CONTRADICTION BETWEEN ETHICS AND LAW: HISTORICAL SURVEY AND PRESENT POSITION

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This article surveys past and present contradictions between ethics and law. Particular attention is paid to the specifics of this issue in Russia. We conclude that some contradiction is unavoidable.

Keywords: law, ethics, morality, norms, inconsistency, social relations.

The key socionormative regulators are morality and law. Performing similar functions, they compete cooperate and often conflict. This is due to the type of society, balance of social and political forces, degree of cohesion, and unity of society. In modern Russia, in conditions of growing social tension, alienation of people from the sources of power and their inability to influence decision-making, and regulation of public relations by law, the gap between law and morality widens.

Partly this is due to a constitutional norm that reinforces ideological diversity and a ban on a unified state ideology. And the ideology is composed of basic values, including moral ones. In these conditions, attention should be paid to the question of whether freedom of value choice is desirable, whether it is possible to consolidate the norms of morality in the norms of law and to ensure them not by the conscience and force of public opinion, but by the coercive power of the state.

The first states and legal institutions were formed with a close relationship between morality and other regulatory systems. State and social transformations were associated with the moral behavior of a person and changes in his way of life. The art of governing the first states relied on the moral calibre of persons exercising power.

In ancient India, ethical views were an integral part of the legal system. In the Vedic texts justice and good acted as the supreme law of the world order, thanks to which it is possible to achieve harmony and universal order. Appeal to the moral categories of good and justice informed practical goals. Behavior and lifestyle adjusted to achieve both personal and public good.

In ancient China, the methods of public administration are morally conceived. The ruler must manage in such a way that in his actions, affection and justice are realized. According to Confucius, a noble husband is a model of moral perfection called to affirm moral standards. Confucius believed that morality, which should be managed by society, consists in voluntary self-restriction. Morality is based on self-discipline. These principles should be transferred to the sphere of lawmaking and politics. This framework relies not on law and coercion, but on virtue, thanks to which the people do not lose their sense of shame, and obey voluntarily.

Moral principles can be seen in the basis of various social regulators. This was noticed by ancient thinkers. In their works often the concepts of law and morality were mixed.

In Homer, justice is a criterion and a legal basis. Hesiod argued that law and justice have common grounds and roots. Thales, Solon, Chilon also tied right and justice. The Pythagoreans, in turn, believed that life had to be subordinated to justice and right: "The just thing is to reward another equal." [1]

Sophists noted the process of transforming justice into a natural law, different from a positive law. Socrates believed that the subjective basis of law-abiding and moral behavior is knowledge. Only those who know what justice is can be just. Knowledge will lead to moral behavior, and justice will become the criterion of legality.

In Aristotle's reasoning, law is also closely linked with morality. The existence of the rule of law, depends on the moral qualities of citizens. The problem of justice is central to the question of the relationship between politics, law and ethics. Justice in the teachings of Aristotle is a kind of uniformity.

In the late classical era, Epicurus pays special attention to freedom. Societal norms and justice are not a given imposed from outside, but arise from individual self-determination.

Cicero argued that law derives from the nature of man. It is this fact that should be used when justifying a right that comes from a higher law that arose earlier than any written law. This supreme law was not invented and created man, but is something eternal, ruling the whole world, thanks to the wisdom of his commands.[2]

Thus, antiquity reveals the close connection between law and morality, affirms freedom and equality as the main characteristics of the natural law.

In the Middle Ages, instead of universal natural law, Christianity places the will and wisdom of God. Natural law is now seen as a reflection of divine justice, approved by the Creator. The ideas of natural law now include theocratic

[1]Philosophy of Law: Textbook / O.G. Danilyan, L.D. Bayrachnaya, S.I. Maksimov et al., Ed. O.G. Danilyan. M., 2006. P. 77

[2]Cicero. Dialogues. About the state. About the laws. M., 1994. P.94-112

elements. At the same time, law is regarded as the operation of justice in a divine order, and the content of justice consists in retribution to each according to desert.

In medieval philosophy, God was regarded as a source of legislation. It is from here that all legal, moral and religious norms must flow, and only divine protection can keep a person from vice, temptation and crime.

The Renaissance saw rethinking of religious, moral and political values. Lorenzo Valla creates a legal ethic, based on personal interest, as a moral criterion for assessing human behavior. In his view, specific living conditions determine, ultimately, the choice between harmful and useful, bad and good. This moral individualism later forms the basis of bourgeois moral and legal values.[3]

In the 17th Century, Hugo Grotius, a Dutch politician, diplomat and lawyer, laid the foundation of international law based on natural law. The latter arose from human nature, a dictate of right reason, obliging us to act in line with our rationality, sociability and self-preservation. A little later, Claude Adrian Helvetius stressed that ethics would be an empty science if unconnected to legislation and politics.

The founder of German classical philosophy Immanuel Kant also paid attention to the relationship between law and morality. He termed moral obligations the realm of practical reason. His doctrine of morality and law is the doctrine of social regulators, human actions in society, about proper and improper behavior. Kant denies the importance of external factors, the agreement of the mind with the outside world as a criterion of morality. In his view, the criterion of morality is consent of the mind with its own rational laws. That is, the origins of moral and legal obligation lie within the subject. In Kant's notion of the categorical imperative, free will is both a moral institution (legislator) and a voluntary executor of moral rules (maxim of reason) .[4] Kant deals with this in his "Critique of Practical Reason." The categorical imperative is an unconditional moral prescription about the proper behavior of man as a rational being who possesses free will. This prescription must be executed without fail, regardless of whether the person receives any benefit for himself or not. The content of the categorical imperative (moral law) comprises, first, the need to act only according to "such a maxim, guided by which you at the same time may wish that it became a universal law" and secondly, the need to always treat humanity as an end and never merely as a means. This categorical imperative cannot be imposed from the outside, it must be inside the person.

[3]Philosophy of Law: Textbook / O.G. Danilyan, L.D. Bayrachnaya, S.I. Maksimov et al., Ed. O.G. Danilyan. M., 2006. P. 99
[4]Nersesyants V.S. Philosophy of law. Textbook. For universities. M., 1997. P. 448

For Kant the categorical imperative brings freedom and the arbitrariness of individuals into a universally valid rational framework. The task of law is to allow only such behavior of a person that would be objectively compatible with the requirement of the moral law. Kant distinguishes right in both a broad and narrow sense. Broadly, it is a duty and based on necessity and justice. Narrowly, duty is based on law.

The rule of law, according to Kant, should be based on the moral autonomy of the individual, which presupposes a person's ability to understand what is good and evil. The moral sphere should not be a sphere of state activity, but should remain a sphere of civil society.

Hegel viewed morality as a rational factor, not a subjective feeling. He considered morality to be the antithesis of abstract law. It consists in the need to follow the universal, while the will that opposes itself to the universal will is considered immoral. Morality is a synthesis of abstract law and morality. Social ethics are realized in the family, civil society and the state. The right for Hegel is a unity of law, morality, ethical life and world history.

German philosopher and economist Karl Marx said that the legislator does not invent laws; he only formulates them, fixing in them the internal laws of spiritual relations.[5] Lawmaking activities should be nothing more than an embodiment of the moral law. Rules of law relying on expediency rather than on morality will widen the gap between law and morality, as is clearly evident today.

In the 20th century, interest in the problems of law and morality continues. In Western European thought, the idea of a fundamental unity of law and morality continues to develop. G. Daben regards natural law as morality, M. Cohen develops ethical jurisprudence, L. Fuller justifies natural law as the internal morality of the law.

Among domestic authors attention to the issue of the correlation of law and morality was paid by B.N. Chicherin, an outstanding philosopher and lawyer. He defended the principle of complementarity, believing that law and morality are independent principles. Morality should fill the gap where legislative regulation is inadequate. A special place in the study of the moral foundations of law belongs to V.S. Solovyov. In his works, the idea of law receives a moral justification. The right is between perfect good and evil reality. Morality, he believed, remains only a good wish without the right, and a state having the right without morality will turn into arbitrariness. Speaking of the relationship between law and morality, V.S. Soloviev outlines the following points: there is no contradiction between law and morality, the latter can arise only in the law itself or within moral precepts, morality is the basis of law, truth and justice determine the unity of law and morality, based on this, moral relations can be

[5]Marx K. The draft law on divorce / Marx K., Engels F. Soch. M., 1955 T. 1. P. 162

given a legal form, law is the lowest level of morality, law is a tougher regulator than morality, coercion in law is obligatory, in the sphere of morality it is impossible.[6] Thus, according to Solovyov, laws that contradict morality, contradict the essence of law, and must be abolished.

These ideas were subsequently developed by the Russian philosopher of law P. Novgorodtsev. He defended the idea of moral idealism, according to which the ethics of absolute values should be based on natural law. A person's right to a worthy existence is presented is a legal right, not only a moral claim.

L. Petrazhitsky held that if law is an imperative attributive experience, then morality is a one-sided experience, limited only by an imperative moment[7].

The philosopher I. Ilyin considered that moral and legal consciousness are autonomous phenomena in interaction. The basis of legal consciousness is the will to spiritual autonomy, and the beginning of moral consciousness is the will to good.

Many philosophers have noted the inconsistency of the influence of law on the socio-cultural situation, on morality. The law must meet universal ethical requirements, but this is not always realized in practice. Historian of law F.V. Taranovskiy, speaking of the interrelation between law and morality, rightly pointed out that in every historical epoch, along with moral ideals, there is a system of so-called positive morality, which is the possible realization of an ideal in a particular time and place. At the same time, positive morality serves as the direct source of law.[8]

In the Russian philosophy of law, it is asserted that the moral content of law is limited for a number of reasons, both objective and subjective.

First, the moral imperfection of the person. In the norms of law, only what the society is ready to accept as a necessity at a given stage of development is guaranteed by the state. Moreover, responsibility and condemnation can only occur for illegal behavior, when a person realizes that he is acting unlawfully, therefore, only values that society considers unacceptable can be legally regulated by means.

From an objective point of view, the legislator should also proceed from the average level of the morality of society, and not rely on the ethical level of the most moral layers, reflect primarily the moral attitudes of the majority. Law, therefore, will not reflect the perfect understanding of justice that is characteristic of a minority.[9] Where the majority opinion does not meet the minimum requirements of morality, the question arises as to the possibility of

[6]Soloviev VS Op. In 2 tons. T. 1. M., 1990 .. S. 450
[7]Embulayeva N.Yu. Justice as a legal value in the works of L.I. Petrazhitsky // In the collection: Thought LI. Petrazhitsky and modern science of law. Materials of the international scientific and practical videoconference. 2016. P. 150-157
[8]Taranovsky F.V. Encyclopedia of Law. St. Petersburg, 2001. P. 120-126
[9]Sinaisky V.I. Russian Civil Law. M., 2002. P. 60-61

applying undemocratic procedures that will allow the minority to play a decisive role in establishing ethical legislation. And here a democratic principle should be implemented in which the minority's opinion should not be suppressed and should be taken into account.[10]

Secondly, conservatism of law means that in a rapidly changing society, the legislator does not always keep up with the development of society, leading to the collisions between the increased moral standards of society and the norms of law.

Thirdly, as V.S. Soloviev comments, the task of law is not that the world, lying in evil, should become the Kingdom of God, but that the world does not turn into hell.[11] A person cannot be forced to improve morally with the help of the right. The formation of ethical principles should not be based on external coercion but on the choice between good and evil, on a certain freedom.

In addition to ethical interests protected by law in any society, there are interests recognized in some societies but not others. The higher the level of general culture and morality, the more ethical values are being given legal protection. The ethical minimum, which legislation is called upon to meet, is always formed on the basis of spiritual, historical and national characteristics. Globalization is a concern because, in a rapidly changing reality, it can lead to the consolidation in the legal system of norms that do not take into account the moral specifics and peculiarities of a particular state.

Morality trumps the law, because it contains the notions of good and evil, just and unjust. The law arises on the basis of these concepts, and the loss of morality in society will inevitably lead to deformation of the legal consciousness and the destruction of the rule of law.

In modern Russia, the topic of clericalization is sharply debated. Conferences are held on the limits of secularism, on the nature and content of this concept, and their usual aim is to justify introduction of the religious component into public life with the goal of, allegedly, strengthening moral education. This, in turn, causes conflict with secular society, reminiscent of the Russian Orthodox Church and other denominations' stance on Article 13 of the Constitution of the Russian Federation, which consolidated the secular nature of the state. A cooperative model of state-church relations provides for harmony and continuing dialogue as to moral and ethical education. However, often the Russian Orthodox Church claims to be a co-ruler of the Russian state, and perceives the need for dialogue with the outside world as a heavy duty and inevitable evil.

Thus, the evolution of the notion of the correlation of the norms of ethics and law with an increasing tendency to close connection, testifies to a certain

[10]Lloyd D. The idea of law. M., 2004. P. 162
[11]Soloviev VS Justification of the Good: Moral Philosophy. M., 1996. P. 332

relativism of the very concepts of law and morality, a constant rethinking of their content and boundaries. In antiquity, the ethical significance of law was not questioned, the need for "good" laws, "right" forms of government, and "just" rulers was proclaimed. In the Middle Ages, divine origin was claimed for law and morality. The modern era saw fundamentally new approaches in determining the meaning of the law and its content, a new consideration of morality, which is reflected both in legal understanding and in legislation. Law ceases to be regarded as a specification of moral obligations, but becomes a phenomenon independent, but interacting with ethical categories.

A special place in the consideration of the relationship between law and morality is occupied by Russian philosophical and legal thought, which distinguishes three main approaches to the relationship between law and morality. First, their identification in the philosophy of the Slavophiles, secondly, the delimitation of law and morality, in the works of B. Chicherin, and thirdly, the consideration of law as part of morality, in the works of V.S. Solovyov.

Slavophiles defended the idea of a unified society, attempted in the era of Stalinism. In modern conditions, individual values dominate, and a unified society is unfeasible. In addition, economy and politics are spheres not of morals but of rights. For management purposes, control, strict accountability, formal indicators and uniformity, and the existence of well-regulated procedures are necessary. From the standpoint of these requirements, it becomes possible to consolidate in the law formal attributes of moral categories, for example, justice. Personal qualities are ignored, the thinking person is not needed, there is no need to be guided by reason or conscience, their functions will be fulfilled by law. But is it possible in this case to preserve the person and personality? Do not try once and for all to resolve the conflict between ethics and law, this is impossible. Law will always reflect the interests of the state and its management, while the norms of morality will save Man.

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