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INSIGHTS FROM THE HISTORICAL GERMAN CODIFICATION DEBATE WITH RELEVANCE FOR THE DEVELOPMENT OF A UNIFORM CIVIL CODE FOR INDIA

*Alexander J. Wulf**

Abstract

The Research Paper presents a summary of the historical German Codification debate between Thibaut and Savigny and discuss its relevance for the development of a Uniform Civil Code for India. In the nineteenth century the German jurists Thibaut and Savigny conducted a debate on the need for a common civil code for all German states. In this historical debate the problems inherent in drafting a civil code were addressed. While Thibaut suggested that a legislative assembly could formulate the civil code by applying democratic-like voting procedures, Savigny argued that this attempt was doomed to failure. In their debate the two opponents disagreed mainly about the nature and foundations of the law. The aim here is to investigate whether we can gain insights from (the study of) this historical German debate that are also relevant for the ongoing discussion on the Uniform Civil Code in India. Drawing comparisons between the historical and modern legal debates has already been fruitful in other contexts such as the debate on a European contract law and a European civil code. It is argued that as in the historical German example, different conceptions of the law may also be relevant in today's debate on the Indian Uniform Civil Code, namely a positivistic conception of the law and a historical, i.e. organic conception of the law. Recognizing these different understandings of what law is and how it is brought about may therefore help to reconcile the opposing sides.

I INTRODUCTION

Family law and personal laws in India are as complex and diverse as the multicultural and multireligious traditions that have underlain and shaped these laws over the centuries. Hindu law, Islamic law, Christian law, Parsi law, a great variety of tribal laws, laws of different states and influences from the laws of the former colonial powers are just some of the sources that have contributed to the legal pluralism that we find today in India. In addition to their complexity and diversity, the personal laws of India are also characterised by the sometimes contradictory influences of tradition on the

* Prof. Dr. Alexander J. Wulf, Professor of Business Law, SRH Hochschule Berlin. e-mail: alexander.wulf@srh-hochschule-berlin.de.

one hand and modernity on the other. The recognition of human rights in general and women's rights in particular, as well as social reform processes aiming at modernising Indian society have had an especially pronounced impact on the country's legal traditions.[1]

Against this background, the long-standing proposal to unify the personal laws in India by means of a Uniform Civil Code (UCC) has been accompanied by an equally long-lasting, extensive and fierce legal, social and political debate. Proponents of the UCC have argued that one important result of such a code would be to strengthen human and women's rights throughout India's many sub-cultures. Opponents have posed critical questions such as whether the UCC would at all be effective in changing traditional cultural practices, whether it would compromise India's multicultural identity, whether it would undermine the rights of minorities by imposing majoritarian law, whether it would still be flexible enough to allow for social change in the future, and many others.[2]

While the debate on the Uniform Civil Code is uniquely Indian and without direct parallel in Western legal scholarship, some of the challenges and arguments do compare to the historical debate on a German civil code. In this essay, I present the main points of the historical German "codification debate"[3] between Thibaut and Savigny and discuss its relevance for development Uniform Civil Code for India. It can be fruitful to draw parallels between this historical debate and modern legal developments. In the modern debate on a European contract law and a European civil code authors from European legal academia have drawn similar comparisons.[4] I argue that as in the historical example, different conceptions of the law are also relevant in today's debate on a Uniform Civil Code, namely a positivistic conception of the law and a historical, i.e. organic conception of the law. Understanding these underlying differences in the perception of what law is and how it is brought about may help to reconcile the

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1 P.I. Bhat & V.D. Kulshreshtha, *Law and Social Transformation in India* 701-703 (Eastern Book Company, Lucknow, 2nd edn., 2012).

2 *Id.* at 747-749.

3 German: 'Kodifikationsstreit'

4 See, O. Lando, "Why Codify the European Law of Contract?" 5(4) *European Review of Private Law*,525-536 (1997); O. Lando, "Guest Editorial. European Contract Law After the Year 2000" 35(4) *Common Market Law Review* 821-831(1998). See also H. Kötz, "Alte und neue Aufgaben der Rechtsvergleichung" 6(1) *Juristen Zeitung* 257-264 (2002); R. Zimmermann, "Roman Law and the Harmonisation of Private Law in Europe", in: A. Hartkamp, E. Hondius, *et al.* (eds.) *Towards a European Civil Code.* (Nijmegen: Ars Aequi Libri et al., 2004)

opposing sides and move the debate forward in a productive way.

II THE GERMAN CODIFICATION DEBATE BETWEEN THIBAUT AND SAVIGNY

In 1814 Thibaut and Savigny, the two leading German civil law scholars of the time[5], engaged in a heated debate which came to be known as the "codification debate". Central to this debate was the question as to whether all German states should have a common civil code. Thibaut argued in favour of modernizing substantive and procedural law by means of codification. In contrast, Savigny argued against codification and pled the case for retaining the law in its prevailing form with its historical foundations. On a theoretical level the debate was rooted in a disagreement about the foundations of law[6]. Savigny's arguments were based on a romanticist conception of law[7]. His premise was that law is predominantly a product of a people's culture and history and that it cannot simply be codified by legislative actions, but has to be discovered and further developed by legal scholars. Thibaut's conception of the law was closer to the principles of the Enlightment. He saw law as a product of reason that can be intelligently designed and enacted by a legislator. Although the situation in nineteenth century Germany was quite different from that in India today, conducting a review and analysis of the historical debate can be a fruitful contribution to the contemporary debate on the Indian Uniform Civil Code.

The debate between Thibaut and Savigny can be seen as representative of the political developments of its time. In large parts of Europe the French Revolution had led to the collapse of the old feudal system. After the defeat of the Napoleonic rule in Germany, the Congress of Vienna created the 'Deutscher Bund', a federation of 41 formerly independent German states.[8] The main political issue in the German states was whether the bourgeois reforms backed by the emerging capitalistic society should be continued, which could lead to the formation of a German nation, or whether the 'ancien règime' backed by the traditional feudalistic society should be re-established.[9] According to this interpretation, Thibaut's essays were representative of the capitalist bourgeoisie and its political desire for modernization and progress. The existing civil

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5 H. Hattenhauer,*Thibaut und Savigny ihre programmatischen Schriften.* (Vahlen, Munich, 2002)

6 *Ibid.*

7 F. Saure, "Wohlthaten einer gleichen bürgerlichen Verfassung", 5(4) *literaturkritik.de*, 192-195 (2003)

8 R. Zimmermann, "Savigny's Legacy. Legal History, Comparative Law, and the Emergence of a European Legal Science" 112 *Law Quarterly Review*576-605 (1996).

9 H. Wrobel, "Rechtsgeschichte, Wirtschaftsgeschichte, Sozialgeschichte. Die Thibaut-Savigny-Kontroverse" 6(2) *Kritische Justiz*, 149-157 (1973).

law legislation was merely a patchwork system of old-fashioned and localized laws that did not meet the requirements of the industrialization and the emerging cross-border trade patterns. In contrast, Savigny supported the conservative reactionary tendencies that favoured the feudal regime and aimed to reconstruct the old political state of affairs. It should be noted that the view that the Thibaut-Savigny debate mirrored the political class conflict of the times is not undisputed.[10] While Savigny's politically conservative views are more obvious due to his aristocratic descent and the political positions he held in Prussia, Thibaut's role as a representative of the bourgeoisie is less evident. In his writings Thibaut carefully avoids attacking the aristocracy or putting forward revolutionary views. He portrays the codification as an urgent need of the people, not as a means to represent their political will or realize any other political interests. He envisages a wise, aristocratic legislative body that he trusts will bring about the codification by command and not by means of democratic principles.[11] It is fair to say that Thibaut did not question the aristocracy as the political leaders of the state. This did not prevent him from representing the interests of the bourgeoisie in the field of civil law.[12]

The political developments turned against the reformist's ambition to create a German nation. Similarly, Thibaut's proposal for a common German civil code was not to succeed. Savigny's theses proved to be correct in the short term, making him the winner of the codification debate.[13] From an historical perspective it is more likely that it was the general political circumstances rather than Savigny's arguments that stood in the way of Thibaut's codification proposal. The lack of support for a German civil code should be interpreted in the light of the aftermath of the Napoleonic occupation that had just come to an end. The codification idea was associated with the Napoleonic occupation and the imposition of a foreign system of law, the 'Code Napoleon'. The citizens were not willing to give up the local state jurisdictions because they were a symbol of sovereignty after the period of domination by a foreign power.[14] In the long term, the importance of the socio-economic trends that were the context in which Thibaut developed his codification proposal intensified. Decades later, in the

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10 H.P. Benöhr, "Politik und Rechtstheorie. Die Kontroverse Thibaut-Savigny vor 160 Jahren"14(10) *Juristische Schulung* 684 (1974).

11 *Id.* at 682.

12 H. Wrobel, *Die Kontroverse Thibaut-Savigny im Jahre 1814 und ihre Deutung in der Gegenwart.* 45(Dissertation, Bremen 1975).

13 *Supra* note 5.

14 M.B. Crosby, *The Making of a German Constitution: A Slow Revolution* 80 (Berg Publishers, New York, 2008).

nineteenth century, they ultimately led to the enactment of the German Civil Code (BGB).

In what follows I give a selective summary of the writings of Thibaut and Savigny. The summary is selective insofar as it contains only those arguments that are relevant to the contemporary discussion on an Indian Uniform Civil Code. I exclude or only briefly state those arguments and claims that are relevant only for the historical context in which they originated. I conclude by stating and summarizing those insights from the historical German debate that are of relevance for the contemporary discourse on a Uniform Civil Code in India.

III THIBAUT'S ESSAY 'ON THE NECESSITY OF A COMMON CIVIL LAW FOR GERMANY'

In his essay 'On the Necessity of a Common Civil Law for Germany', Thibaut drew attention to the fact that currently each German state was governed by different civil law regulations. He criticized this situation and suggested that a common civil code should be introduced for all German states, leading to the unification of their respective bodies of private, criminal and procedural law. However, although Thibaut supported the idea of legal unity, he was not in favour of political unity in the form of a German nation. He believed that a large German nation was likely to run into political tensions and that concentrating governmental power and the pursuing of a common political goal would suppress individuality and diversity, preventing the establishment of a deep bond between the government and the people. He feared that conflicting interests would act destructively if they came together in a single nation. In contrast, the prevailing loose federation of small and politically independent German states allowed conflicting interests to compete peacefully to the benefit of society as a whole, while the small states left enough room for individual expression. This in turn led to diversity and a close connection between the people and their government. Thibaut made clear that it was not his intent to assess the question of federalism and unification on a political level. His proposal for a common civil code for all German states was aimed solely at establishing legal unity.[15]

In his view, legal unity was necessary because the prevailing state laws could not answer the majority of the legal questions that arose. It was often necessary to apply Roman law to fill the gaps in the state legislation. The disadvantage of using Roman law was that it required considerable academic effort to reconstruct it from the historical sources. The results were very complex and difficult for practitioners to apply. He pointed out

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15 Thibaut, A. F. J. "Über die Notwendigkeit eines Allgemeinen Bürgerlichen Rechts für Deutschland", in: Hattenhauer, H. (ed.). *Thibaut und Savigny ihre programmatischen Schriften* 7-12 (Vahlen, Munich1814)

that even if it were finally possible to develop a complete civil code based on Roman law, such a code would still not be of great value to the citizens, since Roman law was designed for a civilization that was entirely different from German civilization. Hardly any of the main pillars of Roman legal theory was still relevant to German society. While the study of Roman law might help to understand the meaning of Roman law in the context of Roman society, it could not be a basis for applying Roman law in German society. The study of Roman law might still be of academic interest, but this did not justify its application to current disputes. After all, the purpose of civil law was to serve the citizens, not to provide interesting subject matter for academic research. In effect, Roman law and Roman jurisprudence could never assume the role of a German civil code.[16]

For these reasons, Thibaut suggested that the German state governments should make a combined effort to formulate and enact a common civil code for Germany. This would help the German citizens to thrive economically and find fulfilment in their lives. In support of his suggestion he first introduced all arguments in favour of a common civil code. He then stated and refuted arguments that could be made against a common code.[17] To make it easier for the reader, I have formulated both types of arguments as positive arguments for the introduction of a common civil code. This makes Thibaut's arguments easier to grasp.

Arguments in Favour of a Common Civil Code for all German States

Makes Civil Law Complete

Civil law has to provide exhaustive regulations that can answer the majority of the legal questions that arise in practice. Thibaut was of the opinion that the prevailing civil law legislations of the German states did not fulfil this requirement, that they were incomplete, widely differing and contradictory. While some of these regulations might be satisfactory if considered in isolation, they were incoherent if seen in the context of the laws of all the German states.[18] To answer the legal questions that arose in practice, Roman law was needed as a complement. In his view, this led to the above-mentioned difficulties, and in particularly to the time-consuming task of reconstructing the ancient law from historic sources. He found the results of these efforts unsatisfactory, as the law remained incomplete and ambiguous.[19] It was his contention that a common civil code for all German states would cure this problem. There would then be no need to refer back to historical Roman law and there would be no

16 *Supra* note 15 at 14-22.

17 *Id.* at 24-25.

18 *Id.* at 12-14.

19 *Id.* at 14-22.

20 *Id.* at 24-25.

contradictions or irregularities created by differing state laws. The German code would contain a complete system of regulations that could efficiently provide an answer to most of the legal questions that arise in daily practice.[20]

Renders Civil Law Understandable and Fit to Serve the Citizens

The prevailing bodies of civil law of the German states were extremely complex and ambiguous. The use of Roman law to fill in the gaps compounded this problem. As a result, the law was extremely hard to understand.[21] Only legal academics and trained lawyers were able, with a great deal of effort, to establish what the law was. Ordinary citizens could not do so and thus remained dependent on legal consultation.[22] Thibaut proposed that a common civil code should and would contain clear and exhaustive regulations. These would be easily understood by all citizens and help them to obtain knowledge on the law, since, after all, the main purpose of civil law was to serve the citizens, not the attorneys or academics. [23]

Increases the Relevance of Legal Research

Another aspect which Thibaut drew attention to was the fact that the complexity of the prevailing bodies of civil law of the individual German states was also a hindrance to legal research. Academics could only select pieces of legislation for their research; they could never study and analyze the entire system of regulations. By making this possible, the introduction of a common civil code for all German states would lead to an academic breakthrough. For the first time, it would be possible to analyze and understand interactions between the different regulations as formulated by the different sources of law. Legal research would also benefit because it would become more practice-oriented than before. At the time, academics still avoided doing research on state-specific legislation, despite the relevance this legislation had for practitioners. The reason for this was that they did not want to commit themselves to the study of a specific state law. Doing so would narrow down their future work and research opportunities and hinder intellectual exchange with academics from other states. In effect, research was conducted mainly on general legislation that was universal in all states. These research results were of mainly academic interest and had little relevance to practice. Thibaut reasoned that the introduction of a common civil code for all German states would allow academics to conduct research that was relevant in all states and to legal practice. A mutually beneficial exchange between theory and practice could take place.[24]

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21 *Supra* note 15 *at* 12-13.

22 *Id.* at 16, 23 & 61.

23 *Id.* at 23-25.

24 *Id.* at 25-27.

Increases the Relevance of Legal Studies

Similar to the limitations that the variety and complexity of the German states' civil law legislation brought to academic research were its effects on legal studies. The universities aimed to offer courses of legal study that would be relevant in all German states. The training thus focused on general, academic topics and did not include specific state laws that were relevant to practice. When students graduated they were not sufficiently qualified. They still had to study the local law of the state in which they wanted to practice. Here, Thibaut argued that legal studies based on a common civil code for all German states would have a clear and logical structure. This would motivate students and allow them to develop a true passion for their subject. Upon graduation they would be fully qualified to practice in all German states. The time and effort that the students would save could be used to acquire additional skills or engage in extracurricular activities.[25]

Promotes Social and Cultural Unity

Politically, the German people were separated. This political separation was insurmountable. For Thibaut it was important that the German people should live in friendship and be loyal to their common culture. He believed that a common civil code for all German states would be a symbol of national pride that would foster the German national identity. The drafting of a German civil code would be a truly national endeavour, as it would be drafted by an assembly consisting of delegates from all German states. The code would then govern the German people on the basis of common regulations. In the long term, having a single civil law for all would lead to common customs and habits - the key to unity between the German people.[26]

Facilitates Cross-Border Transactions

The wealth of the German states depended on cross-border commerce. At that time, cross-border transactions were governed by outdated trade laws and the conflict of laws approach. Thibaut pointed out that these legal institutions were sufficient so long as cross-border commerce had only limited relevance for the German economy. However, as industrialization increased and capitalism grew, cross-border transactions became more important. The old legal systems no longer met the requirements of this changing economic behaviour. This resulted in legal uncertainty and a high expenditure on acquiring knowledge of the laws of other states. This was damaging cross-border commerce in particular and the economy in general. Thibaut's argument was that a common civil code for all German states would overcome these inadequate legal

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25 *Supra* note 15 at 27-32.

26 *Id.* at 33-34.

27 *Ibid.*

institutions. Citizens could conduct business across state borders freely and safely. This would benefit the growth of the economy and increase the wealth of all German states.[27]

Improves Quality and Efficiency of Civil Law Legislation

For Thibaut, the drafting of civil law legislation is a challenging undertaking that requires great skill, virtues and knowledge. A legislative body of a single state cannot satisfy these requirements on its own. Consequently, the civil law legislation that it drafts is of only suboptimal quality. A common civil code would be drafted by a national delegation from each state. This assembly would combine the abilities of all state legislatures and lead to a comprehensive exchange of knowledge. It would be in the best possible position to draft civil law legislation of high quality. Furthermore, the mutual control that would take place between the state legislators in that assembly and the wide public review to which the resulting code would be subject would limit the influence of any political interest on the code. This would insure that the German civil code would govern the affairs of the citizens in a manner that would be in their best interest.[28]

Refuted Arguments Against a Common Civil Code for all German States

Limits the Influence of Political Interests on Civil Law Legislation

Thibaut realised that a common civil code would limit the state governments' scope for abusing their power. It would prevent the implementation of political self interest and arbitrariness in civil law legislation. Thibaut was of the opinion that the German state governments were led by honourable sovereigns. As these leaders had no intention of abusing their power, they would not feel this constraint of power. On the contrary, these honourable sovereigns and their governments would realize that there was enough room left outside the field of civil law legislation in which they could freely exercise their power. These fields were, for example, the administration, law enforcement, the finances and the economy. In the field of civil law, the citizens would be governed by the wise and constant regulations of the German civil code.[29]

Founds Civil Caw on Universal Rationality and Reason

Civil law is founded on rationality and reason. It can be described as pure 'legal mathematics'. Thibaut reasoned that the fundamental principles of civil law were identical in all German states. The existing differences between the states' bodies of civil law had not therefore resulted from natural depositions or local conditions, but from unwise isolation and political arbitrariness. The aim of introducing a common

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28 *Supra* note 15 at 34-41.

29 *Id.* at 43-45.

civil law would be to overcome these solitary ways. He believed that despite the fact that civil law is founded on reason and rationality, some local state laws might legitimately be retained due to local habits and usages and that to permit this would not detract from the rationality behind a common civil code. These local state laws could simply coexist with the common code. However, one should not give too much weight to regional customs and usages because this would reduce the benefits of a common code.[30]

Insures Steadiness of Civil Law

Thibaut warned against making changes in the law without due reflection. He considered that the value of law increases constantly over generations and that only if young generations were governed according to the same principles as their parents did they start to identify with the law. In his view, the conflicting and poorly drafted regulations in force at the time did not fit the requirements of the people. They did not approve of the law and therefore did not identify with it. The law was not seen as an enduring social asset that was passed on from one generation to the next. A common civil code created by the combined efforts of the entire nation would put people in awe of the law. They would proudly identify with this symbol of national honour. They could become accustomed to the code over several generations and this would foster belief in its continuity. This would create something of true value for society.[31]

Saves Costs for the Citizens and the Civil Justice System

The prevailing complexity of and differences between the bodies of civil law of the individual German states were a source of great cost to the citizens and the civil justice system. A common civil code would help to overcome unnecessary efforts and save costs and time. Even if some state governments were not willing to pay for the drafting of the common civil code, the judges and lawyers certainly would. They would benefit greatly from being able to move around freely and work in all German states.[32]

IV SAVIGNY'S ESSAY 'OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE'

In his essay 'Of the Vocation of Our Age for Legislation and Jurisprudence'[33] Savigny

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30 *Supra* note 15 at 51-58.

31 *Id.* at 58-60.

32 *Id.* at 63-65.

33 F.C. Savigny, "Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft", in: Hattenhauer, H. (ed.). *Thibaut und Savigny ihre programmatischen Schriften*. (Vahlen, Munich, 1814); See also F.C. Savigny, *The Vocation of Our Age for Legislation and Jurisprudence, translated from the German of F. C. Savigny by A. Hayward.* (Littlewood, London, 1831)

used a theory-based approach to counter Thibaut's proposal for a common civil code. His theory aimed to show that Thibaut's suggestion rested on a mistaken assumption of the nature of law in society, namely that postulated by legal positivism. Savigny contrasted Thibaut's suggestion with his own theory that the law grows organically in society and with an approach to the study of law, the historical school of jurisprudence, that was associated with it. He clarified his theory by referring to the historical development of Roman law and its enduring importance as a source of law for the German states. He concluded that German jurisprudence currently lacked the ability to codify private law and if private law were codified it would prevent the jurisprudence from reaching true excellence in their subject. Instead he suggested that the historical sources of the law currently in force should be studied. This would strengthen German jurisprudence as a science and help solve the legal problems of the time.

The Sources of the Law

The call for a common civil code for all German states was not new. Similar suggestions had been made in the mid-eighteenth century. For Savigny they were based on a disrespect for the greatness of other times and an overestimation of the abilities of the scholars in those times to achieve absolute perfection. Today, legal positivism is the prevailing school of thought among the majority of the German lawyers. It has led scholars to similar conclusions to those arrived at in the eighteenth century. According to legal positivism, the only source of law can be the legislation enacted by the highest governmental authority. In fact, law and jurisprudence are of an entirely coincidental and fluctuating nature. The law of tomorrow may not resemble the law of today at all if the legislative bodies so decide. This school of thought is based on the conviction that there is a law of reason that could constitute the basis for an ideal legislation that is valid for all times and all circumstances. It claims that this law only has to be compiled and codified in order to finalize positive law once and for all.[34]

Savigny argued that the assumption of the positivistic nature of law and the conclusions that are drawn from this premise, i.e. the call for a common civil code for all German states, are erroneous. In his view, law is not simply made by the legislative bodies; but grows organically within a people, just like language and social manners. It is subject to the same progress and changes as the people themselves: it grows together with the people, develops out of the people and finally dies as the people lose their peculiar characteristics. Because of this close connection, it was Savigny's belief that law cannot

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34 F.C. Savigny, "Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft", in: Hattenhauer, H. (ed.). *Thibaut und Savigny ihre programmatischen Schriften*. 4-7 (Vahlen, Munich, 1814).

35 *Id.* at 8 &11.

be developed in separation or isolation of the people. The two are bound together inseparably by the people's conviction that the law needs to develop constantly and steadily if society is to function properly.[35] Savigny pointed out that the media through which laws existed and were communicated among the people had changed over the ages. In ancient times law had often been transported in symbolic acts of performativity. This had had the advantage that it kept the law vividly in the consciousness of the people. The law was present in society and the people's common belief in it had formed a central part of their identity. With the progress of civilization, law had become more scientific and its primary medium of existence had changed, and was now language and writing. The law was appropriated by a particular class, the lawyers. This class was composed exclusively of those professionally involved in the field of the law. This had made the law more artificial and more complex. As a result, it was less present in the common consciousness of the people. It now had a two-fold life, existing both in the people, as the so called political element of the law, and as a distinct branch of scientific knowledge among legal scholars, as the so called technical element of the law. Savigny theorized that one or other of these elements would dominate at different times among the same people, but that it would be impossible to distinguish clearly between the two. The political element would always exist, at all times and under all constitutional arrangements. Its influence would be especially strong in fields where the people's consciousness of the law prevailed.[36] To conclude, in Savigny's view the law first develops from within the people, after which its development is continued by professional lawyers and legal scholars. The driving forces behind this development were the silent, internal powers of the people and the academia, not the arbitrary will of the law maker.[37] This conceptualization of the nature of law in the society eliminates the possibility of a coincidental or arbitrary origin of the law as is implied by the theory of positive law.

The Codification of Private Law

There are two ordinary types of legislative actions which are consistent with the described mode of organic development of law within society. First, legislative bodies may want to change the existing law due to political reasons. Such politically motivated legal changes can easily corrupt the existing law and should therefore only rarely be implemented. Less dangerous for the coherence and quality of the existing law is the second type of legislative action. A particular legal regulation may be doubtful or vague and therefore needs to be corrected. This type of law-making fosters the will of the people and its implementation was therefore, in Savigny's view, less dangerous.[38]

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36 *Supra* note 34 at 10-13.

37 *Id.* at 13-14.

38 *Id.* at 16-17.

39 *Id.* at 17-18.

Entirely different from these two ordinary types of legislative actions that only result in a partial influence of the law, is the codification of private law. Codification requires the legislative bodies to analyze the entire law and to put it into writing, implementing modifications and changes where they are politically required.[39] The codification effort is based solely on the technical element of the law that falls in the domain of the jurists. The political element, i.e. the influence of the people on the law, is of no importance for the codification. Savigny reasoned that this organic process would already have come to a conclusion long before the codification can possibly start. In the codification effort the only remaining task for the lawyers would be to formulate the results of this process. From then onwards the code would be the only source of law. Every other source of the law that was in force before the codification, i.e. the political element, would become invalid. The decisive difference between a civil code and the ordinary results of a technical, lawyer's efforts, e.g. an academic law book, would then merely be its legal status.[40]

The main argument in favour of a common civil code is its completeness and its precision, which shall lead to legal certainty. Whether this holds true depends on how well the civil code is written. To reach a high quality, the previously existing law must be thoroughly understood and properly expressed. To reach this understanding the underlying principles of the law must be identified. Then the internal relationships and patterns of all legal concepts and rules can be deduced from these principles. In the field of jurisprudence this task is among the most difficult. This, in Savigny's view, is what constitutes the scientific character of the legal sciences.[41] He believed that negative consequences were unavoidable if the civil code were written in a time in which this task could not be satisfactorily mastered. Upon its enactment, the civil code would attract all attention. It would foster the development of the positivist school of thought and its misconception of the law as something soulless and static. Knowledge of the true sources of the law and therefore also of the most important legal principles would be lost. The resulting private law legislation would be incoherent and contradictory. The codification would not only have a negative effect on the legal practice of its time but also hinder the study of the true source of the law in times to come.[42] In conclusion, Savigny stressed that the requirements for drafting a civil code were very high and it would only be possible to satisfy them in certain eras. He predicted that in those eras in which they could be fulfilled societies were most likely to not feel the need to codify. Their practice of law would already be excellent and thus would

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40 *Supra* note 34 at 19.

41 *Id.* at 20-22.

42 *Id.* at 22-24.

43 *Id.* at 25-26.

not benefit from a codification. The only motivation that such an age would have to codify would be to provide a general aid for future generations that might not be able to handle the law as well as the current one. However, Savigny conceded that such precautions were rarely taken in any age and were not very likely.[43]

The Ability of German Jurisprudence to Satisfy the Requirements for the Codification of Private Law

Savigny posited that in the age in which a civil code was written the understanding of the law should be superior to that in previous ages. As a consequence, many ages in which society may be considered to be cultivated in other ways should be considered unsuitable for the task of drafting a civil code. Savigny was aware that this claim had often been disputed on the basis that reason is common to all people and all ages. However, he noted that it had been argued by others that the society of an age can draw on the experience and knowledge of former times and therefore everything that it does must necessarily be better than that achieved in former ages. Savigny warned that this is mistaken and that indeed it is dangerous to claim that every age has a vocation to do everything.[44] He continued that even though in general it is very hard to make a judgment on the age in which one is living, it should be possible to judge that the society of the present age lacked the ability to draft a good civil code. Savigny stated that he did not mean to denigrate the potential of the current time, but that he had arrived at this conclusion in view of the magnitude of the codification task.[45] In Savigny's view, none of the current laws of the German states was truly excellent. This also held true, he believed, for the civil codes that had recently been drafted in Europe, namely the Code Napoleon, the Prussian Landrecht and the Austrian Gesetzbuch.[46] In his eyes, the bad quality of these codes was confirmation that the society of that age lacked the ability to codify private law successfully.[47] He reasoned that if these various efforts were not successful, the inability to codify must have its roots elsewhere than in the jurisprudences and the legal systems of the states and countries which attempted to do so. Rather, they must be common to the entire age, since in his view these jurisprudences and legal systems did not differ much from their German counterparts. He therefore believed that the poor quality of these codes, as he judged them, was not due to some weaknesses that could easily be improved, but lay rather in a general lack of the necessary requirements for codification at that time.[48]

The Approach of the Historical School of Jurisprudence as an Alternative to

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44 *Supra* note 34 at 45.

45 *Id.* at 49-50.

46 *Id.* at 53-54.

47 *Id.* at 108.

48 *Id.* at 109.

the Codification of Private Law

Savigny suggested that to improve the current state of the law in the German states another option should be considered, rather than the codification of private law. Legal scholars should engage in the study of the sources that underlay the currently valid law, which was predominantly Roman law. Savigny called this approach to the study of law the "historical school of jurisprudence", i.e. the thorough grounding of jurisprudence in historical legal studies. Savigny considered it suitable because in his view, Roman law was the best possible source of law and the most suitable object of study for the German scholars of law and lawmakers. This was due to its having an inner logic that resulted in an accuracy in application that made it truly excellent and led to legal certainty. He also added that Roman law was also the only existing body of law of a great people which had enjoyed a long political existence and an undisturbed national development.[49] Roman law had gradually and organically developed from within a people. The influence of legislation enacted by the authorities on the organically grown law had been modest. New legal developments had been directly linked to the established law in such a way as to permit them to benefit from its maturity and certainty. The novel was considered to be merely the servant of the old.[50]

Savigny claimed that the influence of the Roman law on the law of the German states was therefore not harmful overall, but only when the jurisprudence submitted to it in an ignorant manner. He believed that its influence would become beneficial once the lawmakers had learned how to handle the Roman law in a suitable fashion as a truly useful and flawless source of law. He presented the approach of the historical school as a tool that could help German jurisprudence to benefit from the entire legal wealth of the Roman Empire. The aim of the historical school was to trace every established legal system to its roots and thereby identify the underlying organic principles of the law. This would separate the law that was still relevant at the time from that which was outdated.[51] The law for the German states would then finally rest on a profound and exhaustive jurisprudence.[52] A basis for true progress would be created. Roman law could then be given up as a source of law. A truly national legal system based on a national jurisprudence could take its place. This would be more valuable than to simply assure the certain and fast administration of justice. It would be an intrinsic scientific value, a situation in which the law was clear and perceptible - the height of the legal development. At this point one could also consider taking steps to make provision for future, weaker times, either by codifying the law or possibly another way might be

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49 *Supra* note 34 at 28-29.

50 *Id.* at 32-33.

51 *Id.* at 117.

52 *Id.* at 130.

better – time would tell. Whether this situation would ever arise was uncertain. It depended on a number of rare and lucky circumstances. What lawyers could currently contribute in order to achieve this aim was open and honest cooperation with the approach of this historical school of jurisprudence. However, above all they should avoid destroying what would advance German jurisprudence towards this goal.[53] If codification were to be carried out then it would deprive the legal experts of the opportunity to study the historical sources of the law. No national, scientific jurisprudence would then ever develop.[54]

V CONCLUSIONS: INSIGHTS FROM THE HISTORICAL GERMAN CODIFICATION DEBATE WITH RELEVANCE FOR THE DEVELOPMENT A UNIFORM INDIAN CIVIL CODE

Although the situation in nineteenth-century Germany was quite different from that in India today, the historical German codification debate addressed theoretical issues that are also relevant to the contemporary debate on the Indian Uniform Civil Code. While Thibaut's arguments were fact-based, positivistic evaluations of the German legal institutions of his time, Savigny's arguments were theory-driven and advocate a legal policy based on principle rather than expediency and the exigencies of the current times.

In his writings Thibaut identified the most pressing institutional weakness of the legal systems of the German states and predicted how a common civil code would help to overcome these. He argued that a common code would, among other things, benefit German legal scholarship, the economy and the people as a whole. In contrast, Savigny did not directly position himself against all of Thibaut's arguments individually. According to his view, the short-term benefits resulting from the overcoming of institutional weaknesses such as legal complexity and divergences would not outweigh the long-term sacrifices of giving up a coherent, organically developing legal system.

Thibaut and Savigny's disagreement arose from their different conceptions of what constitutes law and how it develops, namely Thibaut's positivistic conception and Savigny's historical, i.e. organic conception of law. As in this historical example, different conceptions of law may also be relevant to today's discussion on the development Uniform Civil Code for India. Honouring this insight would mean recognizing these different understandings of what law is and how it is brought about. Debating matters of legal theory first, before proceeding to address concrete questions of legal policy design, could therefore help to reconcile the opposing sides in the debate on the Uniform Civil Code for India.

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53 *Supra* note 34 at 133-134.

54 *Id.* at 147.