny's concept of Volksgeist. This article aims to analyze the concept of Volksgeist and the Historical school of law. It also relates the concept with Nepalese legal system as well along with a case reference.

Introduction to Friedrich Carl Von Savigny: (21 February 1779 – 25 October 1861)

Savigny, the pioneer of historical school was born on February 21, 1779 in Frankfurt, Germany and was one of the most respected and influential 19th-century jurists.¹ He advocated that the meaning and content of existing bodies of law be analyzed through research into their historical origins and modes of transformation.² He traced the development of law as a evolutionary process much before Charles Darwin gave his theory of evolution. It is for this reason; he is even said as “Darwinian before Darwin” for his contribution to apply the evolutionary principle to the development of legal system.³

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¹ http://en.wikipedia.org/wiki/Friedrich_Carl_von_Savigny

² <http://www.britannica.com/EBchecked/topic/525746/Friedrich-Karl-von-Savigny>

³ Paranjape N.V., *Studies in Jurisprudence and Legal Theory*, 4th edi., Central Law Agency, Allahabad, 2006, p.g. 32.

He studied at the Universities of Marburg and Gottingen and acquired a deep knowledge on the Roman law during his lifetime. He worked as a Professor of University of Berlin in 1810 and later was also appointed as the Prussian Minister of Justice in 1848. His major contributions are

- i. Law of Possession(das recht des bestiges), 1803.
- ii. The History of Roman law in Middle Ages in six volumes, 1818-31.
- iii. System of Modern Roman law, 1840- 49.
- iv. Contracts, 1853.⁴

In 1814, Professor Thibaut of the University of Heidelberg – a natural law jurist put forward a plan before German people for the legal unification of Germany on the pattern of Napoleonic Code 1802 which would accelerate the process of political unification of Germany as she was still politically divided.

But the same year Savigny issued a protest pamphlet, *Vom Berufunserer Zeit für Gesetzgebung and Rechtswissenschaft* (On the Vocation of Our Age for Legislation and Jurisprudence), where he spoke out against the pamphlet by the famous Heidelberg jurist A. F. J. Thibaut entitled *On the Necessity of a General Code for Germany* (1814) ⁵. So powerful was his influence that the move towards codification was effectively halted and it was not until 1900, after many years of sustained agitation, that Germany ultimately acquired her code, the *Burgeriches Gesetzbuch*.⁶

He was not opposed to reform but maintained that reforms which were against the streams of nation's continuity were doomed. The essential prerequisite to the reform of German law was a deep knowledge of its history.⁷

⁴ Dyan S.N., *Fundamentals of Jurisprudence, The Indian Approach*, Central Law Agency, Allahabad, 2004 p.g.245.

⁵http://findarticles.com/p/articles/mi_gx5229/is_2003/ai_n19150038/

⁶ Dias RWM, *Dias Jurisprudence*, 5th edi, Aditya Books, Butterworths, Delhi, 1995, p.g. 377.

⁷ Mahajan VD, *Jurisprudence and Legal Theory*, 5th edi, Eastern Book Company, Lucknow, 1998, pg.560.

Introduction to Historical School:

The Two Prime Reasons for The Evolution of Historical School:

- i. It came as a reaction against natural law, which relied on reason as the basis of law and believed that certain principles of universal application can be rationally derived without taking into consideration social, historical and other factors.⁸
- ii. It came as a reaction against analytical positivism which constructed a soul-less barren sovereign-made-coercive law devoid of moral and cultural values described as 'gun-men-situation'.⁹

The Basic Tenets of Historical School can be Summarized as:

- I. Historical jurisprudence is marked by judges who consider history, tradition, and custom when deciding a legal dispute.¹⁰
- II. It views law as a legacy of the past and product of customs, traditions and beliefs prevalent in different communities.
- III. It views law as a biological growth, an evolutionary phenomena and not an arbitrary, fanciful and artificial creation.
- IV. Law is not an abstract set of rules imposed on society but has deep roots in social and economic factors and the attitude of its past and present members of the society.
- V. The essence of law is the acceptance, regulation and observance by the members of the society.
- VI. Law derives its legitimacy and authority from standards that have withstood the test of time.
- VII. The law is grounded in a form of popular consciousness called the Volksgeist.
- VIII. Law develops with society and dies with society.
- IX. Custom is the most important source of law.

⁸ Agrawal Nomita, *Jurisprudence (Legal theory)*, 7th edi., Central Law Agency, Allahabad, 2008 p.g. 305.

⁹ Dyani S.N., (n.4) p.g. 246

¹⁰ <http://legal-dictionary.thefreedictionary.com/jurisprudence>

VOLKSGEIST:

Volksgeist (also *Volksseele*, *Nationalgeist* or *Geist der Nation*, *Volkscharakter*, and in English “national character”) is a term connoting the productive principle of a spiritual or psychic character operating in different national entities and manifesting itself in various creations like language, folklore, mores, and legal order.¹¹

According to Savigny, the nature of any particular system of law, was the reflection of the “spirit of the people who evolved it”. This was later characterized as the Volksgeist by Puchta, Savigny’s most devoted disciple.¹² Hence, in a simple term, Volksgeist means the general or common consciousness or the popular spirit of the people. Savigny believed that law is the product of the general consciousness of the people and a manifestation of their spirit. The basis of origin of law is to be found in Volksgeist which means people’s consciousness or will and consists of traditions, habits, practice and beliefs of the people. The concept of *Volksgeist* in German legal science states that law can only be understood as a manifestation of the spirit and consciousness of the German people.¹³

As already discussed, his theory served as a warning against hasty legislation and introduction of revolutionary abstract ideas on the legal system unless they mustered support of the popular will, Volksgeist.

Savigny’s central idea was that law is an expression of will of the people. It doesn’t come from deliberate legislation but arises as a gradual development of common consciousness of the nation.¹⁴ The essence of Savigny’s Volksgeist was that a nation’s legal system is greatly influenced by the historical culture and traditions of the people and growth of law is to be located in their popular acceptance. Since law should always confirm to the popular consciousness i.e. Volksgeist, custom not only precedes legislation but is also superior to it. To him, legal system

¹¹ <http://www.jahsonic.com/Volksgeist.html>

¹² Dias RWM, (n6) pg. 378

¹³ Mathias Reimann, *The Historical School Against Codification: Savigny, Carter, and the Defeat of the New York Civil Code*, 37 AM. J. COMP. L. 95, 97-98 (1989). Cited in http://www.law.fsu.edu/journals/transnational/vol11_2/knudson.pdf

¹⁴ Doherty Michele, *Jurisprudence: The Philosophy of Law*, 2nd edi., Old Bairy Press, London, p.g. 233.

was a part of culture of a people. Hence, law wasn't the result of an arbitrary act of a legislation but developed as a response to the impersonal powers to be found in the people's national spirit.

Laws aren't of universal validity or application. Each people develop its own legal habits, as it has peculiar language, manners and constitution. He insists on the parallel between language and law. Neither is capable of application to other people and countries. The *Volksgeist* manifests itself in the law of the people: it is therefore essential to follow up the evolution of the *Volksgeist* by legal research.¹⁵ The view of Savigny was that codification should be preceded by “ an organic, progressive, scientific study of the law” by which he meant a historical study of law and reform was to wait for the results of the historians.¹⁶

Savigny felt that “a proper code [of law could only] be an organic system based on the true fundamental principles of the law as they had developed over time.”¹⁷ Savigny's method stated that law is the product of the *Volksgeist*, embodying the whole history of a nation's culture and reflecting inner convictions that are rooted in the society's common experience.¹⁸ The *Volksgeist* drives the law to slowly develop over the course of history. Thus, according to Savigny, a thorough understanding of the history of people is necessary for studying the law accurately.

In the words of Savigny,

In the earliest times to which authentic history extends the law will be found to have already attained a fixed character, peculiar to the people, like their language, manners, and constitution,. Nay, these phenomena have a separate existence, they are but the particular faculties and tendencies of an individual people, inseparably united in nature, and only wearing the semblance of distinct attributes to our view. That which binds them into one whole is the common

¹⁵ Friedmann W., *Legal Theory*, 5th edi., Universal Law Publishing Co. Pvt. Ltd., Delhi, 2002, p.g. 213.

¹⁶ Mahajan VD, (n 7) pg.567

¹⁷ FREDERICK CHARLES VON SAVIGNY, ON THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE (Abraham Hayward trans., Arno Press 1975) (1831)

¹⁸ JOHN P. DAWSON, THE ORACLES OF THE LAW 196, 198-201, 203, 206-07, 227-28, 231, 240-41, 450-52, 454-60 (1968). Cited in http://www.law.fsu.edu/journals/transnational/vol11_2/knudson.pdf

conviction of the people, the kindred consciousness of an inward necessity, excluding all notion of an accidental and arbitrary origin.¹⁹

Thus, in view of Savigny, law, like language, is a product not of an arbitrary and deliberate will but of a slow, gradual, and organic growth.

Similarly, he also states that

“The foundation of the law has its existence, its reality in the common consciousness of the people. We become acquainted with it as it manifests itself in external acts, as appears in practice, manners and customs. Custom is the sign of positive law.”- Savigny.²⁰

Hence, Savigny clearly believes custom as the source of law and Volksgeist (common consciousness) as the ultimate foundation of any legal system.

Criticism:

As already stated, a precise and flawless definition of law is far from reality, and Savigny's Volksgeist is no exception. The following are the criticisms of Savigny's Volksgeist:

1. Dias maintains that many institutions like slavery have originated not in Volksgeist but in the convenience of a ruling oligarchy.
2. It is not clear who the volk are and whose geist determines the law nor it is clear whether the Volksgeist may have shaped by the law rather than vice-versa.
3. In pluralist societies such as exist in most parts of the world it really seems somewhat irrelevant to use the concept of Volksgeist as the test of validity.
4. Important rules of law sometimes develop as a result of conscious and violent struggle between conflicting interests within the nation and not as a result of imperceptible growth. That applies to the law relating to trade unions and industry.

¹⁹ On The Vocation On Our Age For Legislation and Jurisprudence, trans. A. Hyward (London, 1831) p24 cited in Bodenheimer Edgar, Jurisprudence: The Philosophy and Method of the Law, Rev. edi, Universal Law Publishing Co. Pvt. Ltd, Delhi, 2006, pg, 72

²⁰ Lamsal Narayan Prasad, *Bidhisastra*, 7th edi., Pairawi Prakasan, Kathmandu 2063, p.g. 38.

5. Lord Lloyd also points out that Savigny underrated the significance of legislation for modern society. Sir Henry Maine rightly pointed out that a progressive society has to keep adapting the law to fresh social and economic conditions and legislation has proved in modern times the essential means of attaining that end.
6. Paton states that the creative work of the judge and jurist was treated rather too lightly by Savigny.
7. A survey of the contemporary scene shows that the German Civil Code has been adopted in Japan, the Swiss Code in Turkey and the French Code in Egypt without violence to popular propensity.
8. It was unfortunate that the doctrine of Volksgeist was used by the National Socialist in Germany for an entirely different purpose which led to the passing of brutal laws against the Jews during the regime of Hitler in Germany.

Nepalese Case Reference:

In order to clarify the impact of Savigny's Volksgeist, a landmark case in the history of Nepal can be taken as an example.

Name of the case: Meera Kumari Dhungana v His Majesty's Government Ministry of Law, Justice and Parliamentary Affairs and others²¹

Case: Daughter's Property Right

Decision of the Case:

"Making sudden changes in traditional social practices in matters of social norms perused by the society since a long time ago, may create problems in connection to adjustment in the society. And, it may cause such a situation beyond perception. Therefore, before reaching a decision all of a sudden, a just provision should be made by holding wide and extensive discussions and deliberations taking into account the constitutional provision vis-à-vis equality. As the family law relating to property is to be wholly considered, it is hereby issued this directive order that HMG introduce an appropriate Bill to Parliament within 1 year of receipt of this order, by making necessary consultations with the recognized women's organizations, sociologists, the

²¹ N.K.P. 2052, P. 462

concerned social organizations and the lawyers as well and by studying and considering the legal provisions in this regard on other countries." ²²

Law has immense interrelationship with society and every society is guided by certain norms and customs. The highlighted part of the decision clearly mentions the importance of social practices and norms in the society. Here the Supreme Court mentioned the probable chaos and problems could be inflicted if the any law was introduced that hampers or alters the traditions of people. It clearly means that law should not be introduced in such a way so as to change the norms of people at once which have been followed by them since a long time. Hence, it elucidates that law should be in consistency with the customs and traditions of people and any law reform or alteration in law should be done with due regards to the sentiments and norms of society in order to bring sustainable and peaceful change in the society. Hence, the supreme court in the mentioned case rightly analyzed the relation between social practices of people and law and did not deliver verdict promptly rather directed to conduct research within certain time frame. As a result the law was reformed and it immensely brought huge changes. And today this change is well accepted and has introduced a new paradigm in the Nepalese legal system.

Analysis:

Volksgeist or the general will of the people was much prioritized by Savigny, the pioneer of historical school. Savigny viewed Volksgeist i.e. common consciousness of the people as the base of legal system. . In his view law was not something that should be made arbitrarily and deliberately by a lawmaker. Law he said was a product of “internal, silently- operating forces”²³ . It was deeply rooted in the past of the nation and its true sources were popular faith, customs and “the common consciousness of the people”. The concept of Volksgeist is in fact a much needed element for the proper growth and functioning of law. A law cannot be law unless accepted by the people. Since law is always for the betterment of the people hence it should also be supported and accepted by them.

The concept of common consciousness has to some extent influenced every legal system and Nepalese legal system is no exception. Acts like ‘Samajik Vyabahaar Sudhar Ain,2033’ which

²² Timalina Ram Krishna, *Some Landmark Decisions of the Supreme Court of Nepal*, Shakti Offset Press, New Baneswor, 2003, pg. 164.

²³ On The Vocation Of Our Age For Legislation and Jurisprudence, trans. A. Hyward (London, 1831) p 30 cited in Bodenheimer Edgar, *Jurisprudence: The Philosophy and Method of the Law*, Rev. edi, Universal Law Publishing Co. Pvt. Ltd, Delhi, 2006, pg, 71

was in contrary to the social practices of the people could never be implemented. More than three decades have passed but still the act is in no use. The provisions laid down by it is not consistent with the customs and traditions of people. So its enactment has been proved to be a total failure. Moreover the above mentioned case also has clearly proved the impact of Savigny's theory in the Nepalese legal system.

But still, it isn't sufficient. It is just the half part and the other half is unexplained. In today's world it is not always the custom or will of the people that counts. In order to be law need of legislature act is a must. The creative work of the judge and jurist also play a crucial role in defining law in the present era. Just a mere acceptance of people cannot be termed as law. Law today seems something official and has gained much formal norms for its validity. Savigny's work on the whole, was salutary, however he ruined a large part of it due to overemphasis. However, the importance of Volksgeist still remains matchless as it regarded people as the centre of law rather than fanciful reason or the arbitrary will of supreme legislature.

Conclusion:

The insufficiency of natural law school and analytical school had provided a fertile land where Savigny sowed seeds of historical school. In his view on law, he emphasized on Volksgeist, "a unique, ultimate and often mystical reality" linked to the biological heritage of a people.²⁴ For him, law was not the result of arbitrary act of legislature but the result of certain traditions and customs. Only by a careful study of these traditions the true content of law was found. He marked the Volksgeist or the national spirit as the criteria for the validity of any law. Although the concept is insufficient and is subjected to criticism by many jurists, still its importance in understanding the theory of law is a milestone as it emphasized the need of people's acceptance for the formulation of any law, which is a universal principle today.

²⁴ Freeman M.D.A., *Lloyd's Introduction to Jurisprudence*, 7th edi., Sweet and Maxwell Ltd., London, 2001 p.g. 906.