LEGITIMACY OF LAW
AS ITS JUSTIFICATION AND RECOGNITION

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Abstract. The *subject* of research is social relations in the field of legitimacy of positive law in the modern state. *Methodology*. The methodological basis of the study is the methods of induction and deduction, dialectical-materialistic method, method of analysis and synthesis, historical method, which allowed to objectively comprehend the content and essence of the issues under study. The *purpose* of the article is a theoretical and legal study of the legitimacy of law as its justification and recognition. The *results* of the study are: the legitimacy of law from the point of view of the theory of communicative rationality is investigated; the historical and theoretical process of development of interaction between subjects and the process of recognition, legitimation of norms in society as a social evolution is investigated; the development of the ideas of legitimacy and moral consciousness in the modern legal order is investigated; the tendencies of legitimization of positive law in the modern state on the basis of morality are determined; the peculiarities of ensuring the legitimacy of power through the legitimacy of law are highlighted. *Conclusions*. Law and modern morality stem from traditional relations, and they are interconnected. Legal norms are not just orders, they are fulfilled not only out of fear of coercion, but also out of respect for the law. However, for this, the legal order must be legitimate, enjoy the authority of citizens, and this is possible only if the positive law does not contradict the moral norms shared by a given society. The legitimacy of law lies, first of all, in the development of the legal basis of state and social life. But the meaning of the legitimacy of law in a society that calls itself democratic is seen not in the mere fact of existence and strict implementation of even legally perfect legislation, but in the extent to which it comprehensively embodies universally recognized humanistic goals, ideals, and values. Among them are the recognition of the people as the exclusive source of power and law, the rule of law, separation of powers, inadmissibility of usurpation and unlimited power, equality of all before the law and the court, inviolability of justice, etc. Of course, it is about fundamental human rights and freedoms with the legislative consolidation of the state's obligations to ensure and protect them. The legitimacy of law is the idea, requirement and system of real expression of law in the laws of the state, in lawmaking itself, in subordinate lawmaking with the steady recognition and perception by the population of the state.

Key words: legitimacy of law, legitimation, legality, theory of law, legal nature, legal norms, lawmaking, state, human rights, positive law, morality.

JEL Classification: K10, K39

1. Introduction

Modern Ukraine is undergoing radical democratic transformations. However, during this time fundamentally new political, economic and ideological relations have been formed in the country. They are based on human rights, democracy, rule of law, market relations, pluralism of opinions, etc.

Despite the successes, modern Ukrainian society is still far from democratic perfection. Here it is possible to fully talk about the issue of legitimacy of law. On the one hand, this issue has long been one of the most pressing in Ukraine. On the other hand, the legitimacy of law in modern Ukraine is in a state of relative oblivion at the level of domestic politics and ideology, due to insufficient attention to the theory of state and law. To a large extent, this is due to the bureaucratization of society, the unwillingness of the growing bureaucracy to bind itself to obey the law, which is formed by legal nihilism in society.

Discussions on the understanding and content of the legitimacy of law have been going on in science

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for a long time. The solution of these issues in a particular country is usually determined by the political and legal regime, the functioning of specific political and legal systems, the dominant ideology regarding the understanding of law, power, human rights, freedom, democracy. With all the diversity, it usually refers to the well-known liberal democratic principles in the relations of the population with the state authorities, or their variants.

The understanding of legality largely depends on how the law is interpreted. In science, as is known, there are two main concepts of understanding law. According to one of them, the law is a system of legal norms emanating from the state, enshrined in legislation and guaranteed, i.e. written law. According to another concept, law is not only power norms, but also fundamental ideas and principles of freedom, equality, dignity, morality, humanism, justice, which are most concentrated in natural, inalienable human rights.

Disputes about the priority of this or that concept do not stop. Meanwhile, today the productive opinion about the value of each of them and the need for their close interconnection in practice is increasingly prevailing.

In Ukrainian legal science, especially in the educational literature, the legality of law is often referred to, with certain variations, as the requirement of compliance and perception of normative legal acts by all subjects of law – state bodies, public organizations, enterprises, institutions, officials and citizens. This approach was laid down in the Soviet period of the country's history. The main emphasis then was on the implementation of legal norms. The question of their very content was silenced, which did not cause criticism, because, as the authorities claimed, the content of legal norms is the will of the workers, the whole people.

This understanding of the legitimacy of law is very convenient for any dictatorship. It has the opportunity to create selfish arbitrariness with the help of undemocratic law and its further strict implementation and forced perception by the subjects of power and the people.

It is no coincidence that with the objective course of history, the moral understanding of law, which is generally recognized today, was formed and established, based on the axiom: "the law is correct in content, not in established form" or "not every legislative or judicial-administrative decision, being formally correct, contains a right." (Mishchenko, 2010)

Accordingly, it is necessary to adequately approach the understanding of the legitimacy of law in its true democratic sense.

2. Legitimacy of law and the theory of communicative rationality

The question of the legitimacy of positive law is very relevant in legal science, meanwhile, in recent years, rationalism in understanding the nature of law has been criticized in domestic legal science. It is about E. Yuriychuk, who defends the anthropological approach to law (Yuriychuk, 2010), as well as about T. Novachenko, who points out: "Having embarked on the path of scientific development, jurisprudence finds itself at the crossroads between science and ideology, precisely established fact and value, often succumbing to the spell of illusions, myth-making." (Novachenko, 2016).

In connection with the criticism of the theory of classical rationality, the theory of communicative rationality, which has not yet become widespread in Ukraine, developed by K. Apel and J. Habermas in the twentieth century, seems interesting. According to this theory, there are two types of activity in society: instrumental and communicative. While M. Weber and many other scientists reduced actions and social development to instrumental actions, representatives of the theory of communicative rationality also distinguish communicative actions aimed at mutual understanding. According to J. Habermas, M. Weber was wrong to consider purposeful action as the only model that explains behavior in society. M. Weber identified different types of social action, which differ in varying degrees of rationality. However, in his typology there is no action aimed at mutual understanding of subjects, that is, communicative action (Apel, 1998; Habermas, 1995; Weber, 1998).

Communicative rationality implies that statements can be criticized. Here knowledge is not given as definitively formulated rules, it can be questioned in communicative practices. Proponents of communicative rationality have developed a theory of consensual truth. A fact is not directly an object that exists independently of the subject. A fact is something that is asserted in the statement of the subject. Therefore, the truth is what the community recognizes. In general, in the XX century, many thinkers criticized the categories of "reason" and "rationality", since rationality was perceived exclusively in the sense of the ideas of the Enlightenment. M. Weber, as well as representatives of the so-called Frankfurt School of philosophy M. Horkheimer linked the problems of social development with the spread of purposeful action. The theory of communicative rationality indicates that in the process of evolution of society there is a separation of purposeful action from communicative. After that, different types of coordination of actions are formed, in one case it is mutual understanding, and in the

other – money and power. Thus, supporters of communicative rationality suggest "to consider society as a whole, which in the course of social revolution is differentiated into a system and a life world. The systemic evolution is measured by the growing regulatory capacity of society, while the state of development of the symbolically structured life world is marked by the separation of culture, society and personality." (M. Weber, 1998; M. Horkheimer, 1985)

The fact that in society, in addition to purposeful actions, there are also communicative ones is justified by the historical process of anthroposociogenesis, or the process of social evolution. Communicative action is the basis of other actions. These views were first developed by the representative of interpretive sociology G. Kelsen. According to G. Kelsen, three stages of interaction development can be distinguished in the course of social evolution. First, there is interaction mediated by gestures. Then comes the stage at which symbolically mediated interaction takes place. Finally, the last stage is linguistically mediated, normatively directed interaction (Kelsen, 2004).

At the third, the highest stage of symbolic indirect influence, grammatical language is already formed. In order for it to be formed, it is necessary to have objective, social and subjective in society. Before the formation of these worlds, language cannot perform the function of coordination, because the participants are not able to orient their actions so that they serve as a claim to significance. The binding effect of a statement is directly related to the fact that the listener perceives it as significant. In addition, this means that the speaker, claiming to be significant, firstly, claims to establish truth in the objective world, secondly, to the correctness of legitimate systems in the social world, and thirdly, to sincerity in the subjective world of the subject. Considering how a person, G. Mead points out that a norm is an expectation of the behavior of a "generalized other", that is, a pattern of behavior that any member of society expects from us, perceives norms. "The installation of a generalized other is the installation of the whole community." (Mead, 1934) The perception of a norm occurs only when an individual agrees with it. The norm differs from mere requirements supported by sanctions by the moment of its recognition by the addressee. The difference from animal signals-symbols is that the interaction takes place on the basis of a common culture.

However, this raises the question of how a rule becomes meaningful, legitimate for the whole community. This aspect was most thoroughly developed by L. Wittgenstein: "When different people perform certain actions in different circumstances, it is only by following the rule that it is possible to determine whether they are performing the same actions or not. The criterion that a naturalist uses when observing natural processes will not help here: to identify what is repeated in the observed phenomena. What is repeated, or thus remains in symbolic actions, can be identified only by relying on the rule." (Wittgenstein, 2022) Thus, not every repetition is a rule in society. What is also important is the reaction of other people, in which interaction becomes a cultural program, provided with a common understanding of what is right and what is wrong. However, where does this agreement come from? Subsequently, É. Durkheim drew attention to the fact that ritual practice is the form that generates norms in society, since initially legal norms had a religious character. Violation of these rules was understood not only as a sanction, but also as a violation of the sacred. Henceforth, the moral authority of the rules justifies sanctions and is primary in the norms. Thus, as É. Durkheim pointed out, ritual religious practices made social interaction possible with the help of symbols and formed norms that became significant for the social community. It is ritual practices that create the community of the group, which is personified in significant symbols. Human activity, its instrumental actions presuppose the presence of cooperation within the community, that is, regulation of relations by norms (Durkheim, 1982).

3. Legitimacy of legal norms: ideological genesis

Consider now how the further development of interaction between subjects takes place and how the process of recognition and legitimation of norms in society changes with social evolution. The functions originally performed by ritual practice are transferred to communicative action; the authority of the reached consensus gradually replaces the authority of the sacred. This means the liberation of communicative action from sacredly protected normative contexts. The disillusionment that leads to the sphere of the sacred losing its power occurs through the linguistics of ritually secured basic consent; the potential for rationality of communicative action is released. When there is a division of labor in society, there is a separation of ordinary life and its practices from the sphere of religious practices. The ordinary, or profane, sphere of life performs the function of adapting society to the environment, which gives a certain independence to actions in this sphere. Unlike the sacred sphere, where symbols and rituals are not subject to criticism, in other spheres of life norms can be challenged. The grounds for recognition are gradually changing, that is, the reason for the legitimacy of norms is no longer the authority of the sacred, but the consensus in society, which depends on arguments.

In the early stages of social evolution, there is a mythological consciousness, characterized by a fuzzy distinction between the external world and language, as evidenced by the magical practice that identifies names and the objects they denote. Such a worldview can be characterized as "closed" (using the terminology of J. Berger), that is, when there are no alternatives to sacred beliefs, and they cannot be challenged (Berger, 1998). According to supporters of communicative rationality, there are three historical types of worldview: mythological, religious and metaphysical, modern. The first type is characteristic of tribal societies, the second is inherent in ancient and feudal states, and the last is formed in the modern era. The transition from one type of worldview to another means an increase in the degree of openness of worldviews, the growth of their rationality. These changes cannot be explained only by external, for example, economic, factors). They are explained by problem solving, by the learning process.

The modern scientist S. Zykova developed the training and its stages. In his opinion, learning is seen as a problem-solving process. The new stage of development is characterized by the formation of new skills. Thus, the transition from one stage of thinking to another, higher one, is caused, first of all, not by the influence of the outside world, but by the learning process. According to the proponents of communicative rationality, the development of worldview in the process of anthroposociogenesis is similar to the stages of intellectual development of S. Zykova. In the works of the latter, the category of "decentration" is used, which characterizes the process of intellectual development of the individual. Initially, the external world and the inner world of the subject are not distinguished at this stage. In addition, social and physical phenomena, symbols and meanings are not separated. Subsequently, there is a differentiation of the inner and outer world. The individual begins to realize the points of view of others, which is a manifestation of the decentralization of his worldview. As noted above, the evolution of social worldview is also characterized by decentralization. The mythological worldview does not separate the objective, subjective and social worlds, so it does not allow to distinguish between the world of significant norms and the world of subjective experiences (Zykova, 2013).

M. Weber first studied the process of changing the social worldview from mythological to modern. The process of rationalization, or "disenchantment" of the world in human consciousness in the process of society development as a change of culture was studied by him most consistently along with all the factors that characterized rationalization (Weber, 1994). However, in relation to the subject under study, the most valuable is the development of the worldview itself, which results in the formation of a secular culture in which the norms of law are legitimized in a different way than in traditional societies.

The change of worldview and the departure from religious legitimation of norms occurs as a result of differentiation of such spheres as art, morality and religion. The beginning of this process falls on the XVI century, and it ends in the XVIII century. Thus, by the end of this period, scientific activity was already separated from religion, academies and universities were engaged in science, in which scientific problems were studied independently of religious doctrines. The independence of art and literature is evidenced by the emergence of criticism – artistic or literary. Of course, in this historical period the argumentation is still tied to religion, but the legal system is becoming more and more independent, which is manifested in professional education, development of legal science and justice. "Disenchantment," as M. Weber called this process, led to the formation of autonomous public cultural values that are not associated with magic or religion. The division of society into the world of the sacred and the world of ordinary life disappears; the worldview becomes "open" (Weber, 1994). Thus, in the process of developing a social worldview, the development of positive law takes place.

4. Development of ideas of legality and moral consciousness in the modern legal order

The development of morality and law is directly related to the development of public moral consciousness.

After the emergence of state power, the so-called traditional society, or society formed around the state, is formed. There is already a legal order, although there is no clear distinction between law and morality. Legal norms are perceived as something given, there is no understanding that they can be criticized or challenged. The rule of law is certainly beginning to form as an independent system, because there are already general norms and sanctions, and punishment is already understood as protection of the normative order. However, in a traditional society, an individual simply complies with the existing norms, which he or she cannot challenge. D. Zadykhaylo called such dependence on existing norms heteronomy, which means that it is not the will of man that creates the law, but this law acts as an external third-party motivation (Zadykhaylo, 2007). Finally, in the period of modern times, the so-called modern society is formed, during this period legal norms can already be criticized and are based on universal principles, not on the forms of life of specific societies. Legitimation of law through general legal principles is connected with the idea of rational natural law, which was developed in the XVII century.

In the transition to modern consciousness and culture, the morality inherent in traditional society is divided into morality and positive law. The historical process of rationalization of culture was analyzed by M. Weber, who pointed out how the ethics of faith is formed from the religious traditional consciousness, when due to "disappointment" with the world, the norms justified by traditions are devalued. That is when morality in the true, modern sense appears. For human behavior to be said to be dictated by morality, it is not enough that it is simply based on generally accepted norms. It is necessary that the personality is autonomous and moral norms are accepted voluntarily, not because of sanctions in society or fear of God (Weber, 1994). Moreover, autonomy can only be rational. Morality is formed from the morality of traditional society, when norms lose their self-evidence, when there is an attitude to generally accepted norms, an understanding that they may be different, and, therefore, their recognition by a person requires their justification by the principles of justice, and these principles can be discussed.

Therefore, in modern society the attitude to law and morality becomes conscious.

5. Trends in the legitimacy of positive law in the modern rule of law based on morality

Positive law (position in Latin means "establishment", "affirmation") in the period of formation of the modern worldview is already considered as a human institution, and not as an eternal unchanging divine law. "Modern law is regarded as a law that has been positively put into effect. It does not develop through the interpretation of recognized revered traditions; rather, it expresses the will of a sovereign legislator who regulates the state of affairs in society through the legal means of organization." (Mishchenko, 2010) Law and modern morality stem from traditional relations, and they are interconnected. Legal norms are not just orders, they are fulfilled not only out of fear of coercion, but also out of respect for the law. However, for this, the legal order must be legitimate, enjoy the authority of citizens, and this is possible only if the positive law does not contradict the moral norms shared by a given society. Of course, since positive law is endowed with the power of state coercion, it also affects subjects who do not share public moral principles, but at the same time laws cannot ignore the values of this society, otherwise they will not be norms with authority.

However, it should not be assumed that in modern society morality is above law, rather they complement each other. Here we should recall the characterization of legality, which was given by E. Kant in the work "Metaphysics of Morals" (Kant, 1996). Law abstracts from free will, as freedom of choice is sufficient for law-abiding behavior. Also, unlike morality, law regulates only external relations between people, that is, it is not interested in the motives of behavior. This is because law provides coercive power that can influence external actions, but not the motivation and values of the subject. Thus, positive law needs morality, because law is limited by legality, and legality is the sphere of morality. Thus, moral principles legitimize law, since law cannot be based solely on coercion, but, on the other hand, law compensates for the lack of coercion in modern morality. At the same time, of course, not all legal issues are moral, since the main source of positive law is legislation.

6. Features of ensuring the legitimacy of power through the legitimacy of law

The establishment of democratic ways of forming political institutions in modern times destroys traditional legitimation. Through the rationalization of society, the authority of the sacred is replaced by moral consent, which expresses in a rational form what has always been implied in the symbolism of the sacred: the common interest. Norms are enforced because they have moral authority and express a common interest. Therefore, the implementation of these norms also serves to preserve group identity.

In the traditional society, the rights of the one who held this position were considered as personal rights of the one who held this position. In the conditions of the secular worldview in the new time, when the rule of law is being formed, power has become an abstract category not related to a specific person. Thus, in modern times, bureaucratic management is being formed, which M. Weber first wrote about (Weber, 1994). The formation of legal dominance is associated with a change in the values and motives of interaction in society. The development of motives in interaction is associated with the separation of empirical motivation of the subject from actions aimed at interaction. As S. Kozlov wrote, "in the course of social evolution, there must be a process of increased generalization of value systems." (Kozlov, 2014)

Power relations are unequal, asymmetrical relations. In addition, the authorities rely on monopolistic means of coercion that can always be used against a citizen. In particular, V. Nevidomiy draws attention to this, indicating the reason why the legitimization of power is necessary. In particular, he writes that the justification of state power is necessary because it restricts the freedom of the individual and at the same time has the means of coercion (Nevidomiy, 2011).

This position of the parties can be justified only by the fact that the government serves the general interests in society. Therefore, power inevitably needs justification, i.e., legitimation. In addition, since

the government acts through legal acts, the legitimacy of the government is ensured through law. First of all, it is about modern law and the state.

7. Conclusions

Human activity, its instrumental actions presuppose the existence of cooperation within the community, that is, regulation of relations by norms. The change of worldview and departure from religious legitimation of norms occurs through the differentiation of such spheres as art, morality and religion. In the process of development of social outlook, positive law is developing. The rule of law, of course, begins to form as an independent system, because there are already general norms and sanctions, and punishment is already understood as protection of the normative order. In the period of modern times the so-called modern society is formed, during this period legal norms can already be criticized and are based on universal principles, not on the forms of life of specific societies. Legitimation of law through general legal principles is connected with the idea of rational natural law. Positive law in the period of formation of the modern worldview is already considered as a human institution, not as an eternal unchanging divine law.

Law and modern morality stem from traditional relations, and they are interconnected. Legal norms are not just orders, they are fulfilled not only out of fear of coercion, but also out of respect for the law. However, for this, the legal order must be legitimate, enjoy the authority of citizens, and this is possible only if the positive law does not contradict the moral norms shared by a given society. Of course, since positive law is endowed with the power of state coercion, it also affects subjects who do not share public moral principles, but at the same time laws cannot ignore the values of this society, otherwise they will not be norms with authority.

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The legitimacy of law lies, first of all, in the development of the legal basis of state and social life. But the meaning of the legitimacy of law in a society that calls itself democratic is seen not in the mere fact of existence and strict implementation of even legally perfect legislation, but in the extent to which it comprehensively embodies universally recognized humanistic goals, ideals, and values. Among them are the recognition of the people as the exclusive source of power and law, the rule of law, separation of powers, inadmissibility of usurpation and unlimited power, equality of all before the law and the court, inviolability of justice, etc. Undoubtedly, it is about the fundamental human rights and freedoms with the legal consolidation of the state's obligations to ensure and protect them. The legality of law is understood as the idea, requirement and system of real expression of law in the laws of the state, in lawmaking itself, in subordinate lawmaking with consistent recognition and perception by the population of the state.

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