Artículo de investigación

On the demarcation of philosophical and juridical legal metatheory

О демаркации философско-правовой и теоретико-правовой метатеории

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Abstract

The article deals with the methodological structuring of legal knowledge. It is common practice to specify two types of legal methodology: philosophical and judicial, yet the author demonstrates how new paradigmal parameters of legal metatheory manifest themselves. According to this metatheory, alternative concepts may be of the same order in a metatheoretical sense. The comparison of theoretical and metatheoretical levels of legal knowledge in the framework of three philosophical-scientific paradigms (comparative method) allows philosophy of law to answer the questions: what is law and why there exist multiple variants of legal consciousness. Authors demonstrate why the theme of competition between naturalistic and culture-centered research programs is secondary for legal metatheory and primary for judicial metatheory. The article offers criteria for unambiguous legal consciousness at the theoretical level of legal knowledge and identifies ultimate and reasonable grounds of legal consciousness. The paper concludes that special subdivisions of legal science, legal philosophy represents the paradigmal background of thinking, in the boundaries of which further interpretation schemes of theoretical and empirical levels of knowledge are made possible.

Key Words: Philosophy of law, legal theory, legal metatheory, paradigm, comparative method.

Аннотация

Статья посвящена методологическому структурированию правовых знаний. Обычной практикой является определение двух типов правовой методологии: философской и судебной, однако автор демонстрирует, как проявляются новые парадигмальные параметры правовой метатеории. Согласно этой метатеории, альтернативные понятия могут быть одного и того же порядка в метатеоретическом смысле. Сравнение теоретического и метатеоретического уровней правового знания в рамках трех философско-научных парадигм (сравнительный метод) позволяет философии права ответить на вопросы: что такое закон и почему существует множество вариантов правосознания. Авторы демонстрируют, почему тема конкуренции между натуралистическими и культурно-ориентированными исследовательскими программами является вторичной для правовой метатеории и основной для судебной метатеории. В статье предложены критерии недвусмысленного правосознания на теоретическом уровне правовых знаний и определены предельные и разумные основания правосознания. В статье делается вывод о том, что специальные подразделения юридической науки, философии права, представляют собой парадигмальный фон мышления, в границах которого возможны дальнейшие схемы интерпретации теоретического и эмпирического уровней знаний.

Ключевые слова: философия права, теория права, правовая метатеория, парадигма, сравнительный метод

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Introduction

Theoretical understanding is extrapolated to legal practice: none of legal theory or philosophy schools manage without a basic ontological mindset and an answer to the question, in which reality law exists; nor without a foundational gnoseological attitude: what truth is.

The problem of the notion of law, common for legal science, acquires additional features connected with a qualitative change of judicial metatheory. Thus, "the principles of legal intersubjectivism imply the consideration of the social-cultural parameters of a specific society" (Sirazetdinova & Lukmanova, 2016, p. 373). Researchers move from individual explanatory schemes, appeal to specific schools of thought – phenomenology, communication theory, Neo-Kantianism, resort to post-modernity – to the recognition of the polyparadigmal character of contemporary science and to the adaptation of the idea about distinguishing types of rationality to legal knowledge (Alexander, 2012). Legal consciousness concept represents "only some perspective of thinking about law", so the solution of the problem of such diversity "appears in establishing metatheory" (Gostev, 2016). According to this approach, any point of view on law represents uncontroversial knowledge and may expand to the scope of holistic comprehension of law.

The standpoint of the paradigmal interpretation of law has its advantages, enriching methodological tools of legal science. Yet the mentioned standpoint is vulnerable due to the emergence of a new, more complicated epistemological problem – the multiplicity of metatheoretical views. "Legal theory" gradually goes out of the research vocabulary, being substituted for abstract "methodology" or "epistemology" (Bianchi, 2016) of law. The search for new directions of research to study law (Nagy, 2012, p. 62) results in the fact that philosophical-legal terminology increasingly fills the legal science discourse. At the same time, the formation of judicial metatheory is carried out in a disciplinary way (Zipursky 2006, Warner 2006), as it occurs in the research program, and not in a philosophical-scientific paradigm.

The problem of distinguishing between philosophical and disciplinary metatheories is one of the key issues in modern philosophy of science. Legal metatheory monitors the paradigmality of legal knowledge in the framework of its own competences. Legal philosophy as metatheory explicates ultimate ontological, gnoseological and axiological foundations of legal concepts. It serves as a maximum interpretation scheme of disciplinary theories and metatheories evolution, as original ideas about the nature of law, its study principles, value-based status in society. Is this ultimateness "flexible", is the subject matter under investigation 'open"? Legal philosophy takes on the paradigmal point of view at any legal phenomena, conceptual foundations of their investigation. That is, the paradigmal interpretation of law is inherent in philosophy. The logic of philosophical and scientific-legal knowledge development predetermined the shift of the point of view in legal philosophy. Due to the evolution of philosophy of science distinguishing different types of scientific rationality, the methodological algorithm of study of law is becoming clarified to a great extent.

Constructivism, neo-positivism, and post-structuralism, having become mutually complementary due to their semiotic nature, shifted into the focus of post-non-classical jurisprudence. It is considered that they may become discursive strategies of legal consciousness and ways of legal communication. Some researchers justify the point that "focus on signs is the principal tool of constructing social-legal reality" and as a result, the worldview basis of post-non-classics in legal sciences appears.

The hypothesis of the present article: in contemporary legal thinking, there are two kinds of metatheoretical knowledge – tlegal and philosophical. The purpose of the research is to determine the main parameters of judicial and legal metatheory.

Methodology

In order to clarify methodological dualism – metaphysical and scientific methods of law interpretation – the research employs the principles of structuredness of legal knowledge and distinguishing types of scientific rationality. "Sectoral" interpretation of metatheory does not imply synthesis, but rather separate coexistence of the main legal consciousness concepts. That is why the research is based on the ideas that (a) disciplinary metatheory represents a higher level of scientific knowledge representing a three-tier structure; (b) philosophical metatheory is congruent with metaphilosophy of science, which is "on the one hand, the reflective level of

perception of science itself, and on the other, a result of applying cognitive resources of a certain philosophical system" (Lebedev, 2004, p. 130, p. 254).

Results and discussion

The general theory of law and its metatheoretical level, along with economic and sociologic knowledge, comprise the "body" of a scientific paradigm. Legal metatheory does not fulfill the functions of philosophy of law; it supplies the material for legal metatheory. Common features of the established scientific paradigm manifest in legal, economic, sociological concepts.

In legal philosophy, research strategies of modernity and post-modernity, naturalistic and culture-centered research programs are studied along with systemic, structural-functional and activity methodology: (a) as methodological support of aggregate scientific knowledge; (b) as structural components of legal metatheory, changing their paradigmal characteristics.

It is only in legal philosophy that the unification of multiple judicial metatheories is possible. It is becoming clear that neither phenomenology, nor semiotics cover the whole field of post-non-classical paradigm, and reducing of post-non-classics to the new anthropologic turn leads to inefficient identification of non-classical and post-non-classical paradigms. The suggested constructivist-semiotic judicial metatheory does not shape the matrix of ultimate post-non-classical explanation. As a matter of fact, in post-non-classical philosophy of law, active creation of sign reality by the subject is viewed as a mere fragment of the systemic existence of law in its weakly nonequilibrium or strongly nonequilibrium state.

In judicial metatheory, the way of presentation of worldview concept foundations plays a functional role. For legal metatheory, the common paradigmal logic of metaphysical presuppositions is important, as they play a substantial role. The explication of law through the notions of norm (Hakimi, 2018), justice (West, 2003; Hartz & Nielsen, 2015), freedom (Laborde, 2014; Hartz & Nielsen, 2015), formal equality (Nikolić & Cvejić, 2017; McGill, 2018; Laborde, 2014,) is quite legitimate and generally valid in the framework of the paradigm predominant at present time. It is only in legal metatheory that those definitions coil up into unified abstraction adequate for all patterns of scientific and non-scientific legal thinking. Thus, the positive effect is achieved with an explanation of the essence and structure of the legal method.

The formation of legal metatheory in Russia is linked to the problem of broad interpretation of law. This is indirectly related to ontological issues, rather it is epistemological problem of gradation of different levels of legal knowledge, not relevant before. The so-called broad interpretation of law is specific for the theoretical and metatheoretical levels of legal knowledge on the scale from formal-logical descriptive language to complicated systemic analysis. A broad interpretation of law is the problem of competition between naturalistic and culture-centered research programs, the gradation of the categorical framework, isolation of series of notions. Thus, the notion of a norm bears static operational content with a narrow interpretation of law and dynamic, significant components with the so-called broad interpretation of law. In the first case, at the theoretical level, the true notion of law is clarified, true not in the sense of the theory of truth correspondence, but in the sense of the theory of coherence, internally consistent theory.

At the theoretical level, different conceptual positions should be aligned not in the framework of complementation of multiple interpretations of law, but in the limits of unambiguously understood social-functional nature of law. In other words, the narrow interpretation of law correlates with the classical theoretical-legal level of explanation. Definition of law as a measure of freedom is "own other" of understanding of law as a system of norms. At the theoretical level, no type of legal consciousness can have conceptual advantages. Legal knowledge is seen as a unified concept, not formed inductively, but on the contrary, diverging deductively. Each subdivision investigates specific manifestation of the social nature of law and any branch of the unified concept secure authenticity of certain legal consciousness.

At present, substitution of etatism for systemic understanding about social reality where law is included into the mechanism of essential reproduction of reality lays the ontological foundation for the classical theoretical understanding of law. The aim of the social system is self-reproduction and the unity of its parts. Axiological foundations of such legal consciousness: for social life, keeping social order and normative behavior is a value. Gnoseological foundations of classical legal consciousness: mutual recognition of

cohabitation rules as a result of collective and personal reflection determines the measure of freedom in the social system, and judicially significant actions are considered fair and reasonable. At the theoretical level, any type of legal consciousness reflects a certain aspect of correct, fair, normative reproduction of the social system and its parts.

At the theoretical level of legal knowledge, the multiplicity of legal consciousness is formed not as a result of the drastic difference between conceptual and methodological standpoints, but as a result of the multidimensionality of manifestation of the essence of law in systemic social existence. Each type of legal consciousness expresses a certain form of existence of law as a way of reproduction of social order. It is significant that at the theoretical level, multiple interpretations of social reality do not influence the clear definition of law. Social reality may be understood in keeping with K. Marx as the classical systemic existence of economic and social-political regularities (Csaba, 2012). Social reality may also be interpreted in the post-non classical way in keeping with N. Luhmann as a self-reproducing system consisting of operations and events (Ladeur, 2006). The social-functional interpretation of law is acceptable for micro-legal theory as a function of the state (Tan, 2018) and macro-legal theory emerging into social reality.

In judicial metatheory, the broad interpretation of law becomes a special research topic embracing the whole range of gnoseological and ontological innovations. The task of the post-non-classical legal methodology is to provide a social-cultural, conceptual and methodological assessment of available legal knowledge. The possible sense of existence and functioning of law is thus reflected. In legal sense, historical and cultural states of social reality, mental peculiarities of individuals and social groups, objective social-economic circumstances, subjective political strategies and "stereotyping as monological, one-sided assessment of other social subjects and social phenomena" correlate to each other (Lukmanova & Sirazetdinova, 2016), as well as many other factors of "environmental" existence of law (Edmundson, 2013). The fact of undividedness of law and its environment expands the ontological foundations of the metatheoretical level. Various environmental conditions determine the priority values of the present time, which leads to the anticipated expansion of axiological foundations of understanding about law. "Internal" systemacity entails with "external", law in itself is a parameter of systemic social existence susceptible to nonlinear variation. On the other hand, the knowledge domain of contemporary legal theory expands due to emphasizing role of juridical reflection. Importance is being increasingly attached to the full-scale comparative analysis of existing concepts with the aim to find balanced, unambiguous understanding of law.

How to relieve the problem of the multiplicity of legal consciousness concepts at the theoretical level of legal knowledge? One of the possible ways is to secure the status of classical scientific knowledge for the theoretical level. This implies focus on its single-essence definition, a study of law and not its interpretation, involvement of all approaches (including natural-legal) in the naturalistic research program. The legitimacy of such a solution is connected with the impossibility of elimination of the classical scientific paradigm in contemporary scientific knowledge. Substantial definitions come to the foreground; that is why the interpretation of law cannot be only formal, procedure-oriented and functional, it necessarily retains value-based targets.

The paradigmal frame in legal science points at the uniformity of disciplinary concepts. In judicial metatheory, a paradigm appears, manifests itself and becomes the subject domain of legal philosophy. Legal metatheory reflects both the subject domain and ways of its interpretation from the paradigmal perspective. Questions "what is law?" and "how to study it?" remain "open" in terms of the peculiarity of philosophical knowledge and "closed" in the sense of ultimate explanation for the current period.

Even with the broad interpretation of law, its metatheory does not coincide with legal philosophy; they differ in the same way as contemporary science and philosophy of science. Legal theory and metatheory shape a content-related, empirical basis on which philosophy of law further reflects. It employs exclusively philosophical tools, which remind of the "broad" language of law only terminologically. Thus, legal philosophy turns to legal hermeneutics serving both as a way of interpretation of the sense of law in metatheory and a specific school of thought. However, the context of the corresponding philosophical-scientific paradigm provides the ultimateness of explanation. Due to the paradigmal aspect, for example, a significant difference in the ontological and gnoseological foundations of the legal hermeneutics of Ancient Rome (classical paradigm) and legal

hermeneutics of Dvorkin (non-classical paradigm) is becoming clear.

Conclusions

In legal science, the metatheoretical level is determined by research programs which define sufficient grounds of integrated legal consciousness, and the achieved epistemological results present the topic of special investigation in legal metatheory. Legal philosophy presents self-reflection in the framework of paradigmal assumptions, stepping to ultimate parameters of integrated legal consciousness. Philosophical knowledge comprises generalized worldview methodological experience in a given moment of time.

Discussions on the authenticity of types of legal consciousness directly and indirectly facilitate the formation of modern legal metatheory. A further analysis of the epistemological opportunities of legal metatheory will be effective for its self-identification.

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