Artículo de investigación

Socio-cultural and psychological factors of criticism of the legal idea

Социокультурные и психологические факторы критики идеи права

Factores socioculturales y psicológicos de crítica de la idea legal

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Abstract

The juridical structure involves the choice of a legal model formed by abstraction, or idealization, of the legislative project. The goal of this paper is to identify the cultural and psychological factors of the many-sided criticism of the idea of the rule of law, which is fundamental for constitutional state. Methodology: a concrete historical method was used to analyze the variety of criticism of the idea of the rule of law from Karl Marx to the present, excluding the concept of denial of law. Results: unlike criticism by Marx and Mannheim of law in terms of ideology, contemporary theorists criticize the idea of the rule of law from their own psychological and cultural positions such as ignoring the role of specific socio-cultural conditions that generate special legal norms and relations, is often exploited to position these norms and relations as natural and universal. In

Аннотация

Юридическая конструкция предполагает выбор правовой модели, которая формируется путем абстракции, то есть идеализации законодательного проекта. Цель данного исследования – выявить культурные и психологические факторы разносторонней критики идеи верховенства закона, являющейся основой правового государства. Методология: при помощи конкретно-исторического метода проанализированы варианты критики идеи верховенства закона от Карла Маркса до современности, исключая концепции отрицания права. Результаты: в отличие от критики Марксом и Мангеймом права с точки зрения идеологичности, основным духовным фактором критики права в современном обществе является игнорирование роли конкретных социокультурных условий, порождающих

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the opposite case, the existence of universal legal knowledge (epistemic relativism associated with the relativity of the existence of legal facts) and universally valid legal norms (moral and legal relativism associated with the relativity of the meanings of legal ideas, concepts and norms) is denied, since ideas and values always depend on the views of cognitive or moral subject. Conclusion: while modern law and society need multidimensional criticism from different perspectives, then the idea of the rule of law requires protection in the framework of the theory and philosophy of law.

Key Words: Legal consciousness, relativism, the rule of law, habitualization, juridical structure.

особые правовые нормы и отношения, которое позволяет позиционировать эти нормы и отношения как естественные и универсальные. В противоположном варианте отрицается существование универсального правового знания (эпистемический релятивизм, связанный с относительностью существования юридических фактов) и общезначимых правовых норм (морально-правовой релятивизм, связанный с относительностью значений правовых идей, понятий и норм), поскольку идеи и ценности всегда зависят от точки зрения познающего или морального субъекта. Вывод: если современное право и общество нуждаются в многомерной критике с различных позиций, то идея верховенства закона требует защиты в рамках теории и философии права.

Ключевые слова: Правосознание, релятивизм, верховенство закона,, хабитуализация, юридическая абстракция.

Resumen

La construcción legal implica la elección de un modelo legal que se forma por abstracción, es decir, la idealización del proyecto legislativo. El observatorio de este estudio es identificar los factores culturales y psicológicos de la crítica versátil de la idea de la primacía de la ley, que es la base del estado de derecho. Metodología: con la ayuda del método específico e histórico, se analizaron las opciones para criticar la idea de la primacía de la ley desde Marx hasta la actualidad, excluyendo los conceptos de negación de ley. Resultados: a diferencia de la crítica de Marx y Mannheim de la ley desde el punto de vista de la ideología, el principal factor espiritual de la crítica de la ley en la sociedad moderna es ignorar el papel de las condiciones socioculturales específicas que generan normas y relaciones jurídicas especiales, lo que permite posicionar estas normas y relaciones como naturales y universales. En la opción opuesta se niega la existencia de un conocimiento jurídico universal (relativismo epistémico relacionado con la relativa de la existencia de hechos jurídicos) y normas jurídicas de carácter general (relativismo moral y jurídico relacionado con la relativa de los valores de las ideas, conceptos y normas jurídicas), ya que las ideas y valores siempre dependen del punto de vista del sujeto cognitivo o moral.
Conclusión: si el derecho moderno y la sociedad necesitan críticas multidimensionales de diferentes posiciones, la idea de la primacía de la ley requiere protección dentro de la teoría y filosofía del derecho.

Palabras clave: Conciencia jurídica, el relativismo, primacía de la ley, habitualización, abstracción legal.

Introduction

Although recent literature broadly discusses the future of the global governance (Oberoi, 2017), the value relativism is a significant factor in the escalation of the risks of legal consciousness deformation while critique of the idea of the rule of law (Wilkinson, 2019). The Mannheim Paradox, which consists in the fact that since any thinking depends on the socio-cultural context, Mannheim's own conclusions were predetermined by this context. Hence, no system of thought is more or less correct than any other. Mannheim provided his own problematic method of combating social conditioning, but the postmodern idea that all thinking is distorted, relative and contains significant flaws has led to the popularization of the idea of abandoning metanarratives, which also relate to legal norms. Postmodernism can be assessed as the most ambitious of metanarratives, a kind of inverted metaphysics – a homogeneous universe of

"similar interests", ironically very close to the Kantian concept of noumen in that the essence of the subject will always be beyond human consciousness. Beliefs are illusions, delusions and an incomplete reflection of a much more complex reality, making social agents to apply the "Othering" (Khan, 2018) psychological mechanism. Under the guise of abandoning meta-tales, "identification becomes less stable "(Frolova, 2018, p. 26) postmodernism offers its own grandiose narrative that can overshadow many works aimed at exposing and "correction" of social inequality.

Therefore, if all the allegations are equally false, then sexism and racism have a value equal to feminism and the civil rights movement, and the offense is equal to the struggle for freedom, as is customary to say in criminal circles. Moreover, sometimes this post-modernist relativism often looks more convincing than the propaganda of traditional legal values or their rational criticism. After all, if all knowledge systems and social relations are equally illusory, then there is no way to engage in systemic criticism, because what we perceive as a way out of false consciousness is a form of our enslavement to them. So, the media channels, it would seem, are free from the imposition of ideology, however, regularly reproducing the picture of violations in the state apparatus and law enforcement agencies, they are quite actively involved in the formation of legal consciousness and its deformations. These deformations include "the underdevelopment of legal consciousness and the positivist approach to the law, according to which the only basis for law is the state or the will of the legislator (Sirazetdinova & Lukmanova, 2016, p. 373).

The *aim of the research* was to indicate how faith in the legal order diverges from social and legal practice and what negative consequences this has on legal consciousness.

Methodology

The idea of the rule of law is criticized for its naive view of the law, according to which the content of the law does not depend on the social context in which the law operates. According to K. Mannheim, all historical and political thought is determined by the socio-historical location of the thinker, and therefore all thinking systems are inherently value-loaded, one-sided, distorted, or false (Mannheim, 1945). Following Mannheim's idea, the legal consciousness of each individual is determined by certain socio-historical and economic situation, which brings the process of *legitimization* of political and legal institutions closer to the rationalization and *habitualization* of everyday socio-cultural practices.

The concrete historical method was used in the analysis of socio-cultural factors of refraction of the risk phenomenon in the legal consciousness of a modern individual; it allowed us to identify the conditions for the emergence and establishment of legal awareness in a risk.

Results

In addition to obvious boundaries and prohibitions, legal systems are an influential source of social norms and ideas that filter how people perceive and understand reality. The influence of law permeates our daily experience. Interaction with law is part of everyday life: these are all the usual daily calls for law-abiding behavior in official and unofficial life. They come in the form of rhetoric of judicial debates, advice of lawyers to clients, information on the interaction between the police and suspects, employers and employees, creditors and debtors, or actors depicting the respective characters.

Sometimes, ways of discussing law (legal discourses) reflect ordinary ideas – common sense, for example: "the employer has the right to control what is happening on the computer screen of the employee, which is his own property". In whatever form legal discourses are presented, they help to comprehend what we understand as legal reality. They outline roles such as "owner" and "employee," and describe how to behave in a particular role. A person who acts as an "employee" is subordinate, but has his own powers and rights to protect privacy. In addition, the channels through which relations between an employee who has certain rights and obligations are regulated with others (contracts with customers, partnerships with other companies, internal corporate rules) emerge.

Legal norms divided the world into categories that filter individual experience, dictating the perception of anti-legal actions as something inevitable or as outrageous injustice, which must be countered as illegally imposed. In a broader sense, law and legal discourse affect the way we define concepts such as equality, freedom and justice, which are intertwined with the perception of morality. For example, a starving woman who steals bread for survival is a criminal by law. However, an employer who pays the employee less than the profit that he makes or not in accordance with the agreed amount may receive praise for his ingenuity in improving the profitability of the business.

Thus, law is especially convincing in comparison with the concepts of law, morality and religion, since it is often considered as a wall between order and chaos (Hobbes, 2012). For this reason, existing legal norms and relations can be perceived as undeniable because of their need in a social order. Hence, a clear, concise and detailed legal regulation of all types of legal relations and legal phenomena is extremely important, since the ability to explicitly represent certain social groups, criminalize or legalize behavior and norms through penetration into influential discursive networks makes the law an inalienable means of perpetuating social inequality and social injustice.

In opposite to the concepts of constitutionalism and legal order (Amhlaigh, 2016), for Marx, the ideology of abstract formal equality in capitalist societies overshadows and thus supports real inequality. The state abolishes, in its own way, differences in birth, social rank, education, and profession when it proclaims that birth, social rank, education, and occupation are non-political differences. The state proclaims that regardless of these differences, each member of the nation equally participates in the fate of state sovereignty. Nevertheless, the state interprets education and the profession as private property (Afridi, 2017) and ignores the types of inequality generated by private property, education, and the profession. Formal equality, therefore, remains an abstraction.

Legal norms that are widespread on a global scale proclaim individual freedom and formal equality, but act in such a way that they only mask social and economic oppression, which is also widespread in liberal democracies. Legal discourse to a large extent depends on ideology in the Marxist sense: “the thoughts of the ruling class are dominant thoughts in every era” (Marx, 2004, p. 14).

However, if law is only a “tool for expressing class domination” (Engels, 2002), then this phenomenon most likely refers to the rank of privileges. If law inevitably constitutes by ideas emanating from power relations, then the law has no justification – moral or institutional. If law depends on the legal ideology, then the legality of a particular act or institution looks conditional and unprincipled. If the law reflects only the interests of the authorities (it is a privilege), then this is an expression of power, not law.

The law, in contrast to privilege, not only takes a formal and normative form, but also subordinates power to itself. Moreover, legal ideology itself is not just an invention; it reflects real social conditions and reflects them. The idea of equality before the law, for example, is caused by the realities of capitalist economic relations and reflects them, even if it is formal and incomplete equality. Consensus in society will not be reached if the legal ideology has nothing to do with the social conditions that it is trying to justify.

In the legal context, discourses focus on the concepts of formal equality, individualism, freedom of contract and private property, which ensure the actual existence of exploitative relations inherent in the capitalist type of production, gender hierarchies, racial inequality and other forms of social inequality. Even the Universal Declaration of Human Rights (United Nations General Assembly, 1948) does not provide us with a universal definition of human rights, the source of rights and the role of the state in their protection. Moreover, states with their interests influenced the process of developing the Declaration. Although this information is widely available, a significant part of the texts of the declaration is silent about these problems. Nevertheless, the Declaration and similar documents are perceived by a large number of people as universal.

The definitions of equality and freedom in liberal legal systems base on rather abstract definitions of individualism and formal equality, avoiding the coverage of the problems of deep inequality and social injustice present in these societies. Thus, social inequality is viewed as constantly changing, but it always includes categorizing people into groups, some of which receive privileges at the expense of others. It is generally accepted that women, sexual minorities, and indigenous peoples are among the latter. The forms of privileges are diverse: economic, legal, social, technological. Perhaps binary oppositions of gender and national minorities and majorities (Foucault, 1977, p. 122) are a systemic effect, reflecting the separation of interests of privileged from interests of systematically suppressed large groups of people.

The concept of legal equality is similar to that defined by abstracting the concepts of economic, political, social and cultural contexts of equality. According to the ideology of the rule of law, everyone is equal in law, despite the existence of factual inequality, many of the aspects of which are caused or supported by this very law (legal norms and relations), just like the metaphysical concept of God is used in the Christian tradition described above. Millions of people lose billions

of dollars as a result of financial crises, the deliberate concealment of financial frauds that have contributed to terrorism, the proliferation of weapons of mass destruction and widespread tax evasion, while yet no organization or its leadership was punished in any legal way. There have been very few prosecutions and criminal sentences against large financial institutions or their leaders.

The largest corporations dominate legal resources, while millions of people do not have access to adequate legal assistance. Hence, it is inevitable that legal institutions do not do enough to eliminate anti-legal phenomena. A corporation, as a subject of law, surpasses a specific person who is also a subject of law, and looks like the institutionalization of a transcendent, eternal legal personality, built in the image and likeness of a collectivist community. Like gods, corporations act through their "worldly" representatives from the common people (production and advertising).

Thus, an impoverished employee and a giant multinational corporation are formally equal as subjects of law, but the latter has much higher real opportunities to protect their own interests. With rare exceptions, law enforcement officials are required to enforce the terms of the contracts, since the content is agreed upon by two or more free and autonomous persons. However, freedom to conclude a contract ignores the number of contracts, similar to labor contracts, which are not voluntary, but dictated by the need to meet basic needs or asymmetric relations between parties such as the employer and the employee. Wage work does not ensure the acquisition of personal property and freedom, since ordinary employees do not participate in the distribution of profits, they produce capital that exploits wage labor, as a result of which for the most part they do not have a chance to rise to the position of capitalist (Marx & Engels, 2014) or increase private property.

The number of people employed in corporations and the volume of surplus value produced a huge gap between the remuneration of those at the top and the bottom of the corporate ladder. This division also applies to those employed in the field of legal services, where the salaries of high-level employees (the size of which significantly exceeds the profit they can make) of a large corporate law firm depend on the extraction of surplus value through low-level employees, including lawyers, and companies that do not have corporate and elite customers are constantly in search of random "one-time" customers. This creates the risk of providing inadequate legal assistance to the most vulnerable citizens of society, since the protection of individual interests without huge resources is systematically overlooked by lawyers seeking income and prestige, achievable within corporate legal practice. The pricing on the legal services market is such that millions of the most disadvantaged individuals in the system of society are cut off from quality legal services.

On the contrary, high corporate incomes make it possible to protect resources, use groups of lawyers concentrating on a common goal, and perform, in particular, unjustified and frivolous legal actions aimed at increasing interest in corporate capital. Therefore, a treaty is, rather, still not a document reflecting the actual nature of the legal relations of free and autonomous subjects of law, but an abstraction necessary for the exchange of goods (Pashukanis, 1980, p. 90), the "glue" of capitalism (Anderson, 1974, p. 101). Nevertheless, the treaties refer to a "sense of social solidarity", the text is designed to present the market as an arena of mutual respect, protected in court, in which people can purposefully create their collective destiny through joint activities. In any case, participants in legal relations support the system by virtue of the belief in its justification and viability.

Modern critics of the concept of legal equality also argue that social hierarchies are implicitly supported by the concept of equality, at least in relationships such as racial (Daum & Ishiwata, 2010, p. 844) and gender (Akimova, 2018). In addition, formal equality does not provide any compensation for harm to those who are systematically oppressed by the unequal application of the law, because formal equality is in no way aimed at ensuring social equality, and therefore does not provide a remedy to those who have been disadvantaged by legislative policy. For example, Australian Aborigines demanded compensation for the forced resettlement of their families by the state, since this policy led to a violation of the principle of equality before the law and a sharp reduction in their numbers. These arguments were rejected by the Supreme Court because no evidence of intent to destroy the racial group was found (Marchetti & Ransley, 2005, p. 543). Formal equality, therefore, does not provide protection against systemic discrimination, masks real inequality, asymmetric relations and limits the understanding of equality to an abstract definition.

Individualism emerged while competition for the accumulation of property, which would ensure the individual autonomy of specific groups. Therefore, the concept of individual autonomy mystifies the economic relations that underlie legal ones. Eugene Pashukanis explains that legal relations are very similar to commodity ones. The exchange of goods is positioned as an exchange of equal things, independent of the conditions of their production (Pashukanis, 1980, p. 111); similarly, legal relations are considered as interactions between equal people, independent of their position in the social hierarchy. Thus, the provision of legal relations is positioned as impartial, but in fact is based on "the organized power of one class over another" (Pashukanis, 1980, p. 119), as a large amount of resources opens up the possibility of using privileges, influencing political and legal systems, the media, and art.

Conversely, the most exploited and impoverished workers, such as those from banana plantations in Nicaragua, have limited access to educational resources, and many are forced to leave school early for work. The lives of the exploited and in more prosperous states consist of little more than work and sleep. Consequently, those with privileges are better aware of the sources of dominant legal ideas and approved norms, the ways of developing and restricting the operation of these norms, and have more opportunities to establish rules.

Discussion

A review of legal processes represents law as a neutral mechanical application of the rules in accordance with the rule of law without taking into account social consequences, although lawyers are not mechanics involved in the repair of things, but rather social masters involved in human affairs. For these reasons, formal equality is described by many as a legal ideology. Legal activities and any legal processes cannot be "sterile" in relation to cultural, economic and historical contexts, including the views of judges, although transparency reduces corruption practices and enhances "public trust and legitimacy on the local governments" (Furqan & Din, 2019, p. 13).

As a rule, even lawyers have quite a few current tasks that limit the critical consideration of legal discourses in conjunction with legal practice. Those involved in the analysis of legal activity, as a rule, focus on the idea of formal equality, subjects of law and features of certain areas of law, in particular, property rights and contract law. Each of the lawyers, of course, is aware of the most popular objects of critical research, and various approaches to the interpretation of this object. Lawyers can be faithful to the law, exaggerating the advantages and not paying attention to the shortcomings of law as an object of peculiar attachments: everything that is good and permissible is prescribed in the law, and the law does not suffer from disadvantages (legal idealism). Although this may be an exaggeration, most authors in the field of jurisprudence do not pay attention to the crucial role of legal norms, legal relations and legal practice in maintaining the status quo. Several exclusions highlight the role of escalation of violence in media and creative arts, for instance, "violence towards a person in art is horrifying when the spectator is not one of those who assert himself through violence and dismisses the boundaries of decency and the rule of law" (Stoletov et al., 2019, p. 249).

Conclusions

The ignoring of the specific socio-cultural conditions and social hierarchy that give rise to special legal norms and relations, makes these norms and relations to seem natural and/or universal. These historical and hierarchical social relations are legitimized or discarded in the process of formalization. The law appears as a product of some universal authoritative system of thinking (in particular, within the framework of subjective legal concepts), which is located above and above all subjects of law, and not as determined by the contingent of subjects of law and lends itself to different ways of interpretation. Being in such a framework, legal consciousness is limited in the ability to rethink the social order and, in particular, the legal order, which is a risk factor.

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