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Democratization of Lawmaking and Legal Order: Real Opportunities for Civil Society

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From the standpoint of generalization at the level of social philosophy the article examines the nature and structure of the law and its role in the democratization of all aspects of the society, the relation of law and politics, historically caused legal nihilism of the population under totalitarianism. The need for legitimation of the law as one of the important aspects of building a constitutional and modern civil society in Russia is discussed.

Keywords: democracy, civil society, law, law and order, constitutional state, authority, legitimacy

Point of view

“Dura lex set lex” (“The law is harsh, but it is the law”) is a well-known formula of Roman law. Obviously, it must be one of the characteristics of the modern type of democracy being built simultaneously with the formation of a constitutional state and civil society. It is equally clear that the law and order in our country are still far from European models. We are not talking about the complete eradication of the crime in “the bright future” – it is a utopia from “one only true doctrine”. Deviant behavior will exist as long as the humankind exists, and if the crime is considered to be a disease, it is completely incurable. Another thing is the extent of this disease in the social organism. The Russian authorities do not obviously cope with the task of creating proper law and order, from

here there are some extremes: the mass adoption of prohibitive and restrictive laws, making a number of supervisory bodies to mandatory appeals “Don’t scare business”. One reason of a clearly unsatisfactory state of the law and order is commonly referred to the traditional legal nihilism of the Russian. It is difficult to disagree with it, but there is a logical question: what causes nihilism? In our opinion, it is caused by the age-old division, even by the contraposition of the subjects of lawmaking and enforcement on the one hand and the main population as an object of enforcement on the other hand. In this sense we can talk about different classes of the society, but it should be immediately emphasized that in this context we use the term “class” not in its traditional Marx’s understanding, but in the sense of “ruling” and “not ruling” classes as it is proposed by G. Mosca (Mosca G., 1994,17).

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Example

The term “law” is traditionally used to refer to the system of special kinds of social norms established or sanctioned by the state, which are characterized by the fact that they express will of the ruling classes, have a mandatory character, and in its implementation are provided with a coercive power of the state. Such a conception of the law is its total “juridization”, i.e. its identification with a set of laws.

Moreover, this normative understanding of the law is actually connected with the undemocratic state. The latter has always positioned itself as the voice of everyone and all people, some kind of an absolutely honest Institute, which due to these unique qualities creates and applies the law. The law and order in this approach are understood as unconditional observance of legal norms coming from the state by people under authority, regardless of the perception of people under authority of these rules as fair (“friendly”) or as unfair (“alien”).

In terms of philosophical understanding the law should not be merely understood as a set of mandatory formal rules because such an approach actually does not give social-cultural being of the law. If the authoritative will is expressed in existing laws, it does not mean that it exists in the law, which is a special type of relationship of social actors and the state, “objectively determined and historically volatile measure of freedom” (Nersesyants V.S., 1980, 27).

The concept of the law is most common among the subordination and coordination of correlative concepts: legal ideology and psychology, law and order, legal regime, legal culture etc. Legislative activity of the state as a necessity of power and control in democratic societies should be due to the law. The law is effective only when it corresponds to the actually existing social relations and sense of justice.

Exactly here there is the problem of justice, it means, that the law perceived by public as unfair cannot be an effective regulator of social relations. Only the fair (= legal) law is a real social and moral value, only such a law is executed with minimal use of state coercion or without it.

The law is a social-cultural phenomenon in which the political, economic, national, cultural, etc. history of the society is “reflected” and both the continuity of generations and eras is mirrored. The law is a contradictory unity of the act as a formal expression of justice and the will of the ruling class, and inherent in each class’s view of the relationship between what exists and what should be in the law and its practical application. Moreover, these perceptions are formed as a result of historical development. “The spirit of the people, their history, religion, degree of political freedom cannot be separated either by their influence on each other, or in their inner essence, they are connected to one nod” (Gegel G.V., 1959, 78).

The law is the essence of the unity of the acts and its reflection in the public mind but it is not a mirror reflection and not due to the law itself, as the society should not be based on the law but the law should be based on the society. Only in this context, adequate representation of the relationship between the law, government and state of a democratic type is possible.

It is important to take into account the role played by the legal minds in the implementation of the state legislative functions and in the practice of legal regulation. Obviously, the efficiency of the legal action as a whole depends directly on the degree of compliance of legal norms with legal consciousness of individual groups, classes and the society.

The law, having the function of a universal regulator of social relations, is the main and most effective means of politics that in general at the level of philosophical reflection can be

represented as a “changed form” of sociality. And in the political “pseudo-concreteness” of the undemocratic type an alienated essence of the man himself is transformed, which became for him an external force, some kind of the imperative determining the “basic” boundaries of his existence. The most important tool for the establishment of such boundaries is the law. The democratic state by definition should lead to “releasing” of the human from alienation and in this process the law plays an essential role.

On the one hand, the law is the system of acts, the official legal ideology, legal consciousness of ruling classes and the enforcement by the state. On the other hand, the law is completed by legal ideology of other social sections and groups, with their legal psychology, legal views and experiences in general, emerging as a rule at the ordinary level (of course going to the level of elements of the civil society). Here there is a practical manifestation of the law: “lawful” behavior, active or passive unlawful behavior in the case of non-compliance with the law and legal consciousness of people (as a simple failure of the law). The concept of justice of legal norms adopted by the state and the actual jurisdiction is an element of the legal consciousness of all classes and sections of the population, determining to a large degree their behavioral attitude to the law, the state, political power in general.

Two marked oppositions (sides) of the law, at the same time denying and counting one another in their practical interaction form this particular legal regime, the type and level of the law and order, to a certain extent – the political regime in general. In addition, the law can be represented as a contradictory unity of three main components (which can also be called as the sides).

1. The normative component is a system of legal norms operating in a society.

2. The doctrinal component is general principles of law, the official, as well as any

other legal ideology. All legal ideologies of the society should be attributed to the doctrinal side of law, because objectively they express and justify a separate group of interest, influence on the formation of legal consciousness of people, thereby creating motivation of the legal or illegal behavior.

3. The activity component is the jurisdiction implemented by the state, legal psychology of various social groups and mainly practical behavior of people in the area of law motivated by it. The activity side (component) of the law also includes valuable orientations and behavioral patterns of classes, groups, individuals, stable dynamic patterns of behavior of subjects of legal relations.

The law is the form in relation to the politics, which is the content here. All more or less significant changes in the politics are always reflected in the law. In particular, changes in the activity component of the law are inevitably contradictory in itself, as reflect the difference or opposition (up to antagonism) of the legal views of different classes and sections. To a certain extent, they reflect the conservatism of the legal consciousness as a whole, legal psychology in particular. But in any case all this is the result and form of expression of difference or indigenous opposition of fundamental political interests, which somehow are affected by changes in the law.

Such an understanding of the relationship between the politics and the law may give raise an objection, as the traditionally predominant among lawyers is the view that the law is not fully connected with the politics that legal and political system is only partially “overlap” each other. This is usually argued by the fact that the law draws, expresses and reinforces not only political but also economic, family, household and other social relations, so ostensibly the legal sphere cannot be included as an element in the political sphere.

In our opinion, the law in general should be regarded as a political phenomenon. The main thing here is not that the law in its nature is inextricably connected with the politics and the state, but it is also an argument. But if we take any of three above-mentioned sides of the law – regulatory, doctrinal and activity, we will always find a political interest behind them and, accordingly, domineering or subservient will; stereotypes of legal or illegal behavior to a greater or lesser extent are determined by general political attitudes. Psychological people's attitude to the legal validity, which follows directly from the concepts of justice is also an expression of political interest. The political interest is directly and sometimes open manifested in the regulatory, doctrinal and activity-related aspects of the law.

Genetic, functional and institutional dependence of the regulatory side of the law on the state and state authority also gives a reason to consider the legal sphere to be the element of the political sphere. The law as a whole is an essence of the form, a way of existence of the politics – in our opinion, that should be the approach to the knowledge of the legal effects according to social-philosophical point of view. Being a form of the politics, the law, to a certain extent, is “indifferent” toward the latter. That means, it is relatively independent, but it is unacceptable to make its independence absolute.

The ratio of the law and the politics is affected to the extent that democracy as a form (a method) of ruling is a political phenomenon. Therefore, for the democracy of the modern type the task of the closest approach, up to full compliance with each other (this is the ideal) of the three components of the law – normative, doctrinal and activity, is of course a political task. The solution of this problem in Russia is absolutely necessary, but it faces “terra incognita” – the legitimation of the law.

Conclusion

The term “legitimacy” is often understood as legitimacy (legality) of something. Meanwhile, legitimacy supposes an indissoluble unity of two parts – the rule of law and rightfulness of something in people's view. If we talk about legitimacy of the law, the first side – “legitimacy of the law” – may seem strange. However, for example, the regional law can be contrary to the federal law, the latter can be contrary to the Constitution. Thus, in accordance with the law of 2000 on the formation of the Federation Council the half of the upper chamber of the highest legislative body of the country consists of the representatives of the executive branch of the Federation. But there is Article 10 of the Constitution, which appointed the principle of separation of powers, i.e. the structural and functional isolation of three branches of the power, inadmissibility of combining them, “mixing them” in order to avoid dictatorship. And that is “the legitimacy of the law”. This is however the subject to be considered by the Constitutional Court.

As for the second side of legitimacy of the law, its rightfulness in people's view, of course, opinions differ. But people get objectively included in various social groups, so far having similar interests and opinions, and laws are mostly related to the legal status of particular groups, strata, organizations – retirees, students, military personnel, political parties, media, etc. Traditionally, however, bills are introduced “privately” – in the administration of the head of the State, in the Government and others, as “privately” they are discussed in the State Duma Committee, then submitted to the plenary sessions. For this reason, many new laws need to be amended at once (for example, in the Law on Citizenship of the Russian Federation of 2002 nine amendments were made), and sometimes

they cause a sharp discontent in the society (e.g. acts of housing or education reforms).

A profound public examination of laws to be considered in the Parliament is required. It is not difficult to organize it at the present level of information. Participation in the discussion of laws, bringing them “to mind” will be an important aspect of civil society institutions (parties, social organisations, independent media, etc.). There will be self-expression and self-assertion of these institutions, the growth of confidence in them by the citizens, hence the development of the civil society as a whole. And strengthening the rule of law, respect for the law increases if the project has been recognized as rightful by “friendly” organizations.

Political sociality is characterized by the fact that a person is psychologically inclined to trust above all to “friendly”, “close” organizations and associations, so their participation in the discussion of draft laws, and then the public approval of these projects will form the basis for the positive attitude to the country’s legal acts taken by people. It should be emphasized that at the present time when the political activity of the population is relatively low, a very important role

in the legitimation of the law the trade unions could play an important role, of course, if they stop to perform the traditional function of “the belt from the parties to the masses” and become finally the real spokesmen and defenders of the interests of workers.

Let us investigate another aspect. Experts preparing draft laws are usually associated with official government agencies – the President, the Government of the Federation and therefore they must take into account relevant corporate interests and goals. In addition, not all deputies of the State Duma who discuss and adopt laws are professional enough in the lawmaking. Not every politician is a law-giver. Public examination of draft laws would largely resolve these contradictions.

In our opinion, the legitimation of laws (a specific procedure is not difficult to work out) could not only improve the rule of law in the country, raise the level of public confidence in government and political activity of people, but also in general do a good service in the process of formation of the legal state and developed civil society, i.e. a modern type of democracy in Russia.

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Демократизация правотворчества и правопорядок: реальные возможности гражданского общества

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В статье с позиций обобщения на уровне социальной философии анализируется сущность и структура права, его роль в процессе демократизации всех сторон жизни общества, соотношение права и политики, исторически обусловленный правовой нигилизм населения при тоталитаризме. Аргументируется необходимость легитимации закона как одного из важных аспектов построения правового государства и современного гражданского общества в России.

Ключевые слова: демократия, гражданское общество, право, правопорядок, правовое государство, власть, легитимность.
