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Jarmila CHOVANCOVÁ*

O.W. Holmes and his "The Path of the Law"

Introduction

At defining the concept of law, it becomes obvious that Holmes was a judge by profession. Under the term law he understands a summary of knowledge concerning legal claims enforceable before the court[1]. In each society there exists a need to determine the limits of legality of human conduct. To put it differently, each person wants to know when his or her conduct is in compliance with law and when it goes beyond its limits. It is in the very interest of an individual not to find himself in conflict with law. Knowledge of law enables individuals to recognise the way how to avoid falling foul of the law. It is however obvious that the level of legal awareness among individuals varies. The different extent of legal awareness brings about the need for sufficiently qualified experts in the legal field. The social need thus becomes a determinant for creation and existence of legal profession. The main purpose of the legal profession is, according to Holmes, to provide to individuals such a kind of advice that would communicate both the knowledge of their subjective rights and legally guaranteed claims, as well as the ways how to avoid litigation. Profound study of law being not only a source of knowledge for every lawyer but also a precondition for qualified legal practice, represents a necessary prerequisite for provision of a qualified legal consultancy.

In consequence of the aforementioned, as Holmes sees it, the purpose of legal studies rests with acquisition of such abilities that make it possible for a lawyer to anticipate the courts´ activity in concrete cases whereby the stipulated goal, and/or the ultimate purpose of legal profession as such, are achieved.[2] Only a qualified lawyer can adequately fulfil the purpose of his

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1 O. W. Holmes, jr.- The Path of the Law, lO Harward Law Review 1897. "The law instructs us what is enforceable before the court." (Valent. T., Chovancová J. a kol. *Texty z dejín právnej filozofie,* p. 190).

2 …people want to know when they can fall foul of the law, how to prevent it, and all of this creates the space for the existence of such (legal; *author´s note*) profession. Thus the purpose of legal studies is contained in acquisition of the ability to predict the court´s activity in the pertinent matter." (Valent. T., Chovancová J. a kol. *Texty z dejín právnej filozofie,* p. 190).

profession. Holmes further elaborates these theses by formulating the way how study of law should be perceived.

What accomplishments do we meet?

There were some perils connected with the American law which, according to Holmes, should have been avoided or recognized. In the USA, the sources of law are frequently represented by legal customs, case law, and other sources which are frequently several hundred years old. In view of their age there was a danger that the legal rules they encompassed were imprecise and too casuistic lacking any systematic order. It were mainly precedents establishing rules for future similar cases. Holmes was clear about this stating that for the purpose of proper understanding and acquisition of the aforementioned rules of conduct, it was necessary to make these more precise and subsequently to turn them into general provisions collected in law reports or legislation, whereby a mutually connected system of valid legal rules would be established. To designate the rules of conduct in their historical perspective he used the pompous terms as "lessons from the past", "prophecies", or "prognoses". Also primary rights and duties created in the deep past through judicial decisions and enshrined in precedents were considered prophecies by Holmes.

In order to achieve the purpose of legal studies, i.e. to acquire the ability to predict the courts´ activities in concrete cases, it is, in view of the historical character of the sources, necessary not to mistake law for morality. Such a mistake can appear due to attaching moral content to separate legal concepts, and/or through deriving legal concepts from the concepts of ethics and morality. Holmes illustrates this confusion by pointing at distinction between rights and duties on one side and liability as a consequence of their breach on the other side. Holmes considers such a division of the aforementioned legal concepts unreasonable, as it is necessary to perceive right and duty as a prognosis of a sanction imposed on a person violating the same, whereby liability relationships are constituted. The pertinent terms thus create sort of an integral unity having no sense one without the other. Drawing distinction between law and morality should have a clearly stipulated goal. By detection of separate prognoses and their subsequent generalization and reduction to necessary, frequently legal, contents, an universal system of legal dogmas, valid and applicable under any circumstances, should be created. Such legal dogmas would become a basis of a legal system comprising purely legal terms and concepts under no influence of moral contents. The legal system would thus get rid of its incomprehensibility and historical rigidity resulting in lack of cohesion, unity and clearness. It is evident that Holmes considered such a process crucial, especially in view of its effect pro futuro. The universal character of a legal system based on clear and obvious, frequently purely le-

gal dogmas, should have ensured its perpetual duration which he expressed as follows: "if anything existent in the past burned, we could from them (i.e. legal dogmas; *author´s note*) reconstruct the body of law."

By pointing at problems each person studying law can come across, Holmes also set a start-line for an efficient study programme. The basic premise, the basic principles of legal studies derived from, viewed law as a set of dogmas or systematized predictions enclosed within certain limits. On this basis Holmes formulated the two key principles of legal studies – understanding legal limits via a strict distinction between law and morality, and understanding the very substance of law.

Some aspects between law and morality

Holmes finds the unambiguous determination of limits between law and morality vitally important. He illustrates his clear attitude by comparing the motivation of two individuals, when one acts with evil intent and the other with the good one. If we take into consideration the unlawful conduct itself, both individuals have similar, if not identical, reasons for not coming into collision with law and/or the state law enforcement. Neither of them wishes to face sanction for his conduct. The focus here is thus given to the material aspect of conduct in the form of a result, and/or consequences of such a conduct, and not the moral aspect. It is logical as from the legal point of view at imposing a sanction the priority is given to determination whether there was or was not any violation of law, and not to the fact whether a person acted with a good or evil intention, i.e. to moral aspects. Holmes thus finds the method of separation of law and morality best, as well as the sole concentration on the consequences of conduct we can predict due to understanding law as a set of dogmas and rules of conduct. Separation of law and morality should, however, not result in a system lacking morality and causing moral turpitude and social degeneration. Law represents the external certainty of moral life evidenced by the very history of law, understood by Holmes, as history of moral evolution of human kind. Perceiving the difference between law and morality has its methodological importance for both legal studies and application practice.

An interesting fact is that Holmes finds legal terminology lacking moral contents partly even in contemporary law. His insistence on the strict distinction between law and morality could thus seem unreasonable. This principle, however, is vitally important, according to Holmes, mainly due a natural human characteristic, i.e. to attach moral contents to legal terms subconsciously as a result of external influence. Interchangeability and subsequent overlap of law and morality inevitably results in chaos inside of the legal system. Holmes further alleges that a collision between reality

and something like an ideal state, not existent in reality, is a consequence of the aforementioned situation. Law represents a reflection of the real state while morality determines what should exist in reality, irrespective of the fact whether such a state really exists or whether it only can become reality. Distinction between law and morality should in practice "*stipulate the borders of interference with individual freedom which, we feel, are prescribed by conscience or inferior ideal irrespective of its achievement*" As it has already been indicated, setting forth limits between law and morality should not result in amorality of law. There are no barriers erected between law and morality. Holmes asserts that law is to some extent limited by morality. By way of supportive argument, he points at the fear of state power to adopt such immoral laws that would result in open public revolt. However, he presented his scepticism towards morality even in this place, pointing at the varied perception of the limits of morality. Each individual has its own level of moral values and sensitivity towards their interference. There exists no uniform view in the society as to general moral standards and moral behaviour. Each individual perceives morality differently, which is clearly shown also in law as "also bad legal regulations could be and are valid, we, however, are not ad idem which exactly they are."

Distinguishing between law and morality represents something like a first step to understand the substance of law. When distinguishing law from morality, Holmes pointed at the existing difference between the real world and our imaginations of an ideal one. Consequently, Holmes views the substance of law, representing the second key principle of the study of law, as an ability to anticipate the courts´ activity in reality. To put it differently, the substance of law rests in the procedural mechanism and in legal dogmatics. He derived his theorem from an example behaviour of an evil person who, in order to attain his goal most effectively, must be able to anticipate the court´s response to his concrete activity.Here Holmes again raises the issue of impenetration of morality into law. Understanding the substance of law is one of means which should lead us to correct and just application of law to concrete cases without any influence of morality, which makes the application of law biased and unjust. According to Holmes, it is morality which distracts us from pursuing the clearly stipulated mechanism of legal rules, whereby the legal terms enshrined in them become only vague formulations. Their vagueness, burdened with moral contents, can only be eliminated by focusing our attention on the mechanism of operation of a concrete rule of behaviour, i.e. concrete legal rule, which brings us to understanding the very substance of law. Having long term judicial practice and experience, Holmes, in support of his allegations, set out a lot of examples, mainly one special case in which his views sometimes reached extreme positions.

Chaos resulting from the overlap of the legal and moral contents within concrete terms is well documented by Holmes on the terminology related

to torts. The term "evil intent" is frequently used in the moral meaning of "evil-minded motive". When Holmes asserts that "*a man can be liable for his untrue statements, obviously meant to cause a temporal harm,even without any evil-minded motive"* he obviously depicts a situation when an individual becomes liable for his conduct resulting from negligence.

If we understand the term "evil intent" in its moral meaning, we link it exclusively to situations when an individual acts deliberately. Holmes, however, highlights the legal aspect of this term resulting in liability in form of a sanction for a wrongful act. At both forms of fault, i.e. intentional and negligent, liability relationship arises and/or a sanction is imposed. Transplantation of morality into legal terminology expressing form of fault is thus redundant and inevitably causes chaos at its interpretation. One question still remains open, i.e. to what extent do the legal definitions expressing separate forms of fault reflect moral and ethical values? Consequently, Holmes´s allegation that conduct of each defendant during a court procedure should be considered evil-minded seems rather exaggerated. He reasons his view by stating that the term "evil-mind" does not express the motive of the defendant or his attitude towards future, but is limited only to showing a capacity of the defendant´s conduct to cause a temporal harm to the plaintiff under concrete circumstances. Even though this allegation may seem correct, its very substance is inadmissible, as it consents to the presumption of guilt. Each defendant would thus find himself in a situation when he could be, on the basis of any statement fabricated by the plaintiff, considered as deliberately acting in violation of law from the very beginning of the court hearing, which would pass the burden of proof on the defendant. In the USA, considered a democratic state based on rule of law, seems such a statement made by a Supreme Court Justice rather extraordinary and worth more profound thought. This thesis is unacceptable not only on the principled level, but also due to its illogical nature; as, if somebody asserts something, he should also prove it, and not make somebody else prove it for him.

Holmes´s comprehension of morality as an actual internal state of mind of an individual, i.e. what his intention at the moment is, sheds more light on this issue. If we should focus exclusively on the material aspect of conduct, i.e. conduct and its consequence, it seems irrelevant to take the actual state of mind of the pertinent individual into consideration. What is important from the legal point of view is the attained result, or, to put it differently, the consequence of the conduct, and not its moral background. Holmes illustrates it on the procedure of conclusion of contract.

Formation of contract, according to Holmes, arises upon completion of all the formal elements stipulated by the law, while "*conclusion of contract is not dependant on the agreement of two minds on one intention or goal, but rather on the consensus of two sets of external elements – i.e. not on the fact that two minds are ad idem, but that they said so to each other".* It becomes clear now

that Holmes is a strong formalist focusing his attention exclusively on formal aspects and elements of legal relations. On this basis we can better illustrate his terminological hazard with the concept of "evil-mind". His formalism explains the easiness how this term can be used in court procedure in the meaning proposed by him, however, it does not solve the problem of coming too close to the edge of violation of democratic principles.

In all legal systems there exist reasonable explanations and basic principles influencing separate forms of conduct. Holmes identifies himself with this idea irrespective of the fact, that almost all the legislative decisions were always subject to sanction imposed by the ruler or other sovereign, and/or holder of power. Holmes, however, refuses the generally accepted thesis, that it was logics which represented the most important, and at the same time sole factor influencing the formation of law. He does not contest the idea that law has been developing in some logical sequence, however, he believes that it is not possible to "mathematically" draw the structure of a legal system solely on the basis of some general axioms following the rules of logics. It seems as if he impliedly tried to criticise the classical legislative procedure as a source of legal rules – ways of conduct – as it is namely the court holding – judgment in a concrete case – he finds most decisive. His long-term judicial practice is again reflected in his statement "*such issues, where it is not possible to find out what would the best permanent solution be, become battlefields, and all the judicial decision can do is to follow the majority decision of a concrete court in concrete time and place.*"

Logics is thus only one of the determinants forming the shape of law. The social purposiveness of separate regulations of conduct governing the society represents another important factor in this context. Holmes believes that the judiciary, playing an important role at the formation of law, has partly failed even resigned to the task to consider the social purposiveness of the created rules. It frequently found itself under the influence of various external factors, mainly the ones of political nature, which except for direct influence were also reflected in legislation adopted by legislative bodies. The current social situation with the new ideologies, e.g. socialism and liberalism played a key role in the extent of fighting power and determination of judiciary to fulfil this task. However, it is not possible to consider politics a factor which would *"directly influence the character of judgments"*, as *"something similar has lead people to ... focus their attention to courts as interpreters of constitution"*.It finally resulted in the situation that *"in some courts, there were new principles discovered outside the framework of the given set of institutionalized instruments"* which were accepting the older economic theories leading to *"overall prohibition of something the court considered incorrect."* This is the reason why Holmes found it inevitable to consider the social purposiveness of the rules of conduct in the light of current social situation and existing material circumstances.

Conclusion

In his discourse Holmes ascertained separate items the study of law should consist of, i.e. legal history, economy and jurisprudence – legal theory. History of law is important in order to learn about the development of law while the pertinent knowledge should be directly applicable in legal practice. Holmes in relation to the history of the then valid American law found its 1000 year perspective relevant. The purpose was to encompass the information reflecting this period as contained in the most important and mainly available sources. Taking over the existing customs and rules from the predecessors spontaneously, almost automatically, named by Holmes *"the law of spontaneous growth",* represented the most characteristic feature of the development of American law. What was taken over were not only the legal customs and conventions, but also overall legal opinions.

Holmes reasons this phenomenon by the shortness of the human life as *"the shortness of time forces us to believe, act and think on the basis of rules we know only secondhand".*Only consistent comprehension of the legal development via study of legal history subsequently enables us to understand the contemporary form of law. Holmes believes that law can operate most effectively only when it uses clear and persuasively formulated rules which, at the same time, express also their social purpose. Only due to the knowledge of legal history we can critically evaluate the state of current legal regulation in the contemporary and historical contexts, and on the basis of such critical analysis, the achievement of a concrete result applicable in practice is possible. Under the aforementioned result we understand identification of obsolete legal rules barring achievement of the social purpose they pursue.

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Abstract

The article describes understanding of law and morality, its connection by O.W. Holmes and also analyzes their content. O. W. Holmes speaks about qualified lawyer and about his credits. What credits do we actually encounter? According to Holmes, only a qualified lawyer can adequately meet the standards of legal profession. There were some perils connected with the American law which according to Holmes should have been avoided or recognized.

In the USA, the sources of law are frequently represented by legal customs, case law, and other sources which are frequently several hundred years old.

Also primary rights and duties created in the deep past throught judicial decisions and enshrined in precedents were considered prophecies by Holmes.

Methodology: In the article I using especially method of synthesis in defiing the concept of law and also qualified lawyer by O. W. Holmes.

Keywords: law, morality, study of law, judicial decision, laws, right, institution, society, lawyer, credits.

O.W. Holmes i jego "Droga prawa"

Streszczenie

Artykuł ten opisuje zrozumienie prawa i moralności, ich związku według O.W. Holmes'a oraz analizę ich treści. O. W. Holmes mówi o wykwalifikowanym prawniku i jego zaufaniu. Jakie zaufanie mamy na myśli? Według Holmes'a jedynie wykwalifikowany prawnik może spełnić standardy profesji prawnej. Jest kilka zagrożeń związanych z amerykańskim prawem, które według Holmes'a powinny być zauważone oraz należy ich unikać.

W USA, źródłem prawa są często prawa zwyczajowe, casusy, oraz inne źródła prawne, które często mają kilkaset lat.
Również podstawowe prawa i obowiązki powstałe w głębokiej przeszłości poprzez decyzje sądowe i zapisane w precedensach były uznane za prorocze przez Holmes'a.
Metodologia: W artykule użyto głównie metody syntezy w definicji pojęcia prawa oraz wykwalifikowanego prawnika według O. W. Holmes'a.

Słowa kluczowe: prawo, moralność, studia prawnicze, decyzja prawna, prawa, instytucja, społeczeństwo, prawnik, zaufanie.

О.У. Холмс и его " Путь права"

Краткое содержание

Эта статья описывает понятия права и моральности, их связи согласно О.У. Холмсу, а также анализ их содержания. О. У. Холмс говорит о квалифицированном юристе и его доверии. Какое доверие мы имеем в виду? Согласно Холмсу только квалифицированный юрист может соответствовать стандартам юридической профессии. Существует несколько видов угроз, связанных с американским правом, на которые, согласно Холмсу,необходимо обратить внимание, а также необходимо их избегать. В США источником права часто являются обычные права, казусы, а также другие юридические источники, которые часто имеют несколько сот лет.
Также основные права и обязанности, появившиеся в глубоком прошлом благодаря судебным решениям и записанным в прецедентах, были признаны Холмсом пророческими.
Методология: В статье использовались, главным образом, методы синтеза в определении понятия права, а также понятия квалифицированного юриста согласно О. У. Холмсу.

Ключевые слова: право, моральность, юридическое обучение, юридическое решение, права, институция, общество, юрист, доверие.

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