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LEGAL HERMENEUTICS AND METHODOLOGY OF LAW

The article is devoted to the concept of legal hermeneutics and its fundamental aspects. Among these aspects the author pays particular attention to such as: gnoseological, semiotic, dialectical, dialogical, anthropological, phenomenological and conflictological aspects. Considering major problems of legal hermeneutics, the author comes to conclusion that legal hermeneutics transforms the law into real art, as the Roman lawyers would have put it: the art of good and justice.

Legal hermeneutics is one of the most fruitful methods for cognition of law. It occupies a special place in the methodology of law since the science of law is a discipline mainly preoccupied with «interpretation» and «understanding». Jan Schapp, a German expert in civil law, believes that the science of interpretation of law is one of the cornerstones of legal methodology[1].

Legal hermeneutics, in its widest sense, is a science of interpretation and application of legal rules and it arises from philosophical hermeneutics. However, the concept of hermeneutics is open to several distinct interpretations. Legal hermeneutics does not suggest any universal or dogmatic theory of hermeneutics. It represents an attempt to discover the conditions of human understanding which are not subject to reduction[2].

According to Gadamer, the main objective of hermeneutics is not to develop a set of rules and procedures for textual interpretation but rather to identify what is actually happening to the interpreter beyond his desires and actions in the process of interpretation. Therefore, philosophical hermeneutics sets an ontological objective: to explain the relation between the text and the interpreter, the past and the present, today and the future, i.e. those hermeneutical relations that underlie the understanding. The main concepts of legal hermeneutics include understanding, interpretation, legal text and context.

According to Gadamer's theory, the hermeneutical process consists of three main operations: (1) application, (2) understanding and (3) interpretation.

As far as the application of law is concerned, a famous Russian lawyer Pilenko believes that «in any application of the law, there is a place

[1] See: Шапп, Я. (1996). *Основы гражданского права Германии*. Москва, 14.

[2] Leyh, G. (1992). *Legal Hermeneutics. History, Theory, and Practice*. Berkley/Los Angeles/Oxford, xii.

left by the legislator for individual creativity»[1]. In his opinion, a judge is creating the law within the framework set by the law (and ascertained by general hermeneutical means).

Understanding (mutual understanding) in hermeneutics depends on: (1) the degree of unity among members of hermeneutic community and (2) a genuine aspiration for mutual understanding, i.e. a disposition towards genuine and rational communication as opposed to the strategic type of behavior (Jurgen Habermas).

Legal hermeneutics typically applies the principle of «sufficient understanding» which implies that an absolutely correct understanding is not only unrealistic but is probably not even necessary. Instead, an interpreter of a legal text may be satisfied with such level of understanding of the text which is sufficient to resolve a specific dispute or problem and is not manifestly unfair.

Interpretation in legal hermeneutics is a set of means applied to products of human spirit in order to understand them[2].

In Gadamer's view, interpretation is not an act accidental and complimentary to understanding. Rather, understanding is always an interpretation and therefore the interpretation is an explicit form of understanding[3].

What is the goal of interpretation of law in legal hermeneutics?

Two major theories of legal science disputed for years on this issue: the subjective theory believes that interpretation is meant to discover the historical will of the legislator, while the objective theory maintains that interpretation should reveal the normative or objectively understandable meaning of the law.

At present, a mixed subjective-objective theory is dominating in interpretation of law. According to this theory, «it is necessary to ascertain, on the basis of the legislator's historical will, what could be the current meaning of the law when reasonably interpreted»[4].

From the perspective of hermeneutics, law is also a specific legal language that represents a certain mutual understanding.

In the framework of such a complex and multifaceted phenomenon as legal hermeneutics, one can distinguish various dimensions and aspects that point to its ties with other disciplines. Let's discuss some of these aspects that seem to be the most important.

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[1] Пиленко, А. А. (2001). *Право изобретателя*. Москва, 73 – 74.

[2] Васьковский, Е. В. (2002). *Цивилистическая методология. Учение о толковании и применении гражданских законов*. Москва, 80.

[3] Gadamer, H. (1982). *Truth and Method*. New York: Crossroads, 274 – 275.

[4] Шапп, Я. (1996). *Основы гражданского права Германии*. Москва, 15.

Fundamental aspects of legal hermeneutics

1. Gnoseological aspect

Gnoseology (theory of knowledge) maintains that there are three possible sources of knowledge about the outer world, including the law: (1) sentient experience, (2) reason and (3) intuition[1]. These three sources of knowledge ultimately lead to the following worldview doctrines: materialism (or philosophical empiricism), idealism (or philosophical rationalism) and intuitionism which is close to the phenomenology of law.

Given this, legal hermeneutics may base itself respectively on understanding and interpretation of law (1) from the perspective of its material content (material interests), (2) from the perspective of legal concepts and constructs of legal logic with the help of which the science of law tries to embrace the law, and (3) through intuitional insight into the substance of law and its relations with the real life.

While the first perspective is close to such theories as Marxism and «jurisprudence of interests», the second one is related to legal positivism and «jurisprudence of concepts». As far as intuitionism is concerned, it stands closely to legal existentionalism.

2. Semiotic aspect

According to Petrazhytsky's psychological theory of law, the law – in the form of legal emotions – is objectified and symbolically expressed as non-psychic signs of legal nature (legal symbols)

In this case, we deal with legal semiotics, that is a set of theories studying legal sign systems.

The importance of such type of legal signs as legal symbols is widely recognized. With its help, the government influences its subjects at the subconscious level. Russian philosopher and jurist Vysheslavtsev wrote: «The law is hardly capable to influence [the human mind]. The law is not able to deal with the subconsciousness. Any negative influence is rejected, and the law largely consists of prohibitions. To cope with this defect, the government drapes the law in images and symbols capable of causing influence: «mirror», judges' robes, solemn ceremony of the court session, guards, etc.»[2]

Legal hermeneutics and legal semiotics are essentially the two sides of the same coin since hermeneutics interprets legal signs.

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[1] Савальский, В. А. (1908). *Основы философии права в научном идеализме. Марбургская школа философии: Коген, Наторп, Штаммлер и др*. Москва, 3.

[2] Вышеславцев, Б. П. (1994). *Этика преображенного Эроса*. Москва, 77.

3. Dialectical aspect

Any legal dispute represents a conflict of fundamental principles of law, which cannot be resolved within the framework of these principles since they often point to opposite directions.

The law is deeply antinomic in this sense. It consists of antinomies such as the fact and the norm, public and private law, etc.

Let's consider the principles of modern international law as an example. They represent a system of antinomies. It means that in practice these principles may come into conflict with each other. In other words, their relationship is antinomic.

Thus, the principle of sovereignty of states may come into conflict with other principles such as the principle of equality of states and principles of maintenance of peace and international security; the principle of territorial integrity of states may conflict with the principle of national self-determination; the principle of non-interference of states into internal affairs of each other may go against the principle of respect for human rights; the principle of *pacta sunt servanda* may contradict the rule of *rebus sic stantibus*, etc.

Therefore, every now and then, we come across a conflict (collision) of principles and values of international law, which appeals to human will and requires resolution by adequate means, including interpretation.

Only hermeneutics, as a means of dialectical synthesis of legal antinomies, is able to overcome these antinomies.

4. Anthropological aspect

Legal anthropology is a science about the human being as a social being taken in his legal dimension and it studies legal forms of social life of people from the ancient times until today (Nersesiants). This science is the basis of legal hermeneutics because one can comprehend and interpret the law only with a certain idea and concept of a human being in mind. Legal hermeneutics is both anthropological and anthropocentric in its essence because the understanding of law is ultimately the self-understanding of society and human being.

Hermeneutics occupies a remarkable place in legal anthropology. For instance, a famous representative of legal anthropology Norbert Rouland wrote the following about the hermeneutical element of the African law: «Legal rules born by myths and customs may require interpretation for their best application. Normally, the interpreters are the respected members of the society and senior individuals who are to remind (most often

during conflict resolution) of the fundamental rules or derive them from the observational manner of behavior»[1].

Therefore, the interpretation and understanding inevitably pass through the prism of legal anthropology.

5. Axiological (value) aspect

The law is always based on certain social and legal values, in the context of which legal rules are interpreted and applied. As the German philosopher of law Gustav Radbruch underscored, «the law can only be understood in the framework of concepts related to values. The law is an element of culture, that is a fact related to the concept of value.»[2]

Social and legal values guide the hermeneutical process and set its margins. The law by itself is also an important social value. However, it coexists with other social values which seek to embody in the law.

In the framework of hermeneutical process, things are legally evaluated and classified.

6. Dialogical aspect

The hermeneutical process is always dialogical since it represents a dialogue between the interpreter and the interpreted. Hermeneutics, just like the god Hermes, is a dialogue mediator – between the interpreter of the legal text and the creator of the text – reaching out through time and space.

Dialogical approach dominates in modern hermeneutics. Dialogical aspect of legal hermeneutics is especially vivid in international private law where legal systems of different states carry on a dialogue to overcome collisions between the systems.

7. Conflictological aspect

Legal hermeneutics can be viewed as a means of social conflict resolution. While interpreting legal rules, the interpreter should keep in mind that the interpretation must not escalate social conflicts but facilitate their effective resolution. This function of legal hermeneutics logically follows from the function of the law as a means of resolution of conflicts arising between interests of subjects of law.

The problem of interpretation of international treaties in different languages may serve a good example proving the conflictological aspect in legal hermeneutics. Thus, according to Article 33(4) of the Vienna

[1] Рулан, Н. (2002). *Юридическая антропология*. Москва, 59.
[2] Радбрух, Г. (2004). *Философия права*. Москва, 16.

Convention on the Law of Treaties, when a comparison of the authentic texts discloses a difference of meaning, the meaning which best reconciles the texts shall be adopted. In other words, this approach shows that legal hermeneutics in international law attempts to prevent potential international conflicts that may arise due to different interpretation of rules in the law of treaties.

8. Phenomenological aspect

Russian philosopher Aleksey Losev wrote: «Phenomenology is a pre-theoretical description and formulation of all possible types and degrees of meaning comprised in a word, based on their adequate perception, i.e. perception in the eidos.»[1] He believed that the only method of phenomenology is to cast away any particular manifestations of any phenomenon (the law – in our case) and then grasp and focus on whatever is the same in all its manifestations.[2]

In order to understand the law as a phenomenon of social and human consciousness, it is necessary to apply Edmund Husserl's phenomenological reduction which represents a series of stages meant to «refine the consciousness» and help us focus not on existence but the substance of law.[3] Without rejecting the reality but by «taking it in brackets» together with all judgments of common sense or science, we finally obtain the ideal substance, the eidos of law (i.e. the sense of law directly given to us). In fact, we talk here about the intuitive vision of the substance of law, just like a mathematician visualizes the ideal substance of geometrical figures. By making the law ideal and extracting its refined substance, we obtain some kind of a standard model for cognition and interpretation of all legal phenomena.

From the phenomenological perspective, in order to understand the law as appearing in its distinct branches, it is first necessary to create an eidetic science of law that would help to clarify the initial subject of study, i.e. the law itself.

Adolph Reinach tried to create such eidetic science of law as an *a priori* discipline. He wrote: «An *a priori* theory seems to be absolutely necessary to understand positive law as such. Until we believe that positive law develops all legal notions by itself, we will face an unsolvable

[1] Лосев, А. Ф. (1990). *Философия имени*. Москва, 190.
[2] Лосев, А. Ф. (1990). *Философия имени*. Москва, 191.
[3] See: Руткевич, А. М. (1999). Эдмунд Гуссерль. *Философы двадцатого века*. Москва, 47 – 48.

mystery. The structure of positive law could only be understood through the structure of the sphere that goes beyond positive law.»[1]

Therefore, by analogy to Kant's theory, while positive law is viewed as embodiment of certain empirical experience of society, the empiric nature of the law must have some non-empiric *a priori* foundations which help to systematize and organize the legal experience and based on which the hermeneutical process is carried on.

Certain problems of legal hermeneutics

I believe the following are the most significant problems of modern legal hermeneutics.

First is the problem of the relationship between interpretation and law making. Is there a more or less clear-cut line between interpretation and law making? Where does interpretation end and law making begin?

Interestingly enough, the answer to this question also lies within the hermeneutic field, i.e. the interpretation itself.

The second problem of legal hermeneutic is identification of *a priori* foundations that underlie the mutual understanding and understanding within a hermeneutical community and between distinct hermeneutical communities. Where are those foundations? Are they to be found in some legal archetypes of collective subconsciousness or some natural law?

To end this review of certain issues of legal hermeneutics, I would like to note that, in my opinion, legal hermeneutics transforms the law into real art, as the Roman lawyers would have put it: the art of good and justice (jus est ars boni et aequi).

[1] Райнах, А. (2001). Априорные основания гражданского права. *Собрание сочинений*. Москва, 160.