Asesorías y Tutorías para la Investigación Científica en la Educación Puig-Salabarría S.C.
José María Pino Suárez 400-2 esq a Lerdo de Tejada. Toluca, Estado de México. 7223898475
RFC: ATI120618V12

Revista Dilemas Contemporáneos: Educación, Política y Valores.
http://www.dilemascontemporaneoseducacionpoliticayvalores.com/
Año: VII Número: 2 Artículo no.:108 Período: 1ro de enero al 30 de abril del 2020.

TÍTULO: La idea del historicismo y la teoría de la ley natural en las enseñanzas de F.K. von Savigny.

AUTOR:

1. Pas. Sc. Denisov Anton Mikhailovich.

RESUMEN. El artículo analiza la idea de la historia como una forma especial de desarrollo, que incluye la actividad de autoconciencia pública; se observa que se presentó por primera vez en los conceptos de G.V.F. Hegel y F.K. von Savigny. El principio del historicismo, introducido por F.K. von Savigny en las ciencias jurídicas, le permitió acercar lo más posible el derecho natural y el derecho positivo, que interpretó como dos momentos en el desarrollo histórico del "espíritu popular universal" y la justicia popular.

PALABRAS CLAVES: Savigny, Hegel, historia, derecho natural, derecho positivo.

TITLE: The idea of historicism and the theory of natural law in the teachings of F.K. von Savigny

AUTHOR:

1. Sc. Intern. Denisov Anton Mikhailovich.

ABSTRACT: The article analyzes the idea of history as a special form of development, which includes the activity of public self-awareness, it is noted that it was first presented in the concepts of G.V.F. Hegel and F.K. von Savigny. The principle of historicism, introduced by F.K. von Savigny

in legal science, allowed him to bring as close as possible natural law and positive law, which he interpreted as two moments in the historical development of the "universal popular spirit" and popular justice.

KEY WORDS: Savigny, Hegel, history, natural law, positive law, people, state.

INTRODUCTION.

The border of the XVIII - XIX centuries became a watershed in the history of science. The former metaphysical or empirical method of cognition is being replaced by sophisticated methods of system research, which involve constant reflection on the very method of scientific thinking, suggesting constant reflection of the scientist on the methods and goals of scientific knowledge. Therefore, it is no coincidence that all attempts to modernize scientific knowledge included the methodological problems as their main element. The science of state and law was no exception. The prevailing over the centuries paradigm of natural law in this era was already perceived as a deep anachronism.

Among the theoreticians of law, there was an ideological struggle over which path jurisprudence would choose for its development, what should be the main supporting elements of the methodological constructions of theoretical and legal knowledge. Therefore, it was not a coincidence that a noticeable and influential trend was distinguished in the theory of state and law, which made the main emphasis on the realization in the legal knowledge of the idea of historicism, which formed the paradigm of legal thought, alternative to the dominant paradigm of the social contract that prevailed in the modern era, as well as to the legal thoughts paradigm of natural law [Maslennikov DV (2015), p. 43].

Nevertheless, although the theory of natural law itself no longer plays in the teachings of F.K. von Savigny of the system-forming role, it is preserved in the peculiar interpretation that the great

German jurist gave it, first of all, taking into account the most important idea of historicism in law for him.

DEVELOPMENT.

Research methodology.

In the process of cognition of state-legal phenomena were used:

a) General scientific methods (formal-logical, systemic, structural-functional, concrete-historical).

b) General logical methods of theoretical analysis (analysis, synthesis, generalization, comparison, abstraction, analogy, modeling, etc.).

c) Private scientific methods (technical and legal analysis, specification, interpretation, etc.)

Study results.

It should be noted that the idea of historicism, so significant for the legal doctrine of F.K. von Savigny, entered the circle of basic concepts of the theory of state and law rather late. First expressed by the ancient Greek scientist Polybius (albeit taking into account the specific antique understanding of history and historicism as a cyclic process), it remained on the periphery of political and legal thought for centuries so that already at the beginning of the 19th century under the influence of an impulse that gave it half a century earlier Sh .-L. Montesquieu, to become one of the dominant ideas in the theory of law, the civil society and the state [Denisov A.M. (2017), p. 18-20].

Entry of the idea of historicism into the circle of basic legal concepts of the 19th-20th centuries was caused by objective trends in the historical development of legal theory and the general direction of the movement of philosophical thinking at the beginning of the 19th century. But its exceptional popularity at this time was largely due to the fundamental nature of scientific work and high authority in the legal scientific community F.K. von Savigny [Denisov A.M. (2018), p. 19-24].

At the beginning of the XIX century, the idea of historicism had the character of a real scientific discovery. Its establishment in philosophy (F.V.J. Schelling and G.V.F. Hegel), in the sciences of nature (P.-S. Laplace) and in the sciences of society were perceived as a real scientific revolution after centuries of dominance in the science of a metaphysical approach. The latter was alien to the idea of all development, and therefore, the development of society, i.e. stories.

The Age of Enlightenment in the person of S.-L. Montesquieu, J. Vico and I.G. Herder pointed to the need for an appeal to history as opposed to the established “dictatorship” of reason, from which the 17th-century metaphysical thinking attempted to deduce the basic principles of social interaction, the norms of morality and law. But enlighteners only in the most general form raised the question of the need to take into account historical material, but at the same time they did not take into account the specifics of history itself as a special form of development.

The idea of history as a special form of development, which includes the activity of social consciousness, was first presented in the concepts of G.V.F. Hegel and F.K. von Savigny. Such a content was unfamiliar neither to the public thought of the Enlightenment, nor even to the earlier legal science. First of all, G.V.F. Hegel developed a universal dialectical concept of development, extending it to social processes. The concreteness of the doctrine of the unity of the universal and the special in history allowed Hegel to uncover the dialectics of the absolute value principle of law and historically variable in law. In contrast, F.K. von Savigny was forced to introduce into the theory of law an irrational element - the concept of “national spirit”. With all the profound conceptual differences in the concept of “national spirit”, F.K. von Savigny and G.V.F. Hegel (in whom it was also present) is common in their political and legal concepts that the historical process of law is interpreted by them not only as a prerequisite for the formation of law, but also as its internal content.

According to F.K. von Savigny, the relation of law as a system of norms to the national spirit as the fundamental principle of these norms is mediated by the process of the historical development of the legal consciousness of the people. F.K. von Savigny believed that the fullness of law as a kind of "substance" of norms is embodied in popular justice. The law is contained in it as if in a convoluted form and only needs a purely external detection and consolidation of its norms. The government is called upon to fulfill this task, carrying out legislative activity in the process of its interaction with society.

It seems that it was F.K. for the first time in the history of political and legal thought, von Savigny emphasized the role of legal awareness in the emergence, reproduction and development of positive law, paving the way for future sociological and socio-psychological methods of explaining law. However, F.K. von Savigny remains alien to the dialectical approach that we find in the "Philosophy of Law" G.V. Hegel and who allowed the latter to outline ways to resolve historical and logical contradictions, eternal and temporary, secular and religious in law [Gusev O. V., Maslennikov D. V., Revnova M. B. (2017), p. 11-14; Maslennikov D.V., Revnova M.B. (2018), p. 20-24]. It is this dialectic that enabled the author of the "Phenomenology of the Spirit" to show how the externally unconnected combines: the historical development of law and the absoluteness of law, the artificiality of positive legislation and the eternity of legal values. At F.K. von Savigny, on the other hand, only historically variable in law lends itself to rational interpretation. It is a question of eternal, temporal and supra-historical in law, F.K. von Savigny has no choice but to introduce irrational constructions ("folk spirit") into the fabric of legal theory.

F.K. von Savigny first of all opposed the traditional theory of natural law, which, as the scientist believed, was deduced from the individual mind, and therefore could not have the qualities of universality and necessity. Already in his first programmatic work of 1814, "On the calling of our time to law and jurisprudence," dedicated to criticizing the concept of A.F. Thibault, F.K. von Savigny strongly rejects the claims of natural law theory to dominate legal science. The German

lawyer contrasts this approach with the experience of Roman law, for which there was no gap between legal theory and legal practice. Even more than that: there was no gap between the universal and the special, F.K. von Savigny [Savigny F.R. (1814), p. 89-91], thus moving to the highest level of scientific generalization.

Any general provision of Roman law, which we can consider as a general theoretical definition, was the norm of practical action. And vice versa: legal practice was constantly subjected to scientific reflection and theoretical reflection. If A.F.Yu. Thibault believed that the general German civil code could be created on the basis of the general requirements of the theory of law, based on the provisions of natural law, which in turn were deduced in the Kantian spirit through pure reason, then F.K. von Savigny, on the contrary, considered such an approach impossible. The theory should, like Roman lawyers, go hand in hand with legal practice.

On the critical attitude to the principle of universality of natural law F.K. von Savigny wrote an outstanding researcher of his work P.I. Novgorodtsev: "According to his main statement, the content of law is revealed in history, in the process of objectification of the national spirit, and it should be deduced from here. It seems to him data for reason and not subject to subjective discretion. But this historically given right was exactly opposed to them by the arbitrariness of the rulers, as was the natural law of the former philosophers. Here, we come again to the main motive of the views aspiration, from which all the essential features of his theory are explained. To raise the moral significance of the historical order - such was the dominant goal of its constructions ... The polemic with natural law, which attacked the positive because of the absence of moral elements in it, made us strive to first of all pay attention to the moral justification of positive institutions" [Novgorodtsev P.I. (1999), p. 84 - 85].

Natural law, believed F.K. von Savigny, in the previous legal science, was deduced from the individual mind (deduction is a logical method of deriving particular ideas from a general principle or from a general idea), and therefore could not have the qualities of universality and necessity. On

the contrary, the universal mind, embodied in the national spirit as its own kind of "internal substance", contains the entirety of the ideas of law recognized by the people and legitimate for them.

At the beginning of the XIX century, criticism of the "deduction" of natural law from the individual mind was fully justified in response to the new European epistemological models of law, both in their rationalistic and empirical interpretations. However, it clearly hit the mark when it came to ancient natural-legal teachings that deduced law from a universal objective idea (in any version of Platonism). And also, if we were talking about German classics, who designed I. Kant and I. G. in scientific works. Fichte, and later F.V.Y. Schelling and G.V.F. Hegel, the "absolute subject-object", not reducible to the definitions of individual reason, but introduced into scientific circulation the idea of knowing the universal foundations of historical forms of law.

At the same time, one cannot but recognize witty criticism of the theory of natural law F.K. von Savigny, who revealed its similar nature with a purely positive and purely rationalist view of law. In fact, if we recognize the individual mind as the only source of legal norms, it doesn't matter much: it confirms the norm directly as a legislator, or at first it formulates them as postulates of natural law.

According to F.K. von Savigny, the legislator should observe the development of the legal life of the people and fix as a norm those forms of legal relations that are developed in the historical process. The German scientist to the greatest extent anticipates the modern understanding of the essence of lawmaking [Komarova T. L., Revnova M. B. (2012), p. 25-27]. The value of the creativity of the legislator, according to F.K. von Savigny, consists in the fact that he eliminates the uncertainty in the law, which is contained as a result of historical development, not clarified and not fixed by law. In addition, historically emerging new legal institutions may conflict with those that arose earlier. And this conflict should also be taken into account in the activity of the legislator and timely eliminating it. Thus, the intervention of the legislator in the element of the historical

formation of law is not only permissible, but also necessary from the point of view of the interests of law itself. The written norms adopted as a result of legislative activity record the achieved result of the development of law, although at the same time, as F.K. von Savigny, slow down the process of this development.

The forms in which the law that arises in the bowels of the national spirit is initially institutionalized are, according to F.K. von Savigny, habitual usage and "customary law", i.e. customary law. These forms are fixed primarily in the norms of morality and in the foundations of the popular faith. That is, initially they are everywhere recorded as some "quietly acting" forces, but never - as the arbitrariness of the legislator. The activity of the legislator, if it does not follow the development of the national spirit, can be useful and necessary only in those cases, when due to certain historical reasons, the historical process of the formation of law is slowed down or significantly distorted. This can happen due to the crisis conditions of society, its degradation, disintegration, decline in the moral forces uniting the people and the domination of individualism over them. In this case, the activity of the legislator, establishing laws, based on previous historical experience and the prevailing forms of reflection on the content of legal life, is an undoubted historical good.

According to F.K. von Savigny, law has already been fully given in its original form of positive public justice, it is not the fruit of arbitrary institutions, but needs further development of its form. This development can be realized only through the interaction of this kind of public law-making with the legislative activity of state power. But unlike the supporters of the natural law tradition, F.K. von Savigny does not try to disclose the content of "positive law" embodied in public justice as a set of any natural laws or norms. For him, this "right", although it has objective content, but this consideration takes on a concrete form only through its cutting in the activities of the legislator. If we try to perceive it by itself, as a fact of the historical process, then it will appear to us as something purely irrational in nature.

F.K. von Savigny, wanting to get away from arbitrary idealistic conclusions of the supporters of natural law, in which he rightly saw subjectivity, contrasts the natural law with the positivity of the historically given public consciousness. At the same time, he paradoxically comes to the conclusion that he affirms the irrational nature of the most positive law. Of course, he achieves his main goal, which was to get away from the idea of law as the result of the subjective activity of the legislator or the interpreter of natural law. The price he had to pay for this goal led him only to a more consistent and frank idealism in the interpretation of law.

State F.K. von Savigny interprets as "the bodily image (Gestalt) of the spiritual unity of society." The “Gestalt” lexeme used by him has many aspects in scientific German speech. It can also be interpreted as a prototype or as a “phenomenon”, if we use the expression of Goethe, for similar series of phenomena. It is no coincidence that F.K. von Savigny further stipulates that in the image of the state, the unity of society that is not given in the feelings takes on the features of something sensual. The aforesaid F.K. von Savigny extends to law: in the purely spiritual unity of society, law exists only as “living contemplation” and does not acquire conscious logical forms, but only in the state does law find its life and its reality. At the same time, the state itself cannot yet guarantee the validity of law, since the state is only an “image” of the social essence from which law grows.

So, according to F.K. von Savigny, non-state nature, but cannot exist without the state, being outside of it something incomplete because only in the state does it find its full “image”. "Law" and natural law appear as interconnected entities. Natural law originates in the depths of the national spirit, living social unity, but only in the system of laws, i.e. in positive law, taken in its historical development, positive law receives its final and actual embodiment.

CONCLUSIONS.

In conclusion, we note that according to F.K. von Savigny, the universal mind embodied in the "spirit of the people" as its inner substance, contains the entirety of the ideas of law recognized by the people.

The significance of the work of the legislator lies in the fact that it eliminates the uncertainty in law, which is contained as a result of historical development, not clarified and not fixed by law. The written norms adopted as a result of legislative activity record the achieved result of the development of law, although at the same time, as F.K. von Savigny, slow down the process of this development.

Offering such an interpretation of the relationship between the principle of historicism and natural law, F.K. von Savigny seeks to connect in a unified theory the beginnings of necessity and the truth of law, the reality of the state and the realism of legal norms. Ultimately, he seeks to achieve a concrete unity of legal value and legal reality, without opposing each other the form and content of law. According to his basic tenets, this can be achieved only by turning to the philosophical and legal method of understanding the historical process. It is the latter, according to F.K. von Savigny, is a valid justification of the fundamental concepts of law, in a universal way explaining the relationship of law, state, individual and society.

BIBLIOGRAPHIC REFERENCES.

(In Russian).

1. Gusev O.V., Maslennikov D.V., Revnova M.B. Tserkov' i dukhovnyy smysl prava // Yuridicheskaya mysl'. – 2017. – № 1. – S. 8-14.

2. Denisov A.M. Ucheniya Montesk'ye i Russo kak teoreticheskiye istochniki printsipa istorizma v pravovoy teorii // Mir politiki i sotsiologii. – 2017. – № 1. – S. 18-22.

3. Denisov A.M. Zhizn' i nauchnoye tvorchestvo F.K. fon Savin'i // Yuridicheskaya mysl'. – 2018. – № 3. – S. 19-25.

4. Komarova T.L., Revnova M.B. Pravotvorchestvo kak forma gosudarstvennoy deyatel'nosti // Yuridicheskaya mysl'. – 2012. – № 2 (70). – S. 25-28.

5. Maslennikov D.V. Pravo kak forma razlicheniya dobra i zla // Yuridicheskaya mysl'. – 2015. – № 6. – S. 42-47.

6. Maslennikov D.V., Revnova M.B. Otnosheniye religii i gosudarstva v filosofii prava G.V.F. Gegelya // Yuridicheskaya mysl'. – 2018. – № 1. – S. 20-25.

7. Novgorodtsev P.I. Istoricheskaya shkola yuristov, yeye proiskhozhdeniye i sud'ba. – SPb: Lan', 1999. – 192 s.

8. Savin'i F.R. Professiya nashego vremeni dlya zakonodatel'stva i prava. – Geydel'berg, 1814. – 162 s.

(In English).

1. Gusev O. V., Maslennikov D. V., Revnova M. B. (2017) Church and the spiritual meaning of law // Legal Thought. No. 1. P. 8-14.

2. Denisov A.M. (2017) The teachings of Montesquieu and Rousseau as theoretical sources of the principle of historicism in legal theory // World of Politics and Sociology. No. 1. S. 18-22.

3. Denisov A.M. (2018) Life and scientific work of F.K. von Savigny // Legal Thought. No. 3. S. 19-25.

4. Komarova T. L., Revnova M. B. (2012) Lawmaking as a form of state activity // Legal Thought. 2012. No. 2 (70). S. 25-28.

5. Maslennikov D.V. (2015) Law as a form of distinguishing between good and evil // Legal Thought. No. 6. P. 42-47.

6. Maslennikov D.V., Revnova M.B. (2018) Relation of religion and state in the philosophy of law G.V.F. Hegel // Legal Thought. No. 1. P. 20-25.

7. Novgorodtsev P.I. (1999) Historical School of Lawyers, its origin and fate. St. Petersburg: Doe. 192 s.

8. Savigny F.R. (1814) A profession of our time for law and law. Heidelberg, 1814. 162 p.

DATA OF THE AUTHOR.

1. **Anton Mikhailovich Denisov**. Graduate student of the Law Institute (St. Petersburg). E-mail: denisov@lawexp.com

RECIBIDO: 17 de diciembre de 2019 **APROBADO:** 27 de diciembre del 2019.