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A Philosophical and Historical Analysis on Peculiarities of the Conception of Law in Russia in the Second Half of 19th – Early 20th Centuries

**Sergey A. Khrapov¹, Elena V. Saveleva², Anna N. Haritonova³,
Tatyana V. Goverdovskaya⁴, Dina R. Kripakova⁵**

Abstract

Minds of many scientists are occupied with the issue of a need to formulate new theoretical approaches to defining the essence of law in the environment of extensive and dynamic changes in the conception of law. Scientific literature contains different handlings of the legal theories on the issue of the essence of law, belonging both to the past and present. The authors propose to implement universal logical principles of scientific theorization, developed in science studies, in the modern theory of law to create a human-centered scientific legal theory that is sought after by jurists.

Keywords: Law, Conception of law, Scientific theory, Legal consciousness.

¹ Astrakhan State University, 20a, Tatishev St., Astrakhan, 414056, Russia.

² Astrakhan State University, 20a, Tatishev St., Astrakhan, 414056, Russia.

³ Astrakhan State University, 20a, Tatishev St., Astrakhan, 414056, Russia.

⁴ Astrakhan State University, 20a, Tatishev St., Astrakhan, 414056, Russia.

⁵ Astrakhan State University, 20a, Tatishev St., Astrakhan, 414056, Russia.

Introduction

The issue of the nature of the law has concerned philosophers and jurists of all times. The essence of the answer to it reflects the worldview pertaining to a certain level of reality cognition and recorded in the system of philosophical and legal categories, typical of the given epoch and mentality. It is known that Russian mentality has a specific character obviously reverberating through the system of state legal relations [2]. To date, neither Russian, nor foreign legal science has framed a consolidated idea of law and many issues concerning the conception of law remain eternal and unvarying [8].

I. Development of the idea of the conception of law in Western-European philosophical tradition

We can state that the main trends in the conception of law in Western-European legal and philosophical studies were natural law, statism, the historical and sociological approaches to the understanding of law. Natural law advocates differentiated true natural inherent law and the law imposed by the state and opposed these laws to each other. Having emerged in Ancient Greece, the concept of natural law becomes fully devoid of all the religious implications typical of Thomas Aquinas's works, attaining features of secularism, individualism and radicalism in the works by main ideologists of the concept – I. Kant and J. J. Rousseau – in the 18th century. Acknowledging inalienable people's sovereignty and personal freedom, natural law proponents have differences concerning the essence of this freedom that can arise from mind, moral requirements or common will.

In contrast to the advocates of the concept of natural law, the ideologists of legal positivism or representatives of statism identified law and state commands, emphasizing the leading role of state in lawmaking. John Austin contended that law consists of four elements – commands, sanctions, duties and sovereign. Neither ethic, nor moral categories, nor fairness and sensibility assessments apply to the nature of law – they are just a misleading factor. Hans Kelsen reduces all legal activities to the ability to interpret the rules of law correctly within their hierarchy: from the constitution to legal precedents and deals of legal subjects. The main drawback of this theory lies in the isolated consideration of law without reference to ethic categories, thus giving way to state abuse of power, and to objective consistent patterns of the development of state and society. Friedrich Carl von Savigny, Georg Puchta, Gustav Hugo disputed the existence of single common law that the natural law proponents proclaimed. They believed that each ethnicity has its own law developing through time with the establishment of customs and traditions. The historical school representatives were the first to draw jurists and lawmakers' attention to the necessity of taking into account cultural, historical, national, religious, climatic and territorial peculiarities of an ethnicity under discussion and it can be rightfully seen as their main achievement.

II. Development of the idea of the conception of law in the second half of the 19th – early 20th centuries

In the late 19th century Rudolf von Jhering, Leon Duguit, Francois Geny and Eugen Ehrlich, who were influenced by modern science, developed a new sociological idea of the conception of law. According to this theory, the emergence of law is directly influenced by real creative law execution and implementation, as well as the process of filling in legal gaps by legal subjects. Consequently, the state is to consolidate the existing rules of law, after studying social relations.

It was in the late 18th century when I. Kant wrote his "Groundwork of the Metaphysics of Morals" (1797). There he had all reasons to state that a request "to define law can be confusing for a jurist if he wants to avoid tautology or refer to something that is validated by rules of some country without giving a universal answer to the question asked" [6]. A century later, in the late 19th – early 20th centuries, a renowned jurist Rudolf von Jhering speaking about the issues of the conception of law also stressed that they remain unanswered and it is not clear enough what can be called law. He wrote in "The Struggle for Law" (1908):

“The term ‘law’ is known to be used in two meanings: objective and subjective”. In the first case law is understood as a complex of all the legal phenomena protected by the state, “legal order of life”, in the second, it implies “a specific example of abstract rule in a specific legal power of an individual” [5].

Russian authors expressed similar opinions on ambiguity of the notion of law and the phenomenon reflected by it. Before proceeding with considering political and legal views of a number of Russian thinkers of the second half of the 19th – early 20th centuries, we deem it necessary to clarify one point. As almost all the scientists we are going to mention are, with some reservations, ‘pure’ liberals (only B.N. Chicherin was a conservative liberal), we think fit to analyze their ideas without special focus on political preferences of the considered personalities. Science in the second half of the 19th century was assigned a sacred meaning, Russian intelligentsia esteemed allegiance to science as allegiance to the truth in its religious sense; it was seen as a panacea for all social disorders. It was a period of romanticizing science, scientific idealism of a kind. D.D. Grimm, E.V. Vasilkovskiy, M.N. Kapustin, S.V. Pakhman, N. I. Palienko and A.A. Rozhdestvensky were prominent representatives of legal positivism and made a significant impact on the establishment of the general theory of law in Russia. S.V. Pakhman was a proponent of dogmatic jurisprudence, handling a dogma of law as a separate scientific branch. In his opinion, the dogma studies formal and logical structure of juridical institutions. There is a system of permanent panhuman fundamentals of civil law, arising from the notion of personality and inherent peculiarities of human nature, e.g. egoism. According to M.N. Kapustin, the prime of fairness protected by the state lies at the heart of law. Law is a category of human mind. This idea gradually ripens through the development of such social institutions and categories as family, authority and property; it historically precedes the idea of state. Law is a crucial and essential element of human culture. Being a prominent representative of legal positivism in pre-revolution Russia, G.F. Shershenevich continued developing it in his works. In his papers on civil law, history of philosophy and the theory of law the scientist elaborated on formal and dogmatic understanding of law, relying on positivist philosophy of Auguste Comte, John Stuart Mill and following the traditions of English Analytical School (John Austin) and continental legal positivism (Carl Bergbohm) [9]. G.F. Shershenevich regarded the state as a sole source of law and law as a creation of the state and its function. In this treatment, law was equal to legal texts represented by rules and regulations. Hence, positivism served as a methodical basis of G.F. Shershenevich’s political and legal doctrine, but it included the principle of legal formalism in his handling. Though accepting different philosophical groundings, Russian sociological theory of law developed as a positivist theory. Positivists, together with sociological theory advocates, rejected the possibility to cognize the essence of law as they supposed that science could only define empirical connections between phenomena. An eminent role in the development of sociological trend in Russian general theory of state and law belongs to M.M. Kovalevskiy. It is noteworthy – as A.O. Boronoev emphasizes – that M.M. Kovalevskiy was the first professional sociologist in Russia [1]. Genetic sociology is an important part of M.M. Kovalevskiy’s sociological system; he connects its concept with the idea of progression, sociological historicism that has its roots in positivist traditions. A.O. Boronoev stresses that it is characterized by historical veracity of analysis and width of comparative generalizations that were facilitated by the historical comparative method that M.M. Kovalevsky actively promoted as a method of sociological research of history. The above trends in the theory of law relied solely on empirical material and did not have the potential to make conclusions on ideal component of law and its axiological essence. Different concepts of law intended to understand it as a complex, multi-faceted phenomenon were formulated in Russia in the early 20th century to solve this problem. This direction in Russian legal science was presented by the trend of revival of natural law, which was founded by B.N. Chicherin and V.S. Solovyev in Russia. For example, V.S. Solovyev defined law as “a compulsory requirement to execute minimum good or order, preventing a known evil from happening” [10]. However, it should be born in mind that only good in its unconditional essence, unperturbed by any accidents or external limitations can be a basis of law and morality. Natural law in V.S. Solovyev’s system is a formal idea of law that is rationally deduced from general philosophical

principles. He believed that natural law and positive law are just two ways of looking into the same issue, with natural law embodying “rational essence of law” while positive law being responsible for its historical side. The purpose of revival of natural law consists in being the moral controlling mechanism over positive law, because moral ideals should direct the development of law. Hence, V.S. Solovyov doctrine is based on religious and moral perception of a personality and its moral potential. B.N Chicherin is classified as a representative of the school of revival of natural law; two important characteristics can be detected in his legal doctrine:

1) law is defined as an ideal of freedom inherent in human spirit, revealing itself in various social unions, that a person chooses to plead his/her allegiance to; 2) positive law that is mainly intended to protect personal freedom is compulsory by nature [12].

At the same time compulsory character of law is not imposed by its inherent features, it comes from human nature and consciousness. B.N. Chicherin noted that juridical law becomes compulsory only when it is acknowledged as such in a definite society [3]. According to B.N. Chicherin’s views fairness is manifested in equality. Something that is equally applicable to anyone is considered fair. “Acknowledgement of fundamental equality represents supreme demand of the truth that can be called the equaling truth from this point of view” [14]. This reflects the attempts of the representatives of the natural school to solve the problem of defining the origins of national law and national existence. In pre-revolution legal tradition, N.N. Alekseev was one of the representatives of the phenomenological concept of law. Main components of his philosophical and legal doctrine include phenomenological axiology based on Max Scheler’s theory and Adolf Reinach’s phenomenological concept of law, but these thinkers only developed the ideas embedded in phenomenological method of cognition.

According to N.N. Alekseev, values in law are not only learned theoretically, they are felt, experienced. Proceeding from this statement, there exist different levels of comparing them with human’s soul: from superficial acknowledgement of axiological properties to full immersion into it up to full self-oblivion, i.e. characterizing the zenith of love. This approach to the understanding of law explains its ability to be so diverse in practice without losing its conceptual unity. L.I. Petrazhinskiy was the founding father of psychological school of law in Russia; he assumed that law is rooted in individual’s mind. Interpretation of law from the point of view of psychology allows planting legal science into the soil of reliable knowledge that can be obtained either by means of self-observation (introspectionism) or by observation of other people’s actions. L.I. Petrazhinskiy believes that human emotions that serve as a main motivational (driving) element of the mind function as a source of law. It is emotions that make people act. Legal emotions are bidirectional and legal regulations arising out of them have an attributive-imperative (representative and binding) character. Hence, the theory of L.I. Petrazhinskiy expanded the concept of law. L.I. Petrazhinskiy’s legal doctrine drew sociologists’ attention to the issues of regulatory nature and became an impetus to research the area of legal psychology.

Speaking of scientific work in the field of law, we cannot but mention the works by A.S. Yashchenko who anticipated modern articulation of the issue of law and morals in many aspects, especially in the aspect of their synthetic unity. Despite A.S. Yashchenko ethical-legal doctrine of law was heavily based on religious-philosophical tradition of the substantiation of law and, primarily, on moral-legal theory by V.S. Solovyov, it still possesses doubtless novelty and originality. Originality of A.S. Yashchenko’s philosophy of law manifested itself in an attempt to give substantiation to the harmony of three pillars: law, morality and religion – within the framework of synthetic theory. Holistic approach to law presented in A.S. Yashchenko’s synthetic theory of law is also of great importance for the development of individual legal consciousness that includes correct moral self-assessment, fostering ethical responsibility and discipline as its important constituents [13].

The most significant shifts in the conception of law, especially in the nature of constitutional (general organization) regulations, took place after they introduced the elements of constitutional law and party division in election campaigns to win representation in the State Duma and public impact in Russia. Under these circumstances, Yu. S. Gambarov contrasts law and lawlessness [7] and does not differentiate their contents that can be infinitely variable, but sees the difference in their non-permanent form, that “can change its status from a form of lawlessness into a form of law rather fast” [4]. Proceeding from this understanding of correlation of law and lawlessness, conceived by Yu.S. Gambarov, it is logical to presume that a compulsive character is not an attribute of law, as it is possible to comprehend committing yourself to something, but not compelling yourself, and if the state does not deliver its commitments, law or its formal side does not have a power that can compel the state to deliver these commitments. Thus, Yu. S. Gambarov associates law with a definite public authority organization influencing on subjects’ will through its issued orders; hence, he sees the main difference of law from other marginal phenomena lies in formal qualities of these orders, their capacity to influence human will. It is known that P.I. Novogorodtsev was the founder while Yu.S. Gambarov and B.A. Kistyakovskiy supported main postulates of his teaching to a lesser or greater extent [11]. The main feature of a new variant of the natural-legal ideology, its hallmark, was a consciously asserted idealism that was often ethically colored and theoretically grounded in the ideas of German transcendentalism or in religious and metaphysical insights of Russian philosophy. The normative content of law can be different and can be assessed differently.

Conclusion

On the basis of the carried out research we can make a conclusion that foreign ideas of the conception of law are represented by the following main trends: natural law, statism, the historical and sociological approaches to the conception of law. The specific character of Russian conception a law takes on fundamental principles of Western-European philosophical tradition in general, but formulates new trends in the conception of law, including psychological, religious and philosophical as well a formal-dogmatic Schools.

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