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ACADEMIC LIFE

"I AM NATURAL LAW": THE CRITICISM OF AN INTELLECTUAL TRAP*

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The concept of natural law shows the dichotomy of the "objectivist" and the "subjectivist" approaches. The article analyzes this dichotomy in the context of "natural rights" of the North American Indians.

The objectivist concept of natural law rests on humanistic considerations, which should be expressed in positive law. According to the doctrine, natural law has accomplished a cultural mission and shaped the modern Western law involving the heritage of Roman law, Christianity and of the ancient Greek philosophy. Natural law contributed to the doctrine of law and moreover, it actually helped to stabilize legal order for the people's benefit in the society matching the rule of law.

We encounter a completely different picture in the subjectivist tradition of natural law. According to subjectivist tradition natural law is considered foremost as subjective or "human rights". Today the subjectivist understanding of natural law related to J. Locke is reinterpreted in ethnonational context. Natural human freedom is idealized as life or being "free in nature" and it also presumes recognition of a special status for the Indians, which implies inter alia "freedom" from political community, state and legal institutions suitable only for the non-Indians. Such understanding of natural law fits well the irrationalism of postmodernism philosophy, where the values of existential personal image (individuality, difference and separation) are hugely exaggerated. This means the deviation from traditional trend in western philosophy of law with its well-known adherence to rationalism and its commitment to equality and openness. Practically this leads to ethnonational arbitrariness and complicates the dialogue between the Indians and the rest (non-Indian) world.

🗝 Philosophy of law, natural law, human rights, rights of indigenous people, identity, natural freedom, ethno-nationalism, postmodernism.

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METHODS OF LEGAL THEORY IN THE CONTEXT OF GLOBALIZATION

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The contemporary level of scientific knowledge in the realm of jurisprudence rules out metanarratives about essence of law. Legal pluralism, being one of the consequences of globalization, has become one of the incontestable facts of the legal reality; legal regulation is now carried out on many levels and in a multiplicity of forms. This implies that essentialist discussions about the nature of law are out of date. Russian legal theory until now has relied on the essentialist scheme of legal thinking, in which a definition of the law is the starting premise and the binding force of law is justified with reference to the category of sovereignty. This scheme involves contradictions between: claims from the constitutional discourse about the supremacy of human rights and the priority of principles of international law or balance in law-application, on the one hand; and the theoretical foundations of such claims, on the other hand. The style of legal thinking based on the legal scholarship at the beginning of the XX century can show the inadequacy of philosophical and theoretical conceptualizations of the key problems of legal science such as sources of the binding force of the law, limits of the rule-making power of the state, and the correlation between legal orders created by the state and by other social institutions. Legal education and scholarship in Russia are still presupposing that state power prevails in the issues of law-making and law-enforcement; this justifies the absolute and unlimited character of state sovereignty and the other key ideas in the first versions of legal positivism. Because of the iron curtain in the previous years, in the late 1980s Russian legal philosophers and theoreticians found themselves unprepared to make a theoretical conceptualization of the effect of globalization. Moreover, during many years they just ignored the problems that are connected with this effect. Nonetheless, in the scope of these years the Russian economy and, to a large extent Russian law, have gotten involved in the processes of globalization, including the processes of fragmentation and the pluralization of legal orders. This has resulted in a considerable gap between legal theory and legal practice.

🗝 Sovereignty, concept of law, legal thinking, human rights, binding force of the law, globalization, legal pluralism.

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SALE AS OBLIGATION IN THE LIGHT OF THE HISTORY AND PHYLOSOPHY OF CIVIL LAW

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There is a deep distinction between cash sale, i.e. exchange of goods for ready money without formation of obligation, and obligational or contractual sale which consists in rights and duties aimed at performance of a contract. Like a primitive non-monetary exchange a cash sale functions as two reciprocal donations. Any relationship of this kind falls into an established routine without being tested for reasonableness or correctness, each party expresses its own arbitrariness hence serves only as a means for the other. A transition from cash sale to obligational sale is a transition from duty to freedom as a basis of the relationship. Non-monetary exchange of goods for goods does not imply comparison of value of things but cash sale as exchange of goods for money equalizes the thing sold with the purchase price hence equalizes the seller and the purchaser. Obligational sale realizes this equality as equality in freedom by way of determining contractual rights and duties. Freedom has a form of rights and duties: a contract of sale created by Roman jurisprudence for the first time subordinated relationships between private persons to idea of freedom. Development of obligational sale generally corresponds to development of social freedom.

The second part of the publishing article offers the results of the study of Russian archival purchase deeds for immovable property from XV—XVI centuries and terms of cash sales' regulation under Sobornoye Ulozheniye of 1649. Qualification of old Russian sale as a non-credit cash sale on a spot gave rise to the new interpretation of birch manuscript No. 318 (mid XIV century). Obligational sale is considered in the light of social significance of jurisprudence that makes possible to understand contract of sale as appearance of freedom. The unity of equality and human freedom constitute the subject-matter of jurisprudence. Furthermore, the author criticizes the concept of

equality without freedom which was inspired by Marxist economic doctrine, as a concept confronting the law.

🗝 Cash sale, contract of sale, history of sale, donation, exchange, obligation, duty and liability, freedom, Russkaya Pravda, birch manuscripts.

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CONSTITUTIONAL FOUNDATIONS OF THE NATURAL ENVIRONMENT OWNERSHIP

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Constitutional regulation of the natural environment ownership in the Russian Federation has a systematic character. Constitutional provisions relating to the natural environment ownership are located in different sections of the Constitution, thus allowing for the expression of differences in legal constitutional nature of the regulating relations. Constitutional provisions lay down the methodological foundations in the field of both the ecological and natural resources law.

Economic and political considerations play a role in the establishment of certain forms of natural resource ownership along with ecological and legal considerations. As such the effects of the private ownership of natural environment on the growth of the market economy turn out to be exaggerated and unfounded. The economy advances not only when the private property on natural environment is well established, but when the right to use or rent natural resources is guaranteed. Legal regulation in the field of natural resources requires a high degree of legislative certainty which could be achieved by passing a federal "Natural Environment Ownership Act" or "Public Property Act". Establishing forms of ownership of natural environment requires taking into account the specificity of natural environment as both a matter of ownership and as a public domain.

The constitutional review plays an important role in resolution of conflicts between legislation and legal doctrine relating to the natural environment ownership. The Constitutional Court's proceedings in cases concerning natural environment ownership as well as interpretation of certain constitutional provisions by the court promote the development of the ecological and natural resources legislation according to the idea that nature is a basis for the peoples' life and activities in the Russian Federation.

🗝 Nature, public domain, ownership, forms of the ownership, Constitution of the Russian Federation, ecological legislation, natural resources legislation, the Constitutional Court of the Russian Federation, constitutional review.

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ENVIRONMENTAL (ECOLOGICAL) LIABILITY: THE PROBLEM OF DEFINITION

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The term environmental ("ecological") liability as a special type of legal liability for damage to environment is debatable. Some researchers identify "environmental liability" with "environmental law liability". However such equation is ungrounded. These terms are related as the part and the whole. Environmental law liability is a complex legal institute including different traditional types of liability (e.g. criminal and administrative) as well as environmental ("ecological") liability as a special type of liability for damage inflicted to environment. The term ecological liability had sometimes been used to describe forced suspension or termination of activity causing environmental damage — before the Russian Federation Code of administrative offences incorporated this type of sanctions.

Currently the question often discussed is whether the compensation of environmental damage in excessive amounts with established methods and tariffs of calculation is a type of civil law liability or this is a special environmental ("ecological") liability. Compensation of environmental damage as a legal institute goes beyond the scope of civil law since this institute's methods of regulation are not exclusively private law methods. Those who caused environmental damage and were obliged to compensate it are faced with specific environmental liability since they may be obliged to pay amounts in excess of the estimated directly inflicted damage. Near and remote future consequences of the environmental damage may be taken into account in calculation of the compensation amount based on proportionality principle. The compensation mechanism has to be improved and possible directions for that are presented in the article.

🗝 Legal responsibility, environmental offence, environment, natural sites, environmental damage, compensation of damage, economic harm, ecological damage, methods and tariffs, civil liability, environmental liability.

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TRANSFORMATION OF THE MODERN SYSTEM OF LOCAL ADMINISTRATION: TENDENCIES AND PERSPECTIVES

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Currently the old local administration system is going out of use. Within its framework all administrative powers had been actually exercised by traditional local authorities — councils, their committees and mayors. Most of the municipal services had been formerly provided by municipal authorities independently, using their own structures. Now there is a growing separation between the function and the strategic responsibility for the provision of the municipal services.

The municipal bodies are increasingly seen as the, so called, auxiliary or "enabling" authorities performing the tasks of determining the needs of the populace, establishing priorities for territorial development, defining the standards for the provided services together with the efficient ways for their application, thus, establishing liason between the consumers of the services and their immediate providers by means of the appropriate democratic mechanisms etc.

Thus, traditional administration by municipal authorities ("local government") is being substituted by the increasingly complicating system of interactions between different structures and institutes with certain public authority functions on a local level ("local governance"). Such "diffusion" of municipal functions is going to determine the transformation of the modern local government system.

Modern local government system is based upon interaction between the different actors, both public and private, with the partnership relations. The system of public corporations is operating throughout the country with a set of functions which once the municipal authorities used to perform. Within the framework of such system the municipal authorities increasingly share their specific services with private companies on contract basis. Co-operation with the private sector companies seems to be the objective necessity, especially in the countries with small communities facing lack of administrative stuff.

The analysis of the vertical diffusion of municipal services proves the possibility of certain centralization and of their transition to a higher level. It's often attained by creating various forms of quasi-regional government.

From the point of view of the democracy, vertical decentralization of municipal functions is the most important process, i.e. transition of functions to sub-municipal level. This serves as the core basis for the development of the local self-government and different forms of direct democracy on a local level.

🗝 Local authorities, direct democracy, municipal services, diffusion of municipal functions, new localism, public corporations, sub-municipal level, neighborhood councils, advisory committees.

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THE MODERN APPEARANCE OF THE INDIVIDUAL: IS THE CHOICE FREE?

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In the scholarly research on content and on the protection of the non-property rights of individuals in general, and in the analysis of the legal basis for privacy in particular, special attention is paid to the study of the concept of the "external appearance of the individual". In this article the notion of "external appearance" is studied as it applies to followers of fashion trends in society. Such individuals create a fashionable appearance — an appearance that corresponds to certain aesthetic standards adopted by society in a certain period of time. The right of appearance is grounded in constitutional determination and the protection of personal rights and freedoms. It is qualified as one of the personal non-property rights, — the object of these rights being an immaterial benefit.

Today, a person is free to create their own appearance by choosing clothing, accessories, and changing their body through various external interventions. The main element in creating an external appearance is clothing. Attempts to limit the aspiration for individuality and self-expression by prohibiting the free choice of clothing is perceived in our days as a relic of uncivilized, un-free societies that impose social and cultural dictates. However, this does not mean that the freedom of choice is unlimited. Despite the fact that on the legislative level the choice of clothing is unregulated, this does not mean that it is completely independent. The absence of a law in this case is compensated by social norms.

The right for creating an external appearance is rooted in the protection of privacy: no one should determine what others are able to do with their own bodies. Plastic surgery, tattooing, piercing, etc. are the exercises of a person's right to manifest their individuality — an integral part of private life. The forced change of appearance is qualified as an encroachment on human freedom.

Other components: accessories, hairstyle, make-up, etc. also play a certain role in the creation of one's external appearance. The modern doctrine and practice both tend to recognize these as forms of artistic expression and as copyright elements subject to legal protection.

The freedom of personal self-expression can be limited by the state solely upon moral considerations; however, such restrictions are justifiable only in certain areas and under certain conditions.

🗝 External appearance, image, freedom of self-expression, identity, freedom to choose clothes, clothing as a means of communication, make-up, social norms, inviolability of the person.

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INTERNATIONAL SCHOLARLY CONFERENCE "CONSTITUTIONAL LAW: DEVELOPMENT, PROBLEMS AND PERSPECTIVES"

(15—19 MARCH 2017)

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The authors express their gratitude to students and doctoral students of the Constitutional and Municipal Law Department, Faculty of Law of the Lomonosov Moscow State University: L. Aboubakirova, S. Dronova, K. Gouliayev, K. Tayoupova, M. Narhanyan and others for their help in organizing the conference and preparation of the current material.

The international science conference "Constitutional Law: Development, Problems and Perspectives" organized by the Constitutional and Municipal Law Department at Law Faculty of the Lomonosov Moscow State University with support from the Inter-Regional Association of Russian Constitutionalists and academic and research journal "Constitutional and Municipal Law".

More than 180 constitutional law scholars from Moscow, other Russian regions, CIS countries and other states participated in the conference, and more than 50 participants presented their reports.

The plenary session was opened by Professor Suren A. Avakiyan, Chair of the Constitutional and Municipal Law Department, Law Faculty of the Lomonosov Moscow State University. Suren A. Avakiyan stressed the demand for developing new streamlines in the constitutional law science, as well as for rethinking the existing concepts. Professor Mikhail A. Fedotov, Chairman of the Presidential Council for Civil Society and Human Rights, discussed pressing matters of development of constitutional legislation relating to the area of information rights.

The following reports continued the plenary session: The problems of the development of constitutional law in EU member-states in the context of European integration (Professor T.A. Vasilieva, Institute of State and Law, Russian Academy of Sciences; E. Tanchev, Advocate-general of the Court of Justice of the European Union (Republic of Bulgaria)); Relations between national and international mechanisms of human rights protection (A. Di Gregorio, Professor of the University of Milan, Italy); Directions of development of modern law and the role of constitutional law in this process (Yu.A. Tikhomirov, Institute of Legislation and Comparative Law under the Russian Federation Government); Constitutional justice (Hon. Judge N.S. Bondar, Constitutional Court of the Russian Federation); Modern development of constitutional law (B.S. Ebzeev and E.I. Kolyushin, members of the Central Election Committee of the Russian Federation, G.A. Vasilevich, Belarus State University); New reading of the Russian Constitution (A.A. Liverovsky, Saint-Petersburg State University of Economics); Local self-government organisation (A.N. Didenko, Chair of the Russian State Duma Commission on federal structure and local self-government matters; A.M. Murtazaliev, Chair of the Makhachkala City Council of Deputies),; Teaching constitutional law (L.A. Tkhabisimova, Pyatigorsk State University).

During the conference, the following panel sessions took place: "Constitutional order, democracy and parliamentarism", "Rights, freedoms and responsibilities of man and citizen", "Federalism and local self-government". A visit to the State Duma was organized for the participants.

🗝 Constitutional law, constitutionalism, democracy, parliamentarism, human rights, federalism, local self-government.

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