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"Rechtsstaat" and "Rule of law" Categories in the Studies of Russian Government Scientists of the early 20th Century*

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Abstract

This study examines the theories of Russian pre-revolutionary state scientists on the rule of law, which have been reflected in monographs, dissertations, publications in the periodical legal scientific press of the beginning of the 20th century. The subject of the study is the patterns of evolvement, the content features and results of research undertaken by scientists in the theoretical development of various aspects of a rule of law. The chronological framework is covered by the period from the beginning of the 20th century to 1917, because in the preceding stages the rule of law theory was not developed by Russian government scientists on a serious scientific basis. The conclusion on the qualitative side of the results obtained in prerevolutionary studies that formed the theoretical basis for understanding the essence of the rule of law in the science of Russian state law of this period was formulated in the paper.

Keywords: Teaching, Rule of law, Monograph, Russian empire, Parliamentarism, Constitutionalism, Separation of powers.

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Introduction

The processes of legal systems convergence and the increasing unification of law have renewed the problem of understanding the theory (doctrine) of the rule of law with renewed vigor. At the same time, the question of the correlation between the categories "Rechtsstaat" and "Rule of law" comes to the forefront in the development of Western in general, and European in particular, theoretical and legal discourse. For example, B. Leoni draws attention to the existing problem and the contradiction in the essential understanding of the category "law-bound state" in continental Europe (in comparison with the concept of "rule of law" accepted in Great Britain) [1]. D. Rawls has designed the concept of the rule of law based on the combination of the volume of freedom among citizens (a certain slight reduction in freedom ensures the rule of law) [2]. Finally, some researchers equaled these categories [3, 4], while others tried to use the basis of the concept of "Rule of law" in defining the signs and essence of "Rechtsstaat" [see about this in 5]. The most vivid discussion caused by the complexity of understanding and correlation of the categories of "rule of law" and "supremacy of law" was already apparent by the middle of the 20th century [6]. In this article, we will try to continue the historical and methodological discussions begun earlier [7] and turn to some historical aspects of the development of the rule of law doctrine in order to further use knowledge in future studies of its actual status.

Methods and materials

Reasoning generally on the rule of law doctrine, it should be recognized that it is one of the most important and relevant areas of scientific knowledge that is of interest to researchers in any period of the development of society and a state. In addition, this is exactly the case when the future development of the rule of law and success of the evolution of civil society largely depend on the historical background, and the origins of the development of various problematic issues. Not an exception is the Russian state and legal thought, the most prominent representatives of which began to study the "rule of law" phenomenon in detail until the beginning of the 20th century. This is the reason for the chronological (very narrow) scope of this paper: there were practically no serious scientific works on the problems of the genesis and evolution of the rule of law until the first decade of the twentieth century in the Russian legal science.

In its turn, the question of identifying and systematizing state-legal doctrines about the rule of law has been undeservedly ignored by contemporary researchers, what pushes to fill this scientific gap. To this end, we studied monographic and dissertational research on public law, as well as the most well-known papers in the periodical legal press. Taking into account the criteria of fundamental, systematic and logical completeness, the following works were identified by us within the pre-revolutionary doctrine of the rule of law: Kotlyarevsky "The Rule of Law and Foreign Policy" (defended in Moscow University in 1910), his monograph "Power and right. The problem of the rule of law", 1915, as well as the scientific articles of V. M. Gessen ("The theory of the rule of law," 1905, "On the rule of law" in 1906), N. I. Palienko ("The Rule of Law and Constitutionalism", 1906).

Discussion

S.A. Kotlyarevsky indirectly addressed the problems of the rule of law in his master's thesis ("A constitutional state. Experience of the political and morphological review". St. Petersburg, 1907), but elaborated them in more detail in his doctoral study "The Rule of Law and Foreign Policy" defended at Moscow University in 1910.

The latter work is devoted to the actual and today's problems: clarifying the correlation of international factors, external pressure on a state and building a rule of law, limiting the usurpation of power. The purpose of the research is to answer to the question "how do the legal basis of a modern state and the task

of its self-preservation outside" are reconciled? [8, p. 1-2]. We should take note of his thorough approach to research and its relevance, which was particularly noted by contemporaries [10, p. 92-97]. The main idea of S. A. Kotlyarevsky justified by him in his work was "an excuse for parliamentarism to be widely understood both in the order of historical regularity and order of duty" [10, p. 95], as well as the fact that "a modern state can not be strong without law" [10, p. 97].

The first confirmation of this can be found at the conclusion of the second chapter of the study, when S. A. Kotlyarevsky stated as a result of his analysis of the foreign policy tasks of a modern state, that he does not see that the "democratization to which a modern rule-of-law state is subjected with the force of a historical regularity, somehow deprived it of the properties necessary to keep its place under the sun in the modern struggle of the countries " [8, p. 336].

In the opinion of the scientist, the main feature of a rule of law is that only government agencies that are organized and operate according to established norms are the power holders; power is only a state function and at the same time a social function; its authorities can be extremely increased quantitatively, but qualitatively it will never be characterized by what the despotism is based on - signs of self-sufficient existence and irresponsibility [8, p. 426]. Apparently, this statement has long been not considered as a sign of a rule of law as applied to its modern assessment, and, for example, the 1993 Constitution of the Russian Federation explicitly states that the holder of sovereignty and the only source of power in the Russian Federation is its multinational people.

At the same time, despite such a categorical Kotlyarevsky's assessment of the essence of state power, the idea of modern state evolution is carried through the whole research, when with the growth of democracy and the general upsurge of culture the state system "leans" towards the development of parliamentarism, the distinctive feature of which is the increasing participation of society in the matters of power organization. The author specified the harmony, "which is established between the processes occurring within the state itself, and the general nature of international turn. The latter also favors formation of a strong enough government enjoying freedom of action, and at the same time receiving this force on the basis of popular confidence" [8, p. 42]. S. A. Kotlyarevsky in his thesis unequivocally answers the question posed by him at the beginning of the research: the legal basis of a state and the development of parliamentarism do not come into conflict with the goal of forming a strong state power and self-preservation of the state in the international arena, but are harmoniously combined.

Analysis of problems associated with implementation of the rule of law idea was continued in the monograph by S.A. Kotlyarevsky "Power and right. The problem of the rule of law" published in 1915. The first chapter of the work (“Two Elements of a State”) contained the author's reflections on the approaches to the essence of a state and state power, the outputs of examining the classical and newest achievements of state and legal thought, the results of which reveal the content of the author's *concept of power*: "... Power as a system of legal norms, which hold and by which state institutions operate, is something different from power as a designation of unique experiences, but if there were no these, then there would be no incentives to create such a system" [9, p. 11].

Supporting the psychological approach of N.M. Korkulyov, Kotlyarevsky agrees that the nature of state power can be undoubtedly understood only against a background much broader than that which an isolated science about a state is able to provide [9, p. 14]. The author also extrapolates to the rule of law the key question of the chapter on the relationship between domination and subordination in a state and declares that the formulation and significance of the problem on determining the meaning of the rule of law concept establishes a rather long way to its solution. At the same time, the assumption was made that "the rule of law is essentially meta-legal concept; it contains elements that are indestructible and changeable" [9, p. 22], and the fundamental premise of the very rule of law principle is formulated as the mutual relative

independence between a law and a state [9, p. 23]. Again, this position does not stand up to criticism today, when even taking into account the existing multi-polar representations of jurists (domestic and foreign) on the essence of law and the state, approaches to legal consciousness, the question of the closest interdependence of a law and a state, and their mutual influence on each other.

Of interest as well is analysis of the category of "rule of law" in the scientific literature. Kotlyarevsky studied French, English and German state-legal thought, but generalized conclusions were formulated with respect to German literature. He sees *objective laws* on changing the presentation of the problem on rule of law in connection with the sequence of political eras and finds similarities as the result of analysis of Russian scientific literature on the problem under study.

The author turns from the history of attempts to realize the rule of law idea to the topic set out in the Chapter IV, "A Constitutional State as the embodiment of the rule of law", where he clearly defines his position: "For our time, the rule of law is feasible within the limits in which it is practicable in general, i.e. only through a constitutional state" [9, p. 234]. At the same time, Kotlyarevsky resolutely rejects the equality between the rule of law and the constitutional state: "The first is a meta-legal concept; the second perfectly fits within the framework of legal analysis, which establishes a clear distinction between the constitutional and absolutist state" [9, p. 234] and reveals the *concept* of a constitutional state: "Any state where the people's representation participates in the exercise of legislative power, i.e., where the law in the formal sense recognizes only an act issued with the consent of the people's representation" [9, p. 234].

The result of considering the embodiment of the rule of law principle within the framework of modern scholar constitutionalism was its rooting into the idea on impossibility to identify the rule of law principle with one of the incarnations of constitutionalism, that is, equate it with a constitutional state. It is necessary to admit that this assessment of the correlation between the legal and constitutional state made by S.A. Kotlyarevsky is ambiguous, and that this distinction has a very controversial nature. “In the end, - S.A. Kotlyarevsky says, - "the rule of law expresses only a certain inclination or aspiration imprinted in the state structure and activities. The rule of law refers to the world of ideas, but ideas that are invariably realized and transforming the facts... Its meaning is completely meta-legal, and a lawyer-dogmatist at his finest has the right not to be interested in them. He justly feels that starting to reflect on the rule of law, he would be compelled to find himself in a suspicious proximity to a moralist, philosopher, historian - in any case, beyond the bounds of strict jurisprudence" [9, p. 350].

In the final part of his work, the author is immersed in the supra-legal foundations, or (as he writes himself) the meta-legal meaning of the rule of law. The main theses revealing the essence of the matter, are as follows: a) the rule of law is like-kind “vestibule of a hostel” to the extent possible for harmonizing with spiritual needs of a person; b) abstract legal formalism can not be avoided, that seems so limited in its exclusivity. It can not be avoided because there is no other way of ascent, at least through beneficent despotism or through anarchic liberties; the state is deeply rooted in the elements of violence and selfishness; the rule of law can be embodied in it only within certain limits; the rule of justice is in the smaller extent, and the higher justice is in even smaller ones, being extended to goodness [9, p. 403-404.].

Turning to the periodical press, we note that not all publications are included in the object of the study by us (this goal was not set in principle), but only those papers that represented a complete, logically completed fundamental study. In particular, the collection "The Political System of Modern States" contains an interesting and informative paper by V. M. Gessen "Theory of a rule of law". The paper is structurally divided into three components, where the beginning of the separation of powers, a constitutional monarchy as a rule of law, and two types of a rule of law are consistently analyzed.

The conclusions from the first part are opened with the formulation of the *concept* of a legal state, which according to V. M. Gessen, is "a state in which the government and the judiciary are subordinated to the

legislative power; a state that recognizes as a legislator the legal norms as binding for itself, as well as governments and courts created by it" [11, p. 145].

The principle of separation or, in the modern version, division of powers ("separation of government power from the legislative and judicial ones, and one from the another") should be the basis for the legal construction of the rule of law, while, according to the author, "the rule of law is unthinkable and impossible without an organized system of constitutional guarantees " [11, p. 145].

The author considers the most difficult issue to be an explanation of how the principle of separation of powers is exercised in a constitutional monarchy, upon that, not questioning the thesis that "a constitutional monarchy is a law-governed state". It seems that in this statement there is a fundamental contradiction with the position of S. A. Kotlyarevsky (mentioned above) in assessing the correlation between categories "rule of law" and "constitutional state". Without doubt, we should recognize the validity of V.M. Gessen's concept: on the one hand, the categorical rejection of the possibility of uniting (or even absorbing) these two concepts by Kotlyarevsky is devoid of methodological justification, and on the other hand, it calls into question the essential characteristics of the objects sought.

The doctrine of V.M. Gessen is supplemented by another paper on the same subject, "On the rule of law", published in the collection "The Rule of Law and the People's Voting" in 1906. The author formulates in it a *hypothesis* on the further development of parliamentarism ("... a parliament will be the actual spokesman of the people's will, the will of the people's majority" [12, pp. 59-60]), which is fully realized in the state-legal life of most countries at the present time.

The essence of the rule of law is also revealed in the paper by N. I. Palienko, published in 1906 in the "Law Gazette". The study was timed to the historical moment that Russia experienced after the adoption of the Manifesto on October 17, 1905, and emerged into the state crisis. The author saw the way out of it "in the soonest transformation of the state system of Russia on the basis of a free legal state" [13, p. 133].

The author describes in some detail the development of the rule of law idea. He comes to the conclusion that a possibility of implementing this idea in the sphere of public legal relations directly depends on implementation of the constitutional principle in the political life of cultural peoples, and the essence of the constitutional principle or constitutionalism should be expressed "in the establishment of state power on the basis of law and civil freedom" [13, p. 149]. The scientist continues, "By its idea, the rule of law is a state that carries out the supreme tasks of law, and not only formally determined by law in its organization and activity. The higher purpose of the right to be not only norms that deny arbitrariness in social relations and provide the necessary formal freedom of the individual, but also norms of social justice" [13, p. 161]. Obviously, this position of the author fully corresponds to modern views on the essence of the rule of law. Finally, Palienko emphasizes here that "a state that has all constitutional guarantees of formal legality, formal freedom and formal equality, but at the same time authorizes and allows in these formal legal boundaries severe inequality in the living conditions of existence of different classes of population and the political exploitation of one group of the population by another, such a state can be called legal in the formal sense of the word, but not on the part of conformity of the contents of its legal norms to those higher principles and objectives of the law which clarified by the cultural sense of justice of our time" [13, p. 161].

Conclusions

Analysis of the subject matter, content and chronology of preparing the considered teachings of Russian government scientists in the early 20th century shows practically simultaneous publication of scientific papers by V. M. Gessen and N. I. Palienko on the essence of the rule of law, as well as continuity in scientific preferences. Kotlyarevsky, who consistently developed the rule of law theory making a special emphasis on

clarifying the relationship between parliamentarism and the realization of the idea about a rightful state, state and law.

We chose the above five works as the object of research because they were the logically completed fundamental works that found expression in the form of a dissertation, a monograph and scientific papers. Fragmentary essays and notes in the legal press which has been prepared, as they say, "for the evil of the day", timed to carry out any reforms, or highlighting the main provisions of normative legal acts that somehow addressed issues, aspects or problems of the rule of law, did not fall in our field of vision. It is possible to name with certainty the works listed in this paper as teachings in the proper sense of the word, i.e. scientific texts of well-known experts in the field of law, containing specific conclusions and solutions to legal problems that can serve as a source in the law-making process. In addition, such a small number of scientific studies that make up the general doctrine of a rule of law in the domestic science of a state law may be explained by a very short period of time from the proclamation of the Manifesto on October 17, 1905 to the revolutionary events of 1917. The discussion that began in the broad scientific community did not succeed in developing into full-fledged fundamental works, being stopped by a regime change and a radical change in the vector of scientific research.

At the same time, one can not but note the specific results obtained by the authors and expressed in the forms of scientific knowledge (mainly the theoretical plan). Suggesting and substantiating the original (first obtained) theses (the *concept of a* legal state, power, a constitutional state, the *consistency* of changing the formulation of the question on the rule of law in connection with the succession of political epochs, the *hypothesis* of the further development of parliamentarism), state scholars limited themselves to searching for the essential foundations of the rule of law, in no way offering the legislator some legal constructions capable of bringing the state closer to the corresponding ideal. Thus, pre-revolutionary doctrines on the rule of law were extremely fundamental and did not have an applied character.

Undoubtedly, the results presented in the paper are of a debating nature and are subject to further discussion. However, they can be used to carry out a comparative analysis of the doctrines about the rule of law developed within the framework of the Continental and Anglo-Saxon scientific paradigm, opinions of the past and modern progressive views, to which we call all theorists and historians of law interested in this.

Footnotes

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