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NATIONAL LAW AND LEGAL PLURALISM

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The subject of the article is correspondence and competition legal monism and legal pluralism.

The purpose of the study is to confirm or refute the author's hypothesis that a peculiar dialectic of legal monism and legal pluralism is inherent in domestic law.

The methodology. The methods of various sciences related to the study of social and legal pluralism are combined. In particular, the system approach, dialectical method, methods of formal logic, formal-legal and comparative-legal methods, theoretical-sociological and theoretical-cultural analysis are used.

The main results, scope of application. Within the framework of various social sciences, types of legal understanding, both a monistic view of law and various opinions about its plurality are presented (natural and positive law; the law of various states; domestic and international law; official and unofficial law).

Domestic law in developed countries is unified, but it is a complex unity consisting of various subsystems (levels). The question of whether these subsystems can not only correspond to each other and complement each other, but also compete with each other, be used by various entities within the framework of choosing the optimal regime of legal regulation has always been ambiguous for lawyers.

Discussions about legal monism and legal pluralism contribute to the development of theoretical knowledge about law. Situations of more or less pronounced legal plurality undoubtedly influence the specifics of all the main types of legal activity: from legal education and criticism of law to law enforcement. For the latter, the problem of compatibility of the principles of legality, formal equality and various forms of legal plurality has always been one of the most important.

Conclusions. The main manifestations of weak legal pluralism in modern domestic law can be considered as: (1) identification of subsystems of the law of the subjects of the federation and municipalities; (2) recognition of partial legal autonomy of various non-public organizations and autonomous communities (mainly in the field of private law). Each of these manifestations is considered separately. The problem of constitutionalization of legal pluralism is also touched upon. It is shown that a peculiar dialectic of legal monism and legal pluralism is inherent in domestic law.

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1. Introduction: formulation and relevance of the problem

Within the framework of various social sciences, types of legal understanding, both a monistic view of law and various opinions about its plurality are presented. For example, from the point of view of some supporters of usnaturalism, natural and positive law are separated from each other. For specialists in the field of international law, comparative jurisprudence, the irremediable multiplicity of legal systems on the scale of society-humanity is quite obvious. From the point of view of many sociologists and anthropologists, some representatives of theoretical jurisprudence may exist both legal (official) law and other social (unofficial) law of individual groups (communities).

Domestic legal law stands apart here. It is unified in most developed countries, but it is a complex unity consisting of various subsystems. The question of whether these subsystems can not only correspond to each other and complement each other, but also compete with each other, be used by various entities within the framework of choosing the optimal regime of legal regulation has always been ambiguous for lawyers.

Discussions about legal monism/legal pluralism contribute to the development of theoretical knowledge about law. Situations of more or less pronounced legal plurality undoubtedly influence the specifics of all the main types of legal activity: from legal education and criticism of law to law enforcement. For the latter, the problem of compatibility of the principles of legality, formal equality and various forms of legal plurality has always been one of the most important.

2. The degree of scientific elaboration of the problem

According to some representatives of non-legal social sciences, genuine legal pluralism consists exclusively in the separation of official and unofficial law. In this respect, the classic work of J. P. Blavatsky for the anthropology of law is indicative. Griffiths "What is legal pluralism?". In particular, he argues that the designation of the possible diversity of "legal policy in the internal discourse of state law has only a confusing nominal similarity with legal pluralism as a designation of the empirical state of affairs in society" [1, p. 4, 8]. For other authors of this direction, for example, K. von Benda-Beckmann, it is also obvious that there is a weak pluralism of different subspecies of law. At the same time, it is actually noted that in the conditions of the cessation of geographical isolation of various groups, such pluralism prevails [2, 3].

Within the framework of jurisprudence proper, various aspects of the legal plurality of domestic law and legal regulation have been studied for a long time (the plurality of sources of law, branches of law, discretion of the law enforcer, etc., etc.). In particular, situations are considered when subsystems of law are associated with a particular social group (community), allocated by territorial basis or by a circle of persons. They will be summarized below. In some cases, when analyzing these situations, the terms "legal plurality", "legal dualism", "legal pluralism" are used [4, 5, 6].

3. Methodological basis for studying the problem

In our opinion, in order to study the relevant problem, it is necessary to combine methods characteristic of various sciences related to the study of social and legal pluralism. In particular, the system approach, dialectical method, methods of formal logic, formal-legal and comparative-legal methods, theoretical-sociological and theoretical-cultural analysis are important.

4. Some general assumptions

Within the framework of the law sanctioned and guaranteed by a developed

state, only weak legal pluralism can exist when its special subsystems are distinguished in the law, since:

1) the substratum of the state in the general philosophical sense can only be society as a whole, and not at all the state apparatus, elite, party, ethnic, religious, economic group. Consequently, there can be only one basic rule of law of a developed state, and the existence of polycentric states contradicts the laws of formal logic. Therefore, the mention of the principle of legal pluralism in the constitution of the state, as it happened, in Bolivia [7, p. 325, 348] and Mozambique [8, p. 937], cannot transform the right of the whole state and the right of a separate social group into systems of equal value for society;

2) the state, although under pressure from other internal and external institutions (elite groups, international organizations, transnational enterprises), has not exhausted its positive potential. It is still the largest form of realization of the principle of political and cultural universality that humanity has been able to realize.

The universality of the State, to the extent that it has been achieved, guarantees the beginnings of freedom, justice and formal equality within a large society. Belonging to a particular group may affect the legal status of an individual, but should not lead to his exclusion from the scope of national law. It is noted that the radical expansion of the rights of isolated groups prevents the realization of the rights of individual members of these groups arising from legal law [9, pp. 220-225].

3) the ideology of the unified national (state) sovereignty is interconnected with the state's ability to ensure sufficient unity of legislation, the apparatus of public authority, the law enforcement system, and legal education. Modern developed states have basically eliminated (quasi-) judicial bodies characteristic of national or religious groups, as a result of which normative pluralism has also decreased (for example, the reference to national customs in the legislation on guarantees of the rights of indigenous small-numbered peoples of the Russian Federation today performs rather a decorative function);

At the same time, the partial legal independence of individual communities and groups, distinguished by territorial or other characteristics, is clearly necessary for their preservation and development, and sometimes justified for the state and the individual. She has always attracted attention and remains an undoubted fact. We will point, for example, to the plurality of legal systems within one country highlighted in the doctrine of private international law and mentioned in Article 1188 of the Civil Code of the Russian Federation [4].

The main manifestations of weak legal pluralism in modern domestic law can be considered: 1) identification of subsystems of the law of the subjects of the federation and municipalities; 2) recognition of partial legal autonomy of various non-public organizations and autonomous communities (mainly in the field of private law).

It is permissible to speak both about the different sub-law of a specific subject of the federation, municipality, organization, community, and about such levels of legal law as, say, national law, the law of the subjects of the federation, local law, corporate (local) law, community law. If there are only two such subsystems or levels in a particular state, or the author compares only two subsystems (two levels) out of several available ones, then the term "legal dualism" can be used [5].

The degree of independence and development of subsystems and levels of law can be completely different, from almost autonomous legal communication to only formal, ritual independence.

Despite the inclusion of subsystems of law in the framework of a single whole, the

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combination of legal provisions of law at different levels in practice can undoubtedly be different (from complementarity to competition and direct collisions, which, however, must be overcome). Despite the ideal ideas of sovereignty, hierarchy of norms, and legal technique, such excesses as duplication of legal acts of a higher level at a lower level, the publication and (temporary) actual effect of acts contrary to the acts of the central government, anticipatory lawmaking, etc. can never be completely excluded.

In the case of underdevelopment of the state or its decline, such a sign of it as a single legal right exists only in potency. In this case, the proclamation of the priority of the national law remains largely a good wish for the future.

In the conditions of the impossibility of eliminating deviant norms, 3 main strategies of the state are used – 1) ignoring other regulatory institutions and regulators; 2) their recognition (inclusion, incorporation); 3) a combination of these practices.

In the first case, domestic law is formally valid throughout the territory of the State, but its effectiveness is limited. This is how one can characterize the state of law in the conditions of social revolutions, civil wars, and the emergence of colonial dependence.

In the second case, the recognition of local customs and (or) regulations enters them into the system of legal law. Thus, legal law restores its external unity and effectiveness, but it turns out to be heterogeneous and, at times, contradictory.

As you know, some supporters of the idea of the positive nature of strong legal pluralism (among anthropologists, sociologists, historians) are still putting forward proposals for its legalization at the level of legal law by, for example, fixing relevant provisions in constitutions and legislation, introducing legal institutions of traditional law into legal law, creating and (or) recognizing by the state of judicial and (or) quasi-judicial bodies on national, religious, estate and other similar grounds. At the same time, they refer to the similar experience of individual states in Africa, Latin America, Oceania. Without evaluating these proposals on the merits here, we note that from a formal point of view, all these steps have always been considered as a kind of way to ensure the unity of the state's legal system.

Thus, the constitutionalization of legal pluralism, its formal legitimation in law or judicial practice inevitably means its "weakening", introduction into a certain framework. In some situations, the result is only the formal inclusion of deviant norms in the composition of official law. Basically, it marks at the same time the prohibition of forms of legal pluralism that are unconstructive for society as a whole.

Differences in the norms of subsystems of domestic law are obviously used by private individuals as part of the strategy of choosing the law (re-registration of an organization in order to reduce taxation in another subject of the federation (municipality), the relocation of a citizen to another subject of the federation for the registration of marriage, the change of the employer organization in order to improve labor regulation, etc.) as well as more significant differences in the legal systems of different states.

5. Federalism and legal pluralism

The most studied example of weak legal pluralism within the state is law in the conditions of a federal state, within which a subsystem of federal law and a subsystem of the law of a subject of the federation (vertically), subsystems of the law of various subjects of the federation (horizontally) can coexist.

Federalism is an ambiguous phenomenon. A federation, unlike a confederation, forms a state. The political and legal doctrine points here to the importance of unity. Within the framework of its ideological

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justification, people's (state) sovereignty is emphasized: it is argued either that the sovereign people directly establishes all kinds of governments (the American theory of federalism), or that the people form a political community from which various levels of power are already distinguished (the European theory of federalism) [10, p. 58].

On the other hand, it is a unity that presupposes diversity in various spheres of public life, including in law. In the scientific literature, expressions like "parallel provision of political integration ... and divided governance" are used to characterize the essence of federalism [11, p. 15]. The legislation may distinguish such partially competing principles as the unity of the system of power and the legal space and the differentiation of the subjects of competence of authorities of different levels, (partial) independence of the subjects of the federation.

It happens that diversity comes to the forefront of scientific research and then federalism is more or less clearly correlated with various forms of social pluralism (then legal pluralism proper is mentioned [6], cultural/racial pluralism [12, p. 63], etc.). Excerpts from journalistic literature also accurately illustrate this side of federalism. For example, the expression of obvious regional or local specifics, including in political and legal issues, became a good tone for various essays about traveling in the United States. This tradition probably comes from A. de Tocqueville [13, p. 280], but continues in the XX century, for example, in the essays of I.A. Ilf and E.P. Petrov [14, p. 29], J. Simenon [15, p. 197, 198].

Based on the analysis of modern federations in the most general form , we will draw the following conclusions regarding weak legal pluralism in such states:

1) within the framework of federalism, there can be both the unification of initially existing communities (states) through a treaty, and the construction of new communities by central authorities (in the interpretation of A. Shtepan "federation from below" (coming together) or "federation from above" ("keeping together") [16, p. 163]);

2) the subjects of the federation may be allocated on the basis of a purely territorial principle, as well as in whole or in part, taking into account the ethnic and (or) linguistic, religious affiliation of the population, at the same time social groups and communities allocated on other grounds (profession, ideology, income, etc.), as well as ethnic, religious linguistic minorities (on the territory of the relevant subjects of the federation) have practically no opportunity to express in this way the specifics of their legal culture;

3) the level of legal autonomy of the subjects of the federation from the central government in different countries differs significantly depending on the type of federalism implemented (dualistic (coordinating) – cooperative (intersection of authorities) – competitive – federalism of coercion (intersection) [17]);

4) obvious examples of federations with a high level of independence of their subjects are the United States, especially before 1861, and modern Canada with such a phenomenon as the special status of Quebec.

In these cases, the irreducibility of the levels of power and, accordingly, of law to each other may be emphasized. Thus, the doctrine of dualistic federalism is characterized here by the assertion that the organs of the apparatus of states (provinces) (as well as local bodies) receive power directly from the population of the territories, and not from the organs of the central state apparatus [10, p. 107]. In Canada, the people of Quebec at the level of rhetoric are sometimes recognized even as a separate nation, society [12, pp. 22-40];

ISSN 2542-1514 (Print)

5) there are also states in which only certain elements of federalism are implemented or the subjects of the federation are under strong control of the central government. In comparison with the American model, the subjects of the federation in Australia, Austria, and Germany have clearly less power and "legal" powers;

6) regardless of the degree of independence of the subjects, all real federations can be characterized through the allocation of various subsystems of law. They usually have a basic law (constitution, etc.), their own system of legislation, and sometimes their own judicial system, judicial precedents, regional customs, regulatory legal agreements.

The norms created by the subjects of the federation (even with their smaller number or significance, compared with federal ones) are not just a set of provisions, but interrelated provisions based on federal legislation and (or) the basic law of the subject, having a common regulatory purpose reflecting the well-known independence (autonomy) of the subjects. It is noted that the systemality of the legislation of the subjects of the federation gives a set of diverse and heterogeneous external and internal relations, that the qualities of this system are relative autonomy, integrity, organization, complexity [18, p. 13, 14]. The law of the subject of the Federation ("regional law") it is characterized as a system of legal norms or a level of law [19];

7) the distribution of law-making functions between the federation as a whole and its constituent parts in different states differs significantly according to such criteria as a greater or lesser amount of competence, the assignment of certain issues of specific branches of law (legislation) to the subjects of federations, the presence or absence of a judicial system (individual courts) of the subjects of the federation, etc.

At the same time, with the most minimal law-making powers, they ensure a certain political and cultural autonomy of the territorial community. This role is played, in particular, by the very fixation of the status of the subject and its rights to create authorities, issue regulatory legal acts; securing the right of subjects to receive and use certain tax revenues and (partially) regulate these processes; the right to determine the specifics of cultural policy, etc.;

8) the diversity of legal regulation arising from the implementation of the principle of federalism, and this principle itself, is evaluated differently by researchers: from negative to neutral and positive attitude towards them. It should be noted that in some cases this diversity plays a negative role, but in others, on the contrary, it is one of the few acceptable ways to combine the preservation of a single state and extreme, potentially conflicting, social diversity;

9) the variety of legal regulation in various subjects of the federation can be used by individuals and legal entities as part of the strategy of choosing the law. This is realized today not only at the individual level. The doctrine of competitive federalism is characterized by the opinion that the activity of regional public authorities should be associated with the competition of the subjects of the federation for the taxpayer, producer and consumer [17, pp. 33, 34], that such competition can have a beneficial effect on the development of both the subject and the federation as a whole.

6. Territorial self-government and legal pluralism

Similar conclusions can be drawn in relation to:

1) "states with elements of federalism" like individual empires, regionalist states, states that include territorial autonomies, if the relevant territorial entities and their authorities have law-making competence;

2) states in which local self-government

exists.

Thus, in Russian legal science it is recorded that "the diversity of municipalities predetermines the existence in each of them of relatively independent systems of municipal normative legal acts" [20, p. 9], that municipal normative acts of a municipal entity represent an organized and orderly legal integrity [21, p. 9].

The degree of autonomy and originality of such systems as a whole is less than that of the sub-law of the subjects of the federation, especially since municipalities, as a rule, do not have their own judicial bodies. Nevertheless, these autonomy and originality take place and contribute to the differentiation of legal regulation in both unitary and federal states. In the latter, they reinforce the consequences of the implementation of the principle of federalism.

7. Corporatism and legal pluralism

Corporate (local) legal regulation in Russian science is almost not considered as a reflection of the dialectic of legal monism and pluralism and generally attracts the attention of researchers less often than the problem of "law and federalism". In domestic legal science, it is still sometimes reduced to quite rare cases of the adoption of local acts regulating labor relations, or it is generally taken out of the scope of law. There is also no doubt that in the conditions of a developed state, local acts are often rigidly inscribed in the hierarchy of sources of law, in which they are assigned a subordinate position.

At the same time, an indicator of a more complicated state of affairs is, of course, old and modern discussions regarding the status of the church, church law, and the economic power (the power of the employer). Both at the beginning of the XX century and at the beginning of the XXI century, many canonists were convinced that internal church law is the creation of the church itself and cannot be part of state law or that church law cannot be attributed to either private or public law [22, pp. 12-14; 23, p. 38, 39]. Based on the views of the famous Russian civilist L.S. Tal [24, p. 479-482] our contemporary A.S. Kudrin considers the employer and state authorities as separate subjects of social power and legal influence [25, pp. 16-64].

For organizations working in different fields, there are typical examples of competition and (or) originality in the areas of activity, structure, internal rules. Scientists, publicists, writers somehow compare specific churches, firms, universities, etc.

It can be noted that firstly, within the framework of the social system and the rule of law of the Middle Ages, the state (voluntarily or involuntarily) recognized the existence of various judicial and legal immunities (churches, landowners, cities, merchant guilds, universities, etc.).

Secondly, even at present, the sources of law of non-public organizations and their governing bodies are represented in many branches of private, and indirectly public law, and can be quite peculiar, as a result of which almost every organization differs in some way from another. These differences are related: 1) with the publication of "initiative" regulations and contracts that are adopted within the limits of permissible discretion, or are of a contested nature, but have not become the subject of verification by public authorities; 2) with the presence of legal and quasi-legal local customs; 3) with the issuance of local administrative acts that do not always comply with external and internal regulations, but are applied in practice; 4) with the existence of other local regulators – the goals of the organization's activities, its interests, etc.

In the most general form , we can summarize the following:

1) corporations can be created both from outside (state institutions and enterprises) and

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through the self-organization of certain persons;

2) they may correspond to groups and communities created on the basis of various principles (according to religious, ethnic, territorial, professional, age, economic and other characteristics);

3) the level of legal autonomy of organizations varies and depends on various factors (features of the legal system, political regime, form of ownership, the presence of historical and cultural traditions);

4) corporate norms of law are somehow connected with each other and external norms of legislation, they often have a charter as a basis, largely contribute to the achievement of the goal of the activity of an organization. In other words, they form a system (subsystem), which is also noted in the literature [26, p. 11];

5) these norms of law can be fixed in various formal sources (not only in normative acts, but also in customs, normative contracts and even precedents);

6) the norms adopted in various organizations may differ from each other, affect issues of various branches of law, these differences are largely related to the specifics of the organization's activities;

7) the corresponding differentiation of legal regulation can have both positive and negative significance, but the complete disappearance of the manifestations of independence and originality of organizations is impossible, which is associated with both manifestations of social pluralism and limited opportunities to manage society from a single center;

8) legal diversity at this level can be used by individuals and legal entities in their own interests;

9) the problems of comparing state and corporate regulation, the peculiarities of regulation in various organizations are particularly acute in the context of globalization.

8. Community self-government and legal pluralism

The reference to community law as a separate level of domestic legal law is controversial. We must put out of brackets those normative institutions that are not recognized by the state, that is, they are not included in the system of state law, but in the normative system of the community as such (although they, being singled out by anthropologists, sociologists, historians, most often correlate with the expressions "community law" [27], "community justice" [28]).

If we keep in mind exclusively the norms of communities that are not organizations, to the extent that they are sanctioned by the State (by the whole society), then firstly, they can only be expressed in the form of customs. Secondly, such customs are relatively rarely used in the legal law of a developed State. Previously, they were used primarily in conditions of pluralism of jurisdictions by State-authorized community justice and management bodies, whose representatives themselves were experts in the relevant customs. Today, there are almost no such structures left in the "Western world". Under such circumstances, customs admitted into legal law can hardly constitute a separate subsystem of norms.

At the same time, in historical retrospect and in some modern States of Africa, Latin America, Oceania, the role of such customs may be much more significant, recognized at the level of the basic law, and their array may be much more interconnected. It is significant that even when comparing the judicial practice of using the customs of indigenous peoples in Russia and Canada, it was found that in the latter cases based on customs, the rights of autochronous peoples are sometimes decided in favor of representatives of these ethnic groups, even when at first glance there is a custom that

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conflicts with legislation [29].

In any case, the use of community customs, of course, increases legal diversity, promotes consideration of the interests of social groups and should be considered when revealing the problem of legal pluralism.

9. Conclusions

We can see that the concept of legal pluralism in certain aspects is quite applicable to domestic law. Its use allows us to take a fresh look at the legal regulation of public relations and show that legal law has a peculiar dialectic of legal monism and legal pluralism.

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