CULTURE AS FACTOR INFLUENCING NATIONAL LEGAL SYSTEMS AND DEVELOPMENT OF INTERNATIONAL LAW

To place the law in the system of public values, the following definition can be used: “Law is a reflection of existing philosophical views, moral principles and cultural traditions of the society”. With all the unconditional independence of these categories, on the one hand, and their natural interaction, on the other, the law has two distinctive features. First, unlike philosophical views, moral foundations or cultural traditions, the law emerges as a product of state will and provides a different view of imperativeness as compared to aforementioned views, foundations and traditions. Secondly, these categories can spread around the world freely, or be imposed by force, that is, exist outside the state’s will. The law, meanwhile, initially emerges within the boundaries of a specific sovereign authority and on a certain territory and is legitimately spread throughout the world solely through coordination of the will of sovereigns, forming the body of international law.

Having arisen as a reflection of existing views, foundations and traditions, the law acquires precisely defined forms and begins to act not only through the people's obedience to the law, but also through the system of state and international law enforcement. The formation and operation of law gives an impulse to the reverse process, namely, the impact of the law itself on the views, foundations and traditions of society.

All these interrelated processes shape the philosophy of law and the legal culture.

The interaction between law and culture is a dynamic process. The historical experience of each state demonstrates existence of development cycles, involving fundamental institutions of law and cultural traditions in all their manifestations. A relative exception to this rule was Jewish law – Halakhah. Today

appeals to its norms or refusal to apply them is being practiced by courts in Israel and abroad. Resolution of many conflicts is based on the process of applying ancient Jewish norms that are interpreted in modern ways through analogy, generalization and other methods.[1]

A radically different role is now assigned to the Roman law. Having lost its role as a source of law, it, as Czech lawyer Milan Bartosek notes, has been transformed into an element of private law philosophy and has been regarded as the principle methodology of codified legislation. The experience of the French legal system can serve as an example of such a transformation.[2]

Changes in laws of any state depend on many factors. These include various historical events: revolutions, wars, alliances of states forming and falling apart, as well as various natural and human-made phenomena. In addition to these factors, the objective process of interaction between various legal systems is of no small importance for the development of law. Such an interaction serves as an indispensable condition for implementing a variety of international relations. And, finally, this is the result of certain social transformations associated with the development of political and economic ideas or religious views.

A list of these factors can be shortened or lengthened, but it is highly unlikely that any universal matrix can be created in order to predict or design any legal system models of any state. The validity of such a conclusion has been confirmed by centuries of experience in development of legal systems across the globe.

The legal systems of states belonging to a single cultural and civilizational community not only share some similar features; they also display significant differences. Any attempts to create uniform rules were quite limited. Even such a

1 Kanevsky, A. A. Place of Halakhah (Judean Law) in National Legal Systems Moscow, 2016. pp. 18-40.

2 Bartosek, Milan. Roman Law. Notions, Terms, Definitions. Moscow, 1989. pp. 8-9.

form of creating a single legal regulation as private law was not particularly successful. For example, the Civil Code of Napoleon was accepted by Belgium; the Swiss Law on obligations was reciprocated by Turkey, but the practice of applying these normative acts in each country had its own peculiarities.[1]

In the sphere of public law, of special significance is the historical experience of Japan. After the Second World War, the constitution of Japan was formulated under the influence of the United States. However, it would be an exaggeration to say that the Japanese supreme law was based on American ideas. Subsequently, the Constitution of Japan had considerable influence on development of legislation and law enforcement practice.

No less remarkable is Russia's experience in reforming private law. In the early 1990s, when creating a model of the new Civil Code, acceptable for regulating market relations, the Russian legislators had used Dutch sources, in particular, the new Code of the Netherlands. They used it for the structure of the Russian Code, some definitions and terms. However, it would be a mistake to consider the Civil Code of the Russian Federation a copy of the Dutch code. Moreover, the changes and amendments to the Russian Code which were adopted subsequently, were based not on Dutch, but Russian experience of judicial practice.

What factors then influence the deviations from the selected legal model and the interpretations of own formulas of borrowed legal norms? Among the full range of various factors the national and cultural characteristics inherent to the population of each country stand apart most prominently. "Culture, Academician Likhachev used to say, is a complex multi-layered notion. Culture permeates all aspects of the country's life: it affects people's behavior in the street, and the way they preserve and study cultural values, and the nation's attitude to the sciences,

1 Lisitsyn-Svetlanov, A.G. Interaction of National Legal Systems of International Private Law \\ Modern International Private Law in Russia and the European Union.. Book One. Moscow. 2013. p.71.

especially the fundamental sciences, and the level of quality of television broadcasts, and – naturally – literature and art".[1] This list of various facets of life can be continued, and may include law and the legal relations formed in the society. It would be naive to look for a common citizen, or a person in power, who would be free from the cultural traditions in which they grew up. Moreover, the law of any country provides for special institutions referred to as "public order" and "moral foundations", which each state interprets in its unique way. The great multitude of life situations that judicial practitioners face legal systems has led to emergence in every legal system of a new institution known as "judicial discretion". The essence of this institution is that for the court, or rather, the judge, the right and duty to make decisions is based on his or her personal views, personal values, formed in the national cultural environment of which he or she is a part.

A vivid example of the influence cultural traditions have on law in Russia and abroad is the current situation with the corporate law. One of the main goals in the process of regulating corporate relations is to determine organizational and legal forms of the enterprise and to regulate relations between its participants accordingly. This is a behavior code of sorts for entrepreneurs in a given business community. In conditions of internationalization of economic ties, the rules of behavior of entrepreneurs would be unified or at least very similar across the globe. And indeed the legal community is working in this direction. There have appeared corresponding directions of research, and international conferences on corporate subjects are being regularly held. However, the goal of achieving universal or at least regional harmony is still far off. During the legal reforms of the 1990s the Russian law had not fully accepted any of the models of Western European countries. A no less peculiar situation can be found in the European Union as well. It would be logical to assume that building a unified community must start with a uniform view on the status of business entities and on the rules of

1 Likhachev, D.S. Any Great Culture is A Culture of Conciliatory Nature. // International Likhachev Readings. Globalization and Cultural Dialog. Selected reports. St. Petersburg. 2015. p. 23.

their behavior. However, after quite a few years, the EU has not yet come up with a unified version of corporate law. The factor of entrepreneurship culture, which distinguishes an entrepreneur of Hamburg from an entrepreneur of Milan or Marcel, has played a significant role in this process.

Integration in other spheres of life is as far off. Despite the fact that the national culture permeates all areas of life, and international cooperation has been used to promote integration of national cultures and legal institutions, integration in the field of human rights, in the area of statehood, as well as in the legal setup of the state's political system is also far from being achieved.

The problem of human rights has become one of the most hotly debated topics. This problem is not only political or social in nature, it also has an important religious and cultural dimension. The perception of the Islamic world that follows its own civilizational code could not accept the Western way of life; and this fact has led to forced imposition of western values on the Islamic world, and the demand to adhere to the western standard of human rights, as the only possible option. A deviation from these standards was in some cases declared a gross violation of the norms of international law, permitting use of unauthorized force.

The international practice in its historical retrospect offers many other, more positive examples. Of considerable interest is the experience of interaction between other civilizational systems. China and Japan represent a particularly interesting combination.

China, after being the main civilization development vehicle for millennia, chose a new, communist ideology, in 1949 and that had a tremendous impact on the culture of this country. Initially, its legal and cultural policies were guided by the experience of the USSR, but in the period of the cultural revolution the law-abiding development of the country ceased to exist. Nevertheless in 1978 the country proceeded to adopt the policy of reforms and built a socialist legal state

with consideration of some specifics of the Chinese experience, in particular, taking into account the Chinese cultural traditions.[1]

With the start of the Meiji restoration in 1868, Japan abandoned its policy of absolute isolationism and changed its attitude to foreign culture. Now the country viewed foreign influences positively and even entered into interaction with foreign legal systems.[1] Ever since Japan has adhered to the principle of reasonable conservatism according to its long-standing cultural traditions, however, research shows, the country has clearly chosen to follow Western legal models. Eremin, in his analysis of Japan's legal system, agrees with the point of view of Japanese legal scholars that "law was a cultural product of the historical society, and therefore it should corresponds to each of such societies". [2]

Preservation of Japanese cultural tradition and the issues of legal regulation of what is permissible and unacceptable in art can be illustrated by the attitudes towards erotica in Japan. Article 175 of Japan's Criminal Code, adopted in 1907, to this day forbids production or sale of any pornographic products. However, all issues related to the film industry are being regulated by voluntary organizations that are authorized to decide whether to allow or prohibit the showing of certain films. The Japanese also seem to understand very differently from European countries, what constitutes erotica and pornography. The civilizational differences of Japan can be explained by the centuries-long isolation of the country from the outside world, as well as by peculiarities of the Japanese national mentality that was historically shaped as the homogeneous nation under the influence of religious ideas, ethnopsychology and the country's cultural traditions.[3] These peculiar features are associated with the nation's ways of behavior, their self-expression and appearance, which constitute a part of the unique cultural code of the nation.

1 Lee Jingjie. Borrowing the Western Culture: No Deviations to the Left of Right Shall Be Allowed.// International Likhachev Readings. Globalization and Cultural Dialog. Selected reports. St. Petersburg. 2015. pp. 143-148. Troschinsky, P. V. The Legal System of China. Moscow. 2016. pp 14-15.

1 Eremin V. N. Tradition in Politics and Law of Japan: A View from Russia. // Japan-2000: Conservatism and Traditionalism. Moscow. 2000. pp. 39-55.

2 Ibid. p. 52.

The appearance of an individual within a certain culture has traditionally been shaped by the national, religious, and cultural traditions of the said nation or ethnos. Moreover, the person's appearance has traditionally reflected the social status of that individual. The legal system viewed these circumstances as publicly significant and incorporated them into the law. In our present-day conditions, when choosing your lifestyle, and the guarantee of your freedom and privacy are one's top priority, the problem becomes to consider how all these rights are implemented or could potentially be implemented in everyday life, how the appearance of an individual corresponds to the national traditions and the forms of expressing the nation's national code.[1]

In conditions of globalization this seemingly legitimized side of life found itself showing signs of crisis. Changes in the ethnic, national and cultural makeup of the country's population can lead to changes in the national legislation. Today, we are witnessing the influence that the new wave of migrants has on Western and Central Europe. The waves of immigrants destroy not only the moral foundations of tolerance. They have also led to adoption of regulatory frameworks, which maintain a differentiated approach to main groups of migrants.

The conflicts that emerged in the European society due to the influx of migrants were related not so much to economic problems as to the fact that the local population was not ready to accept representatives of other culture, other behavior patterns. The practice shows that organizational measures taken to assimilate the migrants and the legal instruments of influence on them are not enough to normalize the situation. Any legal system is always challenged by the practice of applying the law, where the central role belongs to a human being, carrier of national, always unique, culture.

1 For more information, see Shebanova, N. A. Fashionable Law. Moscow. 2018. pp. 5-77.

3 Katasonova, E. L. Notes on Japanese Film: All Shades of Pink. // Japanese Studies. 216. No. 3. pp. 57-70. www.infes-ras.ru/js

We are forced to conclude that we cannot change the national mentality, based on religious and cultural values by applying law-based methods. Possibly, in the current situation the issue of legal regulation must rest not so much in the sphere of social support for migrants who wish to adapt to the host culture, and not so much in providing or depriving them of citizenship, as in admissibility of migration as a fact of life.

The legal foundation for resolving these problems must lie on the migrants' rights as a provided privilege, not as a natural right.

The national cultural code objectively limits the possibilities for informational law; at the same time, it plays a positive role by providing a balance to find agreements between the will of the states as a foundation of international law. The very existence of the multipolar world depends on the consideration of fundamental cultural values of each nation in all their diversity. Ignoring these values leads the candidate to the role of the global hegemon being forced to establish economic, political or military dictatorship.

While we do honor the existing principles of interaction between the national culture and the law and the existing international law practice, we need to become aware of the radically new challenges. Their essence lies in that human beings have extended the boundaries of their being and entered a cyber space where their own culture is formed; it is this culture that will possibly create the new philosophy of law and new mechanisms of legal regulations, which would (from the very start) be based not on national but on supranational principles.