manuscript copyright

LUKYANOVA ELENA GENNADIEVNA

DOCTRINES ON STATUTE IN THE POLITICAL AND LEGAL THOUGHT OF RUSSIA IN THE XIX – THE BEGINNING OF THE XX CENTURIES

Specialty 12.00.01 - theory and history of law and the state;
the history of the teachings on law and the state

ANNOTATION

Theses for a scientific degree of Doctor of Legal Science

Moscow – 2018

The proposed work is the first special historical theoretical and legal study of the doctrines on statute in the political and legal thought of Russia XIX – early XX centuries. The research led to the envisioning of the author's concept on the evolution of legal teachings which is based on the works of the most prominent Russian jurists in the XIX – early XX centuries. Following this concept, the evolution of the teachings in statute, which originated in the political and legal thought in Russia in the XIX – early XX centuries, is viewed as a progressive movement from the material interpretation of the statute at the beginning of the XX century to the formalization of its concept in the early XX century; from the interpretation of the statute in a broad sense as all forms of law in force (the identification of statute with law) in the beginning of the XIX century to the separation of these concepts in the early XX century, and the subsequent tendency of bringing the law to the statute (the identification of law with the statute), as well as the struggle and the mutual complementarity of the two directions of theoretical and legal doctrines: the natural and the positivist ones.

Experimental results revealed the factors, trends and patterns of development of the legal teachings which developed in the political and legal thought of Russia in the XIX – early XX centuries, specific features and characteristics of the natural-legal and positivist teachings on the statute in the XIX - early XX centuries. Their theoretical and methodological generalization was carried out, along with the determination of their theoretical and practical value. Scientific novelty is represented in the provisions and conclusions of the dissertation, which originated due to the scientific analysis of the natural-legal, legal-positivist, sociological-positivist and formal dogmatic teachings on the statute of Russian jurists in the XIX – early XX centuries, as well as the psychological doctrine on the statute.

The scientific novelty manifest itself in the reasonings of the provisions of the theoretical and legal content related to the concept and features of statute, its adoption and action, etc., which have both theoretical and methodological significance for the development of modern jurisprudence, and practical

significance for the development of legislation and legislative activity in contemporary Russia.

The following provisions and conclusions bearing the elements of scientific novelty are submitted to the defense:

1) The author of the dissertation relates to the factors which influenced by the emergence of the Russian legal doctrines: the general spiritual development of Russian society at the beginning of the XIX century, caused by the advancements in European philosophical and political legal doctrines of the late XVIII and early XIX centuries: natural legal theory, dogmatic rationalism, utilitarianism, subjective and objective idealism, etc., which influenced and followed the evolution of the Russian teachings on the law; last but not least important factor was the need of the country for socioeconomic and political development.

The author of the dissertation reveals the theoretical and legal problems of Russian doctrines on the statute at the beginning of the XIX century: the issues of essence and concept of statute, its purview, sources, purpose, properties, historical and social conditionality of statute, in connection with the other types of laws. In the teachings of Russian lawyers of the early XIX century there were examined the issues of the procedure for the formation and adoption of statute, the correlation of legal and subordinate acts, within which attempts were made to determine the subject of the statute. Much prominence is given to the one of the most important issues of jurisprudence – the issue of guarantees against abuses by the legislature, ensuring that the legislative acts which are adopted by the legislative authority are in full conformity with the legal essence of the statute.

The dissertation represents the features of the Russian laws of the early 19th century, which condition their high ideological value. All doctrines on the statute in that period, which were natural-legal and were based on theoretical and methodological grounds, comprised the relative substantial consistency and even immutability of the statute, the involuntary establishment of its content by the legislative power and, consequently, the limitation of power by the highest (objective) principles. Russian lawyers of the early XIX century in essence made

attempts to define the purview of the statute, to reveal its deep unchanging foundation, and next, to investigate its formal features. Methodological basis of the legal doctrines of the early XIX century was based mainly on idealism, whereas ideological – on liberalism.

2) The development and content of Russian doctrines on the statute of the second quarter of the XIX century, leaving apart the continuity, was significantly influenced by the socio-political situation and the reactionary-conservative nature of the predominating worldview, which determined the specific uniqueness of the teachings in that period. The author of the dissertation supposes, that peculiarity consists in the moral and religious interpretation of the essence of the statute. Legal scholars in the second quarter of the XIX century tried to combine statute and conscience, statute and morality, statute and religion in their doctrines. The main thing in the interpretation of the essence of the statute in the political and legal thought of Russia in the second quarter of the XIX century becomes the concept of truth, synthetically uniting justice, verity, and goodness; the source of truth in the deity. The concepts of freedom and equality, indicative to the interpretation of the statute in the early XIX century, are gradually leveled. In the second quarter of the XIX century the methodological basis of the statute was the Hegel objective idealism.

3) The dissertation reveals that in the second half of the XIX and early XX century there were clearly formed two directions in the Russian doctrines on the statute which are natural-legal and positivist, within the scope of those doctrines there was being drawn up a wide range of views on the statute. The criterion for division was the philosophical and methodological foundations of the teachings: metaphysical-rational and idealistic – in natural-legal and empirical – in the positivist legal doctrines. Within the bounds of the natural-legal and positivistic directions, Russian legal scholars developed integral systemic doctrines on the statute, including questions of the concept and features of the statute, its types and relationships with other acts of the state and the forms (sources) of statute, the

formation of statute and its operation. All these issues were considered in different ways in natural-legal and positivistic studies.

4) The author arrives to the conclusion that the attribute of the natural-legal doctrines on the statute is the justification of the essential and substantial, or material attributes of statute (the material concept of statute). The essence of statute in natural-legal doctrines is revealed through the concepts of truth – verity, justice; freedom and equality. The content of the statute according to natural-legal doctrines are general and abstract norms, i.e. legal norms. The material concept of the statute determines the coherence, limitation of legislative activity by the legal content of the statute, which, in turn, explains its compulsion, supreme legal force, the need for judicial control over the activities of legislative bodies and other questions of the legal doctrine. In the dissertation it is asserted that the natural-legal doctrines of the statute are inherent in the consideration of procedural aspects of the formation of statute (formal features of the statute) as necessary formal guarantees for the provision of its essential and substantive (material) features. In natural-legal teachings, along with the statute, the judicial practice is recognized as the form (source) of statute, the creative role of the court in the interpretation of the statute is justified. The natural-legal doctrines are unconventional in dealing with the issues of the operation of statute: the possibility of the inverse action of the statute is limited to the boundaries of the natural law – a new statute is unable to abolish the acquired rights; practices of foreign statute are expanding - according to the teachings of I.V. Mikhailovsky, a foreign statute cannot be applied only if it violates the national law.

5) The dissertation shows the main contradiction in the natural legal doctrines on the statute which were developed in the political and legal thought of Russia in the XIX – early XX centuries, the basis for their criticism by positivists – it is the ontological dualism of natural and positive laws existing concurrently, which was mastered at the beginning of the 20th century in the teachings of I.V. Mikhailovsky. At the same time, the question of the correlation between the natural and positive laws was considered in a different way: the teachings of the

early XIX century are characterized by the recognition of the need for strict conformity of the positive statute with the natural at the end of the XIX century. B.N. Chicherin did not consider this conformity to be strictly binding.

6) The dissertation concludes that the positivist doctrines on the statute, which were developed in the political and legal thought of Russia in the second half of the XIX – early XX century, are differentiated into legal-positivist and sociological-positivist, and the peculiarity of the positivist doctrine of the statute was demonstrated by L.I. Petrazhitsky, this work is characterized by a tendency to expand the concept of statute, associated with the interpretation of the statute as not only a real phenomenon, but, in some cases, exclusively as a phenomenon of the state of mind of an individual. There are singled out formally dogmatic doctrines on the statute of Russian political scientists, including constitutionalists, as independent, but in the methodological foundations more inclined to legal-positivistic ones. Many positivist teachings reflect the influence of natural-legal ideas, which is expressed in the recognition of the material signs of the statute. The most consistent legal-positivist teachings on the statute belong to N.K. Rennenkampf, G.F. Shershenevich, V.V. Ivanovsky, and the sociological-positivist teaching – to Yu.S. Gambarov.

7) The idea that is coherent to legal positivism, in contrast to natural-legal theory, tends to eliminate material features in the concept of statute and its formalization (the formal concept of statute) asserts itself and is justified, the interpretation of the statute is viewed only as a form where any content can be vested. In the logic of positivism there is the proclamation of complete freedom and unlimited state power in lawmaking, the denial of judicial control over the legislature to ensure that statutes comply with the constitutional laws. Some positivists deny the legal nature of the basic statutes, for example, G.F. Shershenevich and V.V. Ivanovsky. The compulsory power of the state ensures the mandatory nature of statutes on legal-positivist teachings. Questions of the correlation of the statute with other forms (sources) of law, in particular with judicial practice, are resolved in legal-positivist doctrines in favor of the rule of

statute and the legality of other forms (sources) of law; individual scientists reject the idea that the judicial practice has the nature of the form (source) of statute. The freedom of the legislator lies in in the matter of giving the statute a retroactive effect; the legislator is limited only by the principles of expediency. The effect of foreign and international legislation in legal-positivist doctrines on the statute is allowed only on the direct order of the legislative body.

8) The dissertation stipulates that the presence of formal features of the statute, i.e. the special bodies participating in the adoption of the statute, the procedure for the adoption is justified by the need to ensure the supremacy of the legislative power and subordination of the executive and is reflected in the positivist teachings of Russian government scientists, based on their legal developments on the formal dogmatic method.

9) The author argues the provision that sociologic-positivist teachings in the consistent interpretation of legal problems, especially in the recognition of the material features of the statute, lean more toward natural-legal doctrines than to legal-positivistic ones. They are also characterized by an attempt to get the statute out of the hands of state authorities: the content of the statute and the grounds for its binding power are in society. The sociological doctrines of the statute are not characterized by the apologetics of the statute, their role and significance are assessed rather than restrained, the weaknesses and shortcomings of statute are emphasized, and on the contrary, these teachings are imbued with confidence in judicial practice and legal doctrine, and judicial activity.

10) The dissertation establishes that in the teachings on the statute in the second half of the – early XX century a lot of meanings of statute were being formed. At the initial stage of the development of the positivist legal teachings, under the influence of the German theory of the Laband-Jellinek, a dualism of the notions of statute is formed in the material and formal sense, and these concepts are considered as different, and not as parts of the same phenomenon. Under the statute, in the material sense, the general norm is understood; statute in the formal sense is any other expression of the will of state bodies. The concept of statute in

the narrow sense continues to be used, which is deemed to be the coincidence of the statute in a material and formal sense, and in a broad sense.

The author reveals that the notion of statute is broadly defined in different interpretations in the teachings of the statute in the second half of the XIX – early XX centuries depending on the recognition or denial of communication with the state or law. The most common understanding of the statute in the broad sense is the identification of it with any legal norm, whether it be a regulation, decree, legal custom or legal precedent – a material broad understanding of the statute. Such a broad understanding of the statute was also used in natural-legal teachings. In a broad sense, as a legal and non-legal (organizational) norm emanating from the highest state power, the statute is understood in the teachings of N.K. Rennenkampf, V.V. Ivanovsky and N.N. Alekseyev – formal broad understanding of the statute, as a rule of law, established by the direct command of any authority being it nonexistent or existing, the statute is interpreted in the teachings of LI. Petrazhitsky and E.N. Trubetskoy.

11) The author defines the main regularities which determine the development of legal doctrines, originated in the political and legal thought of Russia in the XIX and early XX centuries. First, this movement from recognizing the material content of the statute – the material concept of statute, is characterized through the ideas of truth, uniting truth and justice; freedom and equality, the formalization of its concept, the conversion of statute into a form filled with any content, whether it be the will of the supporter of the supreme authority, the state, other existing or non-existent subjects, or the common will of the people – the formal concept of the statute. In this regard, all the doctrines on the statute, developed in the political and legal thought of Russia in the XIX and early XX centuries, are divided theoretically by the author into a material theory of statute and a formal theory of statute. Secondly, in the evolution of the Russian jurisprudence there can be traced the movement from the consideration of the statute in a predominantly broad sense, as all forms (sources) of law (the identification of statute with law) in the beginning of the century, to the division of

these concepts: the consideration of the statute only as one of the forms of law and the subsequent formalization of its concept at the beginning of the XX century, and then to the tendency of reducing law to statute (identifying law with statute).

12) The dissertation argues that the theoretical value of Russian teachings on statute is determined by the truth contained in their ideas, concepts, characteristics, the correctness of the methods used, including in the context of significance for the development of modern jurisprudence. Disclosure of the theoretical value of the material and formal theories of statute is associated with the substantiation of the theoretical truth of the main provisions of the material theory of statute: 1) the statute acts as a form (source) of law, interpreted also from material positions, as an unchanging essence, revealed through the principles of justice, freedom and equality; 2) the statute is of a general nature; and also related to the justification of the theoretical inconsistency of the formal theory.

The author claims that the recognition of the expediency of the legislative activity of the state and the functional loading of the statute as an act of the state makes the consideration of the statute not as arbitrary in the content of the will, but as a legal act, an act containing the norms of law. If anyone's will needs legislative form, then only for its own legalization and legitimation. The law needs a form of statute in order to acquire the strength to stand up abuse. The statute is the most convenient form in which a society can legislate so that it is known to everyone, respected by all, uniquely interpreted, became the property and norm of life of the majority of members of society. The general character of the statute as its immanent attribute logically follows from the recognition of statute as the form (source) of law. The rules of law that make up the content of the statute have a general character: they apply to all cases of the same kind, to all persons and act permanently. The general nature of the statute is due to the commonality of norms as regulators of behavior and the commonality of law as an equal and fair measure of a person's freedom in society.

13) The dissertation affirms that the basis of the theoretical value of the main theses of the material concept, or their truth, allows making a number of deductive

conclusions from them, namely: to recognize the limited scope of the legal framework for the activities of legislative bodies, the need to take appropriate measures to ensure the legal content of the statute, the opportunity to challenge the content of the statute, etc.; and to verify it, i.e. test of these findings through practice. The world practice of state and legal development confirms the main statements of the material theory of statute.

14) The author proves that the formal theory of statute, based on positivistic methods of research, does not allow to achieve the goals of cognition of the statute – an objectively true, complete knowledge of the statute, since positivist methods initially ignore the cognition of the essential aspects of the statute, and the obtaining of objectively true knowledge of the phenomenon is connected , first of all, with definition of internal and necessary attributes, properties of phenomena, their essences. The statute in the formal sense is indistinguishable from other phenomena, in particular from arbitrariness, or the concept of 'will' used by follower s of the formal theory, is not constant but is mobile, since the formal characteristics are relative, subjective and variable. Statute becomes a concept and phenomenon of relativity and loses all cognitive value, as it does not allow to distinguish the phenomenon of statute from other phenomena, but practically leads to a situation where the concept of 'statute' is used to designate phenomena that are directly opposite to statute – arbitrariness and lawlessness. The formal theory of statute is not capable of giving a holistic view of the statute and phenomena associated with it, explaining the existence of a number of empirical phenomena (for instance, constitutional justice), characterized by internal contradictions.

15) In the dissertation it is established that the practical value of Russian doctrines on statute of the XIX – early XX centuries is revealed through their critical and constructivist functions. The critical function of the material theory of statute is due to its deontological character. Treating the statute as the unity of material and formal attributes, the material theory of statute asserts legal claims for the content of the act of the governmental regulation, which is called the 'statute'. The material concept of the statute serves as a criterion for the legal evaluation of

available social practices and legislation. The ontological nature of the formal theory of statute, considering the statute as an expression of one's will, identifies the existent with the due, and therefore justifies voluntaristic practice, identifying the actual with the normal.

The author of the dissertation established that the constructivist function of the Russian statutes in the XIX and early XX centuries, as well as of any social theories, is expressed in the possibility of acting as a social technology. The formal theory, generated to a certain extent by political voluntarism, justifying it in social and political practice and ignoring the material characteristics of the statute, ultimately determines the stagnation of social development. While presenting certain requirements to the content of the statute, the material theory of statute, on the contrary, can facilitate the improvement of the legal quality of legislative activity and, to some extent, change the nature and the direction of social development.