

Neoliberal Administrative State, Digitalization and Pandemic

Sergei V. Korolev^a and Irina S. Lyalina^b

Institute of State and Law of the Russian Academy of Sciences, Moscow, Russia

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Abstract: The article examines theoretical approaches to understanding the state - from the classical definition given by G. Jellinek, to the public-private imposition of Maurice Oriou, its transformation under the influence of a pandemic from a constitutional state with a liberal-democratic regime into a neoliberal administrative state. The role of digitalization as an internal process of optimization of an administrative state and an external process of optimization of a welfare state, digitalization trends characterizing the relationship between the administrative apparatus of the state and its citizens, as well as its importance in overcoming the current crisis of the state are investigated. The dichotomy "objective-subjective" in digitalization processes and the context of a pandemic is considered. The impact of the COVID-19 pandemic on the digital status of a person and the challenges and threats posed by the digitalization of a covid database from a neoliberal administrative state are discussed.

1 INTRODUCTION

We live in the era of transformation, fragmentation and even diffusion of what Karl Schmitt called "political theology" (Schmitt, 2000). It is based on the concept, and from the point of view of K. Schmitt's ideological myth that state power is "neutral power" (Schmitt, 2000). In other words, political theology is the product of a triumphant legal positivism, according to which - in the words of Georg Jellinek - the state limits itself to law (Jellinek, 1929). As a result, continuing the logic of Jellinek, Hans Kelsen was able to complete the concept of neutral power in his theory of "pure law". According to this theory, the state is, first of all, a legal structure, that is, law is primary, and the state is derived from it (Kelsen, 1992).

The concept of "neutral power" has long been a subject of debate among constitutionalists. Karl Schmitt, in contrast to it, developed his own doctrine called "decisionism" (Schmitt, 2000) in fact, we are talking about a paradigm change in the classical ideas about the state, law, social interaction, about the person himself/herself. Undoubtedly, this process did not begin yesterday: especially the representatives of

Scandinavian legal realism did a lot to make a hole in the seemingly impregnable fortress of legal positivism (Lyles, 2009).

Therefore, in his work "The Unscientific Nature of Legal Science" Anders Wilhelm Lundstedt, using the term "state" as an example, actually accuses classical jurisprudence of being the secret heir of medieval realism. Lundstedt poses the following question: what is the meaning of the phrase about state neutrality in the struggle between workers and employers? He himself answers: none, since it is impossible to present the state as something third. After all, if we "eliminate" workers and employers, then what will then be left of the "state"? Only desert and "dead existence". The state, according to Lundstedt, is only a designation of a social organization in its entirety and nothing more (Lundstedt, 1932).

2 STUDY METHODS

This paper uses a logical, historical, sociological and systematic method. The latter is a legal way of understanding intersectoral relationships within the

^a <https://orcid.org/0000-0001-9305-0274>

^b <https://orcid.org/0000-0002-2060-4851>

national legal order. Moreover, in our opinion, the systematic method cannot be bypassed when it comes to comparing the system of international law and the system of internal law of a particular state. This allows us to define a systematic method as a system-forming one within the framework of our methodology.

3 PROBLEMS OF THE TERM "STATE"

The term "state" in classical jurisprudence was used without any qualifications, with the exception of the terms "police state" and "rule of law". If we follow Lundstedt's argumentation, then these terms can be regarded as double fictions: "state" - "police" and "state" - "law".

The reality of the "police" is not difficult to imagine and even prove. However, according to Lundstedt's logic, the entire materiality of the "police" easily evaporates if we perceive the "state" as a reified term, that is, as something that exists side by side and independently of "workers and employers." How to imagine a (state) police without workers and employers?

The reality of "right" is much more difficult to imagine. The first that comes to mind is the legislative body, which consists of deputies who themselves are not "rights", but create the so-called black letter law. The problem here is that legislators can, in principle, pass illegal laws. According to the well-known formula of Gustav Radbruch, they can do "legislative wrong, that is, anti-law": "Where there is no even striving for justice, where equality, which is the core of justice, is deliberately rejected in development of positive law, there the law is not only a "wrong right", but rather, it is generally devoid of legal nature" (Radbruch, 1946).

Finally, a third perspective on combining the terms "law" and "state" is offered by Oliver Wendell Holmes, Jr., according to which "law is just a prophecy about what the courts will actually do" (Holmes, 2009). From the point of view of Holmes, and then of American legal realists, the sphere of law actually and practically coincides with what judges do. Wherein, it is necessary to distinguish between the performative (in principle, ritual) acts of judges within the framework of the theory of neutral state power, on the one hand, and the motivational (socio-cultural, psychological and even emotional) triggers of their behavior, on the other one. It is the latter that

form the judge law, for example, in the spirit of Hofeld (Hohfeld, 1919).

A universal definition of the state was offered by the famous Austro-German state scholar Georg Jellinek. It is still replicated in textbooks on public law in Germany as a three-pillar theory of the state (Germ. "Drei-Elemententheorie") (Jellinek, 1929). According to this theory, the state is a political community that combines three characteristics (elements): territory, population and an organized administrative apparatus (bureaucracy). All three signs shall be present in order for the state to take place legally.

Less well known is the definition formulated by the famous French administrativeist Maurice Oriou, who defines the state in terms of combining public and private law, namely as the imposition of "a public thing on a private thing" (fr. L'etat est la superposition d'une chose publique à la chose privée) (Hauriou, 1930).

"This does not mean at all that (political - auth.) community is more than individuals. However, this means that, to a significant extent, the benefit intended for individuals cannot be provided otherwise than through the community, perhaps because in this way the distribution of benefits and advantages is carried out more egalitarian than if it were left to the arbitrariness of private initiatives. So, let us note that the community of a public thing (res publica - author) is nothing more than a tool for better servicing a private thing by means of managing it" (Hauriou, 1930). Hence, Maurice Oriou draws the following conclusion: if from a public thing (public need) there is a danger for private things (personal interests), then it lies in the excessive intensification of the administrative and tax regime (Hauriou, 1930).

4 ADMINISTRATIVE STATE IN THE GRIP OF NEOLIBERALISM

In Europe in the eighteenth and early nineteenth centuries, almost all states were "police" in the sense that "law and order" were almost the only function of European monarchies. However, from the second half of the 19th century, the political elite, with the exception of the conservative monarchists, began to persistently distance the term "state" from the term "police state". Ideologically, the concept of "state" has become an abbreviated formula for the term "rule of law" (Bähr, 1864; Gneist, 1872; Gumplowicz, 1881).

Nevertheless, one cannot draw a sharp line between them, there is no reason to believe that the rule of law in the spirit of liberal individualism of the second half of the 19th century has ceased to be a police state in the spirit of the "night watchman state", another thing is important: in the liberal worldview of the second half of the 19th century, the rule of law clearly associated with the parliamentary regime (the executive branch is derived from the parliament and is accountable to it) and the (many) party system (political parties as public organizations are called upon to "supervise" the state, forcing it to publicity, transparency, and etc.).

Undoubtedly, the rule of law in the era of classical liberalism by itself could not evolve into a "social state" without a "white revolution" (in the spirit of Otto von Bismarck) or a "red revolution" (in the spirit of V.I. Ulyanov-Lenin). However, a mystery remains: how did the currently dominant matrix called the "neoliberal state" manage to digest almost all the previous ones — primarily primitive populism and elitist individualism?

It shall be noted that "the most basic feature of neoliberalism is the systematic use of state power to inculcate the imperatives of financial markets in domestic politics to the accompaniment of (politicians –author). "Globalization" at the international level" (Saad-Filho and Johnston, 2005). As mentioned above, neoliberalism has absorbed almost all the previous -isms. However, in this ideological "compote" the paradoxical combination of individualism and totalitarianism is striking.

The first genetic line of neoliberalism goes back to the beloved brainchild of Adam Smith "homo oeconomicus". This "ideal type" of a rational individual is aimed at his/her own benefit and always subordinates his/her behavior to calculation and personal benefit. The second genetic line goes back to the practice of real socialism, which, however, was not always limited to verbal populism and harsh totalitarianism.

5 ADMINISTRATIVE DIGITAL STATE IN THE CONTEXT OF A PANDEMIC

The COVID-19 pandemic marked, in our opinion, a change in the political and legal paradigm of Western civilization: we are talking about the actual transformation of a constitutional state with its characteristic liberal democratic regime into a "neoliberal empire". Its regime can be characterized

as predominantly administrative and, in tendency, totalitarian.

We have already mentioned the specifics of the administrative regime above. Here a double question arises: how does the administrative regime "degrade" into a totalitarian one, or is it about the transformation of the classical liberal-democratic regime, which in an incredible way is gradually acquiring a "totalitarian face", in which, in our opinion, two aspects are clearly visible: one of them is closely related to the digitalization process, the second – to the socio-political challenges of the 2019 pandemic.

Digitalization processes can be considered, at least, in two ways: firstly, as an internal process of optimization of the administrative (managerial) state, aimed at rationalizing the bureaucratic workflow, and, secondly, as an external process of optimizing the welfare state, aimed at removing barriers and intermediate links between administrative apparatus and ordinary citizens. Therefore, the term "electronic government" was initially ambivalent: on the one hand, this term could mean a document flow system within the administrative apparatus, on the other hand, it could mean an external system of interaction and feedback with the population.

Professor Ulrich Jan Schroeder notes four digitalization trends that characterize the relationship between the state administration and its citizens (Schröder, 2019). First, we are talking about the increase in power (Machtgewinn), which the state acquires in relation to citizens and private firms. This trend symbolizes the transition of the ruling class from the regime of "electronic government", where it is difficult to deny the component of the "welfare state" in the service of citizens, to the regime of the "neoliberal administrative empire", the goal of which is to achieve the most complete transparency of each individual for the "sovereign's eye".

Secondly, we are talking about the danger of loss of control (Kontrollverlust) of the state over management processes: algorithms for the digitalization of state activities, as a rule, are not transparent to bureaucrats. The positive effect of this opacity is that the subjective factor (corruption, arbitrary discretion, and etc.) is minimized, but there is also a negative effect: the increased vulnerability of the state to all kinds of hacker attacks poses a particular danger.

Third, the digitalization of such democratic institutions as elections, freedom of opinion, and etc. is able to transform the constitutional and legal essence of the liberal-democratic regime. First of all, we are talking about the institution of subjective public rights (die subjektiv-öffentlichen Rechte),

which since the time of Georg Jellinek has been the core of the constitutional regime of the civilized states of the West (Jellinek, 1919).

Fourth, the special dependence (die Besonderheit erhöhter Bindungen) on the state of those private firms that use digitalization or are open to it is increasing. Here Professor Ulrich Jan Schroeder notes a tendency that works in a counter-direction towards the already discussed third tendency. In other words, the digitalization of the private sector expands and details the scope of its obligations in the context of the interaction of public and private law (Schröder, 2019).

Let's consider all four trends in the focus of the current pandemic:

1. The digitalization of the "covid database" - in a trend - each citizen symbolizes, at least, "administrative co-residence" or even the merging of "electronic government" in terms of a welfare state, on the one hand, and a neoliberal administrative state" aimed at total control, on the other one.

2. The digitalization of the "covid database" carries a significant risk of losing administrative control not only over the way this data is stored, but also over the protection of personal data. In other words, the risks extend not only to the possibility of unexplained disappearance of these data, but also to the possibility of their change as a result of an unexpected program failure, imperfection or unpredictability of the behavior of algorithms.

3. The digitalization of the "covid database" certainly changes the mode of functioning of subjective public rights. In a trend, the logic of the neoliberal administrative empire may lead to the fact that not only "antivaxerism" (which means an active anti-vaccination position), but also non-compliance with the "vaccination schedule" can be regarded as disloyal and antisocial behavior subject to administrative punishment.

4. Wherein, the digitalization of medical institutions in terms of rationalization and optimization of individual "covid databases" shall objectively contribute to an increase in the responsibility and professionalism of medical workers. First of all, we are talking about the strict observance of antiquarian standards in the system of relations "doctor - patient".

6 STUDY RESULTS

The cross-cutting core of our study is the opposition "objective-subjective" in the specifics of legal science, which, in principle, cannot abandon the

dichotomy "objective law - subjective law", although it allows a change of places between "objective" and "subjective" in it. For example, this approach is characteristic of the institutional theory of law by Maurice Oriou: "So, the subjective is supported by our conscious wills, and the objective - by our subconscious ideas. Having said this, we have touched upon ... the strife (la querella) between subjective law and objective law" (Hauriou, 1968). As you can see, according to Oriou, for a civilized legal order, the system of subjective rights is the goal and, at the same time, the content, and objective law, including positive law, is an instrument and, at the same time, a sphere of ensuring subjective rights.

Within the framework of the topic we have declared, this means the inevitable interaction of "objective and subjective" in three angles: (1) within the framework of the topic "state", (2) within the framework of the topic "digitalization" and (3) within the framework of the topic "pandemic". Let us summarize first in relation to (1) and (3). We are in solidarity with M. Oriu that the state is an instrumental concept. This does not necessarily mean that the state is just a fiction, just a "word" that, within the framework of the dominant "narrative", performs a purely ideological function in the spirit of postmodernism (Foucault, 1975).

According to Oriou's institutional theory, the state is social institutions (for example, a contract, money, family, private enterprise), one way or another taken under political control by the ruling elite. Only by relying on these institutions the state power can become more or less effective. The Achilles' heel and - as Hannah Arendt put it - the "stupidity" of the neoliberal political elite is that it deliberately ignores these social institutions and tries to destroy them. This is possible only through the destruction of human civilization, together with all its "elites". Within the framework of the neoliberal administrative empire project, we see a classic example of solipsism, i.e. complete ideological, but not actual "triumph" of the subjective over the objective.

With regard to the topic of "pandemic", there is a situation of ambiguous "parity" between the subjective and objective perspectives on this problem. On the one hand, discussions about the man-made nature of this pandemic and the objective expectations of some of its results on the part of all carriers of neoliberal ideology, including in the context of the controversial conspiracy theory of elites, do not cease. On the other hand, only the most inveterate "antivaxer" can insist on denying the objective nature of the current pandemic.

Finally, “digitalization” in its purely functional form brings us back to common sense, which is “encoded” in the “objective-subjective” dichotomy. Digitalization algorithms do not make analogous assumptions like "a little more or less," or "which is better: half empty or half full glass". If digitalization algorithms minimize the human factor, then this also applies to the future destinies of the project called “neoliberal empire”.

7 RESULT DISCUSSION

The following conclusions can be drawn from the administrative-legal concept of Maurice Oriou:

- private-law relations, in principle, do not need support from the "state authority": they arose before the state, they can exist outside the effective control of the state and, in principle, can generally "work" in a competitive mode with state structures (for example, the system of hawala cross-border payments) (Korolev, 2016). "Therefore, private law can be imagined without the state" (Hauriou, 1930).
- the administrative state as a system of public administration is primary, and the constitutional state as an organization of supreme power and as an institution of human rights is secondary. In terms of the founder of the German school of administrative law, Otto Mayer, this conclusion sounds like this: "Verfassungsrecht vergeht, Verwaltungsrecht besteht" (German: "constitutional law will pass, administrative law will remain") (Stor and Schröder, 2010).
- From the reasoning of Ulrich Jan Schroeder, the following conclusions can be drawn:
- Digitization, speaking metaphors, transforms the image of a whole, indivisible, polysemantic person in his/her natural analogue environment into a certain digital code, into a certain number of pieces (bits) of information about this person. In this case, there is a digital "diversification" of information about one and the same individual. The digital person turns into a "database", so his/her digital medical record is in principle separable from his/her digital tax card, digital educational card, digital travel card, and etc.
- In principle, each of these cards can be “blocked”, made a priority, or, on the contrary, irrelevant. In other words, from a “digital person” it is possible to construct any configuration from his/her “digital cards” and,

thereby, manipulate and even blackmail a real (analog) person as a “reflection” of his/her digital twin.

- During the current pandemic, not even a “digital medical record” is becoming a priority, but its “covid heading”. This happens not only for objective reasons, i.e. in order to curb the pandemic.

The benefits for the neoliberal administrative state are clear:

- firstly, the entire spectrum of political opposition in the context of a pandemic, for objective reasons, is formalized under one syncretic heading "antivaxers"; it is much easier to keep under social control (no matter how) a consolidated group, than many heterogeneous groups and, especially, an immense multitude of individuals with their personal qualities and differences;
- secondly, "antivaxers" actually oppose themselves to the rest of the population, tired of the pandemic, and, therefore, turn into a convenient target for preventive or repressive measures on the part of the neoliberal administrative state;
- thirdly, “antivaxerism” is becoming an aggravating connotation in the future for those who became “antivaxer” as an initial democrat, Christian conservative, Islamic preacher, trade union activist, and etc.; in other words, “antivaxerism” becomes a kind of political “shibboleth”, making this or that political spectrum “asocial”;
- therefore, a purely special mark in the "digital passport" of an individual works in principle the same way as the criminal history of one or another individual when looking for work.

8 CONCLUSIONS

Since the last third of the last century, the world's population has been subject to systematic pressure from neoliberalism, they proclaimed the "end of history" (Fukuyama, 2006) including the "depoliticization" of public life, which is allegedly governed by "economic laws" based on the principles of competition and economic individualism.

In fact, neoliberalism has no scientific basis: the "economic laws" proclaimed by the apologists of neoliberalism are only a means of systematic indoctrination of national elites and a tool for manipulating the minds of the masses. The emphasis is on, first, to deprive people of a sense of social and

political solidarity, to convince people of the "correctness" of neo-Darwinian individualism and personal struggle for survival. Second, in order to neutralize the political will of the individual, who is no longer able not only to implement, but even to understand one of the main aspects of human dignity: "In the struggle you will acquire your right", which Rudolf von Ihering made the epigraph of his famous brochure "Struggle for the Right" (Jhering, 1872).

Oddly enough, the objective process of digitalization, with all its threats and risks, can become the gravedigger of neoliberalism as the main enemy of human civilization. However, objectively, this result is unattainable without interaction with a subjective, first of all, political and moral-psychological factor.

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