SAVIGNY’S VOLKSGEIST THEORY OF LAW AND CUSTOM AND IT’S DEVELOPMENT

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INTRODUCTION:

ORIGIN AND EVOLUTION:

Law is something which is difficult to define. A uniform definition of law is far from the reality because at various times jurists have their own methods to study and understand law from different viewpoints. Sources, nature and concerns are some of the factors which impacts in defining law\(^1\). So to have clarity in their concepts various schools was established to understand and define law, under which one of the schools was Historical school of Jurisprudence, which was developed by “Friedrich Carl Von Savigny.”

Savigny was considered as the Pioneer or Inventor of Historical School of Jurisprudence, who was born in the 17\(^{th}\) Century in Frankfurt, Germany and was considered as the most respected and significant jurists of his time in the field of development of law and assists a role in its amalgamation\(^2\). Savigny supported that, the meaning and content of law would be analysed through research into their historical origins and mode of transformation\(^3\). He marks out that the development of law as an evolutionary process much before Charles Darwin gave his theory of evolution. Because of that, he was considered as the “Darwin” in the development of jurisprudence\(^4\).

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\(^1\) Augusto Zimmermann, The Darwin German legal Theory- Carl Von Savigny and the German school of Historical law, Journal of Creation, 27 (2), 2013.

\(^2\) German Influences in English Legal Education Jurisprudence in the 19\(^{th}\) Century, 1, UWA L. Rev. 1959.

\(^3\) Available at: http://www.britanica.com/EBchecked/topic/525746/Friedrich-Karl-von-Savigny, last visited on 30.01.2015.

Savigny also joined debates in the phase of structuring of modernity of law. In the later 19th century, modern constitutions and codes were established nearly all over Britain, German and further parts of Western Europe. The project was so deeply established that its effect was seen in the family laws and other labor laws. It was said that, when it comes to modernity of law, anyone can achieve success with Savigny.

The philosophical beginning of the German legal historicism is started way back in the 1800 century and is entrenched in a “Romantic” reaction against the natural law philosophy. This was a reaction against the rationalism, universalism and individualism, which was perceived in natural law philosophy. German historicism approached law through Volksgeist (Spirit of people) rather than covering the world with universal values and principles.

Volksgeist is a term defines the productive principle of a spiritual character in operating in different national entities and manifesting itself in various creations like language, folklore and legal orders. In a simple sense, Volksgeist is a general and common perception 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 perception of the people. Prof. Savigny’s main idea behind the theory was that, Law is an expression of will of the people and it doesn’t come from the deliberate legislation and it gradually develops as the consciousness of the nation arises. The crux of Volksgeist was that a nation’s legal system is greatly influenced by the historical culture and traditions of the people and its growth was located in

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6 Id 2
7 Ibid 3
9 Joachim Ruckert, Frederick Carl Von Savigny, the legal method and modernity of law, 11, Juridica International, 2006.
their acceptance\textsuperscript{11}. Hence, law was developed as a response to the impersonal powers to be found in the people’s national spirit and not by the arbitrary act of the legislation.

German’s historicist claimed that, the evolution of law is connected to the growth of the nation i.e. the law would evolve as it’s nations evolves during the time period and the growth would derive its strength from the powers of the “\textit{Volksgeist}.”\textsuperscript{12} Such notion of natural legal process was not an argument for the freedom of individuals and small entity’s, but it amount to a justification of the organic power of the state. This is so being that the state would act as the sovereign indicator of the collective spirit of the nation.

In 1814, a natural jurist professor Thibaut of Heidelberg University Put forward a scheme before the German’s for the unification of Germany on the pattern of Napoleonic Code, 1802 which would boost the process of political unification in Germany\textsuperscript{13}. But in the same year Professor Savigny issued a protest Pamphlet, Von Berufunserer Zeit Fur Gesetzgebung and Rechtswissenschaft (On the Vocation of Our Age For legislation and jurisprudence), where he spoke against the Thibaut theory of necessity of a General Code for Germany (1814)\textsuperscript{14}. And gave reply to Thibaut’s Proposal by his pamphlet, “Vocation of Our Age For legislation and jurisprudence” and invented a whole new school of Jurisprudence as “Historical School”. Though this process delayed the codification of German law, but it gave the entire new phase to the German Jurisprudence which boosts their political Structure\textsuperscript{15}. Basically, Savigny was

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  \item \textsuperscript{11}Netij Rai, Basic Concept of Savigny’s Volksgeist, Available At, \url{http://www.academia.edu/428817/BASIC_CONCEPT_OF_SAVIGNY_S_VOLKSGEIST}, Last visited- 30/01/2015.
  \item \textsuperscript{12} \textit{Id}
  \item \textsuperscript{13} \textit{Id}
  \item \textsuperscript{14} Available at: \url{http://findarticle.com/p/articles/mi_gx5229/is_2003/ai_n19150038/} Last Visited: 30/01/2015.
  \item \textsuperscript{15} Hall & Fredrick Carl Von Savigny, Encyclopedia Britannica 1099 ( 1971).
\end{itemize}
not opposing to the development of law in Germany, but he was opposed to the process by which the law is developed. He thinks that the development should be on the basis of the historical knowledge\(^\text{16}\) and not by the arbitral legislation.

So if we see that theory in the recent scenario, a survey of the contemporary scene shows that the German civil code has been adopted in countries like Japan, Swiss Code in Turkey and the French code in Egypt etc. without infringing the popular propensity. But it was unfortunate to see that the Doctrine of *Volksgeist* was used by the National Socialist in Germany for a completely different purpose of brutal laws and used against the Jews during the Period of Hitler in Germany\(^\text{17}\).

JURISPRUDENTIAL STUDY: VIEWS OF JURISTS:

As Stated above, Savigny firmly believed that the evolution of law can only be made by taking account the past consideration and without doing that it creates more amount of confusion rather to solve it. The origin of law lies in the Volksgeist. For the purpose of this he made a whole new school known as the Historical school of Jurisprudence. Some basic contribution of his Historical school stated under the following heads:

1. Savigny stated that Law Develops like the Language. He pointed out that Law is a national character and develops like a language in the nation, which not only binds people in one group by faith and opinions, but also, grows with the growth of the society. Development of both the element goes hand in hand. It has no separate being whom follows them but consider as a one being.

2. He stated that in the early stages law develops naturally according to the internal needs of the people but after people reached a certain level, different kind of national activity developing the law accordingly.

3. Law is a continuous and unbreakable process bound by common culture and beliefs.

Savigny’s theory stated that law is the product of Volksgeist, which contains the whole history of the nation’s Culture and which also reflects the inner convictions of the society which are deep rooted in the society’s experience. So, Volksgeist drives law slowly to the development.

As we discussed earlier, Volksgeist is the concept of German legal science. Another jurist named as Prof. Oliver Wendell Holmes analysed Savigny’s Theory. His thought contained

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19 Supra 6
21 Roland N. Stromberg, European Intellectual History, 6, 1996.
aspects of positivism and was a complete follower of social Darwinism. After analysing each and every aspect of Holmes thoughts and beliefs, it was found that, Holmes did not follow the concept of Volksgeist evolve by Prof. Savigny\textsuperscript{22}. Prof. Holmes was the follower of Social Darwinism i.e. those who are powerful will prevail in the society. So it logically opposed to the Savigny’s Volksgeist Concept. Social Darwinism is Highly Scientific unlike Volksgeist which is considered as romantic theory\textsuperscript{23}.

Holmes also indicated in his theory that, one could not speak of the good of a community, because all that exists are the competing interests of different groups within the community\textsuperscript{24}. Holmes believed that all those laws are good if it reflects the dominant force of the community, even if that laws take us to the hell but that law helps in better governing of the democracy\textsuperscript{25}. The Path of Law (Statement made by Holmes) that directs that, while he was familiar with the theory of Volksgeist, he did not feel that the law is embodiment of the people’s spirit which was given by Savigny. Holmes did not oppose the concept nor does he agree with it, he only explains or define how law is developed. So after analysing his theory, it seems that Holmes was more concerned in development of law through scientific way or methods and not by “spirit of the people”\textsuperscript{26}. He said that Lawyers should read the German’s way or concept of development of law but only for knowledge purpose and does not put much stress on Volksgeist concept\textsuperscript{27}.

\textsuperscript{22} Oliver Wendell Holmes, The Path of Law, Holmes Reader, 59-85, 1955.
\textsuperscript{23} Id 14
\textsuperscript{24} Id 13
\textsuperscript{26} Oliver Wendell Holmes, Law in Science and Science in Law, 12 HARV. L. REV. 443-63, 1899.
\textsuperscript{27} Ibid 13
After Prof. Holmes, there were many more jurists who also disagree with the theory made by Prof. Savigny. Among them, Prof. Dias, who observed that the idea of *Volksgeist* suited the nature of Germans, but it was acceptable in a very limited sense, but Savigny, Generalized and treated it as a discoverable thing, but people hold on different ways on different subjects and the spirit does not exist. He also points out that effect of Volksgeist is very limited and in modern times it only plays a role of notifying the laws rather than creating it. Prof. Dias maintains that many institutions have originated but according to *Volksgeist* concept but in convenience of a ruling government which benefited from this and not by following the concept of Savigny who talks about spirit of the people. Prof. Dias also believes that, the view of Savigny's *Volksgeist* was that it only formulates undeveloped principles of a legal system and could not provide all the necessary details. He also was of the view that, on the whole Savigny was absolutely correct about the nature of law but it crumbling by over interphases, he also overlooked the factors which influences the growth of law.

In case of *Meera Kumari Dhungana v. His Majesty’s Government Ministry of Law, Justice and Parliamentary affairs and others*[^31]. It was discussed that, Law has a prodigious relationship with the society and each and every society is govern by certain norms and principles. Here the Supreme Court mentioned that, if any law created by the legislation and if it inflicts the normal tradition of the people then it will create chaos in the society. It clearly means that law should not be introduced in such a way so as to change the norms of people at


[^31]: N.K.P 2052 (462).
once which have been followed by them since a long time\textsuperscript{32}. Hence, it clarifies that law should be in consistency with the customs and traditions of people and any law reform or amendment 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, Supreme Court in the present case rightly analysed the relation between social spirit and law. And today this change is well accepted and has introduced a new standard in the Nepalese legal system. So by this we can see that in this case the Supreme Court total focus on the aspect of the spirit of the people so that the stability and harmony would be maintained in the society.

In today’s Scenario, always it is not the peoples will which matters. In order to build law and order in the society, an act made by the legislature is must. There is not only legislator who creates law, but also the judiciary who plays a crucial role in defining law in the present era. So in today’s world both legislator and people should coordinate with each other to create a better law for the society\textsuperscript{33}.

\textsuperscript{32} Supra 8
ANALYSIS ON INDIAN LEGAL PROVISIONS

STUDIES IN LIGHT OF PRESENT LEGAL FRAMEWORK AND HOW TO OVERCOME THESE KINDS OF PROBLEMS:

In Volksgeist, Savigny put over emphasis on the customs and traditions of the community and completely neglected the role of legislature\(^{34}\). We cannot deny that Custom is not the source of law, but it cannot be the only source of law. In India, the initial practices of following the customs was existed in the ancient period but that was also corrected during the development of time and those constraints was removed from the society like: Sati Pratha, child marriage, discrimination between man and woman etc.\(^{35}\)

The Hindu Law of Succession and inheritance got ultimately codified in the form of Hindu succession act, 1956, which was based on customary law. According to this act, marriage could only be possible between the same cast of the community and marriage was void if it was perform out of this custom. So basically it was totally based on the customs of the community.

In the Constitutionality scheme, Article 244, 244A, 371A etc. clearly states that the law made by the constitution makers was to prevent and maintain the customary laws of the community. Customary laws are one of the most important laws for the tribes so it needs to be protected by the constitution\(^{36}\). Also in Family laws, it was seen that the laws made by the makers was to save the interest of the community by making the laws made in the customs.

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\(^{35}\) Hindu Marriage Act, 1955. ( Bare Provision).

\(^{36}\) David Brooke, “ Q & A Jurisprudence”, 2010. Available at: https://books.google.co.in/books?id=MruNAgAAQBAJ&pg=PT237&lpg=PT237&dq=suggestion+and+recommendation+on+volksgeist+theory&source=bl&ots=5rnnFzixXe&sig=enEeqmPpbsALW1Fz47ZmSrGpIM&hl=en&sa=X&ei=jnWVLyzDM2uATmzoFA&ved=0CD0Q6AEwCA#v=onepage&q=savigny&f=false Last Visited: 8.02.2015.
and follows the principle of Spirit of the people. Like in case of marriage, the bride and broom needs to take the Saptpadi around the sacred fire (Agni) and put a necklace to the bride’s neck, than only the marriage would be considered as valid. So the should be different customs for different people of the community. So by this we can clearly make an outline that the customary law still prevails in the law making procedure of India.

To overcome this problem the legislators should create such law which is created for the benefit of both legislation and society. Like in Hindu Succession Act, 1956, amendment was made by adding daughter as a coparcenary in the Hindu Joint Family property. So these kinds of laws are required in today’s under which no one’s right can be hindered so the goals can be achieved very easily. We cannot say that the customs should completely dispose of from the society, but it should be properly framed and structured, so that the right of the people cannot be infringed.
COMPARITIVE STUDY

COMPARISION BETWEEN DIFFERENT SCHOOLS:

Schools are group of thoughts that are based on broadly the same fundamental premises\textsuperscript{37}. As a theory or philosophy of law, Salmond divided Schools of Jurisprudence into 3 types\textsuperscript{38}:

1. Analytical School
2. Historical School
3. Philosophical School.

These schools of Jurisprudence have tried to analyses the question which proposes that; law is a science and it is just another name of politics on the other hand Positivism suggests that law must be limited to the written rules and regulation which was made by the Government and whereas naturalism maintains that the law must shows the eternal principles of justice\textsuperscript{39}.

Each Schools of Jurisprudence is not a Self-contained body of thoughts but there is a dividing line which separates Positivism from Realism and natural law from Formalism. So there are some schools which were made by different Jurists for better understanding of law\textsuperscript{40}.

1. HISTORICAL JURISPRUDENCE:

This term was first coined by Professor Savigny, in his Book “On the Vocation of Our Age for Legislation and Jurisprudence” in the year 1814 against the proposal on codification of laws according to French Civil Laws. His work was further Translated into English and published in 1831. The Idea behind making this School is that a nation’s customary law is its

\textsuperscript{40} Alan Watson, Comparative law and legal change, 37, C.I.J, 1978.
truly living law and that the tax of Jurisprudence is to uncover this law and describe in historical studies of jurisprudence. The German Historical School of law was a 19th Century Intellectual movement in the study of German law. It is basically based on the writings of Gustav Hugo and Prof. Savigny. It was observed that law is created on the basis of the historical basis and trends of the community.

Prof. Savigny completely under rated the role of legislation in the development of law. He said customs and traditions are all which is required in development of the law and though the legislator’s plays perfect role in development but still it is not sufficient for development at par. Historical School came as a reaction against the natural law which says that laws are derived from principles of universal application and customs and tradition does not play a role in it. Historical school also came as a reaction against the analytical positivism which constructed as a soul-less barren sovereign made, which lacks moral and cultural values.

2. ANALYTICAL JURISPRUDENCE:

It is a legal theory that draws the resource of modern analytical philosophy to understand the nature of law. Austin, Bentham etc. are the renowned jurists who analyse and study natural law theory. It was Sir Henry Maine who termed this school as Analytical school. But, mainly it was John Austin who mainly contributed in the development of this school and through his

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41 Id 23
43 Christopher Tomlins, What would Langdell have thought? UC Irvine’s new law school and the Question of history, 1, UCLR, 2009.
45 Ibid 8
work he approached to the legal positivism\textsuperscript{47}. Analytical jurisprudence is not to be mistaken for legal formalism (the idea that legal reasoning is or can be modelled as a mechanical, algorithmic process)\textsuperscript{48}. Indeed, it was the analytical jurists who first pointed out that legal formalism are basically mistaken as a theory of law\textsuperscript{49}. Analytical Jurisprudence was a reaction to the natural law theory, which was based on morality and ethics\textsuperscript{50}.

Professor Kant also analysed the theory of Savigny and he was of the view that their basis is the problem of power and ability of judgement. He was also said that, it is impossible to create rules that connect recognition and action by applying common perception of the people\textsuperscript{51}.

So basically there is a huge gap between Historical school and analytical school. Historical school in its ideal condition would require an accurate record of the history of all legal systems as its material\textsuperscript{52}. Basically it requires all the previous customs and tradition which were exists in the world to develop law. Its main aim was to develop law according to the prevailing customs in the society or from the spirit of the people which is the basic concept based on Savigny’s Volksgeist theory. Whereas Analytical School used all the existing structures and material to reach its goal, because it examines the available subject matter on a

\textsuperscript{47}Jurisprudence, History and the Institutional Quality of law, Available at: http\textcolor{red}{www.law.virginia.edu}pdfĮ14\textcolor{red}{_jurisprudence_symposiumlaceyjurisprudencelhistoryandtheinstitutional%20qualityoflaw.pdf, Last Visited: 25.01.2015.}


\textsuperscript{49}Ibid 23
\textsuperscript{50}Ibid 37
\textsuperscript{51}Ibid 8
\textsuperscript{52}William Ewald, Comparative Jurisprudence: the Logic of Legal Transplant, the American Journal of Comparative Law, Vol. 43, No. 4, 1995.
particular subject and gave all the powers of making law in the hands of the legislator, as he states that legislator is above the people and it develops and control law more efficiently. To work upon achieving the better governance, we have to focus upon both groups i.e. history and legislator. We cannot undermine one or the other because they both stand at the same point in terms of value and importance. So, we could that by saying, Savigny’s theory was not wrong neither it can be fully applicable but it can be reframed and re-established it structure for better implication in today’s world.

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CONCLUSION

Savigny had prepared a very well structured legal method for the single cases. It is conclusively a scientific and thoughtful method and is less practical but it was case oriented in all the legal cases in the present day scenario. He Share fundamental targets of legal modernity and this will stabilize Autonomy of law. The insufficiency of natural school and analytical had provided a base to Savigny to sowed seeds of historical school in the jurisprudence. In his view, law is derived from the customs, tradition and rules of the community and spirit of the people is important in creation of law and the role of sovereign is very less. He deliberately focuses on his theory of Volksgeist on which whole of his research was depending upon. He thinks that by careful study of the customs, a true essence of law was developed. Although, the concept of Savigny was inefficient and was criticised by many jurists, but despite of all criticisms, Savigny became the founding stone of the beginning of modern day jurisprudence. In the end we conclude that for better governance of the society, the legislators should developed law both on the basis of customs and tradition of the people and Sovereignty of the legislation. Because then only the law can be developed more efficiently. Only focusing on Historical aspect or only focusing on legislative aspect the law cannot be made effectively and the purpose cannot be serving properly. So it needs cooperation from both historical and analytical school (society and legislation) to make a better law.