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Doctrine in the Modern World: Legal Traditions and Modern Potential

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Abstract: This study explores doctrine as a legal category. The researcher notes the polysemy of the etymologic interpretations of this notion and identifies the main characteristics of legal doctrine and its social designation. The researcher posits a thesis that the role of doctrine as a formal legal source of law has become more important amidst globalization and integration. The researcher has come to the conclusion, through a deep and comprehensive analysis that the perception of this category differs significantly in different legal traditions.

Key words: Legal doctrine, juristic doctrine, legal tradition, formal legal source of law, judicial doctrine, doctrinal legal policy

INTRODUCTION

In the most general sense in jurisprudence, the term "doctrine" commonly means a science or a legal theory that is not fixed in formal documents: the works of legal scholars.

However, etymologically, the term "doctrine" is polysemous. First of all, this notion is used in various legal systems on a case-by-case basis. Doctrine as a phenomenon, does not have the same meaning in the Anglo-American and Romano-Germanic legal traditions. Second, the term might have several shades of meaning within the same law family and even in the same national legal system and may be used in different contexts. This makes the standardized research of doctrine as a legal phenomenon complicated.

So, before we identify the primary meanings and functional roles of doctrine in a legal system, we need to reach some conceptual clarity.

MATERIALS AND METHODS

We must discriminate legal doctrine from other legal categories that are close in meaning. The notion "lawyer's law" is often used as a synonym of a legal doctrine. However, the scope of this notion covers not only legal science but also case law, i.e., the law generated by the community of legal scholars, judges and professional barristers while legal doctrine embodies only a part of the legal opinions dominating the science.

Some researchers confuse legal doctrine with the so-called "universitie's law". In our opinion, the viewpoint of Kashanina is the closest to the truth. She states that professor's law or universitie's law is the name of the first law family in the world the continental law family in which doctrine was the source of law. In other words, universitie's law is reduced to one of the global law families while legal doctrine is a universal source of law in most states.

Another, category often viewed as related is book law. In this case, we must recognize as correct the arguments of professor (Petrazhitsky, 2000) who included in the notion of book law not only legal doctrine but also private collected volumes of statutes of law, the Law of Legal Review, the opinions of the Faculty of Law, Prejudicial Law, Programmatory Law and sacral religious books. This way, legal doctrine (or the common opinion of lawyers) is only a part of the law that is manifested through reputable books.

Legal doctrine also differs from terms like "jurisprudence" and "the legal science". Russian legal scholar Gambrov wrote: "What is called jurisprudence is compiled of theory and practice, i.e., theoretical development of the law in force and judicial rulings,

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homogenous rulings of a certain court or category of courts taken separately or as an aggregate". This way, jurisprudence and legal science are synonyms of lawyer's law and encompass doctrine as a part of legal science.

Finally, legal doctrine is tantamount to a legal ideology. Legal ideology systemically covers ideas about law existing in the social mind while legal doctrine embodies only the dominating ideas about law recognized by a society and a state that have been generated by the community of professional lawyers, mainly legal scholars. Legal ideology and legal doctrine share a rational and systemic nature which brings them together but they have different creators (society as a whole and the legal community) and they perform different functions in the society (the dominance and credibility of doctrinal provisions over all other ideas that exist in the society) which sets them apart.

Thus, a legal doctrine originates from science and forms a part of a legal ideology the ideology that is derived from scientific research that is recognized by the society and the state as mandatory and regulates social relations.

With respect to the interrelationship of ideology and legal science, in our opinion, the words of Tumanov (1971) stand true: "The counterposing scheme "science is not an ideology" and "an ideology cannot be scientific" raises science over the social reality and depicts it as unbiased and objective (though sometimes not related to either category of courts). This way, jurisprudence and legal science are synonyms of lawyer's law and encompass legal doctrine as a part of law as a science.

RESULTS AND DISCUSSION

Despite, all of the terminological difficulties and nuances of linguistic usage, we find it necessary to fix a general theoretical definition of legal doctrine. The following meanings of the term "doctrine" were found in a well-known publication series on the sources of law by the academician (Marchenko, 2004), the Head of the Department of Theory of State and Law at Moscow State University:

- School, a Philosophical Legal Theory
- Opinion of legal scholars on certain issues related to the nature and content of various juridical acts, issues of law-making and law enforcement
- Scientific papers of widely recognized scholars related to the state and the law
- Comments to various codes, certain statutes and annotated versions (models) of various regulations

Polyansky (2009a) formulated the following definition of legal doctrine in his papers. It is a frame of reference for problems of the legal regulation of social regulations in the form of principles, presumptions, axioms and other basic foundations this frame of reference regulates social relations and determines focus areas, consistent patterns and trends in the development of legislation, regardless of whether they are fixed in a formal document (Polyansky, 2009b). In our opinion, this is a complete definition; its strength is the attempt to encompass the multifaceted nature of this phenomenon. However, this definition has a weakness which in our opinion is a major one: the peremptory statement that doctrine regulates social relations. Within the framework of the Russian legal system, the regulatory nature of doctrine is disputable, even admitting the provision (which is sometimes encountered in the legal literature) that the regulatory effect of doctrine can be direct or indirect, i.e., mediated. In the latter case, a doctrine as information or as an assimilated system of notions, affects the formation of a legal consciousness among legislators and legal practitioners through legal education and self-education and is indirectly manifested in the juristic acts that they enact. It seems that, in this case, the understanding of legal regulation is too broad, it is confused with the general legal interaction. The summarized definition of doctrine must not contain characteristics such as the capacity to regulate social relations: this nuance is akin only to certain characteristics of the notion of "doctrine".

Demidov defines legal doctrine as "an assemblage of principles, means and methods for justifying and achieving one's goals approved and accepted by the legal community". It is necessary to mention that the literature emphasizes that doctrine as a category, applies only to scientific work.

It seems that the categorical framework of jurisprudence cannot have a summarized notion of a legal doctrine: a doctrine is multifaceted and specifying it depends on the role it plays in the national legal system, i.e., on the context in which this term is used in a given case.

Thus, for the purpose of the present research, we propose to define doctrine as a system of ideas and opinions that forms an integral understanding of an item or a phenomenon.

The main attribute of doctrine is the integrity of the notions that summarize and the fundamental provisions that are taken as a basis of something. In our opinion, the second essential attribute of legal doctrine should be its scientific nature and rigor all doctrine is the result of

scientific work that renders it substantiation and consistency and makes the ideas that form it systemic. These attributes are immanent to scientific doctrine, judicial doctrine, doctrine as a policy document about the development of a certain industry and doctrine as a tenet of legal science or a system of firm views and beliefs about legal regulation within the framework of a given legal system. Researchers distinguish the following attributes of legal doctrine:

- Substantiation which means that doctrine results from professional scientific research
- Its evolutionary nature and continuity
- The consistency of individual scientific provisions and scientist's independent positions

It reflects the needs of the social and economic development of a society and a state at a given period of time; the provisions developed within it are always related to the topical issues of legal regulation; the language of legal doctrine must meet certain requirements such as precise wording, apposite categories and terms, the coherent exposition of ideas, a tendency to make its conclusions, sentences and inferences formally definitive and the correct identification of equivalences and definitions; the use of special ways to formalize the provisions of doctrine including axioms, principles, presumptions, definitions and other basic foundations. The integral components of legal doctrine are the concepts of various legal institutions that contain information about the substantiation of doctrine and the mechanisms of implementing it; a non-documentary form: the results of scientific research are fixed in monographies, reports presented at scientific conferences, collections of scientific papers and other forms. This does not mean that the formalization of doctrine in a hard copy is impossible but rather that doctrine does not imply a formal document (Polyansky, 2009b).

In our opinion, the social role of legal doctrine as a source of law is manifested through the following: first, legal doctrine helps to fill the gaps in the current positive law and to eliminate contradictions between legal provisions. In addition, doctrine ensures an interpretation of the law that is in accordance with its letter and spirit. Doctrine can unite the content and the form in a single formal legal source. Second, legal doctrine as a system of ideas and values has the potential to affect all of the parties within social relations: legislators and legal practitioners and those who act upon the law. Third, legal doctrine can be a source that contains information about the traditions, mentality and history of a certain nation.

Thus, being a part of the social legal consciousness, legal doctrine reflects the peculiarity of the national legal culture and the uniqueness of its legal attitudes. The understanding of the role of law and legal doctrine as its source is predetermined by the spiritual origins of the respective nation. This way, Western legal tradition (Continental and Anglo-Saxon Law) recognizes both written and unwritten rules of conduct issued by the state that regulate the observable behavior of individuals. The principles of formal equality and the freedom of the individual that were won by the bourgeois revolutions are recognized as fundamental and absolute in Western European states. The secularized legal perspective denies the regulatory potential of other social norms religion, morals, traditions, etc. In the religious legal families (Muslim, Hindu, Judiac and Chinese Law), law is subordinate to religious and spiritual values the necessity of achieving faith in God and goodness during the earthly life, so life in such countries is regulated by syncretical rules of conduct-religious, moral and legal. In this case, priority is given to human consciousness, one's spiritual attitude toward his own actions and those of others, rather than a legal assessment in accordance with formal criteria. In this Respect, Religious law is complied with as a result of one's goodwill which distinguishes it from European Law. In Russia, the legal culture has traditionally been committed to orthodox and spiritual virtues, so law is akin to truth ideal morally approved conduct which can contradict the positive state-enforced law.

It is obvious that recently, the term "doctrine" has been used more and more intensely. It can be called a fashion for cliche phrases. It seems that this "fashion" as well as a certain degree of the terminological confusion associated with the word "doctrine" are the result to a significant extent, of the development of comparative legal research against the background of globalization and integration.

Currently, notions like "constitutional doctrine", "judicial doctrine", "doctrine of human rights" and "international legal doctrine" are the most widely used within the legal literature. The term "doctrine" is used in official documents as well. For example, Art. 38 of the Statute of the UN International Court of Justice states that it applies "doctrines of most qualified experts in public law from different nations as an assistive device to identify legal principles".

This brief overview of the linguistic usage options enables us to state that, in most examples, the term "doctrine" and its respective stem words are used to express different meanings that can be elicited only from the general context of the publications. Russian

researcher Polyansky (2000a) correctly states that controversial situations arise when the term "doctrine" is often used in science, legislative and other law enforcement proceedings with its meaning undefined which makes it difficult to identify the role of legal doctrine in the regulation of social relations" (Polyansky, 2009a).

The main studies of doctrine conducted within the framework of modern theoretical legal science pertain to an analysis of its role as a formal legal source of law. From this perspective, the differences regarding how this category is viewed in various legal traditions are obvious.

The role of a formal legal source of law in countries within the Roman and Germanic legal family was significant, particularly during the flowering of the Roman Empire. However, as this legal system developed, its doctrine lost its significance and regulatory potential. Currently, the value of this unique form of law is in our opinion, underestimated. In fact, legal doctrine is the only source of law that enables us to legally formalize theoretical legal science. In other words, legal doctrine enables us to formalize, on an external legal level (i.e., in the form of legally formalized regulations), a product of the highest level of legal consciousness the scientific and theoretical or the doctrinal levels.

Oddly, we can see a contrary trend in common law countries: doctrine is gaining significance in societies in which initially, only provisions elaborated by legal scholars were counted as law and doctrine was underestimated. In fact, this confirms the aforementioned thesis about its significant regulatory potential.

The main conceptual characteristics of doctrine as a formal source of law are relatively similar in these different legal traditions. This way, as a result of the explicit or implicit order of a state researcherity, a text setting forth the opinion of a certain reputable official or group of officials, on issues of legal regulation, can be a formal legal source of law. In such a case, the considered text posits new legal rules that are compulsory for all parties to law enforcement. Such a text, serving as a formal source of law is called legal doctrine in the legal literature.

This way, doctrine, in the formal presentation and the analyzed sense, only exists when it is legalized by a state researcherity. This can happen, first, if the regulatory documents contain a reference to a text that sets forth the opinion of a certain individual or group of individuals regarding legal issues.

As is well known, the above-described method of legalization was employed in legal regulation in ancient Rome. At that time, orders of the emperor vested texts containing the opinions of lawyers on legal issues with the status of formal sources of law. Augustus was the first emperor who issued such orders in respect to the texts written by Sabinus. He headed the so-called Sabinian School of Lawyers (D.I.II.49). Later, in 426, a law on citation was enacted in the Roman Empire Lexcitationis. This statute proclaimed the works of five Roman lawyers (Papinianus, Paulus, Gaius, Ulpianus and Modestinus) to be official sources of law.

The above-described ancient Roman practice was forgotten in the following centuries. Professor Sukiyaynen, a reputable expert in the area of comparative law, writes that, currently, legal doctrine, legalized by various regulatory documents, functions as a formal source of law in a number of countries dominated by Islam.

Currently, legal doctrine as a formal source of law, can be legalized differently. Substantiating a ruling on a specific case, the judge or a different regulatory researcherity may refer to a text setting forth the opinion of an individual or a group of individuals on a legal issue. This type of legalization is used in Anglo-American Law. In that legal system, judges often substantiate their rulings with references to the works of English lawyers recognized as books of researcherity, the so-called literary sources of law. For example, they include the work of Glanvill, "On the laws and customs of the Kingdom of England" and the works of Littleton, Cock and Bracton.

The notion of doctrine is common in the political and legal vocabulary in the US. In his researches, Taribo, the Head of the Department of Constitutional Framework of Administrative Law within the Constitutional Court of the Russian Federation, analyzed the characteristics of rulings of the Constitutional Court of the Russian Federation in view of the possibility of recognizing them as judicial doctrine, analogous to the American model.

In the course of this research, the researcher conducted an exhaustive overview of the use of the term "judicial doctrine" in the American Legal System. As Taribo writes, the term judicial doctrine is very common in the US. It means the principle that underlies the conclusions made in judicial practice. However, a judicial doctrine is not just a principle (a legal principle) it is a legal principle and the principle (method) of settling court cases, i.e., the typical approach (Taribo, 2005).

In the US, the formation of judicial doctrine is natural, it performs the function of summarizing judicial practice quite efficiently. The matter is that as many court cases are being settled, the significance of the first precedent (the original source) gradually wears out but its repeated application makes it look autonomous as a judicial doctrine. The term "doctrine" is commonly used with this meaning and it plays a significant role in legal regulation.

In this context, discourses about doctrine as a source of law, are substantiated. As an example, we can consider judicial and constitutional doctrines in the form of a constitutional text that has been the subject of a series of judicial rulings. We can consider the doctrine of "due process flow" or the "over breadth doctrine" discussed by Taribo as examples. In accordance with the "due process flow" doctrine, each party is guaranteed the right to court proceedings in accordance with the procedure stipulated by law. The "over breadth doctrine" features the judicial interpretation of the First Amendment to the Constitution of the United States: If the provisions of employment legislation that restrict or prohibit the establishment of labor unions or the conduct of strikes are too vague they are considered to violate the right to express an opinion stipulated by the First Amendment to the US Constitution (Taribo, 2005).

In course of his research, Taribo elicits the main characteristics of judicial doctrine in common law countries. First, the source of judicial doctrine is judicial practice. Second, judicial doctrine is based on the principle of precedent and results from making a series of similar rulings and it is regulatory in nature. Third, judicial doctrine is a typical method to settle typical cases (Taribo, 2005).

Taken in the aforementioned meaning, doctrine is a very specific phenomenon immanent to legal systems of a certain type.

CONCLUSION

All of the above enable us to state with certainty that, despite losing its formerly important role in legal regulation, doctrine is still a significant formal legal source of law in many modern states. Although, a "proportion of legislative and doctrinal sources of law can be different in our century compare[d] to the old day's law, David thinks that modern law is still the law of lawyers as the tradition mandates" (David and Brierley, 1978).

Another issue is that legal provisions that are initially fixed in a specific legal doctrine, later on, are often formalized in an official statute. In this case, legal doctrine ceases to serve as a formal source of law in its initial form.

As is well known, the opinions of legal practitioners and scholars on specific legal issues play a paramount role in legal regulation. The system of knowledge formed by such opinions is customarily called legal doctrine. In this case, legal doctrine is not a formal legal source of law; it functions as a factor that affects the formation of legal norms. This is another meaning in which the term "doctrine" is used. In particular, it is this type of doctrine that has a methodological function and creates the legal notions that a legislator uses. It also sets forth the methods of interpreting law. The legislator often just expresses the trends that were finalized in the doctrine, accepting what the doctrine proposes.

It is obvious that the term "doctrine" as used in the Russian legal community has different meanings. However, assimilating the experience and terminology of the common law countries often begets and feeds the opinion that the decrees of the supreme court researcherities are grounded in doctrine and case law which is conducive to viewing the latter as sources of law and to assimilating the term "doctrine" in the national legal vocabulary.

In Russian Science, the meaning and context of doctrine are closely studied in the course of researching legal policy. The belief that a legal system does not develop spontaneously following the course of historical evolution but through special activities of the state legal policy has recently gained a strong foothold in the Russian legal community. Legal policy is viewed as a scientifically proven, planned and systematic activity of the state and of society that is aimed at developing the legal system and ensuring social legal progress.

As, it pertains to legal doctrine, the doctrinal form of a legal policy is distinguished among the major forms and branches of legal policy. Researchers deem that the main result of doctrinal policy must be the doctrinal documents concepts, fundamentals, strategies, etc., that posit the long-term strategic focal points and the main principles of legal regulation in a certain field. In the literature such documents are often called "doctrinal legal instruments". In addition, Russian Legal Science includes research papers postulating the necessity to develop national legal doctrine as a means of legal policy that has a pivotal significance for legislation and for interpreting and enforcing the law.

The fair comments of Polyansky (2009a) render perspicuity to the multifaceted doctrine. In his opinion, based on the definitions of legal doctrine existing in the science it is necessary to distinguish the notion of legal doctrine and the legal doctrine of the state, depending on its source of formation. The term "legal doctrine of the state" mostly refers to its legal policy.

Doubtless, legal theories will still significantly impact the transformation of systems of law in independent political societies. In this sense, in the times to come, the role of legal doctrine in legal regulation will remain as it currently is.

A number of legal scholars have asserted such opinions about the future of legal doctrine as a formal source of law. In their view, the inevitable enhancement of

the role of legislation will eventually exclude doctrine from the rank of the formal legal sources of law. We think that such opinions are unjustified, at least at the current stage. In fact, as was stated, doctrine is imbued with formal legal significance only by the act of legalization by a state researcherity, so it would not be beneficial for the state to eliminate its option to recognize the opinion of a reputable scientist or group of scientists as a source of objective law. The enhancement of the role of legal regulations in the future does not itself explain why a state might decline to use this option.

There is an opinion in modern legal science that doctrine will become more important in the future. Sternberg explained this view by saying that legislative regulation cannot cover all aspects of social relations. Limiting its regulation to positing the main principles and the most important legal provisions in official statutes, the state must leave the legal regulation of the details and the relations of secondary importance to the "law of lawyers" as it is the more flexible and responsive law that keeps abreast of the times and foresees the trends and patterns of its evolution. The above, Sternberg presumed that "lawyers will not be nailed down to the cart of official legislation but will act as free thinkers subordinated to the official legislation only in certain issues, otherwise enjoying the researcherity of independent creators of law" (Taranovsky, 2001).

This position appears to be cogent. We also think that if asocial relation is not properly regulated with a provision of positive law, the issue must be solved using legal doctrine as a product of a legal consciousness of the highest level.

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