Journal of Siberian Federal University. Humanities & Social Sciences 2 (2011 4) 223-229
~ ~ ~

УДК 34.01

Genesis and Evolution of Law: Human-Centric Approach

Vladimir M. Shafirov*
Siberian Federal University
79 Svobodny, Krasnoyarsk, 660041 Russia [1]

Received 4.02.2011, received in revised form 11.02.2011, accepted 18.02.2011

The article substantiates that origin of law is stipulated by human nature, its need for freedom, self-determination. To act pursuant to law means firstly to act pursuant to one's desire, in personal interests, at own discretion. Law does not only forbid and restrict but it grants rights, freedom of choice and activity, therefore the process of acquisition of qualities of an independent, legal person becomes irreversible. In the course of its formation and evolution law has been passing three steps: natural law, positive law, natural – positive law. Each of them has its measure of freedom (a level of development, volume, the list of rights and personal freedoms).

Keywords: Genesis and evolution of law; human-centric approach.

From a position, advocating in this article origin of law is a logical, natural-historical process connected with transition of mankind from a primitive (patrimonial) society to a new higher step of social development[1]. A patrimonial system is the very first, lowest, most primitive form of a community organisation. Its viability owing to the known reasons was supported by collective work, joint property, levelling distribution. A person being out of a community was nothing. He did not only think of separation from a society, but he did not identify himself its member, his "ego", his personality either. He did not have and could not have had social requirements and interests isolated from a collective. In his consciousness and activity a person identified himself with his family, and everything made by him was perceived as made by the family. Absorption of the personal by the public predetermines the major feature of normative regulation under primitiveness. The norms of behavior of that time arising and existing first of all as interdictions, have been directed on maintenance of domination of "the whole", its priority over personal (and in such a manner that the person as an independent person, in essence was not separated, did not stand apart from the whole) (Alekseev, 1994).

Relations constructed on submission of a person to a collective are characteristic as a whole for all the primitive society. And still it is necessary to realise distinction between, for example early-generic and late-generic communities. "If in the beginning a life and activity of separate persons according to the outstanding Russian philosopher V.S.Solovev, was quite defined by a historical life of people as a whole and represented in its root only a product of those conditions which were integrally developed by national history

* Corresponding author E-mail address: tgip.sfu@yandex.ru

with the further development, on the contrary, history itself is more and more defined by free activity of separate persons and all national life becomes more and more a sort of realisation of this personal activity... The aspiration of a person to self-affirmation and uttermost liberation from a primitive unity of a patrimonial life remains to be a general and doubtless fact" (Solovyev, 1990).

A person with his aspiration to freedom and independence arising in the late generic period does not match the model "family-person" any more having rather a unequivocal collectivist kind for primitive public consciousness . Hence it appears that a patrimonial tribal system stops its existence there and then, where and when an independent life of people isolated from a community pursuing their personal (private) interests radically differing from general collectivist ones is objectively and subjectively possible.

A patrimonial organisation of a society having played its necessary role in mankind formation leaves a historical arena. It was replaced by the era which received the name "civilization" (from Latin civis – the citizen) where a free person realising his own interests as well occupies a leading position.

Transformation of a person from an ordinary member of a patrimonial tribal collective into an active converter, a conscious creator of his and social being transforms the contents of normative regulation essentially. There are social norms, which "... in the first instance are based on provision of possible activity measures guaranteed by a society, on freedom to use corresponding social blessings, on establishment of a certain circle of rights of a person... " (Yavich, 1982). This is the way law is being born. Exactly as law: it neither forbids nor limits but gives rights, freedom of choice and activity owing to this the process of acquisition of an independent person's qualities by a man becomes irreversible.

So, origin of law is stipulated by human nature, its need for freedom, self-determination. Freedom, in its turn, is expressed in rights and freedoms. Therefore, the person's rights and freedoms are the core, the deepest thing in law. A free human person is impossible without rights and freedoms either as if without the heart, nervous system, lungs, etc. That is why law (rights and liberties) is not imposed and could not have been imposed by anyone from the outside. Formation of legal properties of an individual is an objective, necessary and rather a difficult and long process. A centuries-old habitual vital collectivist way where "I" and "we" are inseparable changes under cognition, mastering of law. Legal abilities of a person, on the contrary, appear together with establishment of a private interest, private property, delimitation of the individual and collective. To act according to law in the first place means to act according to one's own desire, in personal interests, at own discretion. Said above allows to assert that process of origin, functioning and development of law originates not only under the influence of economic, moral laws, but under the laws of law itself.

At the same time irreversibility of an isolation process of a separate person from "the whole" and emphasis on legal qualities of a person do not mean, that at the beginning of civilisation there were all necessary conditions for recognition every individual free and equal or according to I.Kant his ability to be one's own master .

Thousand-year experience of amorphous, without own "I" life was not overcome in consciousness and behaviour of many people. Compulsory perfection, compulsory making people happy, and compulsory deliverance of people were impossible. Therefore, it is natural, that formation of a person was joined with separation from a family first of all the most mature, capable and active individuals

pursuing their private interests and uniting for their establishment into social groups, classes. Moreover, mankind development (consequently its movement on the way to progress, freedom, law) according to K. Marx, "initially is made at the expense of the majority of human individuals and even whole human classes... That might be that a higher development of individuality is bought only by the price of such a historical process in the course of which individuals are sacrificed" (Marx; Engels).

Thus, law as "a kingdom of implemented freedom" (Hegel) enters life to detriment of equality. But otherwise neither a free person, nor law could have arisen and existed.

Many centuries in a state-organised society have been spent on overcoming (with breaks, turns back, zigzags) limitation, backwardness of law, on transformation of every man into a legal, i.e. into a free and equal personality in full sense of this word. It was the way full of dramatic nature, class collisions, but it was it that has been leading to the treasured purpose. It is better turn to history to achieve fuller credibility.

Specificity of legal socialisation was described by well-known Roman lawyer Guy (II century) so: "The principal division in law is that all people are either free, or slaves" (Reader on foreign countries history of state and law, 1984). For example, all freedom of the citizens in ancient republics was laid upon slavery. But its "narrow" character itself did freedom suitable... for a known step of development (Chicherin). "Only slavery according to F. Engels .. created conditions for blossoming of ancient world culture... Without slavery there would have been no Greek state, Greek art, Greek science, without slavery there would have been no Roman empire either... It was a progress even for slaves themselves: prisoners of war who had made a great bulk of slaves remained at least alive that time, meanwhile they used to be killed" (Marx; Engels)

But it was not the only difference between a slave's position and that of a primitive man. Being opposed a free part of a society's members due to his social and economic state a slave became a carrier of special interests and in this sense received a big portion of social recognition and freedom, rather than a primitive man did (Shaikenov, 1992).

Chapter 53 of book 1 of already mentioned Guy's "Institutions" says: "... Now no citizen of Roman people is permitted to treat slaves excessively severe without a legal ground. Under the decision of emperor Antony the one who will kill a slave without any ground will be not less liable than the one who killed another's slave" (Peretersky,1956).

Certainly, it is more important that even at that time a slave could have been transferred to free people estate. Institution of the freed might serve a proof. "Under law of people, notable Roman lawyer Ulpian wrote, – there are three kinds of people: free and opposite – slaves and the third kind – freedmen, that is those who ceased to be slaves" (Reader on foreign countries history of state and law, 1984). And though freedom was given under permission thanks to the owner, and it was still too far to present equality remission procedure was regulated by the law, and a man ceased to be a slave received a legal guarantee of freedom.

In a feudal society, in comparison with slaveholding, all members of the race "man" were subjects of law including serves. So, in XI-XII centuries legal concept servage ("attached to land) was formulated."… Since then dependence of serves received a legal definition, and it meant, that servage became a subject of rights and duties...Moreover, a serf got an opportunity to be redeemed from dependence, he could have become free, having received a manumission... It was a legal process which usually occurred in the form of a symbolical ceremony – receiving a

written charter given on the terms of immediate payment of a certain sum of money or undertaking a constant obligation to make a certain payment or to execute certain services passing to a serf's successors. It does not mean that a serf ceased to be poor and oppressed. It meant only that he got rights within a certain legal system. From now on he has become a person..." (Berman, 1994).

Acquisition of a status of the person allowed active individuals who were at the lowest steps of a class ladder, to move on higher steps so, to increase volume of rights, freedom of choice and activity. "An individual, – G.D. Berman highlighted, speaking about town law of XII century, – did not exist in legal sense differently as a member of one or more subcommunities within the limits of the whole, and his individual freedom consisted mainly of his mobility, that is his ability to move from one community to another or to address one community for protection against another" (Berman, 1994).

In due course positive resources of feudalism in human sense start to run low. Class privileges remaining personal dependence of people becomes an anachronism. And it is not occasional that where feudalism is replaced by capitalism legal recognition of freedom and equal rights for everyone without exception irrespective of a social origin, class belonging, creed, etc. takes place. In other words, the mankind matured not only to that consciousness, that any person is born free by nature(that what Roman lawyers and French Kings also spoke about in the Middle Ages) but also to realisation of a humanistic idea: "free development of everyone is a condition of free development of all".

In an ideal even in that time, in early capitalism, freedom and equality were perceived in indissoluble unity though in reality their connection will be the most complicated problem and the most difficult test for the world community and it will take more than a century.

Thus, after a man's deliverance from patrimonial chains and entering legal space of a state-organised society a process of formation of a free legal person begins and since that moment all history of the mankind "has been a history of expansion of legal recognition of a personal freedom.." (Vishnyak, 1917).

History of totalitarian states drops out of this natural process (for example, fascist).There is no dilemma law or lawlessness in them. The choice unequivocally is made in favour of lawlessness, however, with a legal form application. But formal use of a normative way of regulation, legal proceedings, justice, procedural institutions, etc. legal means appears not to give any grounds for reference of all listed to the category of legal phenomena, as well as there is no basis, to refer "fascist law" to the category of not developed ones, that is to consider it in the same row with slaveholding, feudal law.

Firstly, the ancient, medieval law is not the law of a separate country and even is not the law of several states, but a set of having general features signs of legal systems having occupied whole independent epochs of a terrestrial civilisation.

Secondly, backwardness either of slaveholding or feudal law was natural, historically inevitable. It found reflexion in theoretical representations (sense of justice) and legal practice of a corresponding society. However, it is important that combining positive and negative tendencies, ancient and medieval systems of law (everyone in due time) moved steadily ahead upwards on civilisation steps, backfilling own, irreplaceable "bricks" in the base of law, a lawful state in modern understanding. Their contribution into world culture is invaluable.

Quite a different thing is legal systems of the fascist states of the XX century. So, under Weimar constitution fundamental laws and duties of German citizens were opposed not constitutional laws and duties but corresponding

provisions of the inhuman program of national socialists. Therefore, together with the crushed human dignity law as a civilisation phenomenon is also destroyed in a nazi state.

Therefore, the matter on preservation, development and provision of law, other universal legal values is first-priority for a civilised world community.

Being based on above stated, it is possible to highlight three steps of formation and evolution of law: natural right, positive law, naturally-positive law. Each of them inherits its own measure of freedom (a level of development, volume, a list of rights and personal freedoms).

The first step of law becoming freedom is natural law or natural and inalienable human rights. Their discovery, revealing caused by the very process of society development took place in the course of a man's recognition himself as a person, his place among other people, need for individual freedom, private property, personal benefit, etc. Recognition of the need for rights leant against practical experience which demonstrated advantages of discretion based on freedom, independent autonomous behaviour at preservation of balance of interests with similar individuals to the most mature, prepared and active people.

Checked up by experience in a pre-state epoch an idea about natural rights and rules which developed on their basis in many respects arose spontaneously, had an intuitive character, had neither formal binding, no accurate distinct from duties, reliable provision and protection even for the limited circle of persons. It is needless to speak about any system of natural rights. The main attempt was made to isolate separate opportunities in the sphere of life, work distribution from that of the due, necessary. And still the modern life keeping begins with such elementary, poorly co-operating having moral, religious but not legal roots natural human rights.

The second step in development of law as freedom following natural law and arising, deriving from it is positive law. Positive law is a companion of a state-organised society. It appeared in the course of draft-normative activity of special subjects, namely, legislators, judges. A certain community of people who learnt advantages of personal freedom through positive law formulates and fixes their rights in statutory acts and other legal sources officially. Thanks to a state-authoritative form weak, not strong enough sprouts of natural law (legal opportunities) received a necessary inhabitancy and new additional energy for their survival, preservation and development as well. In other words, in the course of a historical birth of positive law there was not a delimitation and separation of the natural from will-established law but their inconsistent, disputed interosculation, inter-addition. Moreover, only legal binding (official objectifying) by means of the institution of human rights "citizenship" made it possible: to recognise a person outwardly free, to confirm his autonomy and irreducibility to a collective; to fix an initial complex of rights (their volume, the list), and means of their protection as well.

The first legal life of human rights is considered to be inalienable rights of an antique policy citizen. So, laws of Athens, Rome provide a distinction between an individual "I" and a collective "we". A person as a citizen acquires a legal status allowing him to show his will, desires, propensities incoincident with the will, desire, propensities of other people. It becomes possible thanks to investment a citizen rights: to freedom, property, inheritance, participation in public administration, justice.

Another question is that positive law is only a step (and far from being perfect, developed) in evolution of law as a whole. For considerably a long time the positive factor eclipsed a true source of law – human nature, having put in the forefront

an external, power-willed, obligatory-compulsory beginning, having made the state, instead of the person the centre of legal "Universe". And it is logical. While full or partial unfreedom of people (slavery, serfdom) remains, a formal inequality, law, rights of a person, however, could not be considered differently as through a state prism. It was law of privileges. Investment of that or other volume of rights took place depending on property, a social status, a certain class belonging, estate. Identical freedom and equality for everyone was recognised neither by the ancient nor by the medieval state afterwards.

The list of formally bound rights was limited it is difficult to speak about any system of them it was most likely their certain set the society was not mature enough to build a system of legal rights purposefully yet.

However, even in these conditions recognition of a citizen as a carrier of certain rights was a big step forward in the law development as a whole, became a powerful catalyst in the struggle of all restrained people limited in their rights for universal freedom and justice which finally allowed to change a parity of natural and positive beginnings in law in favour of the first.

The third step of development of law is natural-positive law. Its origin was stipulated by such important for the world civilisation legal documents as the Declaration of rights of Virginia 1776, the Declaration of independence of the United States of America of 1776, the Bill of rights of 1789-1791(first ten amendments to the USA Constitution), the French Declaration on human rights and citizen of 1789. Passage, putting into effect the given documents became the state recognition of not only a citizen (subject), but any person as a legal (personable) person. It was also officially established, that a society cannot be free without releasing each separate person. Universal measurement of positive law entailed removal of a class, class privileges, benefits, establishment of legal equality of all people before the law, promotion of rights and freedoms of a person to key positions in a legal system.

Now inducing energy of positive law needs less "additional charge" in terms of state compulsion as "freedom consists of possibility to do everything that does not inflict harm to another. Certainly, legal logic inherent to natural-positive law content starts to reveal itself in full capacity only at a modern stage of civilisation, but the fact that its first "bricks" are put in the documents named above, is a historically proved one as well as an attempt to formulate and bind more or less possible for that time list of natural human rights.

The world community has made an invaluable contribution into the process of enrichment of law content. The United Nations Organization comprehending tragic experience of the Second World War, transfers a problem of human rights from an exclusively national sphere, internal law to international law sphere. As a result of international lawmaking the Universal Declaration of Human Rights, 1948, the International Covenant on Economic, Social and Cultural Rights, 1966, the International Covenant on Civil and Political Right, 1966 are the legal documents which have laid the foundation of the modern system of rights of a person, creating a general legal status of a person and a citizen. Convention for Protection of Human Rights and Fundamental Freedoms, 1950 and subsequent protocols supplementing it have become such a structure-forming document on the European continent.

Legal circulation under consideration, having begun its continuous movement from the innate rights (natural law), having replaced them for rather a long time with the rights of the citizen (positive law), is coming back again, but now on a better and quantitatively high level of development to recognition human rights and rights of a citizen

(naturally-positive law) a defining element of law content. In modern conditions binding and guaranteeing rights and freedoms of a person and a citizen become the main mission, purpose, advantage of law (as compared to other social regulators) in the society, in the state.

[1] In the scientific literature there is also another state centrist approach according to which law is always formed at indispensable participation of the state. It is either established or authorised by the state. The state acts as a unique source of law.

References

S.S. Alekseev Theory of law (M.: BEK, 1994), 34.

G.D. Berman Western tradition of law: époque of formation (M.: Published by MSU, 1994), 311.

B.N. Chicherin Freedom in the state. // Power and law, 33.

K.Marx, F. Engels, Works. V. 20, 185-187.

K.Marx, F.Engels, Works, Vol.26.P.II, 123.

I.S. Peretersky Justinian's digests (M.,1956), 102-103.

Reader on foreign countries history of state and law (M.: Legal lit, 1984), 54-55.

N.A. Shaikenov Legal provision of a personality's interests: Author's abstract of dis. … Dr.of legal sciences (Alma-Ata, 1992), 17.

V.S. Solovyev Preliminary remarks on law in general // Power and law: From history of Russian legal thought. (L, 1990), 91-92.

M.V. Vishnyak Personality in law (M., 1917), 85.

L.S. Yavich Law and socialism (M.: Legal lit., 1982), 13.

Генезис и эволюция права: человекоцентристский подход

В.М. Шафиров
Сибирский федеральный университет
Россия 660041, Красноярск, пр. Свободный, 79

Статья посвящена исследованию генезиса и развития права с позиций человекоцентристского подхода к правопониманию.

Ключевые слова: происхождение и развитие права; человекоцентристский подход.