

Prohibition as Axiological Basis of Legal Reality

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Abstract

The article proves that the ban can be characterized as a state- (social-) strong-willed deterrent (limiting) means, which under the threat of legal (legal) responsibility is designed to prevent illegal acts of the subject (natural or legal person) and thereby ensure the maintenance of law and order. The ban is a necessary means of ensuring high organization of social relations, consolidation of legal values-is a significant regulator of social relations, designed to ensure the effectiveness of legal regulation. However, the peculiarity of the legal reality of semi-traditional societies, which include moleno and Russia, transforms the role of the ban in legal regulation, strengthening its effect not only legally, but also mentally. Compliance with both legal and legal prohibitions is ensured not so much by the existence of an effective mechanism of legal regulation as by the conformist-marginal mentality of the individual and society.

Keywords: Prohibition in law; Legal reality; Legal awareness.



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1. Introduction

Legal reality, representing a multi-level system of legal phenomena, an autonomous metasocial reality, the semantic expression of which is mutual obligation in the interaction of subjects, can be considered not only ontologically, but also epistemologically and axiologically. The latter approach assumes the identification of those value bases that determine not only the essence and the content of legal reality, but also its perception by different groups of subjects (individual, local group, society), and the influence of intersubjective legal values on the functioning of the main ontological components of legal reality. The leading place in the determination of legal reality value bases is the prohibition. It is most consistent with the permissive type of legal regulation, it is most consistent with the legal tradition and the archaic society based on it. The presence of legal prohibitions in the archaic society that are of a religious and ethical nature, complicates significantly the process of legal borrowing of Western (Euro-Atlantic) legal values and gives rise to the civilizational opposition in the modern world. This causes the need for retrospective legal research to study the origins of legal reality prohibitive nature development.

2. Theory

The definition "legal reality" has been used in philosophy and law theory since the mid-20th century to denote the real existence of individual legal phenomena. Although there were many attempts to study its ontological and epistemological characteristics (Kaufman, 1972), there was no conceptual study of this category. However, the achievements of the western existential-phenomenological philosophy of law laid the foundations for a steady interest to the problem of legal reality in the post-Soviet space. In the mid-1990-ies the philosophers of law Ikonnikova and Lyashenko (2001) and the theorists of law (Kaufman, 1972) turned to the study of this problem almost simultaneously. The modern interpretation of legal reality category is carried out mainly on the basis of integrative legal understanding. However, ontological and epistemological aspects of this category are studied mainly. However, its axiological foundations are still out of the research interest, despite the existence of a large number of works devoted to the study of legal values (Hamrick, 1987; Lobok, 1997).

3. Results

The transgressive nature of modern legal reality is manifested in the widespread dissemination of non-legal practices and the low level of the normative legal culture of population majority. This makes it difficult to identify the ontological and axiological priorities of both social groups and an individual. The features of legal reality structure, where the lower level is legal behavior, stipulate that the entry of a subject into legal reality begins precisely at this level and continues by the ascending exponent. The genesis of legal behavior is largely conditioned by the development of the unity and opposition of the desire ("I want") and obligation ("you must") in the legal mentality. The awareness of the primacy of the latter not only to satisfy one's own interests, but for the progressive development of society (local groups), leads to the creation of social, and then legal prohibitions, which become the basis of legal behavior and determine the degree of an individual entrance into legal reality. Traditionally, since the

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first state-organized societies, the prohibition and then the legal prohibition has been used in the legal system and state mechanism to strengthen and preserve them, and to provide stability (Artamonova *et al.*, 2013).

The legal behavior and the legal mentality of traditional society are based not on reasoning and argumentation, but on affect: an individual, as a part of society, considers the necessary condition for his legal behavior and the maintenance of the social order, the observation of the rules that have arisen in the process of social interaction and aimed at the maintaining of conflict-free coexistence of this group (society) not only spatially and temporally but also cognitively. At the same time, their chronological and content characteristic is completely unimportant. Being perceived mythologically, these rules receive the sacred authority of ancestors or supernatural (including divine) forces a priori (Salter, 1992). The inherent instinct of self-preservation, characteristic of the legal mentality of each person, contributed to the development of protective function system on this basis aimed at the maintaining of the existing world order inviolability. Thanks to myths, the world around a person acquires a structured character not only in general, but also in relation to an individual. Not only the objects, but also the subjects receive a certain verbalized place in the physical, social and legal reality (Calavita, 2010). The specifying character of the archaic consciousness determined that this verbal designation of an object became the taboo. However, this structured nature of the world is not primordial, but is formed either by some sacred subject or is developed in the process of social interaction and takes on a sacral character because of its importance for stability and the maintaining of the conflict-free coexistence of individuals in society (in a local group). Since the universe is the arena for the struggle between good and evil, chaos and order, a man, reproducing the structured elements of order (the words in their original sounding and sense), thereby contributes to the maintenance of the world order and the rule of law as a part of it (Fechner, 1956).

A man's consciousness is antinomical from the beginning. In his opinion, he has a number of alternatives and oppositions (Cohn, 1967). Although the prohibition created formally an alternative between "yes" and "no" for a man, this alternative was uniquely decided in favor of the former one because of the very nature of the universe, i.e. initially the compliance with prohibitions in the archaic consciousness was understood as the actions aimed at the preservation of order and stability in nature and in society and the inviolability of the cosmic world order. The complication of the legal regulation in modern society led to the use of prohibitions in the situation when the legislator seeks to identify imperatively the wrongfulness of certain acts and to prevent their commission in the legal field. Using the prohibitions, a state determines the boundaries of permissible behavior of subjects and determines the boundaries of their actions within the framework of law and order maintaining (Skorobogatov *et al.*, 2015; Skorobogatov *et al.*, 2016). The prohibiting rule of law (legal prohibition) can be defined as a system of universally binding rules and associated general orders established or sanctioned by the state and enforced by its compulsory force, designed in their unity to displace social relations (existing and prospective), which have negative consequences, in accordance with the materially conditioned will and social goals of society (local groups). The prohibitive rules of law indicate the total inadmissibility and punishability of a conduct within the framework of a regulated social relationship (Bachinin, 2001; Villalobos, 2016).

This is connected with the expansion of legal prohibition role as the means of legal policy. By setting a prohibition on the commission of certain actions, the state imposes the duty on a subject to refrain from such actions. Preventing the satisfaction of the interests and the needs of an individual, in relation to which the prohibition operates, it is simultaneously aimed at the implementation of the opposite side interests, first of all, of the state. Legal prohibitions per se are state-authoritative deterrents, which, under the threat of responsibility and punishment, must prevent possible undesirable, unlawful acts that harm both personal and public (social, group, corporate) interests (Vovk, 2008). However, while in archaic societies the role of the prohibition as a verbalized basis of the world order maintaining has been preserved to the present day, in a Western modernized society based on the Protestant ethic of individualism, its role was confined primarily to the public sphere. Permission became the supreme rule in the field of private interests. In Russia, the attitude to prohibitions is more complicated. In the sociocultural context, Russia can be classified as semi-archaic (semi-traditional) societies. In our country, they developed a special archetypal model of interaction and mutual service in the system "personality - society - state". In this model, the main emphasis is not on the separation of powers and the delimitation of the state and public sphere, not on the opposition of mutual rights and obligations, but on the unity of authority and duty, and their interaction to solve common problems (internal and external ones). This model is characterized by the perception that all members of the triad have the rights of duties and the duty of mutual service. Only the unity of the state, society and a man guarantees a stable positive development (Lbezina and Anisimov, 2013).

The legal organization of society and the state in Russia is based on the legal archetype of the order that shapes the attitude to power and law, which are regarded as conservative forces based on the authority of ancestors, determining the nature of the community in accordance with traditional patterns of behavior (sanctified by spirit and the authority of ancestors). Any crime of established order is perceived as the violation of the fixed order and rhythm of coexistence. One of the most typical characteristics of the Russian legal mentality is a stable view of a person's subordinate position justification, whatever it is, in relation to the state. The state in the sense of justice takes the highest place in the value hierarchy. Individuals have a subordinate position traditionally, he is obliged to serve the State, unconditionally placing his interests above their own and not reflecting on the possible infringement of each individual person rights. Due to the sacred perception of the state and its decrees, a legal prohibition is considered a necessary element of order establishing and maintaining (Gordon, 1987). At the same time, the proclaiming and the ensuring of human rights and freedoms are not such. A significant number of Russians are ready to sacrifice their freedom for the sake of stability (the confidence in the future) (Massalova *et al.*, 2018; Sallullin *et al.*, 2016).

In the mass sense of justice, the state is still perceived as a self-sufficient value that can not be completely reduced only to legal forms. In contrast to Western European countries, where the main function of power legitimizing is the constitution and the parliament elected on its basis, the main legitimizing significance in Russia belongs to the institution of the president, whose perception is not devoid of monarchical, patriarchal traits. Paternalism is the constituent of the Russian legal archetype patriarchal nature. The essence of paternalistic attitudes is the availability of guardianship by the state (Moore, 2003). However, guardianship is the subject which unconditionally obeys the dictates of state power, strictly following the established prohibitions. At the same time, along with traditional piety before the prohibitions, legal nihilism and legal infantilism are widespread, due to the fact that individual legal experience largely contradicts the legal tradition. Citizens, observing the actions of subordinate authorities and law enforcement agencies, notice that they do not observe the prohibitions, and also act directly opposite. This led to a wide spread of "non-legal" conflict resolution practices. The observance of legal prohibitions is provided not so much by the conscious actions of an individual, but by constant general attitude to prohibitions. However, if during the previous periods of Russian history, the concepts of legal prohibition were largely identical, there was the dichotomization of this category in modern Russia. On the one hand, Russian legislation is focused traditionally on the maximum number of prohibitive norm establishment that are poorly observed by society because of distrust to power. On the other hand, the prohibition is still perceived as sacred, as the basis of law and order and the world order. However, this is not a legal prohibition, but a legal one created in the process of social interaction of local communities and as a rule it has an unwritten nature. At that, the legal prohibition is perceived as the basis of the socio-cultural identification of a subject. The observance of legal norms by an individual, including prohibitive ones, is the condition for his self-identification, the inclusion in a particular social group. Acting in accordance with the rules of this group, he emphasizes that he accepts these rules, and also shows that he is ready to act like everyone else (Varga, 2012).

4. Conclusion

Thus, a legal prohibition can be considered as one of the leading legal values. He advocates as the axiological basis of the legal reality of archaic and semi-archaic societies, incl. the modern ones. A uniform understanding of the prohibition on various levels of legal reality greatly contributes to its harmonization. However, in modern non-Western societies, incl. in Russia, the concepts of legal prohibition do not coincide. The former is considered in the context of social conditioning, while the second one is unambiguously associated with the legislative role of the state. Despite the traditional paternalism and subordination of an individual to the state, the discrepancy of the legal policy and social expectations leads to the fact that the achievement of social order is provided not so much by the state as by other social actors acting in this case as the informal means of conflict resolution.

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