The problem of the origin of law: an invitation to discussion

До проблеми походження права: запрошення до дискусії

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emergence of law, the state, correlation of state and law, society.

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Getting the answer to the question: for the sake of which universal values humanity has created law and what mission it fulfills today in conditions of a powerful influence of supra-state entities on world processes (European Union, International Monetary Fund, World Trade Organization, European Bank for Development and Trade, etc.), economic and political resources of which allow legal means to cancel political or territorial sovereignty, which is based on principles of modern national states (to the super governmental formation is not only delegated a part of sovereignty, but it is also given the right to adopt normative legal acts binding on all states), actualizes the traditionally debatable problem for the legal science of the essence of law and its influence on the state and social processes. So, it is difficult to cope with understanding without the historical, legal and theoretical generalizations about the causes, conditions, origin, evolution, development, transformation of law as a social and cultural phenomenon.

The theory of law is still ambiguous in the views on the emergence of law. There are three main approaches that solve this issue exclusively in the context of the relation "state-law" – etatist, liberal and pragmatic. Due to the limited resource of publication, we will not stop on a comprehensive analysis of all concepts. However, we draw attention to the pragmatic approach that finds the biggest amount of supporters among the authors of modern publications. Through its mediation, researchers "integrate" etatist and liberal views during study of the nature of the relationship of law and state for the sake of, say, avoiding extremes in the implementation of his assessment. On the surface everything appears visually convincing, but the penetration into the depth of the problem leads to the conclusion that "integration" is carried out by the method of eclecticism (incorrect in this case, the method of research), and the obtained results work in favor of an exclusively etatist (totalitarian) model, as in the future law is seen as a kind of supplement to the state. At the same time, however, a certain role of law is recognized in the internal organization and activities of the state. The adherents of the pragmatic approach refuse to notice the historically and theoretically proved fact that the right arises together with society, and the state as a political and legal institution of the modern type is only one of the historical forms of statehood (the past knows politics, begmentsy, kingdoms, city-states, city-republics , principality, kingdoms, duchies, state-states, national states, etc.), in which the power are institutionalized – generic, tribal, communal, public, state. The need of society in the country, in fact, arises when objectively is formed a complex of economic (at the stage of redistribution of an additional product), political (the need to strengthen public authority as a function of society, the emergence of a political leader), social (the need for the consolidation of society under the influence both internal and external circumstances), psychological (the need to delegate responsibility for the implementation of universal interest and public authority functions of central government institutions), conditions that lead to the emergence of a stable form of power and legal organization of society, which is a modern state as a political and legal institution. We agree that the pragmatic approach has a rational grain, since it correctly separates the individual properties and features of law. However, their absolutisation, without proper justification, interferes with the formation of an objective, comprehensive idea of the law as a social and cultural phenomenon, because it left out of attention the main thing - the principle of the unity of historical and logical in scientific knowledge, the application of which enables to reveal the procedural dynamics of law (the continuity of evolution and development in historical time) in its various historical types and forms of expression (from archaic, to the customary and positive), to distinguish the features of its functional connection with society and the state at each separate stage of historical genesis of society.

It seems that the analysis of the problem of the emergence of law should be carried out in the context of an in-depth development of a pragmatic approach (with the exception of ideas that have not been justified or are not in demand) within the framework of the historical-theoretical model of the functional relationship of law, society, and state. It should be built on an interdisciplinary level; on the basis of the principle of unity of logical and historical in scientific knowledge; taking into account the historical and legal understanding of the meaning and subordination of the concepts of "society", "right", "state", "state"; within the framework of a systematic and informational approach that makes it possible not to let out from the sight the direct genetic link between law and society (the ecological niche of law is culture), and its functional connection (as a social norm) with the authorities that have a recognized right (the privilege) to commit coercion at any historical stage of society's development[1]. Actually, such an algorithm of analysis provides at an ideological level close to the truth (which is a component of common sense – life practice) an understanding of the features of the relationship between law and state within the framework of the Eastern or Western models of socially accepted regulation. And in the context of legal science, it helps to understand the role of society in the emergence, evolution, development and transformation of historical types of statehood and law, and the role of the state in transforming the forms (sources) of law[2].

In this case, the most appropriate to accomplish the task is the application of such term of "law", which could equally effectively be used for the analysis of legal processes both in the societies organized in the state and those that are at the stage of this organization. In this connection, we are offered the following definition: right – it is objectively predetermined, rationally grounded through a cut of universal interest, a system of principles, institutes, norms, rules of conduct, functioning and implementation of which are connected with the authorities, who have a recognized right (privilege) to enforce. Legal guidelines and regulations of the power institutes are objectified in the corresponding external forms, create the regulatory system (archaic, custom, integrated national) within the framework of which the legal influence and legal regulation in society are ensured at any stage of its historical development[3].

The given definition of the concept of "law", firstly, interprets the right in historical terms as a phenomenon of real actuality, which is a complex of principles, formal rules, norms, institutions, which, through the mediation of power (generic, public, state) regulate various spheres of society's life, organize them in the system of social statuses and roles, establish normative regulation of social relations and control the behavior of individuals; and secondly, highlights the essential feature of law as a social norm, which consists in the fact that from all social norms only the right is in a functional connection with the authorities (tribal, tribal, communal, public, state), which is obvious and determinant at all stages of development of society (the essential role in this process belongs to public authority as a function of society, which at some stage of the historical genesis is institutionalized and becomes systematic in the state of the modern type as a political and legal institution); Thirdly, it refutes the thesis that the state creates the law, and in the primitive society there is no law, people are guided by their customs and traditions.

We share the opinion of those scientists who, taking into account the history, legal anthropology, historical linguistics, etc., express the hypothesis that legal behavior is an archetype of human behavior, since the law appeared quite early in society. It can be found where it is necessary at least minimal organization of social relations through normative mechanisms of rights and responsibilities, exchangeable and distributional standards, encouragements and penalties, incentives and prohibitions. The possibility of putting these mechanisms into force through compulsion is only a secondary feature of law, because, firstly, the need for coercion does not appear directly, but in cases of violation of the norm, and, secondly, the ruling authority exercising coercion must already be legal, that is, to have the exclusive right (privilege) of a recognized community to enforce. The right along with other ways of regulating behavior was separated from the syncretic system of social norms, which could already exist in the primitive groups of people of the Paleolithic age[4]. The first forms of law, according to the researcher V. Nerssyants, "cannot be called rudimentary embryonic ones, since in the embryos "genetically" the corresponding phenomenon is encod-

[1] Мірошниченко М.І. До проблеми виникнення права : історико-правовий аналіз / П.П. Захарченко. Актуальні проблеми викладання історико-правових дисциплін в системі вищої юридичної освіти України і зарубіжних країн: матеріали Всеукраїнської наукової конференції, м. Львів, 19 жовтня 2017. Випуск 1. Львів, 2017. С. 31–38.

[2] Мірошниченко М.І. Місце історії українського права в системі юридичних наук в умовах глобалізації. Концепція та методологія історії українського права: зб.матеріалів наук.- практ. кругл. столу, присвяченого пам'яті Олександра Шевченка, м. Київ, 28 квітня 2017 р. К.: «ДС День Печати», 2017. С. 9–16.

[3] Захарченко П.П. Новітні підходи в методології викладання історії українського права / П.П. Захарченко, М.І.Мірошниченко. Методологія в праві: монографія / І. Безклубий, І. Гриценко, М. Козюбра та ін.; за заг. ред. І. Безклубого. К.: Грамота, 2017. С. 53–66.

[4] Мірошниченко М.І. До проблеми виникнення права : історико-правовий аналіз / П.П. Захарченко. Актуальні проблеми викладання історико-правових дисциплін в системі вищої юридичної освіти України і зарубіжних країн: матеріали Всеукраїнської наукової конференції, м. Львів, 19 жовтня 2017. Випуск 1. Львів, 2017. С. 31-38.

ed" hypothetically appeared in the days preceding the flowering of the primitive society, and in the period of the expansion of the primitive communal system it already existed and developed as a customary law.

In Ukraine, the development of ideas about the constitutional state at the end of the 19th and at the beginning of the 20th century called for a discussion that began with others in the academic circles, and was to reveal the relation of state and law not only in the context of their development, but also at the stage of becoming and formation. Concluding this fact, contemporary, encyclopedist of law G. Shershenevich noted that exactly in that moment in the legal science two approaches to determine the primacy of state or law and vice versa began to develop[5]. In the literature there were publications that aimed to find out what is the main and the derivative: state or law? The supporters of the first statement were based on the premise that the state historically and genetically precedes the law, because being a source of law formation; it cannot be caused by it. That is, the state is above the law, and not vice versa.

Proponents of the second approach stood in diametrically opposed positions. Their scientific credo was that state government in its legal nature has a legal character. That is, the state does not form a right, and it itself is a derivative of law.

Having started the discussion, to present days, the theoretical and legal science has not been able to work out a coherent concept on the relation of state and law. The solution of this scientific problem, or at least the commitment of most scientists to one of two points of view, is far from academic nature, as it may seem at first glance, but much more global in its legal and political nature. This is not only two opposing points of view on one of the most important issues in science, these are two opposing ideology in the social sciences. Depending on which view in legal literature and public consciousness will become prevalent, the political and legal consequences that may not always be favorable to the society may come about. In the case when in the official legislative and governmental circles, the idea of the primacy of the state over the law prevails, then we can speak of a high probability of the country's sliding down to authoritarianism, totalitarianism, fascism, communism. This path has nothing to do with the principles of the constitutional state; it is much closer to the opposite pole. In the case when in theory and in practice the principle of priority of law before the state and its separate bodies will become the dominant one, then one can with a great degree of confidence speak about the victorious course of the constitutional state or close to it.

Inclusion of historians and theorists of law in a debate about the origin of law and state will provide an opportunity to show the most convincing examples and demonstrate the practical experience of the founding of states in Europe and America, which testifies to the primacy of law, including in the functioning of the modern historical type of state as a political and legal institution. On the examples of the new and most recent periods of the development of history of law and of the state, which have preserved a sufficient number of documents and sources of law that give us the opportunity to prove the fairness of the thesis we have presented, it is enough to offer the most famous example of the United States as a state. Recall that to appear on the political map of the world, the United States needed to adopt a regulatory act, called the United States Declaration of Independence on July 4, 1776, which was approved by the II Continental Congress of the North American colonies of Great Britain. The document proclaimed that thirteen North American colonies became free and independent states, and all political ties between them and the Kingdom of the United Kingdom were annulled. The II Continental Congress was not a political and legal body in a particular country, but consisted of 65 deputies from all North American colonies and took upon itself the functions of establishing the independence of individual states[6]. As you can see, a normative legal act appears in the beginning, which contains legal norms regulating the establishment of the state institution.

Even more telling fact is the events close to each of us, connected with the proclamation of the independence of the Ukrainian People's Republic, the 100th anniversary of which we celebrate this year. On our deep conviction, as we repeatedly stated in our publications, the independence of the UPR was also proclaimed by the normative and legal act of the Ukrainian Central Rada on the very day it took over the functions of legislative power. It's about the Third Universal UCR of November 7 (20), 1917, from which it is necessary to start the countdown of the Ukrainian state under the name of the Ukrainian People's Republic[7]. Or perhaps in 1991 the state of Ukraine emerged from the subject of the Soviet federation (USSR), and then the act of its independence was proclaimed. So no, everything happened exactly the opposite[8].

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[5] Шершеневич Г.Ф. Общая теория права: В 4-х вып. М., 1910–1912. 805 с.

[6] Захарченко П.П. Історія держави і права зарубіжних країн: Навчальний посібник для дистанційного навчання / П.П. Захарченко, О.О. Ковалевська, О.В. Кузьминець. К.: Україна, 2005. 213 с.

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Consequently, according to the above, it follows that the law is historically and logically preceded by the state. It is an earlier social institution than a state. With the advent of the state as a political and legal institution of the modern type, the history of law appears as the history of national legislation in its interrelation and interdependence with the regulatory activity of the state – its administrative and judicial institutions, the organization and activities of the army, police, penal and prison institutions, etc. History shows that society can develop stably in the coordinates of a dysfunctional environment, and the function of its instrument performs the right. Any form of statehood arises and functions in a system of a tempered environment and is built around the law.

Анотація

У статті українських вчених аналізуються проблеми походження права та наголошується на його первинності перед державою. Наводяться основні підходи у теоретико-правовій літературі, на які спираються дослідники заради розв'язання зазначеної проблеми. Здійснена спроба історично-правовою практикою підтвердити справедливість висловленої позиції.

Summary

The article of Ukrainian scientists analyzes the problems of the origin of law and emphasizes its primacy in the eyes of the state. The basic approaches in the theoretical and legal literature on which researchers are based for the solution of this problem are presented. Has been made an attempt to confirm the fairness of the stated position by historical and legal practice.

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