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IMPLEMENTATION OF THE PRINCIPLE OF FORMAL EQUALITY IN RUSSIAN LEGISLATION

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Abstract

This paper is focuses on problems of formal equality as the essential principle of the rule-of-law state and to the features of its realization in the field of public law of the Russian Federation. The philosophical and methodological analysis of concepts "state", "rule-of-law state", and "warranty state" emphasizes the need to identify and take into account sociocultural aspects of models of the rule-of-law state. It is argued that in building of the rule-of-law state is important to proceed from specific historical conditions and cultural features of the country. Constitutional and legal enshrinement of the principle of equality in the Russian Federation is analyzed. Discrepancies between legislation on paper and the real state of affairs are identified. Specific measures for their elimination are proposed. The research of the Russian legislation allowed revealing many norms which are clearly or vaguely contradicting the principle of formal equality in the field of public law. In this regard, authors suggest carrying out thorough comprehensive revision of norms of public law to ensure their compliance with the constitutional principle of equality. Besides, it is offered to develop the methodology of comparative analysis of draft legal acts allowing us to define their compliance with the principle of equality on the basis of which before their adoption by legislature an obligatory preliminary egalitarian expert review should be carried out.

Keywords: Discrimination, equality, state, Constitution, personality, right.

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1. Introduction

The parallel coexistence of various civilizational paradigms applying for scenarios of social development, to some extent, causes aggravation of socio-political and sociocultural contradictions in the globalized world. Rule of law is the main issue that leads to theoretical confrontation. Ambiguity of this current situation becomes complicated due to cognitive dissonance having understood the contradiction between the standard idea of Rule of law and contemplation of its ontological prototype in different countries. It requires, first of all, the categorial definiteness that may facilitate a further research.

2. Problem Statement

The issue of the Rule of Law requires foremost the provision of the precise meaning of «state». There is a tradition in domestic legal science to associate understanding of state with the type of law understanding. Legalistic law understanding, interpreting the state as apparatus for violence which serves interests of specific (as a rule, governing class) classes is opposed to libertarian-judicial, considering the state as a control of society tool in the name of freedom, justice and well-being of all citizens, who pay for its existence and functioning.

This raises the question whether types of law understanding affect ontological essence of the phenomenon. In other words, before us two types of understanding of the same phenomenon how it is considered to be in domestic legal literature, or nevertheless various phenomena? The question is whether the «apparatus for violence» certain people over others could be considered the state.

One of the fundamental principles of a rule-of-law democratic state is the principle of equality before the law. The principle of equality is known to mankind for a long time; however, even the states having proclaimed it do not hurry to form the legislation according to it, producing conditions for discrimination of the personality (Bulyichev, 2016). The 1993 Russian Constitution enshrined this principle in article 19. However, the content of the principle of equality was proved incomplete, not comprehensive and logically imperfect. In this regard, it is not seldom when laws regulating public legal relations include the provisions breaking formal equality of people.

In this paper we are going to try to gain insight into this problem.

3. Research Questions

The subject of this paper is such concepts as the «state», «rule-of-law state», «warranty state» considered by various types of law understanding and also formal equality as the most important principle of the rule-of-law state, its constitutional formalization and the embodiment in norms of public law of the Russian Federation.

4. Purpose of the Study

The purpose of the research is: 1) studying of approaches to understanding of the rule-of-law state and determination of characteristic of type of rule-of-law state sought by Russia; 2) studying of features of

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constitutional affirmation of the principle of equality in Russia, identification of problems of its realization in standards of the Russian legislation and formulation of proposals to remedy them.

5. Research Methods

For the research dialectics, logical, systemic, dogmatic and comparative legal methods were used.

6. Findings

Any rethinking of a phenomenon assumes breaking down the stereotypes established in scientific and public consciousness. The first of such stereotypes is the class approach to the state and an explanation of its essence by means of violence. Looking back to the Greek city-states, it may be noted that in fact the essence of the state was the protection of own citizens from violence, both internal and external.

This fact focuses on the need of differentiation of essence of a phenomenon of the state from features of its sociocultural perception. Even a word "gosudarstvo" derivative of the word "gosudar" emphasizes possession of the sovereign, in the same way as "caliphate", "emirate". In contrast, the word "state" derivative of the word "station" (the place, the basis) means substationality of the phenomenon, but not its affiliation (Alekseev, 1998, p. 54).

The linguistic construction lead to major difference of understanding and building of rule-of-law states in different cultures and, last but not least, different point of view of State institutions. Interestingly, attitude to a family which is not «cell» of society as it is often called (since families exist without the state but the state without families does not) but the basis and the core varies from culture to culture.

Concepts of the State also are different, to which the Russian thinkers often oppose community, and to the law - internal freedom of a person and a moral duty. So, according to Aksakov K.S. the community is natural formation, and the state is artificial, all-class and over-social (as cited in Hegel, 1990).

It is interesting to compare these thoughts to Hegel's (1990) statements. "State, - he writes, - is the realization of the ethical idea- the ethical spirit as revealed, self-conscious, substantial will, which thinks and knows itself, and carries out what it knows and in so far as it she knows …. The state … is absolute purpose of reason that freedom should be realized and this purpose has the highest right against the individuals, whose highest duty it is to be members of the State.

It would seem that authors write about the different phenomena. And maybe that is what it is. If as the state to understand «a certain organizational power form of expression, specification and realization of the principle of formal equality (Nersesyants, 2001), that is a general form of expression of equality, freedom and justice in social aspects of people's life, then in Russia there never were the phenomenon which is called "state". Therefore in the scientific analysis it is necessary to specify what realities are being referred to.

The situation with the concept "rule-of-law state" is even more unclear. Can the state be not based on law or by definition, it is already law corresponding to this or that type of law understanding. There is a question whether it is legitimate to extend the unified model of development of the rule-of-law state to all countries or the sociocultural feature of its building takes place. Numerous modern publications devoted to a problem of building of the rule-of-law state proceeds from methodological approach of the only possible

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liberal-democratic model of rule-of-law state. However, in our opinion, it is worth to remember about cultural diversity of social processes.

Emphasizing identity of the state as self-regulating political system Ilin (1994) noted each nation and each country is vivid individuality with its own specific qualities, unique history, soul and nature. Therefore each nation is entitled to its alone special individual form of government and constitution.

At the beginning of the XX century, differentiating the rule-of-law and constitutional states, S.A. Kotlyarevskiy (2001) noted that the first is a metalegal concept; the second one falls within the legal analysis, representing one of the historical embodiments of the rule-of-law state. He gives classical definition of the rule-of-law state as the state seeking for legal self-restriction and supporting the Rule of Law regime (Kotlyarevskiy, 2001). He sees the main guarantee against disruption of the rule-of-law state and depreciation of the very idea in stability of public sense of justice, and he emphasizes that not legal mechanisms and positive law, but commitment of human consciousness to the idea of worthiness of the personality protect the rule-of-law state from disintegration.

In our opinion, a person is not just basic element, but the most important institute of the rule-of-law state. Not only a person affects the nature of the state, but also the state has to care for formation, "establishment" of the personality as guarantee of its own excellence. It is no accident that in the totalitarian and authoritarian states the concept "person" is traditionally equated to any adult. Cognitive, but not moral or strong-willed component is recognized as substantial characteristic of personality. It is only natural, if the state is understood as apparatus of violence.

The «warranty» model of the rule-of-law state or the state «with a positive mission», providing progressive realization of goals and objectives is formed in Russia. The warranty state is contrasted, on the one hand, to liberal, acting only as the «night watchman» and limiting own activity with providing protection in cases of citizens' rights violation, and on the other hand – to the state of formal democracy for which «the principle of the state activity is defined by more or less accidental party majority» (Alekseev, 1998).

The «warranty» state is aimed not only at improving of human material living conditions, but also at encouraging the creativity of the person. Its main mission is freeing people «from cruelty of personal struggle for existence by creation of most developed material and technical resources, organization of intensive production of the necessary benefits and establishment of the most convenient system of their distribution for satisfaction of basic needs of citizens, creation of the average level of prosperity and ultimate elimination of poverty» (Alekseev, 1998).

As ideocratic, the «warranty» state should not force the citizens to share just one worldview (Alekseev, 1998). The structure and the main activities of the «warranty» state should be enshrined in legal form. The declaration on duties of state, but not the declaration of the rights of man and of the citizen should be the core of its constitution. Thus, in spite of the fact that development of civil society remains a panacea for development and improvement of the rule-of-law state, one of features of evolution of modern Russian model is the significant role of efficient state and, first of all, constitutional and legal regulation.

The most important principle of such regulation is the principle of equality entailing inadmissibility of existence of special laws and courts for any privileged persons, social classes or groups The Article 19 of the Russian Constitution contains the ample norm establishing the principle of equality.

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However, since the Constitution had been drafted and adopted in very difficult political situation, the structure of this norm, despite its huge value for formation of the democratic rule-of-law state in our country, was not entirely satisfactory.

Thus, part 1of Article 19of the Constitution says: “All people shall be equal before the law and courts.”

The equality before the law means that all legal subjects have the same duty to obey the law and to violators of the same norms there has to be an equal treatment by law enforcement, besides, for all persons there has to be an equal access to a legal system and to protection mechanisms of their violated rights. However, as we see, authors of the constitution did not limit themselves with establishing of equality before the law, and also added *equality before courts.* It is known that the court is law enforcement body which is called upon to safeguard the law. Apparently, the drafters of the Constitution wanted to emphasize that all are equal not only "on paper", i.e. in the text of the law, but also at its implementation in practice. But the fact is, approving this wording; we actually accept a possibility of *divergence in understanding* of equality in positive law and equality in enforcement. Could it be that in the state that proclaimed itself as a rule-of-law state, there are people equal before the law, but not equal before the courts?

Perhaps, desire to avoid an implementation gap is connected by an echo of the Soviet past when there was one of the most democratic Constitutions, but it did not prevent the state from violations of its provisions. However, we also cannot explain a mention of "court" in this constitutional provision with our national legal tradition as the Article 34of the 1997 Constitution of the USSR set out only equality of the Soviet citizens before the law.

It is inaccurate to mention equality before courts because the court is just one of many law enforcement bodies though it is the most significant one. And if there is a reference to the courts in the Constitution so it would be also acceptable to refer to the equality before the prosecutor, the police or tax service and etc. Although it is not said in the Constitution we take equality before other law enforcement for granted.

Part 2 of the Article 19 proclaims: *«The State shall guarantee the equality of rights and freedoms of man and citizen, regardless of sex, race, nationality, language, origin, property and official status, place of residence, religion, convictions, membership of social associations, and also of other circumstances. All forms of limitations of citizens’ rights on social, racial, national, linguistic or religious grounds shall be banned».*

The analysis of Part 2 of Article 19 of the Constitution allows us to distinguish two postulates. The first one proclaims an obligation of the state to guarantee equal rights and freedoms of man regardless of sex, race, nationality, language, origin, property and official status, place of residence, religion, convictions, membership of social associations and also of other circumstances.

As we see, the list of grounds on which discrimination is considered to be inadmissible is not exhaustive. However, the phrase «and also of other circumstances» gives the norm excessive vagueness. We believe it would be appropriate to specify these circumstances. In our view, it would be more correct to complete this part of the norm with a phrase: "… and also of circumstances relating to the identity of citizens".

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The second postulate is formulated in the form of the ban of any forms of limitations of "the rights of citizens (!) on the grounds of social, racial, national, language or religious affiliation". Here we see: a) the list of grounds is exhaustive (The Constitution of the Russian Federation does not prohibit to limit human rights, for example, on the grounds of origin, beliefs, membership to public associations, the place of residence, sexual orientation, etc.); b) a *citizen (!)*, but not a human is identified as a subject whose rights are inadmissible to limit on these grounds (i.e. the rights of foreigners and stateless persons are admissible to limit on these grounds).

In our opinion the list of these grounds should be expanded and it would be more logical to replace the word «citizen» with the word «human».

Part 3 of the article 19 of the Constitution states: “Men and women shall enjoy equal rights and freedoms and have equal possibilities to exercise them.

We assume that declaration of equal rights of man and woman is a borrowing from the previous Soviet constitutions and is even logically superfluous as earlier in the same article it was told about equality of *all* before the law and court, about guaranteeing of the rights and freedoms regardless of *sex*. The constitutional provision about equality of men and women separated into different paragraph, in our opinion, was designed to increase emphasis on a problem of discrimination of women. However, we are not inclined to consider that legal status of a woman is currently belittled at something in comparison with legal status of a man. Nevertheless, this constitutional provision is particularly relevant, and even has acquired a new significance (Bulyichev, 2016).

We believe that the structure of the Article 19 of the Russian Constitution could be supplemented with valuable and very relevant provisions.

For example, it seems pertinent to include in this article a provision affirming inadmissibility of any discrimination regardless of disability. We consider that such emphasis is important and, moreover, is necessary, in the constitution of any modern democratic state and we regret that it had not been reflected in this constitutional norm.

The norms establishing equal rights of persons with disabilities can be found in both foreign constitutions (e.g. in constitutions of Germany, Switzerland) and some constitutions of subjects of the Russian Federation (e.g., in the Constitution of the Republic of Bashkortostan). It seems to us that Article 19 of the Constitution of the Russian Federation might be supplemented with the following new part: *«Persons with disabilities shall not be subject to any form of discrimination, endure privations or restrictions due to the loss or abnormality of psychological, physiological, or anatomical structure or function. No derogation of recognition, enjoyment or exercise of rights and freedoms with regards to persons with disabilities is permitted».*

One more aspect of the principle of equality which was overlooked in the Russian constitution is *equal* legal and social protection of children regardless of their parents’ origin and civil status. The existence of such norm would allow preventing possible discrimination of the children who were born out of wedlock or in mixed marriages. It should be noted that many European constitutions (the constitutions of Germany, Italy, Spain, Portugal, etc.) contain similar provisions.

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The fact that many existing in Russia legislative acts regulating the sphere of public law contain provisions which either directly or indirectly break the principle of equality raises concern. Thus, our analysis of a number of laws revealed articles containing elements of discrimination:

On January 10, 2016 in Russia the amended article 96 of the Criminal Procedure Code of the Russian Federation (hereinafter RF CPC) came into force. It enshrined the detainee's right to make telephone calls. Now, the investigator, no later than in three hours after detention should provide to the detainee a phone to inform his/her relatives. The exception is made for situations at which it is necessary to provide the secrecy of the investigation. However, the detainee's right to hold telephone conversations is possible only in Russian language.

We consider such a categorical position of the legislator is caused by the fact that providing an opportunity to the detainee to make a phone call is exclusively carried out with the purpose of "the notification of close relatives or close persons of his/her detention and location". In this connection, investigator (inquirer) must ensure that the objective of the law was achieved. And as long as all investigators and inquirers are obliged to know Russian language since it is the language of the proceedings (Article 18 of the RF CPC), to understand that the objective of the notification of detention is achieved is possible on condition of conducting a conversation in Russian. But at the same time the legislator did not consider that under article 18, part 1 of the RF CPC the criminal proceedings can be conducted not only in the Russian language, but also in state languages of the Republics – the members of the Russian Federation. Besides, the situations when the investigator (inquirer) is fluent also in other language allowing to monitor a conversation or the investigator (inquirer) has an opportunity to provide simultaneous interpretation of a conversation in Russian are not excluded.

With regard to the foregoing, we consider it necessary to legally permit holding telephone conversations on other (except Russian) language if the investigator (inquirer) is fluent enough in required language or there will be an opportunity to provide simultaneous interpretation of a conversation

Article 145 of the Criminal Code of the Russian Federation (hereinafter RF CC) provides criminal liability for the unfounded refusal to employ a woman or the unfounded dismissal of a woman because of her pregnancy, and also on the grounds that a woman has children below three years of age.

As we can see, only women are protected by Article 145 of the RF CC. Meanwhile there are situations when the man is the only parent of the child. Therefore he also may be discriminated by an employer and the absence of provision in the RF CC establishing liability for the unreasonable refusal in employment or the unfounded dismissal of the man having children under three, violates and limits the rights of men.

In spite of the fact that part 3 of Article 19 of the Constitution of the Russian Federation embodies equality of rights and freedoms between men and women and of opportunities for their realization, in Russian legislation there is still gender - based legal imbalance, and not in favor of men.

It should be noted that the step on elimination of gender-based discriminatory norms in the Criminal Code has been already taken. So in 2010 the amended article 82 of the RF CC included a man having a child under fourteen and being the only parent to a number of persons to whom postponement of the real serving of the punishment can be applied.

We find it necessary to take men raising children alone under protection of the criminal law

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without discriminating them by gender.

The RF CC contains a number of norms establishing unequal repressive measures to the persons who offends honour and dignity of representatives of public authority and to the persons who encroaches on honour and dignity of ordinary citizens**.**

Thus, for example, the current RF CC includes several offences which cause liability for insulting. Criminal sanctions are imposed for insulting: of trial participants (p.1 art. 297of the RF CC); of a judge, juror, or any other person participating in the dispensation of justice (p. 2 art. 297 of the CC RF); of a representative of power (art. 319 of the RF CC); of a serviceman (art. 336 of the RF CC). There is currently no criminal liability for insulting an ordinary person. In 2012 Article 130 of the RF CC «Insult» was decriminalized, but this offence is now punishable instead under Article 5.61 of the Russian Federation Code on Administrative Offences (hereinafter the Administrative Code).

The analyses of sanctions of the above-listed articles showed that the legislator's opinion on honor, dignity and moral sufferings of persons varies according to their legal or social status and adopts the differentiated approach. For example, insulting the judge is punished with up to 6 months of arrest but insulting other representatives of power leads only to imposing correctional labour for up to a year; this is in spite of the fact that according to Article 10 of the Constitution state power in the Russian Federation is exercised on the basis of its division into legislative, executive and judicial, and bodies of legislative, executive and judicial authority are independent and equal. But the most lenient punishment (administrative fine of 1000-3000 rubles) is imposed in the case when an ordinary person is insulted. Though, article 2 of the Constitution says: «man, his rights and freedoms are the supreme value».

The legislator establishes criminal liability for sexual intercourse and other actions of sexual character with a person under the age of 16 (article 134 of the RF CC). Federal Act No.215 of 27 June 2009 supplemented the Article 134 of the RF CC by the note according to which a person who for the first time has committed the crime stipulated by part 1 of this Article, shall be relieved of punishment by court if it is established that such person and the action committed by him/her are no longer socially dangerous in connection with his/her entry into marriage with the victim. As we can see, it is pointed out that one of the key conditions under which a person can be exempted from punishment is marriage of the victim to the perpetrator. However, the legislator didn't take into account specific features of family law and put the persons living in different regions of Russia in an unequal position.

So, in our country according to Article 13 of the Family Code the marriageable age is established as 18 years. The local authorities in case of the existence of some specific circumstances (such as pregnancy, the birth of a child, a direct threat to the life of one of the parties, or other circumstances) may permit the marriage of persons who have reached the age of 16. At the same time subjects of the Russian Federation in accordance of this article has the right to set the procedure and the terms because of whose existence a marriage may be entered into by way of an exception, with account for specific circumstances, before reaching the age of 16. A number of subjects had exercised this right. Thus, in 19 subjects of the Russian Federation a person can marry at the age of 14 and in 6 subjects it is allowed at the age of 15.

Accordingly, taking into account that the minimum marriageable age varies in the regions, the provision for exemption from punishment which is contained in Note 1 to Article 134 of the RF CC, cannot

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be applied in the same way to the entire territory of Russia. And that is obvious violation of the constitutional principle of equality of all before the law and court.

We believe that establishment in the entire territory of the Russian Federation of a uniform age of marriage and also a uniform procedure and terms because of whose existence a marriage may be entered into by way of an exception, with account for specific circumstances, before reaching the age of 16, will eliminate the discrimination of persons based on place of residence and ensure uniform application of Article 134 of the RF CC in all subjects of our country and correspond to realization of the constitutional principle of equality of all before the law and court.

Article 148 of the RF CC is a core norm that provides the protection of the right to freedom of conscience and religion. In 2013 Federal Act No.136 of 29 June 2013 was adopted. This Act excluded the provision concerning of insulting the religious feeling of believers from Article 5.26 Part 2 of the Administrative Code and put it into Article 148 of the RF CC, thus having criminalized this offence (Alekseev, 1998).

After Article 148 of the RF CC was amended new challenges and fair criticism connected with its application, as there were vague evaluative categories, had emerged. In addition, we consider that this norm also tramples on the principle of equality. The matter is that Article 148 of the RF CC protects exclusively religious *feelings of believers*, and does not protect the feelings based on the worldview in which there is no God. Protection of the rights of religious believers in the absence of equivalent protection of the rights of non-believers is the violation of equality of citizens (Bulyichev, 2018).

The insult of religious feelings of believers is punished by the imprisonment up to one year (the same act made in a synagogue, a mosque, a church is punished by the imprisonment up to three years) but in case if someone mocks atheist's belief, in every possible way offending his feelings, only administrative liability is possible. And this obvious discrimination in the criminal legislation takes place in spite of the fact that Russia is a secular state (Article 14 of the Constitution of the Russian Federation) guaranteeing equality of human rights irrespective of their attitude to religion and beliefs (Article 19 of the Constitution).

7. Conclusion

In paper the analysis of various scientific approaches to understanding of the rule-of-law state emphasizing that the feature of evolution of modern Russian model of the rule-of-law state is the significant role of effective public administration and, first of all, constitutional-legal regulation was carried out. Thus Russia should be developed, first of all, as the warranty state.

The model of the warranty state to be effective, assumes a greater need for detail of the legal bases (principles). However, the structure of the constitutional norm establishing the principle of formal equality is far from an ideal which in turn affects other norms of the Russian legislation. So, the Russian legislation contains many norms contradicting the principle of equality. In this research only some of them were specified, but even the revealed problems highlighted the need to carry out thorough comprehensive revision of norms of public law in order to identify their compliance to the constitutional principle of equality. Besides, it is offered to develop the methodology of comparative analysis of draft legal acts revealing their compliance with the principle of equality on the basis of which a preliminary egalitarian expert review should be carried out.

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