Krakowskie Studia Małopolskie
2020, nr 2 (26)

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Social Determination of Law as a Condition of Its Effectiveness

1. Introduction

Law is socially determined, it depends on the social structure and social order, and its essence is expressed in the ability to serve as a means of meeting the needs and interests of society. There is a close two-way connection between the social effectiveness of law and its social conditionality. If one or another norm of law is not caused by the needs of life, it is unlikely that its application will give the desired result. Moreover, even if the subject of legal formalization, such as the state, considers it necessary to regulate certain relations, but practice shows that such formalization has the nature of conflictogenity; such regulation is likely to lead to an imbalance of the legal system, and as consequence – to the instability of the legal order.

Progressive dynamic social life is constantly being modified, complicated and it requires relevant legal determination. The ability of a legislative norm to change with a change in social relations is a basic feature of its effectiveness and determines its ability to act as a reliable regulator of social relations. Instead, the law is not always able to provide for an infinite number of possible socially changeable social situations, the full variety of cases of its practical application.

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The state of the outlined issues shows that attempts to reconstruct the scientific works and to form new conceptual approaches to the description of social determination of law were identified in the legal doctrine. The analysis of the main directions of legal thought, such as the schools of "free law", pragmatic instrumentalism, legal realism, and existential and hermeneutical phenomenology, which, in their knowledge of the true nature of the social action of law, typically accentuated their attention to the problems of social relevance of law.

Any process of cognition is based on the fundamental choice of methods that can play a decisive role in its course and determine its ideological core and purpose. Sometimes one of the methods is fully implemented in a specific context, but none can be recognized as exclusive and absolute. The proclamation of *a priori* dominant provision is always counterbalanced by another one, indicating the constant role of dialectics. Scientific and practical study of the social nature of law, which is determined by the use of dialectic methodology, defines its volumetric dimension and takes into account the complex nature. The use of this approach reveals the diversity and complexity of the process interaction of law and social regulation, within which the interaction and balancing of the abstract and concrete, dynamics and statics, norms and facts take place.

The necessity to compare antinomic models of legal statics and social dynamics – the restrictive within the law and the extended in accordance with the social needs; the specifics of the rational-technical and existential-semantic levels of interpretation – led to the use of the *comparative method*. Using the *formal and logical method* promoted to formulate the basic concepts of the study, to ensure the consistency of presentation of the paper. The *communicative method* was used in the process of sociocultural analysis of the legal thinking as an important instrument for cognition of social life, formulation of one's own judgments in the process of communication, legal views, beliefs and values; in the process of generalization of the specifics of the trial as a discursive struggle between the parties to interpret the provisions of the law.

However, evaluating the problem of the social determination of law, you should take into account the system of the above methods in general. Each established methodological concept has a dual aspect; if you consider it in isolation, it may lead to bias and unreasonable conclusions.

If you consider it to be a part of universalized system of methods, it will allow comprehensively understanding the problem outlined in this study in general.

2. Social constant of legal determination

Analyzing the various interpretations of the concept of law, it is easy to notice that the vast majority of its researchers interpret the subjectivity of law relatively uniformly, referring it to the cultural phenomenon of society and noting that due to this fact it (subjectivity) has not generalized instrumental nature but it has social one in the literal and figurative sense of the word.

Law is an important legal, social and political tool. It, along with other social norms, plays the role of a social controller in social regulation and, as a result, cannot be investigated fully and comprehensively outside of social relations[2]. Law is the result of the influence of social factors on the system of norms and the reverse effect of this system on meeting the social needs of people. According to the key elements of the system of legal regulation, it is possible to determine with minimal error which society we are dealing with – simple or complex, open or closed, monosocial or polysocial.

Any relations are a part of the social order in which certain rules of conduct apply. The study of the social order is a special task of the sociology of law, which differs from jurisprudence, first, by its completely dispassionate method based on observation. If the task of the dogmatics of jurisprudence is to study the language of laws, the task of the sociological approach is to establish how these laws operate in individual countries or in individual social conditions.

Such observation of legal life should be limited to the collection, description and analysis of factual data. The application of such a methodology leads to the fact that law is able to perform the function of social control, stimulating the social behavior of people, acting as a hint, communicating information about desirable and harmful patterns of behavior.

2 Hirsh E. (2001) Sociologiya prava dlya yuristov. Moskva: Centr socialnyh nauchno-informacionnyh issledovanij. P. 287.

The variety and complexity of legal positions require an appropriate evaluation – determining the scope of the "general" in each case. However, in order to "see" the general in the individual, the ability to determine algorithmic principles is not enough. Therefore, an adequate understanding of the legal position by a judge inevitably involves combining the individuality, unrepeatedness and uniqueness of the factual circumstances of the case with the generality and universality of the norm of the law.

The dichotomous concept of fact-norm is expressed both from the point of view of asymmetric interpenetration and opposition. Norms are always abstract and universal, but the actual state of affairs, which requires the use of these norms, is specific and individual. The conflict of interpretation of the dichotomy of the fact-norm becomes a conditional conflict of argumentation, which is expressed as an interpretive projection of the construction of arguments in order to convince the opponents of the truth of the statement[3].

In the history of legal thought, there are many examples of substantiation of sociologization of law, but the origins of the desire to study law in terms of its role in the social mechanism are found in the scientific heritage of the founder of sociological direction in jurisprudence, now world-renowned, eminent jurist Eugen Ehrlich[4]. Based on his research, the thesis of the search for law not in the laws but in society, contributed to exposing the inherent positivism of the separation of law from its real social content, and the destruction of the normative notion of law as a formally defined system of state-sanctioned legal norms.

Actualizing the problem of the free jurisprudence, Ehrlich stressed on the need to create a new approach, which would direct the efforts of jurisprudence to the court practice, would overcome the gap between the law and actual social relations, would manage to adopt the law to the life realities. Criticizing the normative understanding of law as such that is not able to cover the entire diversity of legal life, Ehrlich opposed this understanding to his own "free" interpretation of law. He

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[3] Huralenko N., Voloshchuk O., Slyvka S. (2020) Interpretive activity in the judge's professional occupation. Amazonia Investiga. P. 430.

[4] Erlih O. (2011). Osnovopolozhenie sociologii prava. St. Petersburg : University Publishing Consortium. P. 64.

noted that not all current legislation is applied or performed, there are many relationships which are not regulated by the law at all, but there are also other norms which are valid and sometimes are used by courts, they were made during the cohabitation process – "living law"[5]. Their validity is less than the force of formal law, but their practical value is sometimes more because there is less probability of legal disputes existence than when using clear formal defined law. Living law is only the law that "comes in life, becomes a living norm, anything else is just a bare doctrine, rule, decision, dogma or theory". Living law answers the permanently changeable inquiries of reality; it varies according to the necessities of life, organically develops and improves in the context of social relations – that's why it should be the regulator of social relations.

Actualizing, on the one hand, the sociological conditionality of the legal content, and on the other – the sociological conditionality of the effectiveness of law, the German researcher demanded the study of social life and the processes that took place in it. Only such a methodological component, according to E. Ehrlich, will make the legislator's provisions more flexible, which meet the interests of their executors to embody them in such forms that can be adapted to various changes in public life, while maintaining their essence.

In contrast to the traditional basic concepts of the legal system, such as "rule", "norm", "logic", "formality", the starting point in Ehrlich's explanation of the nature of law was new, qualitatively different concepts – "expediency", "functionality", "effectiveness". The main idea was the following: the creation of a legislative act requires knowledge not only of what relations should be regulated, but of also what they really are.

Defining law as a "mental thing" (*ein gedankliches Ding*), i.e. as an intellectual construction based on the results of observation of social phenomena and facts, E. Ehrlich argues "there would be no law if there were no people who understand the meaning of law. However, as everywhere, here our ideas are also formed from the material, which we receive from the sensory perception of reality", and this leads the scientist to the conclusion that not concepts precede facts, but vice versa.

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[5] Bihun V. (2005) Yevhen Erlikh: zhyttia i pravoznavcha spadshchyna (aktualnyi naukoznavchyi narys. Problemy filosofii prava. Kyiv-Chernivtsi: Ruta. P. 107.

The starting point in explaining the nature of law is the thesis that the concepts never precede the actual existing, and the law order is a mirror image of actual relations, so law should be based not on the state power, but directly on legal facts. In turn, legal facts give rise to conventional rules, characterized by their flexibility, the ability to constant transformation.

At the same time, the holistic vision of law in terms of the factual and the normative, which underlies the sociological cut of law, often leads to the idea of the actual absence of boundaries between legal reality and social reality of norms and rules. The latter gives reviewers such a reason to criticize the methodological ambiguity and methodological uncertainty.

3. Localization of normative and factual in the formation of legal reality

Despite the persistence of the criticism dogmas of sociological legal understanding and some lawyers' use of known arguments about the inadmissibility of the ideas of social dynamics of law, the fact remains indisputable: the binding nature of law cannot be established by simple interpretation and systematization of normative acts and court decisions. Legal norms may remain inactive, i.e. without any application, while the decisions applied by the courts may be contradictory to each other. If the lawyer does not take into account the real direct, flexible and mobile law (which is in infinite development and which is obviously separate from its social essence), he is in danger of creating abstract law, completely separating from existing law, the most effective in this social environment.

Consideration of the normative form of law in its ability to be a factor in the social evolution of society has a basic premise as follows: the normative form of law is not accepted in itself, but to the extent that it as a whole or in parts is socially meaningful. In this sense, the fact that any legal system inevitably faces a complex problem deserves priority: it must meet, on the one hand, the requirements of stability, and on the other – the inevitability of change. Law should be a fixed basis for regulating human activity, but constant changes in the living conditions of society require constant amendments, and therefore, the legal order

must be reviewed constantly in accordance with changes in public life, which it must regulate.

The law will always be a tool to achieve the desired social goals, and the change of doctrinal priorities will take place in the following way: instead of asking “what is law?” another question arises “how does law work?”.

Law is a tool guiding social development and changes of society[6]. There is no stagnation in any sphere of public life. Constant changes in life circumstances require new legal provisions, replacing, supplementing or changing existing norms.

On one hand, to provide the legal accuracy, clarity, orderliness the dogma should be static against the dynamic reality, that it defines. On the other hand, as the definition is always a stop in development, a conservation of the cognitive process, dogma has to be clarified and improved, to fulfill the constantly changing social reality, destroying herewith the stability of the law. Acknowledgement of law as a bearer of the basic social regulator function inevitably promotes the complex comprehensive research of the legal reality, the studying of its actual underground, the disclosure of the channels of interconnection between factual and legislative bases.

The constant changes occurring in all spheres of modern social life affect the structure of interpersonal relationships, human self-awareness.

It is known, that a legal institution exists as such only if it has one meaning for everyone, and the norm becomes legal, if contains the identical scale of behavior. But life doesn’t always fit into the known definitions and social mechanism of the law realization includes the qualities of law enforcing person – his values, legal knowledge, the idea of justice.

The contemporary legal thinking should be based on a functional approach and on a tendency to explore how the legal norms operate, how they should be created to reach with their help the appropriate results, rather than the fact if the meaning in the formal understanding of these norms is correct. All legal theories are nothing but a struggle for reconciliation of conflicting with each other requirements: stability requirements and requirements of changes; law must be stable but it can’t stand still.

[6] Kozlovskyi A. (1999). Pravo yak piznannia: Vstup do hnoseolohii prava. Chernivtsi: Ruta. P. 138.

Jurisprudence cannot be limited to the study of legislation – the dogma of law, because in this case it is impossible to improve. Only the social reality of law makes it possible to assess the current legislation, the legal system and, thus, the formulation of criteria for its change and improvement.

Being notable for static dogmatic character, the law doesn't always get time to develop according to the dynamics of social changes, and sometimes doesn't suit the new economic conditions of managing and social interactions; it can't cover the whole variety of their qualities, that's why it doesn't promote the perception of the veritable nature of its dynamic institutes, and the law remains actually in "abruption" from the real demands of practice. The important component of the contextual problem remains aside, that in the ideological world view sphere characterizes more underlying, more active, dynamic, nonlinear, synergistic mediated aspects of dynamic formation of reality, which according to such conditions principally can't be veritably defined and predicted in the static positive legal doctrine.

The binding nature of law cannot be established by a simple interpretation and systematization of normative acts and court decisions. Legal norms may remain inactive, i.e. without any application, while the decisions applied by the courts may be contradictory to each other[7]. If a lawyer does not take into account real, active, flexible and mobile law, which is in infinite development and which is obviously separate from its social essence, he is in danger of creating an abstract law, completely separating it from existing law that is the most effective in this social environment.

The study of law exclusively as a positive phenomenon, limited by the law, significantly narrows its scope. General rules of law cannot always respond flexibly to the changed socio-economic and political situation. In this regard, social relations, their dynamics, social practice, the emergence of new needs, mechanisms to protect interests and other social transformations should be recognized as the social source of law. Law does not exist "in itself", does not have "pure" legal phenomena (situations), norms and institutions; they all simultaneously act as mental,

[7] Isaev N. (2015). Sociokulturnaya antropologiya prava. St. Petersburg: Izdatelskij Dom Alef_Press. P. 516.

cultural, economic, political phenomena, and therefore the legal system has only relative autonomy.

Conclusions

The social environment is constantly being modified, complicated and requires appropriate legal certainty, which would provide a historical and specific interpretation of the constructive possibilities of social development. The ability of law to change with the change of social relations is the basic feature of its effectiveness and determines its ability to serve as a reliable regulator of social relations. That is why law in its integrity is formed not only as a result of purposeful efforts of the legislator, but is defined as a product of social constructing. The impersonal mechanism cannot carry out legal communication qualifying social situations as lawful and illegal. Representatives of social unions do this; therefore, social factors influence the process and consequent of legal qualifications. Jurisprudence cannot be limited to the study of the legislation – the dogma of law, because in this case it is impossible to improve. Only the social reality of law makes it possible to assess the current legislation, the legal system and, thus, the formulation of criteria for its change and improvement.

Law is created by social initiative; it is subordinate and eventual in relation to social life relations. Only that law, which crystallizes in the process of social life as a living order, amateur, not attributed to anyone, but constantly meets the demands of life, is a real regulator of social relations.

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Summary

The article deals with the social nature of law and order. It is emphasized that a full and comprehensive study of this phenomenon is impossible outside of social relations. It is noted that any legal system inevitably faces a complex problem: it should meet, on the one hand, the requirements of stability, and on the other – the inevitability of changes. Law exists in the flow of social life; it is a tool guiding social development and change society. As a guide to behavior, it is formed on the basis of sociologically established and verified constant and variable factors of social reality. Law is constantly increasing the sphere of social influence; therefore, there are more requirements to legal regulation. However, law performs its function as a regulator of social relations, when it is performed in reality. The life of norms of law is not only and not so much in their presence, existence, as in the functioning, implementation. The purpose, effectiveness and efficiency of law lie in the movement of law from possibility to reality, in the implementation of legal requirements in the actual actions and deeds of people. In this regard, it is important not only to assert the unity of law and society, but also, respectively, the call for constant correction of written law in accordance with changes in the social structure.

Keywords: legal order, social order, factuality and normativeness in law, social reality, effectiveness of law