

# RELEVANCE OF VOLKSGIEST: A THEORY PROPOUNDED BY SAVIGNY

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*“The only certain point which can guide us here is the idea of infinite progression.”<sup>1</sup>*

## INTRODUCTION

**Friedrich Carl von Savigny** (21 February 1779 – 25 October 1861) was a famous 19th-century jurist and historian. One of the principal doctrines of Savigny was that laws are not of universal validity or application. Each people develop its own legal habits, as it has its own peculiar language, manners and constitution. Savigny insists on the parallel between language and the law. Neither is capable of application to other people and countries. The Volksgeist manifest itself in the law of the people; and he therefore said it is essential to follow up the evolution of the Volksgeist by legal historical research. Thus according to Savigny the origin of law lies in the popular spirit of the people and this is what Savigny termed as *Volksgeist*. **Friedrich Carl von Savigny** was the main exponent of the historical interpretation of the law and is considered to be the propounder of historical jurisprudence. He traced the development of law as an evolutionary process much before Darwin gave this theory of evolution in the field of biological sciences in 1861. It is for this reason that Dr. Allen defined Savigny as ‘Darwinian before Darwin.’ It was observed that 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 the growth of law is to be located in their popular acceptance. This laid the foundation of the historical school of jurisprudence which was carried forward by Sir. Henry Maine in England, Vinogradoff, Lord Bryce and many others. His major contributions are:

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<sup>1</sup> Thus no other than Savigny himself! See Ingeborg Schnack (ed.), Der Briefwechsel zwischen Friedrich von Savigny and Stephen August Winckelmann 123 (1984).

- 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.<sup>2</sup>

However Savigny had to face many criticisms by his critics against his Theory of Law. Roscoe Pound and other jurists have criticized it on various grounds such as ---

(a) **Savigny considered the Volkgeist as the source of law:**

(b) **The General consciousness is not the originator of every kind of custom:**

(c) **They considered Volkgeist to be a complex phenomenon.**

(d) Saving talk about organic evolution of law but he could not explain the mode of such evolution.

(e) **Popular consciousness is not the only source of law. Etc...**

**But apart from all these Savigny's legal theory served as a sound warning against the hasty legislation and the introduction of the revolutionary abstract ideas in the legal system unless they mustered support of the popular will i.e. volksgeist.**

The paper is structured as follows. It starts with the introduction as to who was the profounder of the Volksgeist theory and a brief introduction of the German jurist **Friedrich Carl von Savigny** the jurist of the historical school of jurisprudence. The paper next explores the historical school of jurisprudence in brief. It then provides a concept on the main aspect of this paper i.e. Savigny's Volksgeist theory. After analyzing the work of Savigny the paper talks about the various criticisms which he had to face and then the paper concludes by identifying the importance of **Friedrich Carl von Savigny's theory, the consequences of the criticisms of his theory and lastly, the impact of savigny's theory on the society.**

## **AN OVERVIEW OF THE HISTORICAL SCHOOL**

In this paper a discussion is made on the work of savigny and about himself. Now a further analysis will be made on the school from which he belonged i.e. the Historical School of Jurisprudence. It is stated that the work on "Law of Possession" (Das Recht Des Bestiges)

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<sup>2</sup> Neetij Rai, *Volkgeist: in view of Friedrich Carl von Savigny*  
[http://www.researchgate.net/publication/228277985\\_Volkgeist\\_In\\_View\\_of\\_Friedrich\\_Carl\\_Von\\_Savigny](http://www.researchgate.net/publication/228277985_Volkgeist_In_View_of_Friedrich_Carl_Von_Savigny),  
visited on 12.10.2014

which was published in 1803 was the starting point of Savigny's historical jurisprudence.<sup>3</sup>Friedrich Carl von Savigny was the main exponent of this historical interpretation of law and is considered to be the propounder of Historical Jurisprudence. He was the German scholar, he was the Darwin of Historical School of Jurisprudence.<sup>4</sup> His last published work appeared only six years before *The Origin of Species* (1860) and was still alive when Darwin's work appeared. The theory of evolution was thus not new which Savigny had already propounded. Savigny therefore ushered the beginning of the Historical School – his doctrines regarding law was represented in his famous pamphlet 'on the vocation of Our Age for Legislation and Jurisprudence 1814'. The 'vocation' appeared at a critical moment in the history of the German state – the fate of Germany was still uncertain being decided at the Vienna Congress of 1815. There was uncertainty in Germany about German state with its legal diversities and the problem of political unification.<sup>5</sup> These and other factors created a chain of reactions in the minds of German Legal philosophers ---- resulting in the founding of Historical School. The factors which led to its growth in Germany and elsewhere may be summarised below:<sup>6</sup>

1. It was a reaction against the *a priori* notions of natural law philosophy. The philosophers hitherto measured all situations and problems by referring them to an idealised picture of social order without studying law in relation to social growth and legal development.<sup>7</sup>
2. The natural law thinkers have thought of law which was always the same static and unchangeable. They failed to see the law which had grown and developed from the past.
3. The natural law philosophers believed in ideal principle of law as revealed by reason. It didnot look to history, traditions, customs, habits and religion as true basis of law.
4. The Historical School was a reaction against the French Revolution which itself was a product of natural law philosophy ---

With its gospel of liberty, equality and fraternity of men and nations. In Germany a movement grew up which was romantic, irrational and strongly nationalistic in

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<sup>3</sup> DR. PARANJPE N.V JURISPRUDENCE AND LEGAL THEORY, 37 ( 6<sup>th</sup> edition 2012)

<sup>4</sup> C.K. ALLEN, LAW IN THE MAKING, 11 (1964).

<sup>5</sup> DYAN S.N., FUNDAMENTALS OF JURISPRUDENCE, THE INDIAN APPROACH, 75(2004)

<sup>6</sup> Id at 74

<sup>7</sup> id

character and which found its expression in art, literature, history, political theory and law. Nations now started revolting against Nature.

5. Napoleon had conquered many parts of German States and had imposed Napoleon Code ---- the French system on alien Germans. Thus, French Legal System based on French Legal History and requirement was irksome and inconvenient to German people whose law and legal system was different from that of the French. The slogan 'Germany for the Germans' became popular against foreign domination. It gave German people a sense of unity and identity for legal and political unification.
6. The main question before German Jurist was how Germany should be united. Should there be political unification of Germany before legal unification or vice – versa? Thibaut of Heidelberg University --- a natural law jurist wanted<sup>8</sup> to unify German legally before its political unification. Thibaut, therefore by arm chair discussion wanted to give a perfect code through the exercise of reason to Germany on the model of French *Napoleonic Code*<sup>9</sup> of 1800. The French Code was regarded as model and was copied freely throughout the world during the nineteenth century. So was the idea of Thibaut also to make a Code in its completeness and perfection --- a natural law thinking. Savigny's '*vocation*' was an answer to this proposal of Thibaut's plan of codification of law and customs of German people who was not politically united as a nation. Savigny vehemently opposed Thibaut's plan. In this treatise '*vocation*' Savigny saw historical and doctrinal crudities of the framers of the French Code. The Historical ignorance or indifference of the compilers of the Code led them to codify law in an ignorant fashion ---- a code must be archaic and primitive than the law of Justinian.

The Two Prime Reasons for the Evolution of Historical School are:

- 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.<sup>10</sup>

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<sup>8</sup> H. Kantorowicz, Savigny and Historical School Of Law, 53 LQR 326 (1937)

<sup>9</sup> The French Civil Code was actually brought into force in 1804

<sup>10</sup> AGRAWAL NOMITA, JURISPRUDENCE (LEGAL THEORY), 305 (7<sup>th</sup> ed. 2008).

- 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.”<sup>11</sup>

Savigny’s theory of law evoked mixed reaction as it inspired people to struggle against foreign dominations but at the same time encouraged fascism and Nazism in Italy and Germany which eventually led to disastrous World Wars. Some jurists even alleged that Savigny’s fundamentalist ideology provided fillip to racial discrimination in Asia and Africa and led to ethnic communal tensions and religious conflicts.

However, the principal doctrines of the historical school, as expounded by Savigny and some of his followers, may be summarised as follow:

1. Law is found, not made. A pessimistic view is taken of the power of human action. The growth of law is essentially an unconscious and organic process; legislation is therefore of subordinate importance as compared with custom.
2. As law develops from a few easily grasped legal relations in primitive communities to the greater complexity of law in modern civilization, popular consciousness can no longer manifest itself directly, but comes to be represented by lawyers, who formulate the technical legal principles. But the lawyer remains an organ of popular consciousness, confined to the task of bringing into shape what he finds as raw material. Legislation follows as the last stage; the lawyer is therefore a relatively more important law – making agency than the legislator.
3. Laws are not of universal validity or application. Each people develop its own legal habits, as it has its peculiar language, manners and constitution. Savigny 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 historical research.<sup>12</sup>

The basic point of historical jurisprudence might be that history has normative force: that what has come before, and the way we have dealt with circumstances before, matters. Thus

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<sup>11</sup> Supra Note.4 at 246

<sup>12</sup> FRIEDMANN .W, LEGAL THEORY, 211 (5<sup>th</sup> ed.)

Savigny's historical jurisprudence dealt with the theory of *Volksgeist* which mostly interpreted jurisprudence in terms of will of the people.

In the case of *Byran Pestonji Gariwala V. Union Bank of India*,<sup>13</sup> it was stated that,

“the Indian Legal system is a product of history. It is rooted in our soil, nurtured and nourished by our culture, languages and traditions, fostered and sharpened by our genius and quest for social justice, reinforced by history and heritage: it is not mere copy of the English Common law, though inspired and strengthened, guided and enriched by concepts and precepts of justice, equity and good conscience which are indeed the hallmark of the Common Law.”

## CONCEPT OF VOLKSgeist AS A SOURCE OF LAW

Now after getting an idea of the Historical school of Jurisprudence, a clear concept has to be drawn about the main theory of that school as laid down by Savigny, i.e the *Volksgeist* theory. The term *Volksgeist* also *Volksseele*, *Nationalgeist* or *Geist der Nation*, *Volkscharakter*, and in English “national character”, it is a term connoting the productive principles of a spiritual or psychic character operating in different national entities and manifesting itself in various creations like language, folklore, mores, and legal orders.<sup>14</sup> In simple term *Volksgeist* means the general or common consciousness or the popular spirit of the people. Savigny believed that the law of the people and a manifestation of their spirit. The basis of the origin of law is found in *volksgeist*, which means people's consciousness or will and consists of traditions, habits, practise and belief of the people.<sup>15</sup> The concept of the *Volksgeist* is however, an interesting and important aspect of German legal science. 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. German legal science assumes that the law can be studied scientifically as naturally occurring phenomena from which inherent legal principles and relationships can be

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<sup>13</sup> AIR 1991 SC 2234 at 2243

<sup>14</sup> <http://www.jahsonic.com/Volksgeist.com>

<sup>15</sup> Mathias Reimann, *The Historical School against codification: Savigny, Carter and the Defeat of the New York Civil Code* 37AM J.COMP.L.95,97-98(1989) cited in [http://www.law.fsu.edu/journal/transnational/vol11\\_2/knudson.pdf](http://www.law.fsu.edu/journal/transnational/vol11_2/knudson.pdf)

discovered.<sup>16</sup> Although logic was used as a tool, German legal science rejected the focus on logic in developing law that was popular in civil law states such as France. The German legal scientists of Holmes' time believed that it was impossible to create a simplified code of law. Therefore, codification of German law was not desirable for its smooth development at that time. This eventually delayed codification of German law for another fifty years.<sup>17</sup> Savigny did not believe that a proper code of law could be created, at least certainly not for the foreseeable future.

According to Savigny, a law made without taking into consideration the past historical culture and tradition of community is likely to create more confusion rather than solving the problems because 'law' is not an 'artificial lifeless mechanical device' the origin of law lies in the popular spirit of the people which Savigny termed as *Volksgeist*.<sup>18</sup> Savigny's contribution to the development of historical school may briefly be stated under the following heads:--

1. Law develops like language—

Savigny pointed out that law has a national character and it develops like language and binds the people into one whole because of their common faith, beliefs and convictions. According to him law grows with the growth of the society and gains its strength from the society itself and finally it withers away as the nation loses its nationality. Law, language, customs and Government have no separate existence from the people who follow them. Common conviction of the people makes all these as a single whole.<sup>19</sup> The central theme of Savigny's historical jurisprudence may be summarised thus:--

“The organic evolution of the law with the life and character of the people develops with the ages, and in this it resembles language. As in the latter there can be no instant of rest, there is always movement, and development of law is governed by the same power of internal necessity as simple phenomena. Law grows with nation, increases with it, and dies at its dissolution and is a characteristic of it.”<sup>20</sup>

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<sup>16</sup> id

<sup>17</sup> *Supra* Note.2 at 37

<sup>18</sup> id

<sup>19</sup> id

<sup>20</sup> quoted from Savigny's essay 'Von Beruf'

2. Early development of law is spontaneous; thereafter jurists develop it----

Savigny stated that in the earliest stages law develops spontaneously according to the internal needs of the community but after the community reaches a certain level of civilisation, the different kinds of national activities, hitherto developing as a whole, bifurcate in different branches to be taken up for further study by specialists such as jurists, linguists, anthropologists, scientists etc. Law has to play a dual role namely as a regulator of general national life and as a distinct discipline for study. The former may be called the political element of law while the latter as a juristic element but both have a significant role in the development of law. The history of Roman law furnishes the best illustration of these processes. At its earliest stage it was founded on general consciousness of the people but as it grew and developed, it assumed the complex and technical form of law of edicts.

3. Savigny was opposed to codification of German Law----

Savigny was not totally against codification of laws. He, however opposed the codification of the German law of the French (Napoleonic Code) pattern at that time because Germany was then divided into several smaller states and its law was primitive, immature and lacked uniformity.

He opined that German law could be codified at a later stage when the unification of Germany takes place and there is one law and one language throughout the country. Since Volksgeist i.e. common consciousness had not adequately developed at that time, therefore codification would have hindered the evolution and growth of law. He emphasised that codification of German law without having jurist of sufficient genius and adequate expertise in Roman law would not serve the desired purpose as Roman law formed an integral part of the German legal system t that time. He considered lawyers and jurists as true representatives of the popular consciousness rather than the legislators whose role is limited to law- making only.

4. Law is a continuous and unbreakable process:

Tracing the evolution of law from Volksgeist, namely, people's spirit of consciousness. Savigny considered its growth as a continuous and unbreakable process bound by common cultural traditions and beliefs. It has its roots in the historical process

which should constitute the subject of study for the jurists. According to him, codification of law may hamper its continuous growth and therefore, it should be resorted to when the legal system has fully developed and established.

5. **Admiration for Roman law:**

While emphasising *Volksgeist* i.e. people's spirit or as the essence of law, Savigny justified adoption of Roman law in the texture of German law which was more or less discussed in it. He, located *Volksgeist* in the Romanised German customary law and considered Roman law as an inevitable tool for the development of unified system of law in Germany.

Savigny's admiration for Roman law was, however, criticised by Professor Eichhorn who was his customary Professor in the University of Berlin. He wondered how a foreign law could be true *Volksgeist* (popular will) of the German people. Professor Eichhorn was totally against Roman law and wanted German law to be relieved from its influence. On the other hand Savigny and his followers were opposed to the expulsion of Roman law from Germany. Thus there was a conflict between the so called Romanist and the Germanists, the former supporting the retention of Roman law while the latter advocating its total expulsion from the German law. The rift between the two so called resolved by the final German law draft of 1900 which was a combination of both German law and Roman law.

## **INDIAN VOLKSgeist- NEED OF CAUTION**

Nationalism, national unity and integration of India as a strong, inalienable and progressive nation is the need of hour. This glorious ideal of India as a nation we cherish from our culture and traditions in an unbroken fashion and is both a geographical fact and a cultural and historical entity. Indeed the nationalism is sustained by the love of the country in which we live, the traditions we inherit and the hope of a common shared future. Of course, the quintessence of Indian unity and heritage has been a continuing fusion among different religion, beliefs, linguistic and regional variations by harmonising them within the great mosaic

ideal of India as a nation. The seers of Upanishads, Buddha, Mahavira, Guru Nanak, Vivekananda, Mahatma Gandhi and others have preached unity in diversity and not exclusivism. This unholy alliance has fragmented the society on the basis of religion, caste etc. resulting in social and political tensions and conflicts even on issue of national solidarity, unity and integrity. The aftermath of the *Shah Bano* (1986)<sup>21</sup> the *Khatoonisa* (1994), and the controversy over Uniform Civil Code are such instances whereby Muslims have been advocating and perpetuating their separatist Islamic identity before after 1947 when India was partitioned in opposition to Indian Volksgeist. The Supreme Court reminded,<sup>22</sup> the orthodox and conservative Muslim politico – religious leaders that those who [referred to remain in India after the partition, fully knew that the Indian leaders did not believe in two nation theory and that in the Indian republic there was to be only one Nation ---- Indian nation and no community could claim to remain a separate entity on the basis of religion.’ Of course, the need of the hour is to consolidate India nation by fostering and promoting linkages and help in strengthening the bonds of unity and avoid the politics of religion or caste which is responsible for contemporary bigotry, fundamentalism, linguistic and regional parochialism. *Peoples Union of Human Rights V. Union of India*,<sup>23</sup> *President Citizen for Democracy V. Union of India*,<sup>24</sup> *G. Sumahati V. Director, Medical Education, Madras*.<sup>25</sup> The balkanization of Yugoslavia and former Soviet Russia should be an eye opener to all nationalist and patriotic Indians that we must preserve and protect the constitution which Granville Austin had described ‘Cornerstone of a Nation’ as a guarantee of Indian unity. The observation<sup>26</sup> of Sardar Patel in the constituent assembly are a grim lesson and a warning to all those who divide people on the issue of exclusivism, fundamentalism and human rights to balkanize the Indian union. Likewise Nehru, exhorted people to understand and realise from the past history as he put it Nehru Speech in the Constituent Assembly.

‘.....if India goes down, all will go down. If India thrives, all will thrive and if India lives, all will live.....’

<sup>21</sup> Md. Ahmed Khan V. Shah Bano Begum, AIR 1985 SC 945

<sup>22</sup> Sarala Mugdal V. Union Of India, AIR1995 SC 31 at 1539

<sup>23</sup> AIR 1992 Gau.23

<sup>24</sup> AIR 1996 SC 2193

<sup>25</sup> AIR 1993 Mad 328

<sup>26</sup> Desai, D.A; *Framing of Indian Constitution: Constitution of Sardar Patel*, 30 JILI 1 at 12 (1988)

## **CRITICISM AGAINST SAVIGNY'S THEORY OF LAW**

From the above it is clear that Savigny's Volksgeist theory carried huge importance in German Legal science but besides its benefits this theory was criticised by many jurists. Thus it is stated that Savigny's theory has been opposed by his critics on several grounds, the main among those are as follows:--

1. There are certain inconsistencies which are apparent in Savigny's theory. He emphasised the national character of law but at the same time suggested a model by which Roman law could be adopted and accepted as the law of Germany. Again, he located origin of law in the Volksgeist, that is popular conscience but at the same time asserted that certain customary principles of Roman law had universal application. Savigny's undue importance to Roman law has been bitterly criticised by Eichhorn, Beseler, and Gierke and it was because of their intervention that German code was drafted in subsequent years.
2. It is often alleged that Savigny's theory of law is negative, obscure and suffers from narrow sectarian outlook. He was against codification of law which is one of the most accepted forms of modern progressive legislation. This anti-codification attitude of Savigny thwarted the growth of German law for several decades.
3. Savigny's assertion that popular consciousness is the sole source of law is not wholly true. The theory of Volksgeist overlooks the impact of other sources of law such as legislation, precedent etc. in the evolution of law. There are many areas which would have been left without legal rules because there never existed any popular consciousness about them.
4. Again, Savigny's view that customs are always based on the popular consciousness is not accepted. Many customs such as slavery, bonded labour etc. originated to accomplish the selfish interest of those who were in power. They are adopted because they are being blindly followed and continued for a long time and not because they're righteous and have the support of popular consciousness.
5. Roscoe Pound has criticised for his juristic pessimism. Savigny's theory hindered legal reforms and modernisation of law in the name of Volksgeist. Criticising Savigny's legal theory, Pound observed that no legal system would like to stick to the prevalent abuses and baneful customs only because people are accustomed to

them. Savigny therefore overlooked the creative role of law by introducing legal reforms. As Prof. Porkunove rightly pointed out Savigny's theory "does not determine the connection between what is national and what is universal".

6. Though Savigny was not against legislative reform by way of codification of laws, but his approach towards codification was rather cold and pessimistic because in his view codification could never solve all the problems that are likely to arise in future and imperfect code would create more problems by 'perpetuating follies'<sup>27</sup> underlying it, he firmly believed that codification should be preceded by a progressive scientific study of law after taking into consideration the historical evaluation of the particular law.
7. Last but not the least, Savigny's *volksgeist* helped many nations to prevent it for promoting their own ideologies. Thus Nazis twisted it by giving a racial colour, the Marxists used it giving economic interpretation of history and Italy used to justify Fascism.

Thus these are the criticisms that were faced by Savigny by different jurists.

### **SYSTEM OF MODERN ROMAN LAW—<sup>28</sup>**

In the general consciousness of the people lives positive law and hence we have to call it people's law (*Volksrecht*). It is by no means to be thought that it was the particular members of the people by whose arbitrary will, law was brought forth; in that case the will of individuals might perhaps have selected the same law, perhaps however and more probably very varied laws. Rather is it the spirit of the people living and working in common in all the individuals, which give birth to positive law, which therefore is to the consciousness of each individual not accidentally but necessarily one and the same. Since therefore we acknowledge an invisible origin of positive law we must as to that origin, renounce documentary proof: but this defect is common to our and every other view of that origin, since we discover in all peoples who have ever presented themselves within the limits of authentic history an already existing positive law of which the original generation must lie beyond those limits. There are not wanting proofs of another sort and suitable to the special nature of the subject-matter. Such a proof lies

<sup>27</sup> DIAS R.M.W. JURISPRUDENCE 383 (5<sup>th</sup> Ed 1994).

<sup>28</sup> English Translation by W. Holloway (1867).

in the universal, uniform recognition of positive law and in the feeling of inner necessity with which its conception is accompanied. This feeling expresses itself most definitely in the primeval assertion of the divine origin of law of statutes; a more manifest opposition to the idea of its arising from accident or the human will is not to be conceived. A second proof lies in the analogy of other peculiarities of peoples which have in like manner an origin invisible and reaching beyond authentic history, for example, social life and above all speech, In this is found the same independence of accident and free individual choice, the same generation from the activity of the spirit of the people working in common in each individual; in speech too from its sensible nature, all this is more evident and recognizable than in law. Indeed the individual nature of a particular people is determined and recognized solely by those common directions and activities of which speech as the most evident obtains the first place. The form however, in which law must live in the common consciousness of the people is not that of abstract rules but as the living intuition of the institutions of law in their organic connection, so that whenever the necessity arises for the rule to be conceived in its logical form, this must be first formed by a scientific procedure from that total intuition. That form reveals itself in the symbolical acts which display in visible shape the essence of the jural relation and in which the primitive laws express themselves more intelligibly and thoroughly than in written laws.

In this view of the origin of positive law, we have at present kept out of sight the progress of the life of a people in time. If we now look also at this operation upon law we must above all ascribe to it an establishing force. The longer the convictions of law live in a people, the more deeply they become rooted in it. Moreover law will develop itself by use and what originally was present as a mere germ will by practice assume a definite shape to the consciousness. However in this way the changing of law is also generated. For as in the life of single men, no glimpse of complete passiveness can be perceived, but a continual organic development, so is it with the life of peoples and with each single element of which that concrete life is composed. Thus we wind in speech a constant gradual shaping and development and in like manner in law. This gradual formation is subject to the same law of generation from inner power and necessity, independent of accident and individual will, as its original arising was. But the people experiences in this natural process of development, not merely a change in general, but it experiences it in a settled, regular series of events and of these each has its peculiar relation to the expression of the spirit of the people in which the law is generated. This appears in the clearest and strongest manner in the youth of a people for then the connexion is more intimate,

the consciousness of it is more generally diffused and is less obscured by the variety of individual cultivation. Moreover in - the same degree in which the cultivation of individuals becomes heterogeneous and predominant and in which a sharper division of employment, of acquirements, and of ranks produced by these, enters, the generation of law which rests upon the common consciousness becomes more difficult; and this mode of generation would disappear altogether if new organs for that purpose were not formed by the influence of these self-same new circumstances; these organs of legislation and the science of law of which the nature will be immediately explained.

This new development of law may have an entirely different relation to the originally existing law. New institutions of law may be generated by it, the existing law transformed or it may be entirely swept away if it has become foreign to the thought and need of the age.<sup>29</sup>

## **ROLE OF JUDICIARY**

Though much role of judiciary cannot be traced in this aspect, but one reference case that can be cited is the---

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 <sup>30</sup>Government Ministry of Law, Justice and Parliamentary Affairs and others

**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**

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<sup>29</sup> Faiz Kazi, savigny's theory of *volksgeist* and its relevance in contemporary times, *see also* [http://www.law.fsu.edu/journals/transnational/vol11\\_2/knudson.pdf](http://www.law.fsu.edu/journals/transnational/vol11_2/knudson.pdf) visited on 4.10.2014

<sup>30</sup> N.K.P. 2052, P. 462

**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 concerned social organizations and the lawyers as well and by studying and considering the legal provisions in this regard on other countries." <sup>31</sup>

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.

## **CONCLUSION**

After a thorough analysis of all the aspects of Savigny's Volksgeist theory, the study would like to summarize the whole of this idea by giving a proper conclusion to it. Thus, from the facts and circumstances stated above an overview of Savigny's Volksgeist theory can be drawn clearly. And it can also be seen that despite many criticisms Savigny's legal theory marks the

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<sup>31</sup> Timalisina Ram Krishna, *Some Landmark Decisions of the Supreme Court of Nepal*, Shakti Offset Press, New Baneswor, 2003, 164

beginning of modern jurisprudence. His theory of Volksgeist interpreted jurisprudence in terms of people's will. Thus it paved way to the modern sociological approach to law laying greater emphasis on relation of law with society; Savigny's theory came as a reaction and revolt against the 18<sup>th</sup> century natural law theory and analytical positivism. It is observed that 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 the growth of law is to be located in their popular acceptance. It can be further analysed that Savigny's approach to law also gave birth to comparative jurisprudence which has been accepted as one of the most important branches of legal studies in modern times. However, the only defect that could be detected after the study of his theory is that he carried the doctrine of popular will too far. Thus, it can be concluded by saying that the 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. Moreover, Savigny's legal theory served as a sound warning against hasty legislation and introduction of revolutionary abstract ideas in the legal system unless they mustered support of the popular will i.e. Volksgeist

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