GENESIS AND TRANSFORMATION OF SOURCES (FORMS) OF LAW: DOMINANTS AND LEGAL AND CULTURAL FOUNDATIONS

INTRODUCTION

The processes of changing the state and society determine the constant modernization of various legal institutions. The features of the organization and interaction of sources (forms) of law, which are an institutional multidimensional entity, the specifics, and prospects for the development of which in modern society depend on several factors, vary. Issues concerning the sources (forms) of law are the foundation for the knowledge of legal systems. In this regard, it seems appropriate and justified to turn to the study of the genesis and transformation of the sources (forms) of law. The legal culture of modern society is characterized by the development of its modified concept based on the development of previous legal knowledge, the revival of some traditions, and the introduction of innovations based on an actively developing post-industrial society and the actively carried out digitalization of society.

Given the fact that it is currently impossible to unambiguously define the concept of culture due to a wide range of approaches to the interpretation of this phenomenon, we will take the most common position as a basis, which, moreover, attracts by its effectiveness concerning the analysis of transformed reality. The axiological approach is beginning to dominate in modern scientific research. The analysis of the Russian legal culture through the prism of its inherent spiritual and sentimental features allows concluding that today it can be characterized in the context of two trends: tradition and modernization. This trend can be applied to the characterization of the existence and development of sources (forms) of modern law.

METHODS

Dialectical, historical-political, formal-legal, comparative-legal.

RESULTS

It can be argued that the legal and cultural foundations of the sources (forms) of law determine the processes of their genesis and transformation, based on the harmonization of legal systems. The constant change of priorities in this area is based on the search for a balance between traditional and modern forms of law.

DISCUSSION

The pre-revolutionary Russian scholars paid close attention to the issues of the genesis and transformation of sources (forms) of law. Thus, one of the representatives of the formal legal approach in law, Professor N.M. Korkunov (1898, p. 54) wrote that "... the definition of legal norms by the source is more objective than the definition by content". The author understood the source of law as a way of securing (external expression) a rule of law, without identifying the concepts of "source of law" and "form of law", characterizing the source of law as a phenomenon that generates the rule of law" (KORKUNOV, 1898, p. 62).
Russian civil lawyer, professor G.F. Shershenevich, saw in the law one of the priority forms of law. He emphasized that

[...] the law is a rule of the hostel, supported by the state power, coming directly from the state power in the order established in advance. The law differs from other forms of law in the way of developing the content of its constituent norms – the content of the norms is developed by the state power itself... (SHERSHENEVICH, 1995, p. 252).

Note that this kind of approach to the concept of "source (form) of law" is quite acceptable if the law is interpreted as a direct expression of the will of the state. This definition was characteristic of the police state and law that had been flourishing during the Russian Empire.

Russian lawyer, Professor I.V. Mikhailovskii (1914, p. 237) suggested a different approach to understanding the sources (forms) of law and pointed out that "... the source of law" is still understood differently and there are disputes about it... in fact, all scholars equally understand "sources of law" as "factors that create law", and disagreements begin only when deciding what should be considered "law-making factors". Thus, the author presents the concept of "sources of law" more broadly, rejecting an exclusively formal legal approach to the stated problems, and points to the multidimensionality of the so-called law-making factors, among which economic, financial, social, political and other relations can be named, and not only government orders.

Another point of view on the question of the concept of the source (form) of law and their relationship in pre-revolutionary legal science was supported by such proponents of psychological and sociological theories of law as L.I. Petrazhitskii and S.A. Muromtsev. Russian legal scholar L.I. Petrazhitskii (1907, p. 513) emphasized the inexpediency of analyzing these phenomena as "... contradictory in nature". The source of law, according to the views, can be both the will and consciousness of the state and society, as well as individual social groups and individuals. The form of law, therefore – is not only law or other normative legal act, but also a judicial precedent or some other form recognized by a particular socio-cultural and religious community as authoritative for its worldview, legal awareness, and harmonious psychological perception. Accordingly, the source of law is primary and is determinative concerning the form of law. Continuing to develop the views of his teacher Professor L. I. Petrazhitskii, Soviet legal scholar M.A. Reisner (1925, p. 270) emphasized that

[...] for us, the distinction between the separate forms of objective law, or, as it is called in ordinary jurisprudence, "the source of law", is of no particular importance, because right is always right... Objective law can equally give the establishment of formal equality with the help of any acts of law, contract, custom, judicial precedent or the dictum of learned lawyers... (REISNER, 1925, p. 270)

Through the prism of the class approach to understanding the essence and social purpose of the law, Reisner gave priority to the will of the ruling class, which dictates the rules and regulations that formalize its rule, in questions about the relationship of the source (form) of law. A special approach to determining the form (source) of law is observed in the works of the Soviet author P.I. Stuchka (1964, p. 74), who, relying on the Marxist-Leninist methodology, considered the social relations established in the period of transition from capitalism to socialism to be the source of the new law, and decrees and other acts of the Soviet state acted as its form.

The development and direct implementation of the newly formed law in the practice of Soviet justice was carried out by D.I. Kurskii. He emphasized the class character of both the Soviet right itself and its source – the will of the proletariat. In contrast to the views of L.I. Petrazhitskii and S.A. Muromtsev on the possibility of the individual orientation of legal orders, D.I. Kurskii did not recognize the individual interest and will of a single individual as a source of law. He insisted on the absolute priority of the interests of the ruling class, the will of which is the source of law (KURSKII, 1927, p. 14).
Representatives of the psychological and sociological schools of law L. I. Petrazhitskii and S.A. Muromtsev understood the source of law as the will and consciousness of both the state and society, as well as individual social groups and individuals. The form of law meant both a normative legal act and a judicial precedent, and other forms of law were also allowed. The Soviet authors, emphasizing the class nature of law, insisted on recognizing the will of the proletariat as its source, and the form meant the laws of the Soviet state, the treaties it concluded, customs that did not contradict class consciousness. Since the late 1920s — at the beginning of the 1930s, a positivist approach to determining the sources (forms) of law had been prevailing in the USSR, which recognized the will of the Soviet socialist state as the source of law, and its form — the normative legal acts issued by this state, the Communist Party, trade unions and other authorized bodies and officials.

There are several diametric approaches to the question of the relationship between the form and the source of law in modern legal science. Moreover, as a professor at Oxford University I. Brownlie (1990, p. 1) rightly states, it is generally accepted for Western legal scholars to distinguish between formal and material sources of law. The Russian jurisprudence traditionally recognizes the close relationship of sources (forms) of law and legal culture. Noting that law is not only closely related to culture but is also a part of it, I.N. Gryazin (1983, p. 33) identified three main points of this relationship: 1) culture and law ensure the integration of the individual into a social whole; 2) culture and law are the embodiment of accumulated social experience; 3) the form of law is ultimately determined by the forms of culture in which the law exists. In the same vein, the position of S.I. Maksimov (2002, p. 147), who focuses on the fact that the concept of legal reality (picture of the world of law) is set by the world of law, represented in the sense of justice, it consists of theories of various levels, regulations, everyday experience. Regardless of the understanding of this legal reality — as an objectively existing phenomenon of a practical nature or as a model of legal reality — its legal and cultural basis follows from the very essence of this phenomenon. Similar concepts exist in foreign studies. For example, P. Gevirtz notes that it is important to study not only how the law is created, but also how it is formalized (BROWNLEE, 1990, p. 1).

Based on the above, there is every reason to believe that the sources (forms) of law have legal and cultural grounds for their existence and development, largely determined by the peculiarities of the legal culture in which the law exists. The problems of the legal culture of modern society are directly related to the problems of implementing political and economic reforms aimed at optimizing public relations. The value, functions performed, and (BROWNLEE, 1990, p. 1) the role of legal culture increases immeasurably, and the more, faster, and more precisely the norms of law cover the most important social relations, the more significant the legal culture becomes. Therewith, the more it is covered and supported by other systems of regulation of public relations, the more pronounced its impact on public relations.

It is indisputable that legal norms should be adequate to the system of public relations, which are subject to their regulatory impact, as well as the concept of legal understanding, which is the basis of a certain legal order, as well as other factors, in particular the specifics of understanding the argumentative series of formulated legal provisions and the audience that perceives them. An increasing number of doctrinal studies are being carried out as part of the expansion of research on the influence of various factors of the conditionality of law as an entity predetermined by linguistic phenomena (DIDIKIN, 2019). We believe that this requirement of adequacy to the specifics of public relations and other phenomena that determine the law as a whole should also correspond to the forms of fixing the norms of law. In this regard, it should be noted that the sphere of law is not once and for all a certain stati...
The modern feature of the legal culture of Russia is that it is characterized by the requirement of subordination of legal norms to a certain moral “truth”, the primacy of moral and ethical, social by nature imperatives concerning state-legal and formalized prescriptions. Y.M. Lotman and B.A. Uspensky quite rightly defines culture as a “non-hereditary memory of the collective, expressed in a certain system of prohibitions and prescriptions” (LOTMAN, 2000, p. 487). Given that social activity in the legal space is regulated by updating the legal meanings expressed in officially issued acts, (FEDORCHENKO, 2014, p. 32), this once again proves the predestination and mediation of legal and cultural factors of the formal consolidation of legal prescriptions.

Certainly, the legal and cultural foundations of the sources (forms) of law determine the processes of their harmonization, the constant change of priorities in this area, and the search for a balance between traditional and modern forms of law. Modern legal regulation is replete with a variety of well-established and innovative forms that require the construction of a balanced and harmonious system. Therewith, the legal and cultural grounds for revising the existing system of forms of law come to the fore, which indicate that this system should not have sharp deviations from the priority of traditional forms of law. Society needs to harmonize the processes of modernization and preserve its cultural characteristics. Attention to traditions and historical cultural experience is a guarantee of the stability of the legal system.

On the other hand, the facts of legal reality imply a revision of the role of traditional forms of law, which in turn leads to an increase in the role of other sources. Currently, an urgent problem is the study of the forms of judicial law-making, including in the aspect of linguistic analysis of accepted legal rules (SOBOLEVA, 2013). In this case, the problem of introducing the so-called auxiliary forms of law, which include legal awareness, principles of law, and legal doctrine, becomes relevant (BOSHNO, 2005, p. 5-6). Nor should the significance of the legacy of customary law be diminished, which has so far not lost its role in legal systems (WIEACKER, 1995, p. 82), as well as the legal doctrine, the significance of which was repeatedly reflected during various periods of development of the state and society (WESENER, 2011).

In addition, there are proposals for the recognition of not only written but also unwritten forms of law (VASILEV, 2009, p. 25). There is a problem with the emergence of mixed forms of law, which is also ambiguous. G.K. Gins noted that hybrid forms in law are the least suitable, they are tantamount to avoiding a direct answer. He wrote that if a mixture, like some chemical compositions, creates something new, then is it not better to give it a name and define its special qualities and properties? (GINS, 1938, p. 3). These controversial issues of forms of law, before getting their direct implementation, should be justified in terms of the possibilities of the current level of legal awareness, legal culture, legal mentality, traditions of legal regulation, etc. The legal consciousness of both lawmakers and law-enforcers may not be ready for the perception of these non-traditional legal phenomena for the Russian legal system.

In addition, it should be noted that with the development of legal doctrine, the textual expression of legal principles is justified by the dependence on new factors that, with the development of social relations, can affect the specifics of both external and internal expression of sources (forms of law). Thus, for example, there are opinions that the so-called “judicial emotions” influence decision-making, among other factors (MARONEY, 2006, p. 131-133). In this regard, given the convergence of legal systems and the interaction of various sources of law, it is possible that at a certain stage of the development of the rule of law, a similar impact will be significant for forms of law. The specifics of the sources (forms) of law are also influenced by their belonging to a certain school of legislative technique—French or German one (LASSERRE-KIESOW, 2000, p. 26). In addition, we should not detract from the fact that often the very choice of acts that are forms (sources) of law affects the effectiveness of the legal system (CRUZ, 1993, p. 123).

Therewith, we should not miss the fact that the legal culture is opposed by legal anti-culture, which includes factors of negative human activity (BONDAREV, 2006, p. 14). It should be noted that the manifestations of anti-culture have a direct impact on the formal consolidation of legal regulations. In this regard, we can cite the opinion of Professor V. M. Baranov (2002, p. 37), who believes that it is quite possible and necessary to talk about the established “legal position” of the subjects of shadow criminal law. This legal position can be formally expressed.
For example, the legal positions of the deputy corps, which in the law-making process are not just expressed by deputies but are often actively “implemented” in draft normative legal acts (BARANOV, 2002, p. 40). The noted position can consolidate the interests of the subjects of shadow criminal law, which, through lobbying processes, penetrate the sphere of legal awareness of deputies. Hence, there is a need to form mechanisms to counteract these processes.

**CONCLUSION**

Summing up, it should be noted that the genesis and transformation of sources (forms) of law are based on their legal and cultural foundations, which determine the processes of their harmonization, the constant change of priorities in this area, and the search for a balance between traditional and modern forms of law. The following patterns can be considered the main dominants of the genesis and transformation of sources (forms) of law:

- the forms of consolidation of the norms of law are adequate to the specifics of the system of social relations in a given legal culture;
- the peculiarity of the legal culture, within the framework of which law exists, reveals the fundamental foundations for the sources (forms) of law;
- formal consolidation of legal prescriptions is predetermined and mediated by the specifics of legal culture;
- the moral principle affects the specifics of the sources (forms) of law;
- the law and the forms of its consolidation are permanently changing following the challenges of the time, giving rise to bipolar consequences;
- legal culture prepares lawmakers and law enforcers for the perception of innovative forms of law, allows them to resist the formalization of regulatory prescriptions.

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Genesis and transformation of sources (forms) of law: dominants and legal and cultural foundations

Gênesis e transformação de fontes (formas) de direito: dominantes e fundamentos legais e culturais

Génesis y transformación de las fuentes (formas) del derecho: dominantes y fundamentos jurídicos y culturales

Resumo
O trabalho tem como objetivo estudar a gênese e a transformação das fontes (formas) do direito no aspecto de identificar os principais dominantes de seu desenvolvimento e fundamentos socioculturais. Os principais métodos de pesquisa – dialético, histórico-político, formal-legal, comparativo-jurídico. Como resultado da pesquisa conduzida, as seguintes conclusões podem ser formuladas: As fontes (formas) de direito são determinadas pelas formas da cultura em que existe o direito, pois refletem as características do conceito modificado da cultura jurídica da sociedade, que se baseia no renascimento de diversas tradições, na introdução ativa de inovações axiológicas na emergente sociedade pós-industrial no contexto da digitalização das relações públicas. Os fundamentos jurídicos e culturais das fontes (formas) de direito determinam os processos de sua harmonização, a constante mudança de prioridades nessa área e a busca de um equilíbrio entre as formas tradicionais e modernas de direito. Esses processos são realizados com base em vários domínios, que devem incluir dois aspectos: tradição e modernização.

Keywords: Sources (forms) of law. Legal culture. Harmonization. Genesis. Dominants.

Abstract
The work aims to study the genesis and transformation of the sources (forms) of law in the aspect of identifying the main dominants of their development and socio-cultural foundations. The main research methods – dialectical, historical-political, formal-legal, comparative-legal. As a result of the conducted research, the following conclusions can be formulated: The sources (forms) of law are determined by the forms of the culture in which law exists, therefore, they reflect the features of the modified concept of the legal culture of society, which is based on the revival of several traditions, the active introduction of axiological innovations in the emerging post-industrial society in the context of the digitalization of public relations. The legal and cultural foundations of the sources (forms) of law determine the processes of their harmonization, the constant change of priorities in this area, and the search for a balance between traditional and modern forms of law. These processes are carried out based on several dominants, which should include two aspects: tradition and modernization.

Keywords: Sources (forms) of law. Legal culture. Harmonization. Genesis. Dominants.

Resumen
El trabajo tiene como objetivo estudiar la génesis y transformación de las fuentes (formas) del derecho en el aspecto de identificar los principales dominantes de su desarrollo y fundamentos socioculturales. Los principales métodos de investigación – dialéctico, histórico-político, formal-legal, comparativo-legal. Como resultado de la investigación realizada, se pueden formular las siguientes conclusiones: Las fuentes (formas) del derecho están determinadas por las formas de la cultura en la que existe el derecho, por lo tanto, reflejan las características del concepto modificado de la cultura jurídica de la sociedad, que se basa en el renacimiento de varias tradiciones, la introducción activa de innovaciones axiológicas en la sociedad postindustrial emergente en el contexto de la digitalización de las relaciones públicas. Los fundamentos jurídicos y culturales de las fuentes (formas) del derecho determinan los procesos de su armonización, el cambio constante de prioridades en esta esfera y la búsqueda de un equilibrio entre las formas tradicionales y modernas del derecho. Estos procesos se llevan a cabo en base a varias dominaciones, que deben incluir dos aspectos: tradición y modernización.

Palabras-clave: Fuentes (formas) de la ley. Cultura jurídica. Armonización. Génesis. Dominantes.