ТЕОРІЯ ТА ІСТОРІЯ ДЕРЖАВИ І ПРАВА

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LEGAL DOCTRINE: ASPECTS OF UNDERSTANDING

The focus of this article is the research of the nature of legal doctrine, its features, content and the role in legal practice. Actuality of the working out of the legal doctrine is closely connected with the problem of determination of its role and significance in the development of Ukrainian law. It is concluded that legal doctrine has not only descriptive, but also prescriptive character (contains elements of the things existent and the proper). Describing law, carrying out its logical or economic analysis, scholars find gaps in legislation, desuetude of the legal norms, their non-compliance with the principles of law, etc., and prove the need to establish / change / abolish legal rules or institutions of law. The legal doctrine exists and develops in the system of coordinates, which are set by traditions, ideological, cultural, religious keynotes of society.

Keywords: legal doctrine; legal science; source of law; legal interpretation, legal thought.

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Прововая доктрина: аспекты понимания

Статья посвящена исследованию природы, характерных особенностей, содержания правовой доктрины, ее роли в юридической практике. Актуальность изучения правовой доктрины тесно связана с проблемой определения ее роли и значения в развитии украинского права. Сделан вывод, что доктрина имеет не только дескриптивный, но и прескриптивный характер (содержит элемент сущего и должного). Описывая, осуществляя логический или экономический анализ права, ученые выявляют пробелы в законодательстве, несоответствие правовых норм принципами права и обосновывают необходимость установления / изменения / отмены норм или институтов

права. Правовая доктрина существует и развивается в системе координат, которые задаются правовыми традициями, мировоззренческими, культурными, религиозными доминантами социума.

Ключевые слова: правовая доктрина; юридическая наука; источник права; юридическое толкование; юридическая мысль.

> The work of legal doctrine is almost always value-laden.
> Legal doctrine is a good example of a practice of argumentation,
> pursuing knowledge of the existing law, yet in many cases leading
> to a change in the law
> *Aleksander Peczenik*

Problem setting. In the modern Ukrainian jurisprudence and practice, there is a trend to move beyond the framework of understanding law as issued in the form of legislation, command of the sovereign or purely as an instrument of state policy. Law is in fact a complex set of norms, practices and ideas with closely interwoven mental, cultural, moral, religious foundations, experience of the previous generations, values of freedom and justice. The rejection of the prevailing in Soviet times methodological monism opens the way to intellectual achievements (important both from the theoretical and the practical point of view), involving a comprehensive study of the complex nature of law, the specific features of its formation and development, its role and significance in the life of society and an individual.

One of the basic ideas, actively supported and argued by many Ukrainian scholars, in the most general form, can be formulated as follows: law is much more then state law [as a certain array of existing statutes, administrative regulations, edicts, etc., adopted by a competent authority]. A statement of a well-known Ukrainian author M. Koziubra: «The original genesis of the law is rooted not in the state, but in real life, in the atural, inalienable human rights; law arises not at the same time as the state, but precedes it. Under certain social conditions it can exist without the state and beyond the bounds of the state» [8, p. 35]. Another well-known scientist M. Tsvik holds a similar view: «Law can arise before its officially recognized forms have been enshrined, it can exist in unity with them and independently of them. Human rights, case law and customary law, which have a normative nature, can act or, in point of fact, act beyond the scope of legislative law» [12, p. 25].

Such conceptual changes in understanding law allowed to include into the subject of scientific discussion such categories as soft law, corporate law, the rule of law, the judicial precedent, etc. What is meant here – is not just a theoretical discussion, but the real reform of various elements of the Ukrainian legal system based on the best models of Western democracy. However, the impact of the 70 years of actually existing socialism on the Ukrainian legal culture is still significant. We can see that in the practice of both law practitioners and in the field of scientific research. For example, one of the Supreme Court of Ukraine decisions stated that «doctrinal provisions are not a source of law under Ukrainian legislation» [11]. Some scholars propose to adopt a specific statute "On the system of sources of law of Ukraine" that would identify modern sources of Ukrainian law, and establish the internal

structure of the sources of law system, taking into account the main types of relations between them. In the opinion of the initiative author, this move could provide a seamless interaction between different sources of law, eliminate difficult situations when conflicting sources of law are used, and facilitate the process of «shifting away from the extreme positions of legal positivism both in science and in practice» [7]. But is it really an echo (or even a revival?) of ultraformalism ("hyperpositivism") that dominated the Socialist Legal Tradition? An anti-formalist evolution of the continental Western European legal culture was taking place over a long period of time, while in Ukraine it has only just begun. This is just the beginning of a long and hard path of changes and reforms, which brings many challenges and obstacles. The collapse of the Soviet block prompted H. Kötz to declare solemnly that the Socialist Legal Tradition «is dead and buried». Although he realistically acknowledged that it will take a long time to erase its traces [13, p. v].

Rene David, exploring the role and significance of statutory law in modern European legal systems, states that today nobody considers the law as the only source of law and believes that a purely logical interpretation of the law can in all cases lead to an acceptable legal solution. Although the law-making role of the legislator is still great, law in itself is more than just a law. It is not dissolved in the legislator's power; law should be created by the joint efforts of all lawyers. Acts of legislation have become the main element of perceiving law, but it does not exclude other elements and makes sense only in conjunction with them. Acts of legislation form a sort of skeleton of the rule of law; these skeletons come to life due to other factors. Acts of legislations hould not be considered narrowly and textually, often irrespective of the broader methods of their interpretation, which demonstrate the creative role of judicial practice and legal doctrine [4, p. 89, 107]. So the question of sources of law is not only a subject of theoretical discussions and disputes, it is of great practical importance. In any law-governed democratic state, the main task of the judiciary is to provide a real mechanism for the protection of human rights. At the same time, no country has perfect legislation – it lacks certainty and clarity of legislative norms, there are gaps and collisions in legislation, etc.

Under such conditions, it is virtually impossible to reach a reasonable and fair judicial decision without applying other sources of law. Referring to the principles of law, customs, fundamental human rights, legal doctrine, the judge completes the law, modernizes it, and to some extent corrects the mistakes made by the legislators, as well as sometimes «block» unjust laws. In this regard, it is worth looking back at the momentous decisions of the German courts (taken in the post-war period and in the 90 years after the unification of Germany), which directly refer to the Radbruch's Formula. This is a vivid example of the importance and relevance of the legal doctrine, which, according to Rene David's concise definition, was and remains a «very important, living source of law» [4, p. 121].

Paper objective. The topic of the sources of law is a traditional in Ukrainian jurisprudence and statutory law, for obvious reasons, remains the main subject of research in this field. Recently, we can see scientific publications, which focus on the

issues related to the clarification of nature, the role and significance of legal doctrine as a source of law. The views on the phenomenon of legal doctrine can be found in the works of M. Karmalita, M. Mochulska, Y. Yevgrafova, N. Parkhomenko, L. Petrova, P. Patsurkivskyi, V. Trofimenko, but, in our opinion, they are mostly eclectic, and sometimes overly contradictory. In no case do we blame the researchers for their incompetence and do not question their intellectual abilities. Existing excessive diversity of views on legal doctrine can be explained by the complex nature of this phenomenon.

Legal doctrine, as well as legal custom, is not proclaimed or approved (although sometimes it happens, for example, in Ancient Rome), but spreads and develops over time. Unlike with statues, you can, as a rule, only roughly determine the moment when the legal doctrine comes into force. Moreover, the influence of the legal doctrine on legislative and judicial practice is not always evident. Sometimes (this is especially noticeable in the countries of Anglo-American law) judges are involved in the process of creating the legal doctrine. Contemplating and summarizing their own experience of judicial activity, they publish scientific articles and monographs, and some of them play a significant role in the development of legal thought and practice – doctrinal ideas, concepts, views, approaches are not always born in the offices of university academics. According to S. Boshno, the legal doctrine refers to those legal phenomena that have not just repeatedly changed and change their status, but also seek to dissolve in science, judicial practice, religion, general principles and other sources of law [2, p. 70] I. Zelenkevich relates the legal doctrine to «the most ancient and mysterious sources of law» [6, p. 42]. As we see it, in this case, the authors do not exaggerate and unnecessarily dramatize the situation, as it may seem at first glance. In the context of our study we will try to describe in general terms the views of Ukrainian and foreign researchers on legal doctrine and to lay out our own priorities and accents in the outlined scientific discourse.

Paper main body. The declaration of Ukraine's independence in 1991 significantly changed the overall situation in domestic legal science, which, evaluated objectively, is in a state of upsurge and renaissance. There was a real opportunity to enrich the national law with the achievements of European and world legal thought, which is relevant in the context of European integration processes, where Ukraine is an active participant. Today, scientists can also open the treasury of the pre-revolutionary jurisprudence ideas (until 1917), which was scrupulously closed and sent to the «museum of history» in Soviet times, and fruitfully use its content. Starting from the second half of the nineteenth century, the subject of legal research has been expanding due to the inclusion of issues related to the clarification of the nature, role and significance of legal doctrine in the legal life of society.

The recognition of the legal doctrine as an impotant source of law, which was defined as "scholar-made law", "scientific law", "the law of approved in science opinions", "book law", "jurisprudence", has become the key issue in the scientific discourse. The lack of a co-ordinated position in the assessment of the legal doctrine is caused by the complexity and diversity of this phenomenon, as well as by the variety of ideological and methodological positions of researchers, their adherence to certain

types of legal thinking. It seems that a concise analysis of argumentative statements by lawyers of that period will be interesting for both Ukrainian and foreign authors.

M. Rennenkampf (1832–1879) defending the idea of legal positivism, considered law as an expression of the will of the state and did not recognize the scientific law as a source of law. In his opinion, scientific positions are devoid of normativity features, formal certainty and universal necessity. The impact of science is indirectly mediated: it affects judges, legislators solely through beliefs, scientific explanations, and not owing to the external force of the sovereign. However, science can and should help people – the discovery of the secrets of nature and the laws of development of the material and spiritual world phenomena opens up opportunities for their adaptation and change in accordance with human needs.

Professor **M. Gredeskul** (1865–1941) noted that the activities of judges and legal scholars in the logical plane arevery similar – if there are legal loopholes (inaccuracies, conflicts), they tackle such issues applying creativity. Notably, scientific research and developments in the sphere of law are even more significant than the work of judges in this area, since judges rely on the authority of legal scholars. Often, their conclusions become a conceptual basis, ideological guidance for judicial practice. However, scientific law becomes a source of law only when an external authority imparts the binding force to the conclusions reached by the legal scholars. Thus, the views of Roman lawyers became important sources of law, when the external authority in the person of emperors gave them the right to provide conclusions, binding on judges (jus respondendi).

A representative of the sociological direction in jurisprudence **S. Dnistrjanskij** (1870–1935) argued that law arises from social ethical rules that are formed amid public relations. There are mediators between customs (the original form of law) and the law of the state – legal practitioners and theorists dealing with the science of law. He stresses that the science of law is an important way of creating law. Lawyers, summarizing and bringing existingin reality public relations to a common standard, formulate clear and understandable legal norms, and if necessary, explain, specify and complete them in accordance with the new requirements of social life. In this way, thanks to the activity of lawyers, some new areas of law had arisen long before they found a clear expression in the form of codification.

Ju. Gambarov (1850–1926) characterized jurisprudence (law, created by lawyers) as a specific source of law. This law consists of theory and practice, that is, theoretical insights of law and court practice, which develop theoretical guidelines, applying them in the real life of society. Court decisions, court practice, legal science are forms of expressing law. Jurisprudence is a significant law-making factor, but not a formal legal source of law. Guidelines developed by legal experts are authoritative for lawyers themselves, but are not mandatory. The law of lawyers can become a fully valid source of law only provided there is a norm (the instruction of public authority), which authorizes lawyers to create mandatory regulations.

According to **A. Federov** (1855–1935), science can be considered a source of law only conditionally: it clarifies, interprets the current law and thus contributes to its further development, often creating – in order to fill the gaps – new legal provisions. The latter, similar to the provisions of judicial practice, can become the basis of the rules of customary law or legislation that are genuine (fully valid) sources of law.

L. Petrazycki (1867–1931), the founder of the psychological theory of law, considere dimperative and attributive emotions and experiences of subjects, that arise on the basis of normative facts as the source of the binding force of law. Such facts of normative nature (particular species of posistive law), which really affect the mind and psyche of the persons, determining a certain type of behavior, except for legislation and customary law, is also "book law", "the law of approved in science opinions", communis doctorum opinio, etc.

We can state that in modern science there are different approaches to understanding the legal doctrine, which is defined by the «spirit» of law; ideas and views of well-known lawyers; authoritative scientific works – monographs, scientific and practical comments to laws and codes, etc. In our view, such approaches are not fundamentally false, since they reveal some aspects of this phenomenon. At the same time, they are somewhat one-sided and insufficient to reveal the nature and essence of the complex phenomenon of legal doctrine. In our opinion, the most succinct from this point of view is the opinion expressed by S. Alekseev: «Legal ideas penetrate directly into the matter of law and express its features and specific characteristics, and therefore science that concentrates these ideas, closely interacts with positive law. This interrelation and, most importantly, interpenetration are so significant, that in real life and in historical assessments, one or another national legal system to a large extent appears in the form that it has in scientific developments and in the statements of lawyers. And most importantly, this is no longer an illusion of legal realities, but the legal reality itself, which to a large extent determines the validity of a law, its application and judicial practice» [1, p. 617]. Therefore, the legal doctrine contains a significant regulatory potential, which is revealed in the interpretation of the statutes, in the settlement of so-called «hard cases», in the creation and modification of judicial precedents.

The legal doctrine is created, reproduced and developed primarily thanks to the intellectual and creative efforts of legal scholars, who focus on the study of law on the basis of formal dogmatic, historical and other methods, the development of techniques and methods for its interpretation and systematization, understanding of the accumulated legal experience and creation of «scientific picture» of the legal world on these grounds. The provisions of the legal doctrine are created, as a rule, as a result of conducting fundamental research related to a deep and comprehensive analysis of the essence, content, peculiarities of functioning and development of state legal phenomena (legislation, judicial practice, separate branches of law) in

certain legal systems and substantiation of rational approaches to solving the main problems in the sphere of legal practice.

This refers to legal knowledge represented in the generalized form: legal constructions, notions and categories, principles, legal ideas, concepts, etc. that shape the content of the legal doctrine, which in its turn has an objective form in terms of scientific works[1] – monographs, scientific articles, reports, commentaries on legislation, etc. The provisions of the legal doctrine can also be classified according to different criteria: by the source of its origin – personified (such as the «Radbruch Formula») and collective, which is communis opinio doctorum; according to the distribution in different legal order – recognized at the level of the national / supranational legal systems, legal families; by official recognition – sanctioned by public authorities and embodied in positive law and officially unrecognized.

The legal doctrine in some way describes legal concepts, rules, principles (or some areas of law – Patent law, Tax law, Tort law, Privacy law, Labour law, Family law, etc.) and explains why they exist in society. This explanation can be historical, sociological, psychological, economic, etc. [the rule exists because it complies with traditions, social economic realities, moral principles of society] or it can rely on the internal logic of the law system structure. In the latter case, the validity of the legal norm is explained by the existence of another legal rule or legal principle, which brought it forth.

At the same time, the legal doctrine is not a «photographic representation» of the current law. Describing law, carrying out its logical or economic analysis, lawyers find gaps in legislation, desuetude of the legal norms, their non-compliance with the principles of law, etc., and prove the need to establish / change / abolish legal rules. As S. Maksimov rightly points out, description is the main method of the legal doctrine, although sometimes it applies methods of explanation and justification, which are not commonly inherent in it. Although lawyers to a certain extent distinguish between the purely logical analysis of law and substantiated recommendations to the legislator (what the law should be like), it is difficult to distinguish them in reality. By describing and explaining the law, scientists change it through the legal doctrine [10, p. 36]. A. Peczenik noted: «By production of general and defeasible theories, legal doctrine aims to present the law as a coherent net of principles, rules, meta-rules, and exceptions, at different levels of abstraction, connected by support relations. The argumentation used to achieve coherence involves not only description and logic but also evaluative (normative) steps» [14, p. 75]. Thus, the legal doctrine is both descriptive and normative (and not just one of those), that is, it has cognitive and normative functions; if by the normative terms we mean the creation of ideal models for legal reality and its change.

Therefore, the legal doctrine has not only *descriptive*, but also *prescriptive* character [contains elements of the things existent and the proper], because it contains

[1] A. Peczenik noted that legal doctrine in Continental European Law (scientia iuris, Rechtswissenschaft, Rechtdogmatik, "doctrine of law", legal dogmatics) consists of professional legal writings, e.g., handbooks, monographs, etc., whose task is to systematize and interpret valid law [14, p. 75].

the vision of the law as it should be, that is, its imaginary ideal image, justifies the necessity and expediency of consolidating the norms of law, the formation of new branches and institutions of law, their improvement or reform. An important component of the legal doctrine is the evaluation and forecasting component, which contains recommendational and orientational in their nature provisions, and is the result of a critical analysis of the practice of law-making. This makes the legal doctrine a significant factor in the formation of law and enables it to actively influence various components of the legal system, including the definition of the meaning and ideological orientation of legislation.

The creation of a legal doctrine, development of its specific provisions, is directly related to the interpretation of legal texts as well as comprehension and understanding of the content of the legal requirements enshrined therein. In fact, any doctrinal study includes the analysis and interpretation of legislation, court decisions, international legal instruments, etc. Often, such intellectual activity is not limited to the literal interpretation of legislative norms and is aimed at highlighting certain topical issues in the field of law from the standpoint of unwritten principles of law, values, interests, fundamental human rights, etc.

Legislative norms reach up to judges through the «sieve» of lawyers' interpretive activities, who, not only in the language of available and understandable terms, find out and bring to the reader the contents of legal regulations. If necessary, they complement, refine, «clean» them from various defects – contradictions, ambiguities or vagueness of wording in legal acts, etc. The doctrinal interpretation of legal norms and their results are inseparable from argumentative practices, and the legal doctrine itself is an argumentative discipline – there are certain arguments which are supported by the legal community in the basis of any provisions of the legal doctrine.

The doctrinal interpretation of legal norms and their results are inseparable from argumentative practices, and the legal doctrine itself is an argumentative discipline – there are certain arguments which are supported by the legal community in the basis of any provisions of the legal doctrine. Mark Van Hoecke noted that from the Middle-Ages until the seventeenth century legal doctrine has developed as an argumentative discipline, which determined what kind of arguments were acceptable in which cases, with whole catalogues of arguments. Actually, interpretation and argumentation cannot be separated from each other, both in legal doctrine and in legal practice. Each text interpretation needs arguments when diverging interpretations could reasonably be sustained, and a legal argumentation will almost always be based on interpreted texts. So, legal doctrine and legal practice are both hermeneutic and argumentative, but interpretation and argumentation appear to be roughly two sides of the same activity, in which interpretation is the goal and argumentation the means for sustaining that interpretation [16, p. 5]. When judges use certain doctrinal constructions in their decisions, they agree with the relevant arguments. Even if the latter are not explicitly mentioned in the text of the court decision, they implicitly become part of the court legal position.

Since the legal doctrine appeared in the legal life of society, its main task has been the interpretation of legal texts – legislative acts, court decisions, etc. Their existence is a prerequisite for the existence of a doctrine [no special legal texts – no legal doctrine][1]. As noted by foreign authors, the work of legal doctrine in the French historical tradition (and in general in European) is in one way or another related to the interpretation of written law. Faced with its various sources, coordinating and systematizing them, the doctrine contributed to the creation of a holistic legal order and thus paved the way for future codifications [15, p. 17].

The formation and development of the legal doctrine is influenced by external and internal factors. The latter are related to the internal «mechanisms» of the legal science development. These are unresolved scientific problems that give rise to scientific discussions, scientific polemics, and the confrontation between different methodological approaches (the struggle between realism and nominalism, materialism and idealism, legal positivism and natural law theory, etc.). External factors (integration and globalization processes, formation of the information society, environmental problems, etc.) are rooted in the natural and social environments that are characterized by constant volatility. Such changes give rise to new values, the restructuring of the hierarchy of values, and the emergence of new rules of coexistence of people. The need for their crystallization, harmonization, conceptual formalization, in fact, necessitates scientific research, development of specific proposals and recommendations for improving legal regulation of relations, etc.

The process of developing a legal doctrine is long and multi-stage and begins, as a rule, with the nomination and substantiation of the original author's views on certain phenomena of legal reality or approaches to solving pressing problems of legal practice. In the course of scientific discussion, which can last for years and continue on the pages of journals, scientific conferences, round tables, etc., scientific ideas and theories are improved and conceptialized, and also the optimal ways and mechanisms of their implementation in the state legal practice are developed.

This may lead to the development of a new direction in legal thought or establishment of a scientific law school. Therefore, the legal doctrine – it's not just a set of views of individual lawyers, but to a certain extent the product of their joint intellectual creativity. As a result, an integral, conceptually and methodologically, logically consistent knowledge of law, its branches and institutions, which is to some extent reduced to an internally consistent core, is created. Due to its proper argumentation, logic (systematicity, completeness, consistency), compliance with the social cultural context, it receives recognition and support of the legal community.

[1] Mark Van Hoecke comes to a conclusion that legal scholars are often interpreting texts and arguing about a choice among diverging interpretations. In this way, legal doctrine is a hermeneutic discipline, in the same way as is, for example, the study of literature, or to a somewhat lesser extent, history. In a hermeneutic discipline, texts and documents are the main research object and their interpretation, according to standard methods, is the main activity of the researcher. This is clearly the case with legal doctrine [16, p. 4].

A similar approach to understanding the nature and features of the legal doctrine can be found in the writings of modern Ukrainian scholars. For example, V. Kolisnyk characterizes the constitutional doctrine as a set of ideas, provisions, scientific views and theoretical generalizations, established and recognized by the scientific community, which together comprise a logically completed and internally agreed vision, understanding and explanation of the essence, features, main characteristics and patterns (or trends) of development of a certain constitutional and legal phenomenon. Usually a doctrine consists of a rather complex and extensive system of interrelated ideas, provisions, theses, conclusions and generalizations [9, p. 208].

The legal doctrine (as a resume or result of doctrinal legal research) has a stable, conservative character. If a particular scientific idea (a provision) has become an integral part of the legal doctrine, then, as a rule, it does not change over a long period of time – it may take more than a decade before it is changed or finally rejected. However, this does not mean that the legal doctrine is completely unchangeable. Csaba Varga, pointing to the relative constancy of the doctrine, notices its open texture, because it has the potential that «this could also have been different», even if it has not happened or it can not become something else. However, for the same reason, and this is another pole of the double nature of the doctrine, at any time it states that it is final and ultimate (self-commissioning) in its certain state, although it is likely to open already on the next day or be unchangeable forever [3, p. 102].

Y. Yevgrafova emphasizes that the doctrine is not necessarily driven by the nature of the legal culture of society, but is an autonomous, self-sufficient phenomenon whose action and influence are not limited by the time and borders of national states. Such are the long-standing doctrines of natural law, national sovereignty, social contract, etc. In fact, equating doctrine and legal science, Y. Yevgrafova indicates that it is one of important social institutions, which plays a significant role in the life of society and the state, in particular, in state-building, the improvement of the modern system of national legislation, law-enforcement activity, the formation of a legal culture of citizens, etc. Scientifically grounded conclusions and suggestions should form the basis for the development of nation-wide concepts and programs of social economic development of Ukraine [5, p. 55].

But can the relevant concepts of natural law, national sovereignty, separation of powers, etc. become an integral part of the system of national law without their creative interpretation in accordance with the national historical, economic, social cultural peculiarities, specificity of the legal culture of Ukrainian society? Can we possibly directly include T. Hobbes, J. Locke, S.-L. Montesquieu's treatises to the programs of social economic development of Ukraine? It is expedient to have a fairly flexible understanding of the concept of separation of powers, national sovereignty and mechanisms for their implementation, which results from the inadmissibility of the dogmatic interpretation of this scheme for once and for all, as well as the possibility of completing these concepts with new elements that match modern realities. Obviously, the basic ideas and principles formulated by the outstanding figures of the

past, their followers and like-minded people, are specified and updated by modern lawyers.The latter develop the legal doctrine, which, in our opinion, is a cultural and historical phenomenon – it embodies the interests, needs, values and traditions existing in a certain society translated into the legal language.

Conclusions of the research. The legal doctrine exists and develops in the system of coordinates, which are set by traditions, ideological, cultural, religious keynotes of society. They largely determine the content of the legal doctrine, which implicitly has a specific axiological burden. Correlation with the existing social cultural reality is an essential feature of the legal doctrine.

The proposed understanding provides an opportunity to separate the doctrine from the philosophy of law, which reveals the general idea of law. The results of philosophical and legal quests in the form of doctrines, philosophical and legal concepts are mainly universal, invariant in historical and cultural terms. The connection between legal doctrine and the philosophy of law lies in the fact that any doctrinal study is based on the idea of the nature of law. In relation to the legal doctrine, the philosophy of law is on the meta-level and defines its ontological and epistemological foundations.

It must be admitted that legal academics do not have a «monopoly» on the creation of a legal doctrine. So, a significant contribution to the development of the American legal doctrine was made by O. *Holmes*, B. Cardozo etc. They conceptualized and generalized their own experience of judicial activity in a series of articles and books that substantiated their views, ideas, principles which were supported and recognized far beyond the boundaries of the American continent. While in the continental law a legal dictionary is created by legal scholars, the language of the English law is created predominantly by judges – original legal constructions are the result of the judicial decisions incertain categories of cases. These constructions are not static – they are refined, adjusted, filled with new content by joint efforts of both judges and legal scdolars. Therewith, judges use persuasive legal provisions developed by legal scholars. At the same time, the latter, analyzing legislation, judicial practice, international legal documents, formulate new findings and proposals that, under certain conditions, may change the legal doctrine. As rightly stated by Csaba Varga, the doctrine, on the one hand, fulfills the promise of completeness, and on the other hand, it always has a transient character, because at any moment it is only in the state of development [3, p. 102].

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Правова доктрина: аспекти розуміння

Стаття присвячена дослідженню природи, особливостей, змісту правової доктрини, її ролі в юридичній практиці. Актуальність вивчення правової доктрини тісно пов'язана з проблемою визначення її ролі і значення у розвитку вітчизняного права. Одну із базових ідей, що активно підтримується та аргументується сучасними вченими, у найзагальнішій формі можна сформулювати таким чином: право – це дещо більше, ніж законодавство. Такі концептуальні зміни у розумінні права дозволили включити до предмета наукового обговорення такі категорії, як м'яке право, принципи права, верховенство права, судовий прецедент та ін. Йдеться не тільки про теоретичні дискусії, а й про реальне реформування різних елементів української правової системи на базі кращих взірців західної демократії. Проголошення незалежності України у 1991 році істотно змінило загальну ситуацію у вітчизняній правничій науці, що, оцінюючи об'єктивно, перебуває у стані піднесення, ренесансу. З'явилась реальна можливість збагатити національне право здобутками європейської й світової юридичної думки, що є актуальним в контексті євроінтеграційних процесів, активним учасником яких є Україна. Одним з таких здобутків є рух до визнання правової доктрини як чинника, що відчутно впливає на нормотворчу, правозастосовну, правотлумачну діяльність. У правовій, демократичній державі головним завданням судових органів є реальне забезпечення ефективного механізму захисту прав людини. Водночас законодавство будь-якої країни не є досконалим. При недостатній чіткості законодавчих норм (відсутності ясної, точної, зрозумілої мови нормативних актів, розпливчастості формулювань, наявності у законодавстві прогалин, колізій тощо) винесення розумного, справедливого, належним чином аргументованого судового рішення без використання інших джерел права є фактично неможливим. Звертаючись до принципів права, правових звичаїв, прав людини, правової доктрини, судді «добудовують» право, удосконалюють його, і так у певному сенсі виправляються помилки законодавця, іноді припиняючи дію несправедливих законів. Можна констатувати, що у сучасній науці існують різні підходи до розуміння правової доктрини, яка визначається як «дух» права; ідеї та погляди знаних правників; авторитетні наукові праці – монографії, науково-практичні коментарі законів і кодексів тощо. На наш погляд, такі підходи не є принципово помилковими, позаяк розкривають окремі аспекти цього явища. Водночас вони дещо однобічні та недостатні для розкриття природи та сутності складного феномену правової доктрини.

Правова доктрина створюється, відтворюється, розвивається передовсім завдяки інтелектуально-творчим зусиллям правознавців, основним змістом діяльності яких є дослідження права за допомогою формально-догматичного, історичного та інших методів, розробка прийо-

мів та способів його тлумачення і систематизації, осмислення накопиченого правового досвіду і створення на основі цього «наукової картини» правового світу. Положення правової доктрини створюється, як правило, в результаті проведення фундаментальних наукових досліджень, що пов'язані з глибоким та всебічним аналізом сутності, змісту, особливостей функціонування і розвитку державно-правових явищ (законодавства, судової практики, окремих галузей права) в певних правових системах та обґрунтуванням раціональних підходів до вирішення основних проблем в сфері юридичної практики. Йдеться про відображені в узагальненій формі юридичні знання: юридичні конструкції, поняття й категорії, принципи, правової ідеї, концепції та ін., які утворюють змістову частину правової доктрини, що має об'єктивовану форму у вигляді наукових праць – монографій, наукових статей, доповідей, коментарів законодавства тощо. З моменту виникнення у правовому житті суспільства правової доктрини її основним завданням є інтерпретація правових текстів (законодавчих актів, судових рішень та ін.). Їх наявність є необхідною умовою існування доктрини [немає спеціальних правових текстів – немає правової доктрини]. Формування правової доктрини, створення окремих її положень безпосередньо пов'язано з інтерпретацією правових текстів та осмисленням, урозумінням змісту закріплених в них юридичних приписів. Фактично будь-яке доктринальне дослідження включає аналіз та інтерпретацію законодавства, судових рішень, міжнародно-правових документів та ін. Часто така інтелектуальна діяльність не зводиться до буквального тлумачення законодавчих норм і спрямована на висвітлення певних актуальних питань у царині права з позицій неписаних принципів права, цінностей, інтересів, основоположних прав людини тощо. Зроблено висновок, що правова доктрина має не тільки дескриптивний, а також прескриптивний характер (містить елемент сущого і належного). Описуючи, здійснюючи логічний або економічний аналіз права, юристи виявляють прогалини в законодавстві, застарілість норм права, їх невідповідність принципам права тощо і доводять необхідність встановлення / зміни / скасування юридичних норм чи інститутів права. Правова доктрина існує та розвивається в системі координат, які задаються правовими традиціями, світоглядними, культурними, релігійними домінантами соціуму. Кореляція з існуючою соціокультурною реальністю є істотною ознакою правової доктрини. Такий підхід дає можливість відмежувати доктрину від філософії права, яка розкриває загальну ідею права. Результати філософсько-правових пошуків у вигляді вчень, філософсько-правових концептів є універсальними, інваріантними в історико-культурному відношенні. Зв'язок правової доктрини та філософії права полягає у тому, що будь-яке доктринальне дослідження спирається на уявлення про природу права. По відношенню до правової доктрини філософія права знаходиться на метарівні і визначає її онтологічні та епістемологічні основи.

Ключові слова: правова доктрина; юридична наука; джерело права; юридичне тлумачення; юридична думка.

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