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PROBLEMATIZATION OF MORAL JUSTIFICATION OF LAW IN THE HISTORICAL SCHOOL OF LAW

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Abstract

The purpose of the study is to update the informative potential of the historical school of law in order to put forward the problem of the absoluteness of core moral postulates in culture. For this, it is proposed to compare moral intuition with the analysis of the legal theory of the historical school of law, wherein original ideas essentially changing the vector of moral research have been developed. The author takes into account the fact that the universality of morality and its ability to evaluate a certain type of behavior as moral, using the criteria of its perception as proper-improper, is recognized not only in natural law, but in positivist theories of law as well. Giving law a worthy place alongside morality, representatives of the historical school of law refused to consider morality as a source of formation and evolution of law. Such perspective helps to look at the nature of legal imperativeness from a different angle, since it liberates law from value judgments and any connotations of objective morality. The scientific novelty of the research consists in the approach to the analysis of the relationship between the formal-legal field and the moral domain on the basis of the positive law characteristic features. The findings indicate that, in the historical school of law doctrine, law shares general goals with morality, but it has its own importance and does not need moral qualifications or moral assessment.

Keywords: Historical school of law, law, morality

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1. Introduction

Over the past decades, complex, intense and vigorously debated activity related to the search for a new type of law understanding has been carried out in the domain of Russian jurisprudence. It has been a matter of creating a theory that would synthesize historical experience and contemporary legal knowledge and, finally, allow for answering the question of what the law is. In the context of competing theories claiming to be fundamental ones, the positive jurisprudence and the natural-law doctrine have come to the fore, as they did hundreds of years ago. At the same time, researchers still aspire to derive an absolute, i.e., single and universal, concept of the law which would imply developing an integrative theory that unites all other types of law understanding.

The research of many Russian scholars is developing in this direction. Thus, Romashov (2005) suggests considering "realistic positivism" as an integral type of modern jurisprudence; Ovchinnikov (2004) develops legal hermeneutics; Polyakov (2016) suggests a communicative theory of law. This list of scholars can be continued. It should be noted, however, that the creation of an integrative theory is an extremely difficult task, primarily due to the deep interpenetration of law and other social spheres. The most important obstacle to transformations sought in the theoretical and legal field is the problem of morality and law.

As for the historical school of law (Gustav Hugo (1764–1844), Georg Puchta (1798–1846), Friedrich-Karl von Savigny (1779–1861)), it has, oddly enough, fallen out of the contemporary scientific debate, and, in fact, does not participate in the process of creating a new image of the law. Hence, the question arises: "Why has this doctrine become an orphan in contemporary conditions?"

2. Problem Statement

In the course of our research, it seems important to point out two possible reasons that determined the position of the historical school of law in contemporary jurisprudence. Firstly, it is the theoretical uncertainty of the basic concepts underlying its theory. It is related, particularly, to the understanding of the law whose substance is the mythical and irrational "national spirit". Secondly, in the age of victorious liberalism, when the majority of modern legal theories are declaring the idea of human rights as the law-establishing one, their claims to the status of a universal, true for all cultures, and unconditional basis of civil and political existence are absolutely incompatible with the idea of the unique singularity inherent to the legal reality of each individual national culture, recognized by the historical school of law.

3. Research Questions

The list of grounds for depriving the historical school of ability to influence contemporary legal debate shows, in our opinion, not so much the weakness of its initial provisions, but rather their special originality. The most general impression that emerges after reading the texts of this school is as follows: this theory has managed to escape from the grip of confrontation and struggle between natural law and positivist theories. As a result, morality has been separated from law and expelled into spaces where,

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existing autonomously, it may pursue the goals common with those of law, but employ resources and mechanisms that differ from it.

Let us focus on those provisions of this theory which argue in favor of the theoretical consistency of the propositions mentioned above.

4. Purpose of the Study

4.1. The first thesis. The Organic Doctrine of Law.

Defining the objectives of the research, first, it is necessary to understand the meaning of the "organic doctrine of law" developed by the scholars of the historical school. In his study "The Historical School of Lawyers", Novgorodtsev (2010), a Russian philosopher, jurist, and a well-known critic of the historical school of law doctrine, puts a special emphasis on the significance of this concept's role in solving moral and legal problems: "If this view could be justified historically and philosophically, it would, of course, be able to fundamentally undermine the idea of natural law" (p. 84). Thus, by this statement, Novgorodtsev defines the vector of our progress towards the goal: to prove the self-sufficiency of objective law is only possible through the justification of the truth of the original precepts of the historical school of law, particularly, of the organic doctrine of law.

According to this doctrine, law is an organic product of historical development, and in this sense it acquires the highest authority and becomes equally inviolable for both society and government. All the theories that had previously existed considered law as a necessary tool for the optimal solution of the problems which are faced by a society represented by the government. Representatives of the historical school stand for the opposite view: society itself owes its existence to law as a determining factor in the consolidation of society as a cooperative enterprise.

The reasoning of the historical law school representatives shows that these thinkers have been able to make use of the dynamic aspect of social reality to the fullest extent in their theoretical constructions. Since the time of Aristotle, it has been known that none of the entities, whether it is the natural world or the social world, abides in eternity; any individuality is changeable, transient and temporary. In Russian philosophy, this idea was first formulated by N.Y. Danilevsky, who gave this powerful social philosophy trend of the end of the 19th century the opportunity to hold on. These views were further developed in the works of K.N. Leontiev, Spengler, A. Toynbee. Cultures are born and die, their stay in history is not eternal, but the very fact of their existence manifests their ability to resist those changes that will take over the ethnos, ultimately contributing to its death.

In the study of Savigny (2011), this function is assumed by law. It is the law that has the "anchoring power" giving stability to the "continuing existence of people" (p. 283). Taking root in society through legal beliefs and forming social structure and order, the law itself is constantly changing, but, in changing, it remains faithful to the basic principles that are objectively necessary for the survival of a particular ethnic group. The change of law, according to Savigny (2011), "is subject to the same law of emergence from internal force and necessity, which does not depend on chance and individual will, as well as the original emergence itself" (p. 283). This also applies to the emergence of the state: "The

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creation of the state is also a kind of the creation of law, or, rather, the highest stage of the creation of law in general" (Savigny, 2011, p. 287).

This conclusion is supported by the doctrine of the "national" as a source of historical manifestations of people's life. By its very manifestation (materialization) the institutions of law are obliged to the creative power of "national spirit". Thus, the people are by no means a passive executor of legal requirements, blindly fulfilling the will of the sovereign, but, on the contrary, they act as highly interested and active creators of legal reality, preserving and protecting their right as a guarantee of their own existence and rootedness in society. It is the "national spirit" that carries the function of "forming" and "retaining" law as "the supreme necessity, the formative force coming from within" (Savigny, 2011, p. 287).

4.2. The second thesis. Rejection of a volitional approach in interpreting law

Representatives of the historical school of law were the first to draw attention to the fact which had been previously ignored, and is still frequently disregarded, in contemporary jurisprudence: law, both public and private, does not imply a will-based source of its formation. Law develops beyond agreements and orders, in line with the course of circumstances, like language and mores. Indeed, the language is neither given to people by God from the very beginning, nor it is established by any agreements. The language is formed by itself. The same is with law. It develops and evolves together with the people, and dies with them, as soon as the people lose their identity. Gustav Hugo, and later Savigny, do not go beyond this conclusion, and, furthermore, affirm that this is the basic principle of the origin and formation of law, in contrast to the sources of its origin, accepted in the natural-law and positivist schools.

So, the law has an objective character. It is not created, but rather reproduced, i.e., it always exists. And the reaction of social agents to this "exists" can be of diverse kinds, including a conflict.

In modern sociology, such ideas resonate with the main theoretical provisions of N. Luhmann's legal doctrine. According to Luhmann, the legal system is not a set of norms, but a way in which law creates itself based on itself (self-reproduction) (as cited in Litvinova, 2007). In her study "The features of N. Luhmann's sociology (on the example of the subject area of law)", Litvinova (2007) draws attention to one of the lectures in which a well-known sociologist defines law as a "structure" for the permanent occurrence (Domestication) of conflicts (p. 14). Moreover, according to Luhmann, law is given the function of legitimizing conflicts. The possibility of conflicts is inherent in the very structure of legal norms – in the sanctions provided for by the norms (as cited in Litvinova, 2007).

However, modern socio-political and legal theories are mainly based on a different methodological attitude, whereby "the vital matter of political philosophy is war, whereas a similar matter of the philosophy of law is peace" (Riker, 2005, p. 12). In this context, law is focused on the implementation of both short-term tasks, e.g. the resolution of short-term conflicts; and long-term goals, e.g. to promote social peace. Such a picture of reality also defines the main goal of law – "coercion to peace". If this is the case, then the law's beginning is indeed based on a will, regardless of whether it is aimed at changing the established order, due to particular considerations conditioned by local circumstances, or, in its criticism, it relies on the need to find universal moral foundations. The very existence of conflicts in this case indicates that people have an inherent desire to morally criticize positive institutions. This explains

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the persistence of natural law theories. Of course, it is not to be said about minor and unimportant contradictions between the law and life, rather about major conflicts between the positive order and the moral consciousness. “It was from these conflicts that the doctrines of natural law commonly developed…As we can see, it is a reaction of moral consciousness against positive impositions” (Novgorodtsev, 2010, p. 12).

Savigny revolts against this understanding of the law. The volitional approach restricts the role of law to an exclusively negative function – the struggle against the deviations from ideal concepts, which is fundamentally wrong. Those who think so, proceed from the concept of injustice, which is supposed to be eliminated by law as an intolerable evil, for the sake of true freedom. However, if that were the case, if an ideal peace were to be established, the law would have to disappear “Thus, putting the negative at the forefront”, Savigny (2011) writes, “they act as if to know the laws of life we would have to base on the condition of the disease. The state seems to them to be a kind of necessary defense that could disappear as unnecessary if a fair way of thinking prevailed ...” (p. 457). In fact, the main function of law is positive: it sets the boundaries within which an individual acts without interfering with others. Through these boundaries, “the existence and efficiency of each individual acquires a secure, free space... a separate will is allotted an area in which it should dominate independently of any other will” (Savigny, 2011, p. 456).

5. Research Methods

The study employs a comprehensive methodology combining elements of the historical genetic approach and system analysis.

6. Findings

According to the organic theory of historicists, people come into contact with law when they find themselves in the world of normative requirements and role expectations. The most consistent expression of this idea was in the E. Durkheim’s sociology. Society is infinitely superior to the individual, both in time and space, so, according to Durkheim (1995), it is able to impose on an individual patterns of actions and thoughts sanctified by its authority. This coercion applies to everyone, and is the hallmark of social reality. In Durkheim's (19955) terminology, society is an objective fact, or “social fact”, with the characteristics of superindividual reality. As for the cause determining this social fact, it should be sought among the preceding social facts and not in the states of individual consciousness.

Although the application of E. Durkheim’s rule to the interpretation of the historical school doctrine might not remove the question of the confrontation between what is and what is due in law, it suggests, at least, some significant adjustments to solving this question. We judge on what is due by what exists. Therefore, criticism of the existing phenomenon does not make sense from the point of view of moral ideals and goals that are not implemented in reality. The true foundations of criticism are rooted not so much in the determined discrepancy between reality and its fictional ideal models, but in the recognized deviation from the existing social standards of what is due. Representatives of the historical school of law noticed one of the essential weaknesses of both the natural law doctrine and the theory of positive law – a speculative interpretation of the genesis of both the existence and the law.

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In the History of Roman Law, Savigny (2011) writes: “Law should by no means to be understood as if it is created by the will of individual members of the people, for such an individual will might have chosen the same law by chance, but it is more likely that it would have chosen something different” (p. 282). It is safe to say that Durkheim’s thought develops in the same direction. Addressing the members of the French Philosophical Society, the sociologist says the following: “Rights and freedoms are not intrinsically inherent in the nature of the individual as such. Analyze this individual empirically, and you will not find in him the sacred character which he has been endowed with and which has assigned him certain rights” (Durkheim, 2002, p. 27).

7. Conclusion

Interpreting the formation and life of legal norms and institutions as a certain objective course of things, representatives of the historical school of law excluded the possibility of moral influence on law. With regard to morality, they came to the conclusion which is precisely expressed by Novgorodtsev (2010): “If the normal development of law occurs under the influence of internal organic forces, then human intervention in this natural process should be recognized as illegal” (p. 10). The power of law is determined by its main function and stems from its ability to introduce the existence of free beings within certain limits. These beings should contribute to, and not interfere with, each other in their development.

The ideal of objective law in this case is the expansion of its sphere of influence and the unconditional expression of its inherent internal principle. Savigny (2011) calls for a distinction between the requirements of justice, which are arbitrary and subjective in their basis, and the requirements of public interest. Recognizing the kinship and difference between law and morality, the scientist recognizes that law serves morality, but not by fulfilling its requirements, rather by ensuring the free manifestation of the moral force inherent in each individual will.

In fact, we do not mean any kind of ministry here. The concept of force in law has a purely legal meaning, not a moral one. Pukhta (2010) pays special attention to this point. “A person is therefore a subject of law,” he writes, “because he/she has the above-mentioned possibility of self-determination, he/she has a will" (p. 430). And he writes further: “The relation of the will as a force to an object is its subordination, resulting in domination over it” (Pukhta, 2010, p. 432). At the same time, the moral quality of this domination itself is not taken into account. “For example,” continues Pukhta (2010), “the legal power over a thing in the form of ownership should be recognized, even if the owner used this thing for morally evil purposes... " (p. 432). This means that law has a common meaning and is recognized by everyone, it applies a single scale to competing parties and gives everyone the opportunity to take place in their dignity - to be the owner, the master of something. Dignity is already a moral characteristic, but it can be found only in the legal coordinate system. That is why law itself, in addition to the moral qualification, has its own inherent meaning, and has a quality value recognized by morality.

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