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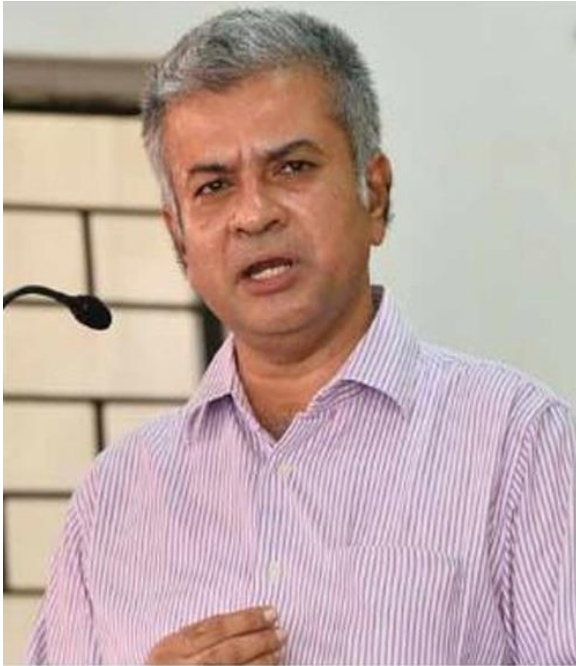
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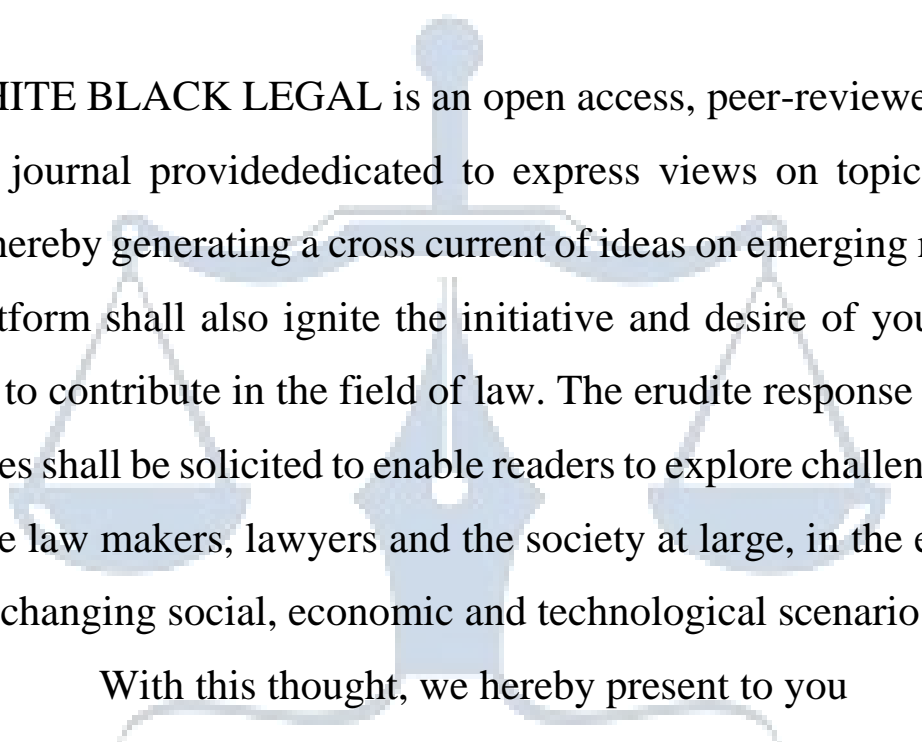


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With this thought, we hereby present to you

W H I T E   B L A C K  
L E G A L

# **SAVIGNY'S VOLKSGEIST: THE INDIAN PERSPECTIVE**

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## **INTRODUCTION**

Savigny, a highly regarded and significant figure in German law during the 19th century, is recognized with founding the Historical school of law through the concept of Volksgeist (the spirit of the people). His most notable writings include:

1. Das Recht des Bestiges (Law of Possession), 1803,
2. The History of Roman Law in the Middle Ages in Six Volumes, 1818–1831, and
3. The Modern Roman Law System, 1840–1949,
4. Contracts, 1853

## **HISTORICAL SCHOOL OF LAW**

The fundamental tenet of the German Historical School is that legislation should not be viewed as an arbitrary collection of rules established by a higher authority. Instead, those laws should be viewed as the people's convictions being expressed, much like how language, conventions, and practices are manifestations of the people<sup>1</sup>. It further states that a country's customary law is its actual living law, and that it is the responsibility of jurisprudence to discover this law and outline in historical studies its social provenance. Acceptance of this approach, like other schools of thought, did not require agreement with its theoretical or practical implications. The Volksgeist, a type of public consciousness, serves as the foundation of the law.

## **THEORY OF VOLKSGEIST**

Savigny's concept of law is known as the Volksgeist. Volks means "people," and geist means "their common will," which are combined to form the term Volksgeist. Volksgeist translates to "law is a common will of the people" or "spirit of the people." Volksgeist can be defined as an inclusive notion of the people or their collective spirit. The basic tenet of Savigny's philosophy was that the rule of law was a reflection of popular will rather than the result of purposeful legislation, and it

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<sup>1</sup>Indian Legal Solution, Historical School of Jurisprudence Indian Legal Solution (2021), <https://indianlegalsolution.com/historical-school-of-jurisprudence-2/> (last visited Oct 3, 2023).

evolved as the country's consciousness grew. The primary tenet of Volksgeist was that a country's legal system is heavily impacted by its historical culture and traditions.

According to Savigny,

"The underlying principles of the law are real and live in people's everyday consciousness. We get to know it as it shows up in practice, manners, and conventions as it appears in external acts. The hallmark of positive law is custom"<sup>2</sup>.

Savigny therefore regards Volksgeist (common consciousness) as the ultimate foundation of any legal system and custom as the source of law.

## **JURISPRUDENTIAL STUDY OF THE THEORY**

Theory of Volksgeist can be explained in the following manner:

### **1. Law prevails basically in society**

Savigny claims that the law is a byproduct of how people live in a given society and that it is the result of that society's culture. It represents deep convictions grounded in society's shared experience and embodies the entirety of a nation's cultural heritage. Over time, the development of the law is influenced by the Volksgeist. As a result, Savigny contends that effective legal analysis requires a full comprehension of human and social history.

### **2. Law develops like a language**

According to Savigny, the law evolves much like a language. According to him, law has a unique national character and evolves in a similar way to a national language, which not only unites individuals of like thoughts and opinions, but also develops along with society. Both of these components are simultaneously developed. It is the same existence as them and is thought of as one being. History demonstrates that laws are created in accordance with societal norms already in place and are approved by national characteristics such as language.

### **3. Law is a continuous process**

Law is a never-ending process limited by the shared values and ideologies of society, not a one-day invention. It grows as a result of society's regular and ongoing process. Customs and usages in society are initially accepted as being followed by everyone, and those who don't comply with them are isolated from the rest of society. Eventually, however, all of these things must become common,

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<sup>2</sup>Navan, Friederich Karl von Savigny Indian Law Portal (2020), <https://indianlawportal.co.in/friederich-karl-von-savigny/> (last visited Oct 4, 2023).



at which point they become laws that apply to the entire society.

#### **4. Law initially arises naturally and is later elaborated by jurists**

According to him, law initially evolves naturally or spontaneously in response to a people's internal requirements, but after a population reaches a certain level of civilization, various national activities shape the law in accordance with those activities.

#### **5. Savigny disagreed with the idea of codifying German law**

Savigny opposed the codification of German law based on the French model at the time since Germany was divided into several minor states at the time and its law was crude, immature, and inconsistent. He believed that German law may be codified once the country is united and there is only one law and one language spoken throughout the country. Volksgeist's common consciousness was not sufficiently advanced at the time. Savigny believed that the gradual expansion of the law would enable its codification. He continued by saying that historical customs, rather than arbitrary legislation, should be the basis for law.

### **VOLKSGEIST IN THE INDIAN ASPECT**

According to him, legislation is the result of the desire of the people rather than an arbitrary act of the legislature. When passing a law, the lawmaker must be aware of the general mindset of the people. 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 saw of the State as having three stages: life, growth, and death. Here, as the populace got more powerful, the rule of law would deteriorate and ultimately vanish as the country lost its sense of identity.

According to Savigny, there have been three stages in the development of law<sup>3</sup>. First off, there is a political component to the law. Every nation and piece of legislation must start here. The 'technical' portion of legal competence is combined with the political component in the subsequent stage. The time is appropriate to codify the laws since, after this stage, one can see how the country is deteriorating and slowly dying. One of the biggest problems with this idea is how it tends to assume that there is a sense of unity among the populace and a constant call for it.

Furthermore, the most knowledgeable lawyers in society tend to disagree with this strategy. Due to

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<sup>3</sup>Nitish Ahuja & Aditi Rai, Application of von Savigny's theory in the Indian aspect Nitish Ahuja ... Journal of Legal Research and Juridical Sciences (2023), <https://jlrjs.com/wp-content/uploads/2023/05/91.-Nitish-Ahuja.pdf> (last visited Oct 3, 2023).

the reliance on the collective consciousness, individual jurists who might have been in a position to offer their insightful opinions on law are completely ignored. The biggest drawback, in my honest opinion, is that the people's collective will might not always be the greatest for society. If it were the true, legal theory would not have developed as quickly. The general consensus of the public in ancient society backed the prevalent patriarchal and sexist customs, which would have persisted. Something like slavery, which was ubiquitous in the community and was overwhelmingly supported by the populace, might not have been considered eliminated if Volksgeist had been strictly adhered to. This, in my opinion, is the main problem with the Volksgeist notion. After understanding the main idea of Savigny's theory, we'd want to try to relate some of the characteristics to the contemporary legal system, focusing especially on India.

Following are some of the characteristics of this theory linked with the current legal system of India-

1. **The National Character of the Law:** Savigny merely touched on the national character of the law. This law, which would be created by popular vote, needs to have the ability to unite the nation. However, India has a federal structure of governance. This is distinguished by a division of power between the State and the Center in the areas of legislation and administration. The objective is to protect (to a certain extent) provincial autonomy while advancing the interests of the country. This strongly contradicts Savigny's theory.
2. **Elected Representatives:** The definition of "democracy" as a system of government is that it is one in which the people of the country have the final say. In our country, the people who are elected by the electorate are the ones who eventually pass the laws. Elections surely give a sense of the nation's overall pulse. It is safe to say that this procedure does take the collective will of the people into account because the people decide who will make the laws.
3. **The source of the law-** According to Savigny, Volksgeist is the only source of law. The only thing that matters is the people, nothing else. The majority of the Indian Constitution's provisions are taken from other foreign legal systems, if the Constitution is to be examined. While Part 3 on Fundamental Rights was directly copied from the American Constitution, the Emergency clauses were adapted from the German Constitution. A law that has been received cannot ever become a part of the system, according to Savigny. However, Savigny was mistaken because the British brought many laws from England to India and codified them. These have been quite beneficial to us and have greatly aided us. But again, this is the opposite of what Savigny and his theory advocated.
4. **The public's will might not be "good"** - The collective will of the people may not always be advantageous to society, as was previously indicated. It's possible that people don't always want to move forward for their own improvement. Slave trade and the Sati ritual

were once encouraged by a shared will. If the 'Volksgeist notion' had been taken literally, we would never have been able to advance and eliminate such rules. It is vital to realize that the general public's perception won't always be accurate, therefore this assumption won't hold in India.

- 5. The legislation is supreme** - Even while the Indian legal system does to a significant part respect customs and traditions, in the end what matters is the law of the land. The Constitution is superseded by this statute, which was made by the legislature. Savigny's assertion that custom is the ultimate source of law is not necessarily true in India, which is another problem with his theory. Only a portion of Savigny's theory can be applied to India. The Indian Constitution is more like a federal one because of the division of powers between the federal and state governments.

## **RELEVANCE OF THE VOLKSGEIST IN THE INDIAN CONSTITUTION**

The framers decided to create a Constitution rather than waiting for the people's spirit to change through time when the Indian state was still in its infancy. The Constitution's Preamble, however, reflects the popular spirit. Thus, the basic structure theory can be viewed as a tool to defend the volksgeist from arbitrary and purposeful constitutional revisions meant to change it. The Preamble's use of the phrase "we the people" is symbolic rather than literal. Customs and usages are recognized as law under **Article 13** of the Constitution. Because the aforementioned practices are deeply ingrained in the public conscience and have been practiced for a long time, the state does not want to control them. The articles pertaining to the management of religious affairs are the main provisions that exhibit the volksgeist. Every person has the freedom to spread his or her own faith, according to **Article 25**.

**Article 15** can also be seen as Volksgeist because it forbids discrimination on the grounds of race, sex, and caste. The framers of the Constitution did not intend to alter peoples' conscious choices, which is why they wrote **Article 44**. It specifies that the State shall make every effort to establish a uniform civil code throughout the nation. Until their consciousness has advanced to the point where they agree to the adoption of a Uniform Civil Code, communities have the liberty to abide by their own local laws under this directive concept.

## **PERSONAL LAWS AND VOLKSGEIST**

In her dissenting opinion in the **Sabarimala decision**<sup>4</sup>, Justice Indu Malhotra noted that religious

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<sup>4</sup>Indian Young Lawyers Association v. The State Of Kerala(2019) 11 SCC 1

communities and organisations in a heterogeneous democracy like India have the freedom to choose the practices and norms that are essential to their operation.

In **Shayara Bano v. Union of India**<sup>5</sup>, the Supreme Court made it clear that codified personal law cannot infringe on any fundamental rights because it has statutory standing following codification and is covered by **Article 13**.

However, the Supreme Court ruled in **Madhu Kishwar v. State of Bihar**<sup>6</sup> that even customs are subject to basic rights. India is still not ready to embrace the promise of individual freedom and equality enshrined in its Constitution, as evidenced by the opposition to both the Sabarimala and triple talaq judgments. According to the volksgeist idea, since lawmakers act on behalf of the people, the people are ultimately responsible for their actions. The Indian Constitution's lenient approach to personal laws shows a subtle appreciation for the volksgeist or "we the people" mentality.

## CONCLUSION

According to Savigny, the true meaning of a law can only be discovered after a comprehensive examination of the prevailing norms and traditions. Savigny described the volksgeist as "a unique, ultimate, and often mystical reality" connected to the collective history of the population, yet the formulation of laws involves numerous technicalities. As people lack the necessary expertise to choose the best legal framework, volksgeist will be useless in dealing with complex legal matters. The Indian Constitution gives people plenty of space to practice their beliefs and practices, yet a law that is only based on a person's spirit can disregard the fundamental values ingrained in our Constitution. Therefore, it's important to maintain balance between the two.

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<sup>5</sup>(2017) 9 SCC 1

<sup>6</sup>(AIR 1996 5 SCC 125)