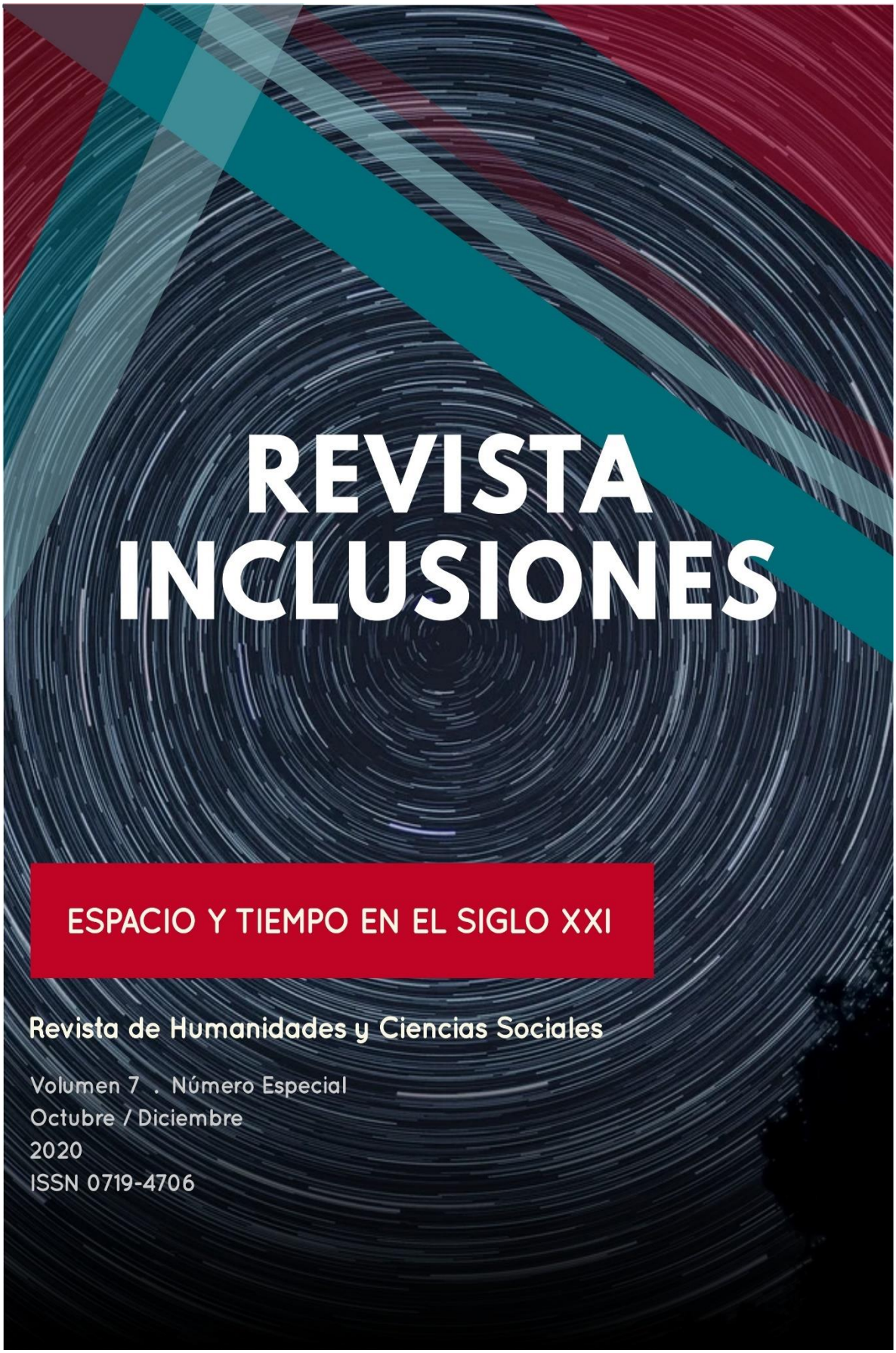
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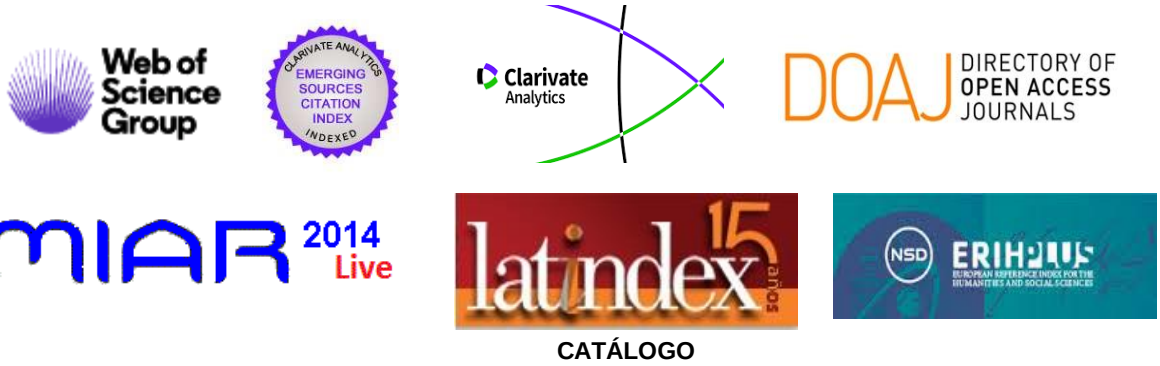

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WEST EUROPEAN ORIGINS OF A. D. GRADOVSKIY'S LEGAL THEORY

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Abstract

The topicality of the issue is due to the acute necessity to elaborate the thoroughly substantiated conception of the further reforming in today's Russia. The reforms can only be implemented successfully under the condition of developing an adequate legal system. At the same time, modernization of political institutions would be impossible without further systematization of the Russian law. The optimal basis for such modernization is the creative theoretical synthesis of the Russian law with West European legal ideas and concepts. Certainly, we do not speak of the fundamental change of the basic laws of the Russian Federation, but about such theoretical synthesis which would open an immediate opportunity for the evolution of political institutions towards forming a constitutional system embodying the best conceptual developments of the past and present.

Keywords

Constitution – Liberty – Law – People – Politics – Liberalism

Para Citar este Artículo:

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For life, power is needed; power is in knowledge, knowledge is in labor.
A. D. Gradovskiy

The modern Russian political thought highlights the issue of the "national idea", the directions of development of Russia in the 21st century, the development of civil society, etc. The most topical are not the ideas of radical reformation of the society, but the projects of constructive social creation. Therefore, the topical task is to analyze, from the philosophical, historical-legal and political-scientific viewpoints, the establishment and evolution of constitutional conceptions in Russia, as well as their embodiment in the social reality. The recent reforms in the country elucidated the very fact of improbability of the blind imitation of the West European and American constitutional experience, without taking into account the Russian political traditions, the specific national-historical destiny of the Russian people and other peoples within such huge state formations as the Russian Empire and the USSR. The practical implementation of the individual freedoms guaranteed by the authorities, the development of political pluralism and religious tolerance, as well as the implementation of the key constitutional principles – division of powers, creation of the check-and-balance mechanisms, provision of decentralization and self-government on-site and integration of power within the federal state – all this requires dialectic scientific approach, combining the awareness of the specificity of the modern Russian social-political process and the ponderate study of the preceding philosophic-political tradition.

In this respect, it would be extremely relevant to analyze the history and traditions of the Russian liberal philosophy in general and its specific area – liberal conservatism. Alongside with the doctrines of such brilliant representatives of this area as K. D. Kavelin, B. N. Chicherin, P. B. Struve, especially significant is the social-political philosophy by Aleksadr Dmitriyevich Gradovskiy (1841–1889) – an outstanding jurist, historian and political philosopher, one of the brightest figures of the Russian intellectual life of the second half of the 19th century. As under the modern conditions the role of comparative research of the genesis and main stages of evolution of the Russian and West European liberalism increases, it should be noted that the name of A. D. Gradovskiy is associated with one of the most creative attempts of synthesis of the Russian and Western liberal traditions, which was manifested in the creation of unique liberal-conservative versions of the philosophy of history and the philosophy of law. The result of such synthesis was development of a fundamentally new conception of the Russian state reforms, which openly and purposefully opposed both the reactionary monarchism and various branches of revolutionary socialism. The conceptual heritage of Gradovskiy is one of the key areas of the Russian social doctrine, which concentrates the experience of forming a constitutional, rule-of-law state on the basis of the integrity of the powerful central authority and varied traditional and brand new forms of the people's self-government.

In the recent years, a lot of scientific, journalistic and fiction literature is published, which is devoted to the Russian historical past. The philosophic, sociological, political and historical-legal conceptions of the Russian thinkers are researched. The positive aspect of most works is their striving to find answers to the questions generated by the current development of the society and state. Also, these works touch upon the problem of sources and historiography of the Russian constitutionalism and liberalism.

While in the Soviet period (in particular, in the 1930–1950-s) the scientific literature was dominated by class approach to the analysis of ideological doctrines in the Russian social-political thought, later the situation started turning to the better. Since 1960-s, a new stage in studying the Russian liberalism begins.

There appeared interesting publications by N. A. Balasheva, N. I. Bochkarev, A. A. Galaktionov, V. D. Zor'kin, V. A. Kitayev, Ya. Ya. Kozhurin, V. A. Kuvakin, Sh. L. Levin, V. A. Malinin, B. G. Mogilnitskiy, P. F. Nikandrov, A. I. Novikov, N. A. Pirumova, V. N. Rozental, A. G. Slonimskiy, V. A. Tvardovskaya, A. N. Tsamutani, I. P. Chuyeva, V. P. Shkorinov, K. F. Shchatsillo and other authors.

The 1980–1990-s saw the rise of interest towards the theoretical heritage of the Russian philosophical and political-legal thought, which researched the issues of social and rule-of-law state, various conceptions of freedom and political fairness, including the liberal ones. The works by D. N. Alshitz, A. S. Akhiezer, V. P. Baluyev, Yu. A. Baskin, M. G. Vandalkovskaya, N. V. Gabidullina, K. S. Gadzhiev, P. P. Gaydenko, O. L. Gnatyuk, A. V. Gogolevskiy, I. G. Golosenko, I. B. Gradinar, V. G. Grafskiy, V. A. Gutorov, N. G. Dumova, A. A. Ermichev, A. N. Erygin, A. F. Zamaleyev, V. P. Zolotarev, V. D. Zor'kin, I. A. Isayev, Z. A. Kamenskiy, V. K. Kantor, B. G. Kapustin, A. A. Kara-Murza, V. Zh. Kelle, M. Ya. Kovalzon, I. Yu. Kozlikhin, V. V. Kozlovskiy, A. A. Korolkov, A. I. Koshelev, K. M. Kuntsevich, N. Ya. Kupritz, A. A. Levandovskiy, D. I. Lukovskaya, L. S. Mamut, A. N. Medushevskiy, V. M. Mezhuyev, V. S. Nersesyants, V. S. Nikonenko, A. I. Novikov, L. S. Novikova, I. D. Osipov, A. S. Panarin, I. K. Pantin, A. P. Panchenko, A. I. Patrushev, S. N. Pogodin, A. V. Polyakov, A. A. Popov, V. I. Prilenskiy, V. F. Pustarnakov, S. N. Pushkin, A. M. Salmin, S. S. Sekirinskiy, I. N. Sizemskaya, V. V. Sogrin, E. S. Tokareva, I. N. Khudushina, A. I. Ulyukayev, A. I. Utkin, T. M. Fadeyeva, V. G. Fedotova, E. Yu. Solovyev, S. A. Chibiryayev, V. I. Shamshurin, I. Shapiro, V. F. Shapovalov, L. E. Shaposhnikov, I. I. Sharifzhanov, V. M. Shevyrin, V. V. Shelokhayev, G. I. Shchetinina and other authors view the specific features and typological characteristics of the liberal thought, analyze the historical, sociological and philosophical features of the liberal world outlook, present a comparative analysis of the Russian and West European liberalism and the theory and practice of constitutionalism.

On this background, the research of the West European origins of A. D. Gradovskiy's legal theory is still rather incomplete. The analysis of his ideas and the role they played in the development of the Russian philosophy of politics and law is still topical.

Earlier, the author repeatedly emphasized that the liberal-conservative philosophy of A. D. Gradovskiy was in many of its aspects practice-oriented, due to his striving to elaborate a thoroughly substantiated conception of the further reforming in the imperial Russia. He was deeply convinced that the reforms could only be implemented successfully under the condition of developing an adequate legal system. At the same time, modernization of monarchical institutions would have been impossible without further systematization of the Russian law. The optimal basis for such modernization was the creative theoretical synthesis of the Russian law with West European legal ideas and concepts. Certainly, the fundamental change of the basic laws of the Russian Empire was not proposed; what was proposed is such theoretical synthesis which would have opened the immediate opportunity for the monarchy evolution towards forming a constitutional system.

The immediate examples of such evolution were Germany and France. In both countries, modernization of the legal system was associated, somehow or other, with the Roman law reviewing. In France, adoption of the Napoleonic Code in 1804 de jure consolidated the results of the revolution, which swept away the "old rule". The French legal system appeared to be equally suitable for both monarchic and republican regimes. Therefore, it was not by chance that, constantly analyzing the French philosophical, political and legal literature, Gradovskiy still prioritized the German version of the legal and political system modernization and, accordingly, the option of synthesizing the Roman legal tradition

with the German traditional law. In particular, out of all diverse areas of juridical thought, the largest influence on forming Gradovskiy's social philosophy (besides the direct influence of the Roman law tradition) was made, in our opinion, by those discussions which were going on in Germany between the proponents of Hegel's philosophy of law and historical school of law. Another important source is scientific anthropology and sociology (including the sociology of law, gradually segregating from the latter), which were still forming during his life period and preserved their links with the previous philosophic-legal tradition.

The monumental Roman legal system was a perpetual example for many generations of intellectuals, not only due to its perfect juridical formulas per se, but also because during many centuries it was a source for developing the European social and political. Having taken the conceptually fundamental legal ideas from the Greeks, the Romans, according to a Renaissance legal scholar, restored these ideas for themselves in the grand code of the 6th c[1]. The Roman-Byzantium Digest, and then the Institutes of Justinian were the culmination of the Greek philosophy impulses due to which the Roman philosophy of law developed. These collections ultimately consolidated and developed the fundamental difference between the private and public law, the idea of natural law as the highest standard of justice, and many other important elements of philosophy of law and jurisprudence. In this sense, the Justinian system was an ambitious project aimed at embodying the juridical ideal of the "genuine philosophy", including also the elements of a conception which in the 20th century was called "social engineering".

The principle of codification in the Roman law was based on the idea of legal thought evolution from the custom (*fas*) to law (*jus*), which ultimately merges with the custom. In the Roman law, the religious element always played an important role, which was further increased with the merging of the republican legal tradition with Christianity, during the Imperial epoch. The Justinian Code appeared to be the apex of the new "juridical religiousness", which included both the idea of a jurist as a priest of law, and the idea of God as a source of law. In compliance with the original intention of eth Imperial authorities, the Justinian Code was not only a dogmatic and terminological review of the old civil law (*juscivile*), but also the transcendent representation of the universal nature (*physis*), which served as a universal social basis for the Christian intelligence (*logos*) and its imperial embodiment. Merging of the Christian morale and social doctrines with the Greek-Roman tradition of order and political organization strengthened the tendency for systematization under the aegis of caesaropapism. For example, Emperor Constantine the Great, having recognized Christianity as official religion, preserving the pagan title of the supreme pontiff, thus uniting the tw merging traditions of the positive rule.

The central provision of the Justinian Pandects was a vast anthology of classical jurisprudence containing extracts from 39 classical Roman authors. Together with the Institutes, they constituted the sacred canon of the civil law, being both a peculiar monument to the Roman jurisprudence, an insurmountable model for all subsequent systems of the west European law, and the prototype of systematic social doctrine[2]. Probably the most radical difference of the Roman legal system from its later European versions was the

[1] F. Baudoin, Commentarius de legib. XII. tab. Tractatusuniversi (Venetia, 1584); A. M. Honoré, Tribonian (Ithaca, 1978); P. Collinet, Etudes historiques sur le droit de Justinien (Paris, 1912); G. Ladner, "Justinian's Theory of Law and the Renewal Ideology of the Leges Barbarorum". Images and Ideas of the Middle Ages, num II (1983): 609-628; H.F. Jolowicz, Roman Foundations of Modern Law (Oxford, 1957); M. Kaeser, Roman Private Law. Tr. Rolf Dannenburg (Durban, 1965) Y A. Berger, Encyclopedic Dictionary of Roman Law (Philadelphia, 1953).

[2] E. Lerminier, Philosophie du droit (Paris, 1831).

prohibition of any judicial and academic interpretations[3]. There were at least two motives underlying this ambitious prohibition: a) the emperor's will was considered, in compliance with the principle of absolute authority, as a single source of law; b) the social order was to be maintained and perpetually guaranteed by the "perfect" system of law. Thus, as it has been mentioned before, the new system of imperial law became a model for both a powerful authoritarian rule and a certain type of social engineering.

The rationality of the Justinian Code was, undoubtedly, a functional element of the Imperial ideology in the sense in which it could be formulated and perceived at that time. The basis of the empire was the military expansion, but in a broader sense the imperial power (*imperium*) implied the sovereign will of a monarch over both private and public life of the subjects. Imitating God, the emperor was considered the owner of all-mightiness, implemented through the authority of law regulating all things – human and divine. History almost froze, as the emperor's will not only suppressed all ancient legislation sources, including the senate power and the right of jurists to make independent decisions (*jusrespondendi*), but also excluded all contradictions (*antinomiae*) in the published legal texts. Sucj dogmatic viewpoint was confirmed by the specially organized system of juridical education, aimed at training the "new Justinians" Такая догматическая точка зрения подкреплялась и специально организованной системой юридического образования, направленной на подготовку "новых юстинианцев" (*novi Justiniani*) in the specially organized three emperor's schools in Constantinople, Beirut and Rome. This system, which further served as a model for juridical education in the West, also created the basis for perception of jurisprudence as "genuine philosophy" (*vera philosophia*), which had been propagated by Ulpian – one of the Roman law classical authors. The codes of law represented, in the opinion of many authors of the philosophy of law, "wisdom" and "practical art" at one and the same time, aimed at people's well-being, which depends on certain statements about different facts based on applying the principles of law to individual problems. In this sense, the canon of civil law created balance and played a mediation role between the juridical domains – practical and academic, historical and philosophical. The dialectics, inherent to the Roman law, expressed in its polar categories, led to identifying jurisprudence with genuine wisdom, to defining it as the "knowledge of the divine and human affairs"[4].

The intellectual context of the Roman-Byzantium jurisprudence, expressed in the "Digest", potentially included not only the further developed principles of juridical science, but also some elements of the tradition of the Western liberal education. Law, as the only (genuine) science, was based, from the philosophical viewpoint, on the Aristotle's difference between the practical and theoretical types of knowledge: it simultaneously required the comprehension of the idea of justice and its practical application to the human conditions. Also, law was supposed to combine the individual and the general, the private and the public spheres. If the individual is viewed as the starting point, the sequence of conceptual principles of the Roman law could be represented as expanding concentric circles. The most remote from the centre is the sphere of natural law, which Ulpian peculiarly (though contradictorily) defined as "what nature teaches all animals" (D.I, I, 3). The next sphere is "laws of peoples" (*jusgentium*), limited to the human race in the sense that people are perceived, within this theory, as a collectivity, a unity of rational beings. Further, the jurists began to identify this sphere with the so called "primary law of nature", viewed as the

[3] F. Pringsheim, Justinian's Prohibition of Commentaries to the Digest. Pringsheim F. Gesammelte Abhandlungen (Heidelberg, 1961).

[4] E. Rice, The Renaissance Idea of Wisdom (Cambridge (Mass), 1957).

expression of pure reason, differing from the "secondary law of nature". Still more narrow is the separate national law (*jusproprium*), originally perceived as Roman civil law, though later it comprised the legal statutes of other peoples as well (D.I, I,9).

It is also important that the Roman jurisprudence (at least, in its classical period) was independent both conceptually and professionally, and did not starve to be bound with the philological and philosophic standards. The notion of law was derived from the notion of justice (*jusajustitia*) and the authority of individual rules was based on law, not vice versa. The juridical interpretation differed from the philological, philosophical and theological ones its two fundamental aspects: first, the jurist were to acknowledge the changes of certain provisions of law on the assumption of its context, and, consequently, to recognize what was directly conditioned by the very juridical casus; second, being unable to avoid contacts with the world of "reality" and "action", jurisprudence was bound not as much by particular texts as by the problem of their effective interpretation. Since the Justinian code was based on the well-known triad by Gaius – all laws we use refer either to people, to "things", or to actions (*depersonis, derebus, deactionibus*), – the facto of human will always remained decisive in the Roman law. The individual will (*voluntas*) received its legal interpretation within the conception of liberty (*libertas*). Accordingly, the ruler's will was interpreted through the prism of the notions of power and authority, while the social stability depended on the balance between the private and public powers. A similar balance was to be maintained between the people's customs, embodying the "people's will", and the legislation, embodying the idea of law. Consequently, the conception of the integral order of law was also conditioned by the two poles of social change – from unwritten custom (*fas*) and habit (*consuetudo*) to formulation of law (*jus*), which included the various legislative reforms[5].

This polarity may have been best revealed in the well-known formula – "everything the emperor states has the power of law", as the sovereign's orders rely both on his supreme power (*majestas*), and on the indisputable fact that the people have entitled him with their own power and authority (D.I, 4, I). Later, this provision on delegating the power by the people to a monarch generated both the theory of monarchic absolutism and the concept of people's rule. Throughout the history of the Western social thought and political philosophy, this provision not only constantly stimulated the development of the authoritarian and democratic rule conceptions, but also spontaneously generated disputes on the correlation between the legislative, executive and judicial powers.

A similar stimulating role was played by the Roman theory of civil law, as within its frameworks the fundamental issues were posed, relating to human existence and guaranteed order of social life. Freedom and property, protected and expanded by legal action, were the cornerstones of the Roman law. Interpretation of these notions became the starting point of the Western social philosophy. This was further promoted by the exclusive complexity of the Roman social life, which generated the necessity to interpret multiple issues from the juridical point of view. Family law, status of women, slavery, position of foreigners, protection of rights, succession, testaments, inheritance, donation, etc. – all these sphere required elaboration of the relevant legal norms and prescriptions, referring to ownership and dominion, acquisition and transference, various limitation measures and punishments for crimes. Laws on obligations and liability, on contract making, of the forms of partnership and corporations, together with endless procedural discussions, always

[5] A. M. Honoré, Gaius (Oxford,1962).
D.R. Kelley, "Gaius Noster: Substructures of Western Social Thought". American Historical Review, num 84 (1979): 619-648.

served as unattainable standard for the subsequent generations of jurists and social philosophers, due to their scale and perfect elaboration. Having established the key terms and categories of social life and social activity, status of social classes and groups – from the poorest proletarians to the highest nobility, – having revealed and defined the various forms of social organization and conditions of their well-being (for example, the people's good, the public convenience, etc.), the Roman jurists, essentially, formed that very context, outside of which the development of the Western thought and culture in general appeared to be unthinkable and impossible.

The classical idea, according to which jurisprudence is the genuine philosophy, was perceived by the European legal scientist almost literally, regardless of the schools they belonged to: whether they were the proponents of the domain of the clerical power over the secular one ("the ultramontanes") or defenders of the idea of national state, scholiasts or humanists, theoreticians or practitioners. In the 16th century, the idea of scientific approach was promoted by the striving for reforms in studying law by combining the latter with various dialectic or systematic methods – from Aristotle categories to encyclopedic knowledge of the Italian humanists and the Protestant thinkers (for example, "new logic" of R. Agricola, Ph. Melanchton, and, especially, P. Ramus, based on the unity of logic and rhetoric)[6]. The purpose of such "methodologization" was, first of all, pedagogical, but it also promoted the opinion about the scientific and practical character of jurisprudence and the conviction, traditional from the Roman times, that it is the supreme form of wisdom. The use of the logic methods generated the new direction in interpreting the juridical texts, beginning from the work by K. Rogerius "On interpretation of law" (1463) up to the "New method of interpretation of law in jurisprudence" by Leibnitz (1667).

Starting from the Renaissance period, the nascent social studies, besides striving for encyclopedic character, adopts the principle of interaction between theory and practice as one of the most important scientific criteria. Law was viewed as a "science", because it was universal; within its frameworks all things were interpreted in terms of their causes, bases and consequences. As a result, jurisprudence claimed its dominance over not only medicine, but also philosophy and theology. At the same time, law was viewed as art, which depends on the ability of a person to judge, and is determined by the society's striving for the common good[7]. By the middle of the 17th century, the above ideas were dominating in West Europe. "Jurisprudence", Leibnitz wrote, "has evolved to occupy the throne of wisdom"[8].

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[6] R. Stintzing, Geschichte der deutschen Rechtswissenschaft (Bd. I. Muenchen, 1880); N. W. Gilbert, Concepts of Methods in the Renaissance (New York, 1960); Th. Vieweg, Topik und Jurisprudenz (München, 1969); K. Luig, "Institutionen-Lehrbuchen des nationalen Rechts in 17 und 18 Jahrhundert". Jus Commune, num 3 (1979): 64-97; Hrsg von J. Bluehdorn & J. Ritter, Frankfurt Philosophie und Rechtswissenschaft (1969) y F. Ebrard "Über Methoden, Systeme, Dogmen in der Geschichte des Privatsrechts". ZeitschriftfuersweizerischesRecht, num 67 (1948): 95-136.

[7] O. Gierke, Natural Law and the Theory of Society. tr. by Ernest Barker. (Cambridge, 1934); C. von Kaltenborn, Die Vorlaeufer des Hugo Grotius (Leipzig, 1848); O.W. Krause, Naturrechtler des sechzehnten Jahrhunderts (Frankfurt, 1982); H. Medick, Naturzustand und Naturgeschichte der bürgerlichen Gesellschaft (Göttingen, 1973); E. Reibstein, Volkerrecht: Eine Geschichte seiner Idee in Lehre und Praxis (Muenchen, 1957); Hrsg Michael von Stolleis, Staatsdenkerim 17 und 18 Jahrhundert (Frankfurt, 1977); R. Tuck, Natural Right Theories (Cambridge, 1979) y E. Wolf, Das Problem der Naturrechtlehre (Karlsruhe, 1964)

[8] G. W. Leibniz, Sammtliche Schriften und Briefe. VI (I) - S. 233 (Berlin, 1923); H.-P. Schneider, Leibniz' Bedeutung für die Gesetzgebung (Freiburg, 1941); F. Sturm, Das roemische Recht in der Sicht von Gottfried Wilhelm Leibniz (Tuebingen, 1968) y H. Stehle, Der Rechts gedanke im politischen Weltbild von Leibniz (Frankfurt, 1950).

The key to understanding this trend was the old and new natural law, which was formulated rather diversely during many centuries in the Greek philosophy, Roman jurisprudence, Thomistic theology, humanistic learning, and which was transformed and facilitated by "new science" and mathematical philosophy of the 17th century. The bases of the modern natural law were laid by the so called "second scholastics" of the Spanish theologians such as F. de Vitoria and F. Suarez, philosophical jurists, such as J. Oldendorp, J. Coras and A. Gentili, not to mention J. Bodin and J. Althusius. Its structure was determined by racism and Protestant neo-Aristotelianism[9]. In the 17th century, the key theoreticians of natural law were H. Grotius, S. Pufendorf, J. Selden, Th. Hobbes, Leibnitz and J. Doma.

Alongside with that, the natural law school already contained a trend, which, gradually strengthening throughout the 18th century, became determinative in the 19th century. This trend is historical jurisprudence, which paid great attention to the specific environment where various legal systems and conceptions were formed. As early as Bodin and Grotius formulated the following idea: history is not only relevant to the philosophy of law; it is the very sphere in which law appeared and should be appropriately interpreted.

In the works by A. D. Gradovskiy, who belonged to this school of juridical theory, alongside with repeated mentions of the early classics, the greatest attention is paid to the philosophy of law by Montesquieu, in whose book "On the Spirit of the Laws" the analysis of law in its historical context acquires the form of a comprehensively elaborated conception. Certainly, despite the above-mentioned new trends in the interpretation of law, Montesquieu still in many aspects oriented his discussion on the nature of law towards the old tradition of commenting adopted by the Roman jurists. Montesquieu's book starts with general definitions, properly corresponding to the section of The Digest titled "On law and justice". Then it views the main forms of government and their various modifications, from which he gradually passes on to various forms of human relations (included, first of all, into the sphere of legal regulation which the Romans called *juscommercii*, i.e. "commercial law"), and then to the status of a personality (freedom and slavery), family and right of succession[10]. In the course of research, he lavishly cites not only the Roman jurists but also their later commentators and even the extracts from Ulpian, discovered in the 16th century. In a more fundamental sense, Montesquieu developed the tradition of juridical comparative studies, the origins of which also date back to the Roman jurists, who were the first to face the problem of the "conflict of laws" in both theoretical and practical sense, for example, a written law and a custom, a secular and an ecclesiastical law.

One of the main aspects of Montesquieu's juridical theory was the analysis of the old concept of a custom. A significant part of his book was devoted to the evolution of social life and customs in France since barbarian times till more enlightened periods. For him, each of the barbarian customs had its own "spirit", corresponding to the natural foundations and factors. In particular, the spirit of the French law was most vividly expressed in those laws which suddenly appeared all over Europe and brought, according to Montesquieu, endless good and endless harm. In his encyclopedic work, permeated with historical approach and

[9] P. Peterson, Geschichte der aristotelischen Philosophieim Protestantischen Deutschland (Leipzig, 1921); H. Drietzel, Protestantisches Aristotelismus und absolutes Staat: die Politica des H. Arnisaeus (Wiesbaden, 1970) y H. Rommen, Die ewige Wiedekehr des Naturrechts (München, 1947).

[10] R. Aron, Stages of development of sociological thought (Moscow, 1993); E. Ehrlich, "Montesquieu and Sociological Jurisprudence", Harvard Law Review, num 29 (1915–1916): 582-600; E. Fournol, Bodinprédécesseure de Montesquieu (Paris, 1986) ; M. Huilling, Montesquieu and the Old Regime (Berkeley, 1976); M.H. Waddicor, Montesquieu and the Philosophy of Natural Law (The Hague, 1970) y S. Goyard-Fabre, La philosophie du droit de Montesquieu (Paris, 1973).

theoretical reflection, the idea of a custom becomes a category of social philosophy. Montesquieu did not share the common enthusiasm about the legislative reform. He considered any kind of social engineering to be a prologue to a new form of despotism. For him, improvement of social conditions was, undoubtedly, impossible without enlightenment and intelligence, but he also thought that the "spirit of laws" determines the conditions and limits of any enlightened reform. Therefore, the main goal of law-making is to follow the spirit of the nation, the features of its genius, and those national dispositions which would protect its freedom better than any legislator. The habits and customs cannot be changed by laws, they rather change by themselves in the course of historical development. Experience and education, as well as intelligence, should be aimed at adjusting the laws and institutions of a nation to its customs. That was the main lesson, which Gradovskiy took from Montesquieu's heritage, repeatedly insisting, upon him, that the laws can be understood correctly only in the historical and geographical contexts determining the life of a particular nation. It is from Montesquieu that he borrowed the idea fundamental for his doctrine – that philosophical interpretation of a society cannot be limited to the sphere of law or literature texts: it should strive to comprehend the spirit of the nation, its self-consciousness.

As it has been noted above, interpretation of jurisprudence as "genuine philosophy" has always had both the theoretical and the practical aspects. During the Enlightenment epoch, the practical aspect gradually started to go to the foreground, first of all, in the form of an intellectual movement aimed at codification of law. In the 18th century this movement reached its apex, putting forward the following fundamental issue – is it possible to formulate the customs and traditions of a nation, reflecting its national spirit, in the form of a published legal code? Can the Justinian's Code be reformulated in such a way that it reflects the social and national differences characteristic of modern Europe? The most enlightened answer to this question was, certainly, the positive one. Its result was the gradual transition from jurisprudence to legislation, from the "will" of people to the will of government.

The idea of a "code" is, in a certain sense, the leading metaphor of the social philosophy of the Enlightenment. In 1756, Morelly in his famous work "The Code of Nature" proposed a draft code, corresponding, in his opinion, both the nature and the "genuine spirit of laws"[11]. In the historical aspect, the idea of the code was a peculiar transformation of the concept of positive law. The rule of rationalism in the jurisprudence of that time led to identification of codification with the ideal of natural law. The origins of the idea of codification of law were not limited to the philosophical approach and its influence on the public policy. For example, in France the complaints about the vagueness, contradictions, unfairness of laws and misuse due to their incorrect interpretation appeared two centuries before the Revolution. As early as in 1546, a French jurist Ch. Dumoulin in his "Speech on the concordance and unity of customs in France", which later was perceived as a prophetical document and a manifesto of the new reformatory school, wrote, "Nothing can be more laudable and useful in any state than bringing all, extremely vague and often absurdly differing from each other, customs … to an integral brief, most clear and just concordance"[12].

The crucial impulse to codification was made by the French Revolution, which immediately after its victory was identified with "the triumph of philosophy". Its essence was in radical breakup with the past in general and the traditional law in particular. As early as in the first months after ruining the feudal regime, the elaboration of the draft Constitution,

[11] M. Duchet, Anthropologie et histoire au siècle des lumières (Paris, 1971).
[12] Ch. Dumoulin, Oratio de concordia et union e consuetudinarium Franciae. Dumoulin Ch. Tractatus commerciorum (Paris, 1546).

adopted in 1791, was going on under the slogan of creating the cardinally "new juridical order"[13]. This issue was ardently discussed at the meetings of "a committee on feudalism", and the speakers used mainly the natural law terminology. During these debates, the issue of confrontation of the legislative and judicial powers was extremely sharpened. The most radical position was formulated in the slogans of a left wing representative in the National Assembly A. Duport, who developed the relevant ideas by Rousseau – "No more courts!", "No more judges!". The essence of his arguments was that implementing justice is a purely logical process. Under democratic regime, laws are no longer shroud in mystery, guided by privileged experts; the laws are "socially determined" and can be applied to any citizen. And though these proposals were rejected (including by Robespierre)[14], they fully corresponded to the widely spread conceptions and opinions, for example, of such people as J. Bentham – the founder of the philosophy of utilitarianism, or Napoleon Bonaparte, who dreamt of a state without lawyers[15]. Similar proposals arose during discussion of the new code of laws. Thus, J.-J. R. de Cambacérès, who occupied one of the top state positions under Napoleon, thrice (1793, 1794 and 1797) submitted drafts of such code[16]. Having appeared during Jacobin euphoria, these drafts finally prepared the adoption of the Napoleonic Code, called "The Civil Code", in 1804.

Initially called "The Code of the French people", his collection of laws expressed in its official rhetoric the hopes for creating the legal norms deduced from pure reason and "natural law". The goal of the new legislation was to "improve" and "foresee" absolutely everything. Such approach fully corresponded to the ambitions of the "first consul" Napoleon who, preparing to announce himself an Emperor, strived to play the role of new Diocletian. Also, an important fact should be taken into account that during the preparatory work for adopting the new code, new terminology was formed, which later became one of the constituent parts of jurisprudence and other social sciences. In the work "Dissertation on social science" written in 1799, Cambacérès, continuing to view jurisprudence as "genuine philosophy", attributes a completely new sense to the latter. For him, he science of society should include moral philosophy, political economy and legislation, united for the main goal – "to improve the social relations" (de perfectionner les relations sociales)[17].

In general, one may come to the logical conclusion that in the course of political and constitutional debate the European legal tradition was transformed on the basis of the natural law concept, Enlightenment ideals and revolutionary practice, developed in the spirit of the times. As a result, by the beginning of the 19th century, the new "philosophic school" appears on the basis of natural-law theories. The representatives of the school, using the simplified concepts of human psychology and social relations, abstractly analyzing the issues of freedom, property, contract, etc, tended to completely substitute the historical approach for the models of social order and regulation, borrowed from the natural sciences.

[13] J.C.Q. Mackreel, The Attack on "Feudalism" in Eighteenth-Century France (London, 1973) y Ph. Sagnac, La Législation civile de la revolution française, 1789-1804: Essai d' histoire sociale (Paris, 1898).

[14] M. Fitzsimmons, Dissolution and Disillusionment: The Partisan Order of Barristers, 1789-1815 (Cambridge (Mass.),1987).

[15] J. Bentham, Draft of a new plan for the organization of the Judicial Establishment in France (n.p. 21 Dec. 1789).

[16] F. Papillard, Cambacérès (Paris, 1961)

[17] M. Leroy, Histoire des idées sociales en France. II (Paris, 1950) y G. Gusdorf, Les sciences humaines et la pensée occidentale. VIII. La Conscience révolutionnaire: Les Idéologues (Paris, 1978)

Alongside with that, the massive disillusionment about the previous ideals, growing after the defeat of the Revolution, prepared the grounds for a completely different philosophical-historical approach to the interpretation of the nature of law.

The new approach originated in Germany freed from the Napoleonic yoke. For A. D. Gradovskiy – a historian of the Russian law and a publicist, who, as was mentioned above, sympathized with the principles of the Prussian codes adopted in the end of the 18th – beginning of the 19th centuries, – all nuances of theoretical discussions, which appeared at that time in Germany and spread all over Europe, were, undoubtedly, of great importance. Surely, he knew about the philosophical disputes between the followers of the founder of the "historical school of law" K.F. Savigny and of the G.W.F. Hegel's philosophical system at Berlin university, which facilitated the division of the Hegelians into "right" and "left" ones. "War looks fascinating", wrote E. Lerminier, one of the French disciples of Savigny, "…Those belonging to the historical school beware of philosophy… Those in the philosophical camp look down with pity at purely historical jurists"[18].

The works by the school founders – G. Hugo from University of Gottingen and K. F. Savigny – Hegel's rival at Berlin University – gave a comprehensive critique of various rationalistic theories of law, oriented towards the philosophical ideas of the Enlightenment[19].

Putting forward the provision that the foundations of jurisprudence must be "positive" and "historical", not rationalistic and "metaphysical", Hugo oriented both towards Kant's critique of "old philosophy" (including on the issue of natural law), and towards the methodology of Hume, who rejected the metaphysical strivings of the natural-law theory for custom, "common opinion", which was the preferable position "in all issues related to morals, as well as with critique"[20]. Thus, the revolutionary idealism of the natural law theoreticians with their belief in the limitless capabilities of a human to change the existing relations on the basis of reason was contrasted with the conservative "juridical anthropology" of the German juridical school, hose representatives tried, from the new heuristic positions, to view the old philosophical dilemma of nature and history, including the relations between instinct and civilization, reason and practical judgments.

Hugo's system, which he called the "philosophy of positive law", was, in outward appearance, aimed at accommodation of contradictions, traditional in the European thought, between "the divine" and "the human", nature and law. This "positive", or "realistic" approach to the issue of law appeared, according to Hugo, in the Ancient Greek theory of the origins of law, elaborated by the sophist, as well as by Plato in his doctrine on the properties and objectives of laws, which later became an object of thorough investigation by the Roman jurists and the Medieval legal thought. Of the modern period thinkers, the greatest influence on the formation of the historical school of law was made by Bodin and Montesquieu, who as early as in the 19th century were viewed as the founders of historical jurisprudence and later – of the sociology of law as well. This line of evolution did not comprise such "opponents of positive law" (*Gegner des positives Rechts*) as philosophers-enlighteners (i), "physiocrats and economists", as well as "communists" – Rousseau, Diderot, Mably and "many others"[21].

[18] E. Lerminier, Introduction générale à l'histoire du droit (Paris, 1830)
[19] Hrsg. von Hans Erich. Bödeker, Aufklärung und Geschichte (Göttingen, 1986) y P.H. Reill, The German Enlightenment and the Rise of Historicism (Berkeley, 1975).
[20] G. Hugo, Lehrbuch des Naturrechts (Berlin, 1819).
[21] G. Hugo, Lehrbuch des Naturrechts (Berlin, 1819)

From the standpoint of contemporary experience and new critical philosophy, Hugo made an attempt to elaborate the new "encyclopedia of law" by stating and solving three fundamental questions: what legality is (*Rechtens*) (dogmatic aspect); whether legality is concordant with reason (philosophical and rational basis of law in its correlation with the problem of conditionality of natural law); how it appears and what the problem of historical evolution of law turns into[22].

Hence, Hugo's "juridical anthropology" was a sui generis "pre-knowledge" (*Vorkenntniss*), i.e. the prerequisite basis for the historical and philosophic interpretation of various legal systems, in this aspect anticipating the philosophical hermeneutics of consciousness, elaborated by Gadamer and Heidegger[23].

This tradition of critique of rationalistic philosophical and legal theories was continued in a much larger scale by K. Savigny, starting from his famous manifesto "On calling our time to legislation and legal studies" (1814), which immediately made its author the head of the historical school.

The direct reason for creating this manifesto was the publication of the work by Heidelberg professor A.F.J. Thibaut "On the necessity of a general civil law for Germany"[24], in which he developed the ideas of a patriarch of Heidelberg school S. Pufendorf. Partially recognizing the main postulate of the historical school about the law as the manifestation of the "people's spirit" (*Volksgeist*), Thibaut proved that the contemporary civil law goes beyond the limits of the old German traditions, determined not only by time and place, but also by numerous distortions, responsible for which is not the people but the generations of the German jurists. Law must be deprived of the distortions and completed within a single German Code. Without this prerequisite, all calls by Savigny and his followers from "the so called historical school of law" (*sogenannte historische Rechtsschule*) for revival sound groundless and unsubstantiated[25].

Objecting to Thibaut, Savigny rejected the not always groundless, in our opinion, reproach with reactionary attitudes, consisting, as a rule, in the fundamental provision of historical school about the unconscious development of law, refuting the free creativity of a human personality in its formation[26]. According to Savigny, the uncritical merging of the main foundations – natural law, Roman law, customs and precedents, "traditional law" and "general principles" – in the Napoleonic Code (1804) by its compilers[27] led to the creation of a completely arbitrary construction, which, being transferred to the German ground, eroded it "like cancer", promoting the implementation of the Napoleonic imperial plans. Savigny denied that he was "under the power of the past", insisting on the creative perception of the German legal tradition (*usus modernus Pandectarum*) and "modern Roman law"[28].

[22] D.R. Kelley, The Human Measure. Social Thought in the Western Legal Tradition (London, 1990).
[23] D.R. Kelley, The Human Measure. Social Thought in the Western Legal Tradition (London, 1990).
[24] A.F.J. Thibaut, Über die Nothwendigkeit einer allgemeinen bürgerlichen Rechts für Deutschland (Heidelberg, 1814)
[25] J. Stern, Thibaut und Savigny (Darmstadt, 1959) y D.R. Kelley, The Human Measure. Social Thought in the Western Legal Tradition (London, 1990).
[26] E.N. Trubetskoy, Encyclopedia of law (Kiev, 1901).
[27] J. Stern, Thibaut und Savigny (Darmstadt, 1959) y Montesquieu Ш. Selected works (Moscow, 1955).
[28] K.F. von Savigny, System des heutigen römischen Rechts. I, XIV (Berlin, 1940).

In this sense, in the opinion of Savigny, the goals of national revival were best met by the Prussian code of 1792, which comprised the local traditions and customs of the German people. It is in this sense that law expresses the people's spirit, which has little in common with its philosophical interpretation by Herder and Hegel[29].

Thus, Savigny's conservatism was rather enlightened. His image as a conservative of irrational trend appeared mainly under the influence of sharp criticism of his ideas by another prominent scholar of historical school in jurisprudence – R. Jhering[30].

In the 19th century, the West European jurisprudence still did not abandon their imperial claims for the status of the "genuine philosophy" as the basis of the true social science. From the middle of the 18th century up to the first quarter of the 19th century, juridical encyclopedias were being published, which substantiated this claim[31]. In general, the juridical encyclopedias had a number of common features with philosophical systems, including Hegel's system, which also claimed for encyclopedic status. An essential difference was, however, the traditional link, which the juridical encyclopedias preserved with the traditional trends of social thought, with all their contradictions and ideological orientations.

On this background, the conception of the German historical school of law actually was seen as a "great breakthrough". This school, as was mentioned above, was as much a post-revolutionary, as an anti-revolutionary phenomenon. Its ideas, presented by Savigny, rapidly spread all over Western Europe. For Savigny, the "positive law" was a product of history, while it subject is people. Such position was neither sentimental nor idealistic. In fundamental sense, Savigny's doctrine was both the apology of the dominance of law against the monarchs' claims, and the protection of the scientific principles against various "philosophical" approaches to interpretation of law. Unlike Savigny, Hegel continued vindicating the traditional idea, according to which law is a constituent part of moral philosophy. Uniting the practical reason and the philosophical anthropology, Hegel in his philosophy of law decidedly opposed the claims for monopoly in European jurisprudence of those jurists who considered it to be a structural element of a larger heritage of the European philosophy and on these grounds considered themselves entitled to exploit the old philosophical tradition.

A notable feature of Hegel's philosophy of law and philosophy of politics was the deep understanding of social determinacy of all form of social consciousness. The unity of the philosophical and the social is best revealed in the famous Hegel's aphorism – everything that is reasonable is actual, and everything actual is reasonable. The ardor for the social was generally characteristic for the post-Revolutionary Europe, but never before Fichte and Hegel there were so many systematic attempts to investigate interaction between spirit and society (*Geist und Gesellschaft*). Partially, Hegel owed the appearance of this trend in his philosophy to the heritage of Scottish enlightenment, in particular, political economy and moral philosophy by A. Smith[32].

[29] Mannheim, K., Conservatism: A Contribution to the Sociology of Knowledge. Ed. by D. Kettler, V. Meja, and N. Stehr (London, 1986).
[30] E.N. Trubetskoy, Encyclopedia of law (Kiev, 1901).
[31] U. Dierse, Encyklopaedie: Zur Geschichte eines philosophischen und wissenschafts theoretischen Begriff (Bonn, 1977).
[32] Hegels, Philosophie des Rechts: Die Theorie der Rechtsformen und ihre Logik (Stuttgart, 1982) ; H. Marcuse, Reason and Revolution: Hegel and the Rise of Social Theory (Boston, 1960) y V.S. Harris, Hegel's Development toward the Sunlight, 1770-1801 (Oxford, 1972).

This aspect of Hegel's philosophy is usually viewed (either in the benevolent or, on the contrary, sharply critical way) as anticipation of the Marxist doctrine. The radical difference of Marxism from Hegel's approach lies in the fact that Marx, starting from the Hegel's social philosophy, later almost completely ignored his ethical and anthropological ideas.

In his interpretation of the preceding tradition of jurisprudence, Hegel views law in its "positive" and historical aspects, perceiving "natural law" as manifestation of purely philosophical viewpoint. It is significant that he strived to achieving the truly philosophical synthesis of the positive and natural law, considering their contrasting to be incorrect. At the same time, Hegel sharply criticized the principles of the Roman law and its late interpreters, for example, such as Hugo. Recollecting the famous formula of the Roman jurists – "any definition is dangerous", Hegel thought that they, for the corporate professional reasons, tended to the system of abstractions having no grounds in either philosophy or history. He thought that it was just unwise on the part of Hugo to praise the rational character of the Roman law, likening its categories and "trichotomies" to Kant's categories. Finally, Hegel's contribution to the dispute between the philosophical and historical schools, which was initiated by Thibaut and Savigny, was that the very basis of this dispute was transferred from the professional natural-law basis to the true philosophical formulations and, first of all, to the definition of absolute idea of law.

In a certain sense, Hegel recognized that the sources of dialectic formulas were hidden in the very nature of civil law, including that type of it which was shaped in The Digest and, especially, The Institutes of Justinian. First of all, civil law is anthropocentric and, consequently, subjective. Its basis is "conscious existence". Hegel also did not reject the "trichotomy" of the Roman jurisprudence, expressed in dividing the categories into three part – person, thing, action (*persona, res, actio*). In certain sense, he even strengthened the line of argumentation characteristic for the Roman law, insisting on the meanings of "will" and "freedom of will". According to Hegel, law itself has "will", or spiritual sense, as well as the subjects of law. The second constituent element of the "legal trinity" – a thing, i.e. the reality, is the natural and necessary objective of the free personality, its egoistic "Self". The subject of law needs an object for self-realization – that is, personal freedom. The category of reality is another characteristic of the social existence, that external environment where the subject penetrates with the help of the third element of the "legal trinity" – an action. Moving along this path of restoring the fundamental structure of law by its dynamic interpretation, Hegel comes to the formulation of the first and most direct stage of the social action from the positions of the most fundamental social unit – a self-determining personality.

But while Hegel defines freedom as a social amalgamation of a subject and an object, called property, then its opposition is represented by another juridical term – alienation, to which the philosopher attributes a completely new meaning[33]. From the free, entitled with right personality, the human essence rushes in concentric circles outwards – to the family, "civil society" and the state-nation, which represent the human and material expression of the Idea. Hegel, undoubtedly, philosophically restored the traditional difference between the private and public spheres of activity. The nation (people) includes and controls a free individual in the same way, as the public sphere (*res publica*) includes and controls a private

L. Dickey, Religion, Economics, and the Politics of Spirit, 1770-1807 (Cambridge, 1987) y N. Waswek, The Scottish Enlightenment and Hegel's Account of «Civil Society» (Dordrecht, 1988).

[33] B. Ollman, Alienation: Marx' Conception of Man in Capitalist Society (Cambridge, 1971) y J. Israel, Alienation: From Marx to Modern Sociology (Boston, 1971).

person and a private sphere of life activity (*res privata*). Hegel's critique of the historical school of law was further developed by E. Gans, and then by one of the former disciples of the latter – K. Marx. One of the most fundamental objections of the latter against Hugo and Savigny was that they attributed too much rationality to the Roman law, thus mixing the issue of will with the issue of reason, the issue of the origin of law with the issue of its legitimization, finally recognizing the priority of the positive law over philosophy.

Still, Hegel took a lot from the legal tradition and even expanded it in philosophical aspect, separating it from its professional context. Moving along this path, he transformed the process of evolution of the philosophy of law, as well as of moral and political philosophy. "…The truth about law, moral, state", he wrote, "is as old as it was openly given in public laws, public moral, religion, and is commonly known. What else does this truth need, as the thinking spirit is not satisfied with the possession of it in such way most available for it, if not being comprehended, and the content reasonable as it is being given a reasonable form…"[34]. In his philosophical treatment of human experience, Hegel placed law at the service of encyclopedic system, which facilitated intrusion of philosophy into the world of social action and historical development, putting an end to the claims of jurisprudence for being the main social science.

In our previous research we repeatedly attempted to assert what role Hegel's philosophy of law (as well as Fichte) played in forming the conception of the national spirit, based on an independent and self-determining personality, in Gradovskiy's philosophy. Also, Hegel's philosophy had a no less influence on Gradovskiy's theory of evolution of the Russian law and political institutions. Special dynamics to this theory was added by Gradovskiy's synthesis of the German philosophical and juridical tradition with the new trends in historical anthropology and sociology.

Among the new trends in anthropology, Gradovskiy thought to be most promising that unity of the method of research of the ancient people's mode of life, inherent to the newly arisen ethnology, with the new methodology of historical research, which was presented in the works by an English scholar H.J.S. Maine[35]. Like Savigny, Maine predominantly strove for reconciliation (intellectual and practical) of the society and law. At the same time, he rejected the utilitarian interpretation of law (J.Bentham and J. Austin) as mere disposal and obligation, as it was completely inapplicable to the early periods of history, when law had rather the character of a custom or "habit". For Maine, the significance of the research object in his work "Ancient Law" was not only that "the European nations embedded the splinters of the Roman law into their walls", but also that the Roman law "of all known human institutions had the longest history…; from the very beginning up to the end it progressively transformed to the better"[36]. In other words, it was the ideal model for both historical comprehension and social improvement. Alongside with comparative jurisprudence and comparative mythology, the Roman law opened ways to studying peoples in their natural state.

[34] G. W. F. Hegel, Philosophy of law (Moscow, 1990).
[35] H. S. Maine, Ancient Law. 10th ed. (London, 1924); H. S. Maine, Lectures on the Early History of Institutions (New York, 1975); H. S. Maine, Dissertations on Early Law and Customs (New York, 1886); L. W. Burrow, Evolution and Society: A Study of Victorian Social Theory (Cambridge, 1966) y P. Grossi, An Alternative to Private Property: Collective Property in the Juridical Consciousness of the Nineteenth Century. Tr. by L. Cochrane (Chicago, 1981).
[36] H.S. Maine, Ancient Law. 10th ed. (London, 1924).

Just as other worshippers of the historical school of law, Maine tended to the ideas of primitive communism, which in the ancient epochs was illustrated by a rural community and the belief that the ancient law knew almost nothing of individuality, while the categories of "a person" and "a thing" are hardly distinguished. As one of his recent biographers wrote, Maine "used the Roman law to breathe new life into the old truths"[37]. The same path was followed by some representatives of sociology, thriving in the second half of the 19th century[38]. Certainly, this science was also not free from simplified scientism, formed under the influence of Darwinism, which generated in its representatives (as earlier in jurists) "imperial dreams" of measuring and directly controlling the society. Just as the old jurisprudence, sociology claimed for the status of a science, basing on the idea of its own universality, while preserving many elements of juridical terminology and ways of thinking.

Similarly to the anthropologists' approach to the notion of "culture", sociologists viewed "society" their key abstraction, striving, by L. Ward, to find its "real laws" and not paying attention to the principles of historical changes and variability. This trend is apparent even in the most prominent representatives of this school, such as L. Stein, who started his career as a lawyer but further, like Marx and Proudhon, came to the conviction of the priority of economic order and, first of all, property. Following Hegel and rejecting "common will" as a synonym of state, Stein elaborated "the conception of a society and its dynamic laws"[39].

Propagating the fundamental difference between the political and the social, the state and the society, the sociologists as early as in the 19th century could not but realize that the conception of a society had always been contradictory, being divided by the principles of the economic and the proper social organization, the society and the market. This ambivalence was clearly expressed by Maine, who distinguished the notions of "status" and "contract", as well as by F. Toennies in his well-known distinction between society (*Gesellschaft*) and community (*Gemeinschaft*). Such distinctions were made absolutely consciously. This is substantiated by Toennies's distinction between property and ownership: the former is characteristic of a society, the latter – of a community[40]. Actually, when elaborating his sociological conception, Toennies started from the critique of the extremities of the juridical traditions – on the one hand, abstract naturalism of Hobbes, on the other hand – conservative views of the historical school of law. Nevertheless, he, in general, supported the idea, developed within this school, of a custom as an expression of "the people's will".

In conclusion, it should be noted that in Gradovskiy's social philosophy all these aspects of new anthropology and new sociological methods were developed in a specific way. He, undoubtedly, believed that the juridical tradition can be viewed as a model of social knowledge, within the frameworks of which the notions and conceptions should be comprehended in the system of law per se. for him, the notion of "a custom" was inseparable from the social and cultural contexts and, first of all, from the specific social interests. Gradovskiy developed the same conception, originating from Montesquieu, which had placed the name of this remarkable French scholar among the founders of the modern sociological knowledge. Following the path of Montesquieu, Gradovskiy in his philosophy

[37] G. Feaver, From Status to Contract: A Biography of Sir Henry Summer Maine, 1827-1888 (London, 1969).

[38] R. Nisbet, Sociological Tradition (New York, 1966) y A. Mitzman, Sociology and Estrangement: Three Sociologists of Imperial Germany (New York, 1973).

[39] L. von Stein, The History of the Social Movement in France, 1789-1850 (Totowa, N.J. 1964).

[40] F. Toennies, Community and Association (London, 1965); F. Toennies, On Sociology: Pure, Applied, and Empirical (Chicago, 1971); F. Toennies, Custom: An Essay on Social Codes (New York, 1961) y F. Toennies, On Social Ideas and Ideologies (New York, 1974).

successfully escaped the pitfall, into which the scholars of subsequent generations often fell, incurring sharp critique. The essence of this pitfall is that their conception of law was just a kind of "juridical ideology" as a form of false consciousness[41].

Thus, the research of evolution of the German and French political institutions towards creation of constitutional order, on the one hand, and the comparative analysis of these trends and their Russian analogies during the reform period of 1861, on the other hand, allowed A. D. Gradovskiy to combine the liberal values with the traditions of the Russian state life, the new experience of reforms with the West European experience, which will always have the perpetual significance.

The unceasing ideological confrontation, based on selecting the path of further development of the social-economic reforms, forces to constantly turn to the recent historical epochs, when the ideological confrontation was not less sharp than today. At the same time, the current situation is, in a certain sense, unprecedented, as it constantly generates the specific effect of an ideological "black hole" – abundance of programs and slogans propagated by political parties and groups seemingly has no grounds. Therefore, under extreme dispersion of the social consciousness, the orientation towards the creation of a liberal society by Western models, proclaimed by the new Russian political elite, is not supported by the striving to ideological synthesis of liberal-conservative and socialistic traditions, which is very characteristic of the West Europe today.

In our opinion, the features of the current ideological situation in Russia originate in that very period when the conservative, liberal and socialistic philosophical-political conceptions appeared and entered into an uncompromising controversy with each other. While the Russian conservatism sought to substantiate, in a new way, the original principles of the Russian social life and monarchic statehood, the Russian liberal thinkers, like, for example, A. D. Gradovskiy, not only creatively appropriated the achievements of the European science and culture, but also elaborated the Russian variant of the constitutional law-governed state. At the same time, both trends sharply polemized with the radical versions of the Russian socialism, the philosophy and policy of which was aimed at complete disintegration with the existing social traditions.

The method of creative theoretical analysis, synthesis and comparison of forming the legal system of Germany and France with the Russian reality, implemented by Gradovskiy, has a permanent significance for determining the modern strategy of reforming the Russian society.

The theoretical provisions and conclusions of the research can be used for further studies of the history of the Russian social consciousness, in general, and the Russian liberalism, in particular. The materials and results of the research can be used in educational and special courses on social philosophy, history of political and juridical thought (in particular, history of the Russian social-political thought of the second half of the 19th century), and for elaborating the prospective development programs of the Russian society in the 21st century. Presumably, the theoretical provisions and result reflected in the article will be useful for further research of the life and ideological heritage of A. D. Gradovskiy.

[41] K. Mannheim, Ideology and utopia. Diagnosis of our time (Moscow, 1994); C. Loader, The Intellectual Development of Karl Mannheim (Cambridge, 1985) y V. Meja, Stehr N. hrsg. Der Streitueber die Wissensoziologie (Frankfurt, 1981).

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