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Ethical Code: Between Law, Morality, and Administrative Regulation of Human Behavior

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Abstract: The article examines the issues arising from defining the essence and specifics of an ethical code as a unique institution and regulator of human behavior. The heterogeneous nature of the ethical code as a social phenomenon existing at the intersection of law, morality, and administration in managing human behavior is subjected to detailed analysis. The author identifies and discusses evolution of the concept of law from a purely legal phenomenon to a semantically significant image present in the realm of religious and scientific experience, shaping the subject-conceptual schemes of theology, natural sciences, social sciences, and humanities. The juridification of various areas of social experience resulting from this fact, including moral regulation, is considered. Additionally, the article analyses the specific situation created by the ambiguity of ethics and law as different forms of public consciousness, as well as the classification of international ethical codes under soft law, and national and professional ones under self-regulation.

Keywords: morality; law; administration; ethics committee; interdisciplinarity; action; human behavior; regulation

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Contents

I. Introduction

Can a code be called ethical? Certainly, yes. This is evidenced by the facts — there are numerous currently active, outdated, and still under discussion documents with such a designation. This does not contradict the legal theory, according to which ethical codes belong to the category of normative acts, differing from legal laws only in that they do not belong to the sphere of law, i.e., they are not legal acts. According to Malinovsky, the latter does not prevent the recognition of the social significance of ethical codes, which have not become normative legal acts simply because their development and approval are carried out not by state legislative bodies, but by various professional communities (Malinovsky, 2008, p. 41).

However, the etymology of the word can seem confusing, as the use of the word *code* to denote the concept inevitably leads us to the sphere of law. Indeed, if we turn to ancient times, we can find the original Latin meanings of the word *codex*. In all similar cases, there are many of the meanings: from a tree trunk to a block attached to the feet of a criminal or from logs used to make a river ferry to wooden tablets specially coated with wax for writing words. A codex was distinguished from a scroll, but then this word was extended to all text carriers, e.g., papyrus and parchment scrolls. Emperor Gregorian was the first to call a set of imperial constitutions a codex, followed by legal codes bearing the names of other emperors, which gave rise to one more meaning of

this word, turning it into the main one, and then the only one. Thus, throughout late Antiquity and the Middle Ages, Roman law conveyed to us the basic meaning of the word *code*, "a systematic collection of laws on one of the major sections of law, issued by the legislative power" (Small Encyclopedic Dictionary, 1907–1909, p. 119).

May this institution be outside the legal sphere, but in some or even all essential elements similar to legal institutions? How can we understand what is genetically and essentially connected with law, and what is only symbolically or metaphorically? The question is not simple, because in the process of historical development of European and then the world civilization, too many concepts, notions and even institutions have emerged, in the name, structure and content of which the influence of law is clearly evident. With all the diversity of assessments of this, only one thing is clear: the influence of law enforcement practices on all spheres of social life, on systems of thought and action is unprecedented. Now we can speak about the juridification of theology and morality, natural science, social and humanitarian studies, as well as about the emergence of non-legal social regulators, literally adjusted to the law and built in such a way as to complement the law or enhance its meaning and sense (Joyner, 1981).

II. Methodology

In our research, it is appropriate to recall the entire methodological arsenal of historical and scientific reconstruction, which highlights the genetic method, structural functionalism, phenomenological method, and comparative analysis. The genetic method will help us understand how the first legal codes were formed and why this term was used beyond the legal realm, for example, in the realm of morality, as well as in the area of self-governance and corporate self-regulation. The structural-functional method is applied to identify the social and legal functions of the regulator in question (Frederic and Kirgis, 1987). The methods of phenomenology and legal comparativism allow us to determine the meaning and legitimacy of the presence of a non-legal institution within the legal space.

III. Juridification of Theology and Morality

The ethical code is not a law, but a set of regulatory principles that can guide actions beyond the legal regulation while problems and conflicting grounds for social action remain. This is generally how the ethical code is understood, as expressed, in particular, by Malinovski in the study mentioned above. One could fundamentally agree with this position, as outlined in textbooks and dictionaries. However, it is unclear why the term *code* is applied to a document that does not pertain to the legal sphere but clearly seeks to appear analogous to a legal code. Why should we liken something that is not law in essence to law in form? The answer can be found in the philosophy of Immanuel Kant, who introduced the concept of the categorical imperative, interpreting it as a moral law. Unlike legal law, which is established by a legislative authority, namely the state, in the case of morality, a person is subject to a law that they establish themselves. Thus, alongside external commands, Kant introduces the concept of internal commands, i.e., imperatives. "But freedom", Kant writes, "among all the ideas of speculative reason, is also the only one whose possibility we know a priori — though without having insight into it — because it is the condition of the moral law, which we do know. The ideas of God and immortality, on the other hand, are not conditions of the moral law, but conditions only of the necessary object of a will determined by this law, i.e., conditions of the merely practical use of our reason" (Kant, 2002, pp. 5–6).

We can see that in the Kant's philosophy, the discussion is not about the document being addressed in this article. The moral law presented in the *Critique of Practical Reason* cannot be formulated once and for all, as written laws and the norms contained within them are. Each time prior before a free and autonomous subject wishes to follow the moral law, they must find an appropriate formulation, and such a formulation arises only through the process of reasoning, the standards and guidelines of which are contained in Kant's ethical teachings and practical reason.

One could discuss the individualism of the founder of critical philosophy, the appeal to internal motivation, the autonomy of the subject, and so on. Meanwhile, social practice shows us that discussions

about morality lead to the formulation of moral norms, which are then used for external coercion — that is, to judge and condemn the actions of others — yet to do this without any "bureaucratic" formalities and tedious judicial procedures (Chodosh, 1991).

One should remember that before this, in the Middle Ages, theologians introduced the concept of Divine Law in order to attach something external to the ordinary legal law. But even here, the discussion is not about legal law. "Since good as perceived by intellect is the object of the will, it is impossible for God to will anything but what His wisdom approves. This is, as it were, His law of justice, in accordance with which His will is right and just. Hence, what He does according to His will He does justly: as we do justly what we do according to law. But whereas law comes to us from some higher power, God is a law unto Himself" (St. Thomas Aquinas, p. 21).

As with Immanuel Kant, the theological interpretation of the concept of law has a worldview or metaphysical character. The medieval theologian, like the Enlightenment philosopher, views the world as something akin to society, specifically a developed society with a state and written law. However, such constructions are not particularly suitable for external institutional regulation of collective action. Despite the centuries-old authority of Saint Thomas in Catholic circles and the popularity of Kant's philosophical ideas among philosophers, their reasoning is too abstract to move from the category of "dogmas" to the category of "guides for action".

Thus, Thomas Aquinas used the experience of legal regulation to explain Sacred Scripture, thereby "juridifying" theology. Immanuel Kant applied the concept of law to "juridify" the inner world of man, which he described using a Cartesian interpretation of the concept of the subject. In Kant's texts, we clearly see the influence of theology, which he managed to combine with psychology and anthropology, thereby forming a psychological-theological ethics that effectively aligns with law. It is this understanding of the moral law that can be found in his *Metaphysics of Morals*, where the metaphysical principles of the doctrine of right precede the metaphysical principles of the doctrine of virtue, which in turn precede the ethical teachings on principles and the ethical teachings on method.

IV. The Influence of Law Enforcement Practices on Experimental Natural Sciences and Socio-Humanitarian Studies

It is worth mentioning separately the modern European "juridification" of natural science when Galileo, Newton, and other creators of mathematical natural sciences easily proposed various mathematical formulas and called them laws of nature. Dmitriev finds numerous instances of applying the concept of law to describe natural phenomena in the works of Aristotle, Cicero, Roger Bacon, and other ancient and medieval scholars, theologians, and philosophers. However, this phenomenon fully applies to the Modern era, where the works of Francis Bacon, who made significant contributions to philosophy, natural science, and law, became particularly important. Dmitriev writes, "Indeed, in the works of both Bacon and several natural philosophers influenced by Baconian ideas (such as Boyle), frequent use of legal terminology (trials, witnesses, testimony, etc.) is noticeable. For instance, in *Novum Organum*, while describing the procedure for verifying initial generalizations (lower axioms or axiomata infima) for their universality, Bacon employed the legal term fide-jussione (surety)" (Dmitriev, 2021, p. 187). Moreover, due to the efforts of Bacon, Newton, and British science of the seventeenth century during the formation of ideals of experimental methodology, the juridification of physics increasingly aligned with the British tradition of Common Law, distancing itself from *ius latinum* (Dmitriev, 2021, p. 189).

The search for laws and norms in the social and humanitarian studies can be considered as the last act of juridification. Thus, in the first half of the 19th century, the laws of historical development were formulated: the law of three stages of development of society by Auguste Comte and the law of change of socio-historical formations by Karl Marx. These laws gave historical knowledge compliance with new criteria of scientificity — they allowed to explain past events and predict future ones. Then the attention of sociologists switched to microsociology aimed at explanation of individual and collective actions of people, as well as their interactions. They came to understanding that society is able to influence the activity of its members through assimilation of

certain norms and rules by people and instilling a willingness to follow them.

This is how social control works, consisting not only of a set of social norms, but also of a system of social sanctions that ensure their observance. Social control allows us to operate with the concept of law, which in sociology acts as one of the social regulators, usually acting without the help of the state. "It is time to return to the concept of legitimate order, or as it has been put above, legitimacy norms, in relation to action. The way in which Weber deals with this is of central interest. In the first place he makes two classifications, the distinction between which is not at first sight evident. The first is of modes in which the legitimacy of an order may be guaranteed. The second is of reasons why binding legitimacy is attributed to the order by the actors" (Parsons, 1949, pp. 658–659).

Social control in the concept of structural functionalism is interpreted as prevention of deviations from the norm and as a means of responding to deviations that have already occurred. An important part of social control is reliance on sanctions, because without sanctions, all attempts to control something inevitably turn control into simple observation, recording, and registration. But in order to really control something, society's actions to monitor compliance with social norms and, in particular, to impose sanctions on the violator are to be ordered and categorical. Thus, step by step, the rules for describing the interaction of man with society in legal terms were formed. Folk customs, government laws, religious canons, moral standards — all turned out to be forms of social control, for the theoretical description of which the categories of law and the corresponding experience of using a legal vocabulary were needed (Higgins, 1987, p. 21).

Sociologists have expanded the legal vocabulary in order to add terms of encouragement to the terms of punishment — so medals and titles, certificates and placing a photo on the "wall of honour" were added to stigmatization, dismissal, administrative arrest, imprisonment and placing a photo on the "wall of shame". Some of this set has a clearly expressed legal character and is associated with the activities of an ordinary court, something pertains to the non-legal sphere, although

it imitates it — the court of the public, public condemnation, "comradely court", "court of officer's honor", etc.

It is clearly visible how the concept of the normative, coming to us from the sphere of law, captures ever larger spaces of theoretical thought, called upon to describe everything connected with people and their activities. "Every social group invariably couples its scale of desired ends with moral or institutional regulation of permissible and required procedures for attaining these ends. These regulatory norms and moral imperatives do not necessarily coincide with technical or efficiency norms. Many procedures which from the standpoint of particular individuals would be most efficient in securing desired values, e.g., illicit oil-stock schemes, theft, fraud, are ruled out of the institutional area of permitted conduct. The choice of expedients is limited by the institutional norms" (Merton, 1938, p. 673).

V. Ethical Codes in the Context of Law

Today, ethical codes belong to the normative, however not legal sphere. By non-legal, but normative I do not mean the phenomenon that Hegel, and then some Russian authors, called wrong (non-right) or para-right. Rather, I discuss moral norms accepted and assimilated by society and thus ceasing to be purely moral, but turning into social ones (Shelton, 2000). Why cannot moral norms be social, and social ones moral? Because they are removed from the sphere of internal conviction and become a collective assessment based on morals, not on ethics. Socrates discussed this, pointing out that morals and customs do not need explanation, not to mention their critical assessment. Immanuel Kant also wrote about this, asserting the autonomy of the subject and denying the possibility of society's interference in this activity. Therefore, social norms are much closer to customs and mores than to moral norms, and ethical codes can only be attributed to the sphere of social regulation of activities that do not fit into the framework of legal regulation (Bleicher, 1969).

It is absolutely clear that the ethical code does not directly relate to the sphere of law, but it is also clear that it has some legal content that is not limited to the fact that it is one of the social regulators. Courts take

into account the decisions of ethical committees and corporate boards as if they were the opinions or assessments of experts. At the same time, it is obvious to everyone that ethical committees or other bodies interpreting the ethical code are not expert organizations (Zakharova, 2019).

VI. Ethical Codes and the Principle of Complementarity

A widespread and almost universally accepted opinion today is that ethical codes act as additional regulators in the general system of social regulators, where law, custom and tradition are traditionally considered the main ones. All these regulators were formed quite a long time ago, a little later morality was added to them, and that resulted in creation of this special product, adding philosophy, theory and practice of managing individuals to ethics and law.

Different philosophical concepts and competing paradigms of social and humanitarian knowledge have been used to designate something that equally combines the features of law and something that is not law. But the question of how consistent the values of these quasi-legal and legal imperatives are has always remained open. Thus, David Damler in his article *The Synesthesia of Values: How the Ideals of Modernist Design Predisposed and Shaped Fascist Legal and Political Thought* directly writes that the aesthetic, epistemological and moral (legal, political) are always connected with each other and their connection is not mechanical, but organic. This is exactly what Spengler wrote about, proclaiming the existence of a certain primordial symbol, embodied in the spheres of aesthetics and ethics, ontology and the theory of knowledge (Spengler, 1926).

Damler calls Spengler's primordial symbol a common underlying mechanism, but this does not change anything — it could be easily called an archetype or even a paradigm. "Value judgments are regulated via chronologically antecedent emotions. Their attribution to a certain normative category is an analytical achievement that only occurs in a second step. 'Analogical' interferences are inevitable due to the processes involved being partly identical. Jurisprudence, too, continually operates with terms that have an underlying sensuous, aesthetic component

and depend on concrete experiential knowledge. This lifeworld horizon and the attendant aesthetic preferences differ from society to society, sometimes considerably from state to state, despite otherwise very similar economic and social conditions" (Damler, 2018, p. 811).

But it is not just a conflict of values. It is important to understand the ontology of this phenomenon, which is not law, but is functionally and essentially connected with it. A mere reference to the fact that this is just another regulator coexisting alongside law is clearly not enough. There are many terms to denote phenomena that, while not being law in their pure form, can be attributed to the sphere of law either by their nature or by their functions. It seems appropriate to recall the interpretation of this phenomenon proposed by Biryukov. This author combines all of the above connotations in the concept of "doubling of law". This author discusses different options for the terminological explication of this phenomenon of legal reality: para-right, shadow right, semi-right, and finally, non-right. (Biryukov, 2010). In Russian legal studies, the term para-right was first used by Samigullin, who believed that para-right is social relations that are regulated by law, however bypassing the law in real life (Samigullin, 2002).

An example of existence of para-right as a complementary element to law, replacing, but not cancelling it, is the concept of voluntary obligation, widespread in international law, which is the building material for the formation of a new legal space. "In the discussion of new governance in the European Union, the concept of 'soft law' is often used to describe governance arrangements that operate in place of, or along with, the 'hard law' that arises from treaties, regulations, and the Community Method. These new governance methods may bear some similarity to hard law. But because they lack features such as obligation, uniformity, justiciability, sanctions, and/or an enforcement staff, they are classified as 'soft law' and contrasted, sometimes positively, sometimes negatively, with hard law as instruments for European integration" (Trubek et al., 2005, p. 5).

The term *wrong* was introduced by Georg Hegel in his *Philosophy of Right*. By *wrong*, Hegel means deception, crime, denial or violation of right. "Wrong is the mere outer appearance of essence, giving itself forth as independent. If this semblance has a merely implicit and not an

explicit existence, that is to say, if the wrong is in my eyes a right, the wrong is unpremeditated. The mere semblance is such for right but not for me. The second form of wrong is fraud. Here the wrong is not such for general right, but by it I delude another person; for me the right is a mere semblance. In the first case wrong was for right only a semblance or seeming wrong; in the second case right is for me, the wrongdoer, only a semblance or pretense. The third kind of wrong is crime" (Hegel, 2001, p. 84). Hegel understands the third type of wrong — crime — as wrong in itself and for itself, because in this case even the appearance of a desire to preserve the legal framework is absent. The individual committing crimes wants wrong and asserts their desire as their own will.

Not all theorists agree with such an uncompromisingly negative understanding of the term *wrong*. The concept of *wrong* can be interpreted in accordance with legal anthropology or in the context of the doctrine of soft law, which has become widespread in international law. Today, it can be said that the rapid spread of this term has contributed to its inclusion in the doctrine of law, but its theoretical comprehension is not keeping up with the needs of practice. The concept of soft law is intended to designate phenomena that universally perform the functions of law by compensating for the absence of law and replacing it.

VII. Specifics of Ethical Codes in Genetic Research

Since the ethics code in genetic research is not a type of formal law, it should be recommendatory. Adherence to the principles, prescriptions, and prohibitions contained in the Code must be carried out on a voluntary basis and apply only to civilian developments (Demin, 2016).

According to Olkhovikov, "the special character and weakness of international medical law lies in the fact that the regulation of medical activity (including healthcare services) is closely linked to the norms of medical ethics developed by international medical organizations, which are not yet legal norms, but acquire legal significance in certain cases (being given the force of a source of law by national state bodies, being taken into account by courts when determining standards of professional prudence, etc.)" (Olkhovikov, 2014, pp. 56–57).

Like any ethical code, the Ethics Code in the field of genetic research should answer the following questions:

1. Why is it needed and whom does it serve?

2. What values and principles is it based on?

3. What norms and standards of behavior should be observed by all participants or subjects of the code?

4. What procedures should be used for resolving disputes and conflicts related to violations of the ethical code?

5. What measures of responsibility should be applied for violating the ethical code?

6. What mechanisms can be used for tracking and monitoring compliance with the code?

The Ethics Code in the field of genetic research should be a document that lists the principles that doctors and researchers should follow in their practical activities. This set of principles should be systematic, and the principles should be formulated in such a way to be specified in the form of prescriptions, recommendations, and prohibitions. These principles should be clearly interpretable in complex situations to resolve contradictory and controversial situations.

The specificity of genetic research is, on the one hand, the fact that it involves therapeutic activities, and on the other hand, research, and on the third hand, technical-design work. Thus, there are three areas of applied ethics-medical, scientific, and engineering. When traditionally listing the addressees of the Code, in addition to the state, it is necessary to include scientists conducting genetic research, physicians using genetic technologies, biotechnologists and bioengineers, pharmacologists, university teachers, and legal staff of health insurance companies.

VIII. Conclusion

Currently, many ethical codes could seem chaotic, but their conditional structuring can be done based on the semi-chaotic structure of professional and guild unions. As a result, different levels of coverage emerge — global, national, regional, and corporate-guild regulations related to the sphere of professional ethics. They arise from the self-organization process of various professional communities — educators and lawyers, scientists and artists, businessmen and doctors build upon

the system of legal norms and principles, creating systems of additional norms that also act as effective regulators organizing human actions and interactions.

Meanwhile, ethical codes not only resemble laws in their titles but they are written in language understandable to lawyers, because lawyers actively participate in their creation. Moreover, they are based on deontological logic and modalities. Furthermore, these codes' functions are greatly similar to legal ones — unlike genuine ethics, which appeals to the individual's conscience and moral autonomy, this ethics is mandatory and its implementation is monitored by society. That's why these so-called guild codes more closely resemble disciplinary statutes, where a legal narrative prevails, along with legal techniques for regulating socially significant actions of individuals or groups (Zakharova, 2022).

In view of the above-mentioned, without negating the differences between ethical and legal codes, it seems reasonable to view the former as a particular kind of law. This rationale stems from the necessity to study the possibilities and challenges of interaction and mutual alignment between these two types of regulation. There are a number of academic discussions about the compatibility of ethical and legal regulatory frameworks, as well as mechanisms for distinguishing corresponding jurisdictions. It is also interesting to consider the distinction between respective ethics, i.e., the ethical values and principles underlying both legal and ethical codes. This is particularly justified since not all principles and values coincide in the ethical codes of advocates and prosecutors. Moreover, not all principles in prosecutorial and advocacy ethics are compatible with each other, even though both operate within the framework of unified legal ethics and include principles like legality, adversariality, and others, which undoubtedly belong to both ethical and legal categories.

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