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SHADOW LAW AS A SYNTHESIS OF THE SHADOW OF THE STATE AND QUASI-CIVIL SOCIETY

Summary. The article is devoted to scientific analysis of the phenomenon of “shadow law”. It is noted that shadow state and quasi-civil society are interpenetrating phenomena, a peculiar two-level illegal security system that ensures the most initiative sections of the population protection against threats that originate from the authority as well as society itself. Synthesis of the shadow of the state and quasi-civil society is shadow law.

Key words: state, law, shadow state, shadow law, shadow politics, quasi-civil society, entrepreneurship, business.

Problem statement. Nowadays, in the minds of the most purposeful part of Ukrainians a view on a peculiar quasi-civil society, a particularity of which is that it replaces the state and compensates its incapacity, has formed. It, certainly, obstructs transformation of legal values that originate in the legal consciousness of citizens, but not more than any other manifestation of contemporary corruption and shadowy policy which is now being openly declared. Given the fact that people are forced to come into contact with the authorities mutually intertwined with them, forming systems of horizontal-vertical informal connections – family, friendly, or perhaps even simply criminal. In this case it is justified to talk not only about quasi-civil society that takes upon itself functions of government, but also the tangent to it and its complementary shadow state. The shadow state and quasi-civil society are interpenetrating phenomena, a peculiar two-level illegal security system that ensures the most initiative sections of population protection from the threats originated from the government and society itself. Synthesis of the shadow state and quasi-civil society is shadow law, which recently has increasingly become a subject of independent studies [2; 4; 6; 9; 11; 12; 13; 17; 18; 19].

The purpose of the article – to explore shadow law as a synthesis of the shadow state and quasi-civil society.

Research position. The majority of researchers draw attention to the fact that the efflorescence of shadow law falls to 80s-90s of the twentieth century. Yet nowhere and never has shadow component played such a significant, it is to say, crucial role as in the Soviet Union. Shadow law significantly affected a component of legal consciousness of Soviet citizens which is known as legal psychology, i.e. people’s emotions, psychological surges regarding law, legal phenomena and actions taken by party and soviet organization [7, p. 37].

Today there is no unitary approach to content, scope and even the terminological meaning of the concept of “shadow law”. Formerly, even G. Hegel in his work “Elements of the Philosophy of Right” used a similar to shadow law concept of “unjust”, which is a special freedom that demonstrates arbitrariness and isolation of an individual from the common will and common law, under which the natural law was understood. The term “unjust” is widely used by contemporary theorists of law (K.O. Trykhlil [15], V.S. Bihun [5], V.M. Baranov [4], O.V. Malko [10], etc.), scientists and philosophers (V.A. Abashnik [1]). For example, O.V. Malko and O. Ie. Mikhailov in one of their latest works dedicated to life of

legal society, noted that “legal life covers also a sphere of shadow law operation, negative law (unjust), and various legal anomalies.” Legal pathology, in their opinion, in this sense, is a part of legal life, its ingredient [10, p. 62].

Iu. A. Arzamas understands shadow law as an antipode of positive (written) law, norms (rules) of conduct aimed at regulating social relations differently from the way it is done by state on behalf of its authorities.

At the same time, these provisions can be clearly negative concerning positive law proceeding from authorities, that is radical opposition to rules of law, expressed in laws and by-laws, law treaties, and also rules of conduct that have certain deviations from rules of law and generally accepted moral values embodied in law. Hereat, shadow rules have different goals and objectives than the rules that come from the state. They are aimed at regulating people’s conduct that is “outlawed” [3, p. 6].

The researchers note that consequences of rules of shadow law can not only be negative, but (even how strange it may sound) also positive. For example, progressive ideas that emerged on the basis of shadow law rules can then be approved by law-abiding citizens and completed in the form of positive law. On considering this issue, professor Iu.A. Tikhomirov said that “shadow law either provides formal law and its institutions, or opposes them, or generates useful social regulators (“everything that is not prohibited by law is permitted”), or contributes to formation of new legal regulators” [14, p. 443-444]. However, in our opinion, in most cases activity of shadow law affects negatively on society and its members, as it either directly or indirectly contributes to its shadowing.

Major reasons for shadow law existence are economic. As noted by O.M. Chernysh, shadow economy in Ukraine has become one of the most important, not only economic but also social and political problems. By domestic and foreign estimate scope of the shadow economy in our country is from 40 to 60% of GDP. The amount of capital that is outside Ukraine, but has Ukrainian origin, from the beginning of its independence, makes approximately \$ 30 billion. According to Ukrainian researchers, about 40% of the labor force has some income from shadow economy. [17]

Accordingly, the problem of the shadowing of our society, in terms of historical materialism, originates from the field of economics. A special role in this process plays shadow economy, which is inextricably linked to corruption, as these are antilegal sides of the same coin. And this tandem is connected by diverse connections, based primarily on personal, family, and other benefits. To this list one can also add and corporate expediency. In contemporary conditions shadow economy, rules of which are a part of the legal system of Ukraine, that is shadow system of law serves the same factor of shadow lawmaking, as well as organized crime. The reasons for its heyday are well-known – the tax burden, excessive state regulation of labor markets and output, flawed legislation. Among consequences are deterioration of investment climate, distrust of state leaders from both citizens and representatives of foreign countries. Struggle with shadow economy cannot consist only in administra-

tive and punitive measures. Firstly, it is impossible without detailed statistical calculating of shadow capital. Secondly, as the experience of other countries affirms, extremely effective method of combating it is amnesty of shadow capital – both political and legal. However, apart from well thought-out approach, this measure requires breaking of national stereotypes about the fact that all shadow capital are criminal. Studies show that most of them only “driven into the shadows” [17].

Tax evasion, illegal export of capital, issue of counterfeited output, car theft, kidnapping, illegal use of labor, total corruption – all this and much more forms shadow economy. Moreover, growth of shadow economy promotes institutionalization, the emergence of new, modern shadow rules, i.e. rules of conduct that are applied not only to business representatives (business elite, bankers, representatives of small and medium-sized business, etc.), but also to other sectors of the population. Shadow rules arising by means of shadow economy, become, in certain circumstances, organizationally steadfast forms of shadow law causing such anti-social phenomena as passive legal nihilism, professional degradation and so on.

According to O.V. Ulianovska, shadow economy from the standpoint of law should be considered as a nominal structure, with the help of which destructive economic and legal processes are shaped. Means of economy shadowing are used for illegal enrichment and, thereby serving illegal interest [16, p. 2]. As a result, it affects not only the level of legal consciousness of average citizens, but also professional quality of lawyers, as well as various kinds of social relations that lead to social degradation of society, to its inability to resist actively unlawful actions. Modern entrepreneurs know perfectly how to avoid paying taxes, how to get in touch with the criminal “authority”, how to keep “double” or even “triple” books. The shadow regulations which act as antilegal conduct inevitably affected the formation and professional distortion of citizens’ legal consciousness.

However, these days dominant in Ukraine moral directives are often directed not so much against shadow relations in all their entirety but against abuse of officials, that is corruption in the strict sense of this word. And the closer people are to shadow surroundings (either practically or only psychologically), the more clearly this feature of modern mass sense of justice is manifested. It is here, in our opinion, where lies the distinction between entrepreneurial minority (real and potential) and non-entrepreneurial majority. Of course, the struggle against corruption and the struggle against shadow business can be separated perhaps only in the imagination. However, under present circumstances, this distinction is meaningful. It is precisely the ranks of representatives of the Ukrainian “bottom” business who nowadays represent the most expressive request to change the very nature of the relationship between the business class and the state. Their considerable part seems to be ready to emerge from the shadows, if the government ensure acceptable for them legislative rules of game.

In other words, in frames of mind of “bottom” entrepreneurship an important tendency can be viewed which indicates that an idea of a peculiar kind of “social contract” between business and government ripens. This idea for Ukraine is certainly new: such contract can take place only if the state makes a major stake on the business, freed from administrative dependence on itself (state). It is important that current shadowy alliance between business and government satisfies entrepreneurial class increasingly less, and a need for transparency of economic connections is felt more and more acutely.

In our view, the value of this turn cannot be overestimated. The values of legal order under conditions of market economy can be established neither in government nor in general population as long as they are not rooted in business. If the society is not legal-

ly conscious and there is no legal order, there cannot be any legal state. In this case, it can be either repressive-police or imitating-legal, i.e. quasi-civil. Therefore, it is important to understand that the formation of such phenomena as shadowing has already begun in Ukraine. Nowadays there is a question how quickly business class will be able to consolidate (in particular organizationally, and perhaps politically) on the basis of values of legal life. As long as political power disposes of property, and the law is handled in a single pair of hands, nothing will change: management apparatus, law enforcement, and the judiciary system will remain corrupted despite all attempts at reforming them. Under these conditions, mass legal consciousness will react to all this with peculiar inconstancy between moral-repressive idealism to shadow materialism.

The perception of law in citizens’ minds is connected not only to perception of proper legal values (freedom, potential equality, awareness of their own individual interests and the desire to meet them), but also moral, when law is viewed purely as a means of order restoring from the viewpoint of state via authoritative enforcement, in order not only to meet the perceived self-interests, but also to strengthen the unity and independence. A similar type of repressive moral sense of justice is peculiar to majority of the modern Ukrainian society. Unfortunately, one can talk about the effectiveness of regulation within the legal awareness of this type rather arbitrary. Its owners do not violate the law, but at the same time do not manifest legal activity. Non-infringement of law is applied not so much on perception of its values but on absence of real opportunities, moreover, subjective (own passivity) and objective (poverty) opportunities.

Legal activity as a type of legal consciousness is, unfortunately, peculiar to a small segment of the population (it is usually citizens related to entrepreneurial activities). The presence of legal activity among entrepreneurs, awareness of their individual interests and, at the same time, awareness of the impossibility of satisfying them within the existing legal framework (because of the peculiarities of enforcement activities by the state) are of interest to the phenomenon of shadow law, which, despite all the negative traits has become in modern Ukraine a subject of close scientific study and reinterpretation. However, the main drawback of shadow law is seen not so much that it is contrary to the positive law, but in the fact that it displaces positive law by blocking all those positive tendencies associated with the development of legal activity and destruction of moral and repressive type of consciousness.

In our opinion, the cause and mechanism of rising of shadow laws are reduced not only to economic but also to political aspects. For example, according to majority of experts, the rise and “rapid efflorescence” of shadow law falls on the “period of stagnation”, when there was a relative economic stability in the country. There is the same effect in the current period when high prices on energy sources allowed Ukraine to solve many pressing economic issues. All this indicates that the degree of shadow relations cannot be associated only with economic factor. Equally important are the political factors, that is the goals and objectives that are set by the government. Historically, these goals and objectives are primarily associated with the state itself, strengthening of its power both domestically and internationally.

Expansion of shadow law in today’s Ukraine can be explained by historically stipulated state type of society’s consciousness, on the one hand, and impracticability in terms of practical implementation, of its goals and objectives, reflected in the national legislation, – on the other, lead to ineffectiveness of positive law in many areas of social life, while the real social life requires its normative regulation, the need for which is satisfied by shadow law. In other words, the main reason for spreading of shadow law is seen in the

sharp differences between legal idealism of legal ideology of the state and legal nihilism of legal psychology of society.

Conclusions. Consequently, a significant amount of shadow law as a social regulator of social relations can be interpreted as an imbalance between natural and artificial selection in favor of the latter. The reasons for this include:

– Lack of political competition as a means of forming the subjective composition of the legislature, which in its turn is stipulated by lack of country real political opposition;

– Significant distortion of economic competition where big business has unlimited possibilities to resolve their issues through lobbying (i.e. remaking “general rules of the game”), and medium and small businesses compete not so much for the consumer but for government officials to obtain necessary for conducting business permits (registration, licenses, etc.).

All this takes place against the background of relative permanence of positive law by the majority of citizens. However, this irrevocability speaks not so much on the effectiveness of regulation, but rather the conformist type of consciousness of the majority that has no real opportunities to realize their legitimate interests on the basis of either positive or shadow law.

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Мартьянов С. С. Теневое право как синтез теневого государства и квазигражданского общества

Аннотация. Статья посвящена научному анализу такого явления как «теневое право». Отмечено, что теневое государство и квазигражданское общество представляют собой взаимопроникающие явления, своеобразную двухуровневую нелегальную систему безопасности, которая гарантирует наиболее инициативным слоям населения защиту от угроз, которые исходят и от власти, и от самого общества. Синтезом теневого государства и квазигражданского общества является теневое право.

Ключевые слова: государство, право, теневое государство, теневое право, теневая политика, квазигражданское общество, предпринимательская деятельность, бизнес.

Мартьянов С. С. Тіньове право як синтез тіньової держави та квазігромадянського суспільства

Анотація. Стаття присвячена науковому аналізу такого явища як «тіньове право». Наголошено, що тіньова держава й квазігромадянське суспільство являють собою взаємопроникні явища, своєрідну дворівневу нелегальну систему безпеки, що гарантує найбільш ініціативним верствам населення захист від загроз, які виходять і від влади, і від самого суспільства. Синтезом тіньової держави та квазігромадянського суспільства є тіньове право.

Ключові слова: держава, право, тіньова держава, тіньове право, тіньова політика, квазігромадянське суспільство, підприємницька діяльність, бізнес.