ON THE SYSTEM OF GERMAN LAW IN F.C. VON SAVIGNY’S DOCTRINE

Olga Maratovna Belyaeva
Kazan Federal University, Institute in Naberezhnye Chelny.
E-mail: olga.beliaeva@mail.ru

ABSTRACT
The article considers the attitudes of F.K. von Savigny, the acting Minister of Justice and the professor of German law, to the impossibility to undertake codification work in Germany in the middle of the 19th century. Savigny sought to prove the fallacy of the fixed thesis that the law is created by the legislator. Law does not depend on chance or arbitrariness. The law of any people develops historically, as well as the language of the people or their customs. Consequently, the law reforms should be gradual. The legislator is competent to fix only what has already been formed as a law. The law from the point of view of the representatives of the historical school of law (G. Hugo, F. K. Savigny, F. Pukhta) is a product of the people’s spirit, popular belief, and most importantly, is a consequence of the historical experience of the people. The representatives of the historical school of law considered the judge to be higher than the legislator, and the morals and customs of society are more important than rational-speculative written laws. F.K. Savigny was right in his convictions concerning the unreadiness of German society to undertake comprehensive codification work. German Civil Code, issued at the end of the 19th century, gave rise to unfavorable criticism of the professional community, and Savigny himself entered the history of legal thought as a brilliant jurist and founder of the historical school of law.

Keywords: codification of legislation, the people’s spirit, the historical school of law, Roman law, custom, the German Civil Code of 1896, the code of laws of German law.

INTRODUCTION
Friedrich Carl von Savigny (1779-1861) is Professor at the University of Berlin, a representative of the historical school of law, the author of the concept of the gradual development of national law. At the age of 33 he became the rector of the university, where he gave lectures to C. Marx.

Savigny was a judge, a member of the State Council, and within the period from 1842 to 1848 he was serving as Minister of Justice (Legislation) of Prussia. Savigny was directly involved in the drafting of the Penal Code of Prussia and the Unified Code of German Bill of Exchange C. Savigny is often called the “Kant of jurisprudence” and even the founder of “modern German jurisprudence”, which in the first half of the 19th century replaced the old natural-legal doctrines and dealt with a systematic legal and dogmatic study of positive law, its sources, methods of analysis, the conceptual apparatus, etc., i.e., jurisprudence, later being described by great German jurist R. Iering as “the jurisprudence of concepts” [1].


METHODS
The methodological basis of the research is a set of methods of scientific knowledge among which the dialectical method takes the leading place. The article uses universal (dialectics and metaphysics), general scientific (analysis and synthesis, systemic and structural) and specific scientific methods (formal legal, comparative legal, hermeneutic).
RESULTS
Savigny denied the theory of natural law and its postulate of intelligence as the main source of law, arguing that the law is connected with the history of the people. Law is an expression of “the national spirit” (der Volkgeist), a kind of legal ideological tradition. Law is always a historical manifestation of an impersonal people’s spirit, people’s consciousness, an organic product of secret inner strength. In other words, law is not an arbitrary, subjective product of the legislator, but the result of the historical experience of the people, which often exists naturally, spontaneously, more often - protractedly and organic: “the law has a completely different origin - both under the influence of chance and human will, reasoning and wisdom”. Law is always connected with the fate of certain people and has a specificity inherent in the given people. “…This organic relationship of law with the essence and character of the people also manifests itself over time and also in this is comparable with the language” [11].

Savigny just defined the inextricable link that exists between law and national culture to be the category of “people’s spirit”. The representatives of the historical school of law, including Savigny came to the conclusion: there is no law at all, there is a historically fixed law of this or that people.

In this case, traditional law has supremacy over positive laws. Traditional law is organically connected with the common conviction of the people, is adequate to the conditions of people’s life, and therefore, is able to effectively regulate social relations [2]. The representatives of historical school considered a judge and a legal practitioner to be higher the legislation and the legislator, and the ways of life, morals and customs of the community are more important than “rationally speculative” written laws [3]. Laws, codes are only a secondary source of law in comparison with the custom and legal awareness of lawyers [4].

As Montmorency put it, Savigny interpreted the law as a living organism that is subject to natural history and obedient to a cosmic process that runs through the ages, so that law would have to grow organically together with “the evolution of races and kingdoms and tongues”. This attitude fuelled Savigny’s strong objection to the codification of laws, because if law is always the manifestation of any given society culture and tradition, then the codification of laws essentially stunts the naturalist process of organic evolution of the law [5].

That is why Savigny esteemed the codification of law always injurious and excessive - it cannot be arbitrarily imposed on the people, since it ignores the people’s legal views and makes a strike at the organic development of law [2].

Savigny stressed that it is impossible to create some new or original national law by copying and repeating Roman law. He saw the task of German jurisprudence not in fruitless copying of Roman or modern foreign law, but in the proper free and consistent scientific development of the historically legal material, as the Roman jurists used to do in their time [1].

Savigny asserted that law in its historical development goes through three stages. Initially, law arises in the minds of the people as “a natural law”. This law always has a national specificity, like language and political structure of any people. With the development of folk culture, the law becomes more complicated, it begins to live apart in the minds of lawyers - so scientific law emerges. Lawyers are not the creators of the law, but only the spokesmen of the people’s spirit, they develop legal concepts, generalizing what has already arisen in practice. And finally, the last stage in the development of law is the stage of legislation. At the same time, lawyers prepare drafts, putting them into the form of articles of the law what has already been produced by the national spirit [6]. Accordingly, Savigny distinguishes two main stages in the development of law: the stage of natural law (naturliches Recht) and the stage of the scholarly law (gelehrtes Recht). “Every law arises through a custom, that is, it follows from morals and from popular beliefs, and then from the science of law; therefore, always from internal, imperceptibly acting forces, and not from the arbitrariness of the legislator” [12].
Savigny opposed the legislative creation, believing that the legislator cannot create norms of law using one’s own discretion, his task is only to legislatively express the convictions of the people (Volksüberzeugung), the people’s sense of justice. “Positive law lives in the general consciousness of the people, and, consequently, we must also call it people’s law”. The people are the true subject of law and its creator.

Savigny declared codification to be a matter of a later stage of the development of law. The dispute between Savigny and the professor of Heidelberg University, A. Y. Thibault on the creation of the Civil Code of Germany went down in the history of German law.

In 1814, the book “On the Need for Universal Civil Law in Germany” appeared, in which Thibaut calls for the earliest possible creation of a single German Civil Code that would be based on the same rational principles as the French Civil Code of 1804 (“Code of Napoleon”) [7].

Many scholars in their articles mention of this fact. So, Luis Kutner отмечает, Germany being without a unified civil code at this time, Anton F.L. Thibaut, a professor of Roman law at Heidelberg, wrote the aforementioned book to demand that a general civil code be adopted for the nation. Under his plan, Professor Thibaut proposed that a single, unified code of laws for the German states be drafted by an interstate committee on the laws. Indulging in natural law, Thibaut assumed that such a committee of jurists and practitioners would be able to draw up a suitable code, and, further, dogmatically asserted that codification could revolutionize a legal system overnight [8].

Thus, A. Thibaut calls for the unification of German land law (Landsrecht) - the law governing in the territory of individual principalities and representing a lot of contradictory and disjointed provisions that only contribute to the disunity of the country. Which Savigny answers with the work “On Calling of Our Time for Legislation and Jurisprudence”, where he notes that the Germans “are scarcely out of the shell yet to create a code of laws” and “the striving for improving our legal status with one stroke from the top” is fraught with fatal consequences.

So, Thibaut believed that it is possible to create a national German code, which will be comprehensible for any “mediocre head”. In politically fragmented Germany Savigny did not see uniformly trained lawyers like the Roman lawyers of the time of Papinian, who could develop this code: “Therefore, the code of laws should not be created collectively, but by one author unless we want this code of laws to be purely mechanical connection, something stillborn and, therefore, absolutely useless” [9].

It is worth noting that Savigny did not deny the possibility and necessity of codification, but only after the creation in Germany of a single “organically developing legal science”. Codification is seen by Savigny as a complex and highly demanding task that cannot be carried out with the current contradictory state of the legal consciousness of legal scholars. Savigny did not want to copy the same code of France with minor amends, moreover, his attitude to this step was extremely antagonistic, because being an adherent to the historical school of law, he advocated original German national law and its self-development.

Savigny notes with indignation: “Thibaut believes that the creation of the proposed code of laws can be completed in two, three, four years and that it will not just be an auxiliary material, but a solid work that is worthy of being inherited by future generations, as a shrine, and that in the future it will be enough to make only minor corrections in it “and gives examples of such hastily codifications - the French Civil Code of 1804, the Prussian Land Code of 1794 and the Austrian General Code of 1811. In their content Savigny discovered important shortcomings, and most importantly - the constant implication of the possibility of justice to re-create the law, following the fictions of natural law, then analogy, then “legal concepts”. It was this that the main political-legal thought of Savigny’s arguments was connected with: his time is not ready for codification, and therefore, it is better not to “spoil” the old, centuries-old “folk right” [10]. Savigny writes: “The present time has no vocation to take the code”. The current low level of legal science
does not allow at the present time to create a perfect national codification from the point of view of legal technique.

Savigny notes: “Unfortunately, the entire 18th century in Germany was very meagre in the great lawyers. True, there were many diligent men who did very valuable preparatory work, but the matter rarely advanced beyond these preparatory works. The lawyer needs a twofold understanding: the historical, in order to distinctly apprehend the originality of each epoch and every legal form, and the systematic, in order to see every concept and every position in a living connection and interaction with the whole, i.e., in a relation that is the only true and natural. This double scientific understanding by the lawyers of the 18th century is extremely rare, and they were adversely affected, above all, by a variety of trivial aspirations in philosophy” [11, 12].

Savigny places responsibility for the unsatisfactory legal development of the whole epoch upon the school of natural law, the dominance of which led to the fact that Roman law in its true historical form was not taught in universities. As a consequence, exemplary methods of theoretical and practical evaluation of legal situations, perfected by Roman lawyers, were forgotten, which gave rise to the gap between theory and practice.

SUMMARY
The words of Savigny were not the ungrounded warnings - the first German Civil Code was published only in 1896, almost a century later and, despite the fact that the code was the result of long legislative developments and research, had many complaints from the legal community. Thus, the German jurist Otto Girke wrote: “It is the abstract German language of lawyers, it is rather translation than prototype, being unpopular and completely incomprehensible to the layman, it lacks strength and profundity, sensual clarity, convincing eloquence, it is often doctrinal, pedantic, in addition, it is trivial, superficial, monotonous. It must be said with regret that the character of the people’s legislation was so alien to no other code as to this one” [9].

According to Russian jurist B. A. Kistyakovsky, the dispute between Savigny and Thibault “marked the final decline of the ideas of natural law” and “led to the triumph of a new school of law - historical” [9].

For several decades of the first half-middle of the 19th century scientific traditions and problems of the historical school of law mainly determined the content of legal research in Russia as well, since the effect of German science on young national jurisprudence in the 19th century was extremely dramatic. So, in 1829 in Berlin K. Nevolin, V. Leshkov, P. Redkin, S. Bogorotsky, L. Blagoveshchensky, V. Znamensky, S. Ornatsky were sent on training to F.C. Savigny. It is historical and legal research in the 50s-60s years of 19th century with which almost all of them began their scientific activity later became famous professors (S.V. Pakhman, D.I. Meyer, I.E. Engelman, K.D. Kavelin, N.L. Duvernya, etc.). [4]. Moreover, the Russian government in 1840 awarded Savigny the Order of St. Stanislav of degree II for active participation in the preparation of Russian students.

It is also worth mentioning the influence of the German scholar on the views of the famous Russian reformer, M.M. Speransky, the latter specially came to Berlin in 1830 to talk with Savigny.

The closest followers of Savigny were well-known German jurists and writers J. and V. Grimm – the compilers of the famous “Dictionary of German Law of Antiquities” (and no less well-known collection of “Fairy Tales”), historian of law K. Eichhorn (in co-authorship with him Savigny published “The Journal of Historical Jurisprudence”). In the general philosophical sense, the aspirations of the historical school found correspondences in Schelling’s theory of idealistic “romanticism” [10].

Meanwhile, having received universal recognition in academic circles, F.K. Savigny, as a legislator, caused an extreme discontent in Prussian society. He did not accept either the equality of nationalities or
civil marriage, he minimized the number of causes for divorce, rejected the institution of the jury, defended the death penalty and corporal punishment, etc. According to the general opinion, his “moderate gradualness” in the legal resolution of the accumulated problems became a drag on the development of society” [13].

CONCLUSION
In foreign legal literature F.K. Savigny is often called to be the “king of German jurisprudence of the 19th century”. His doctrine of abstract obligations and bilateral treaties became the core of German law of obligations. Many of his ideas have not lost their relevance at this time [9]. The traditions of the historical school of law are reflected in modern legal systems (Germany, Switzerland), considering law and custom as two sources of law of the same order.

Savigny made many lasting contributions to jurisprudence that greatly influenced all the social disciplines as well. Among these contributions are included the revealing of continuity between present legal institutions and those of the past, the laying of foundations for legal sociology, and the articulating of methods for historical research [14].

Savigny is lauded as ‘the Darwin of the science of law’, because, according to its author, his achievements for ‘the science of law’ resembled the achievements of Charles Darwin for the ‘science of biology’ [15].

In the second half of the 19th century the historical school of law loses its leading positions in science and is replaced by legal positivism, normative theory of law and the theory of violence. The final blow to the historical law school was delivered by R. von Iering and his realistic theory of law, which assigns the primary role in creating the law to the legislator. Iering describes the historical school of law as follows – “seeing the salvation of jurisprudence in the philological study of antiques, being alien to any philosophy and trying to restrain the free development of modernity in order to perpetuate the once-existing situation” [16]. “The activity of the historical school was limited and is limited only to the historical and dogmatic processing of laws that are valid in Germany, namely, Roman and German private law; it did not become a universal history of law and the philosophy of school” [16].

ACKNOWLEDGEMENTS
The work is performed according to the Russian Government Program of Competitive Growth of Kazan Federal University.

REFERENCES

Augusto Zimmermann. The ‘Darwin’ of German legal theory—Carl von Savigny and the German School of Historical Law. PAPERS || JOURNAL OF CREATION 27(2) 2013. P. 105-111.