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Rehabilitation of common sense: law and justice in sight of metamodernism

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ABSTRACT

One of the relevant tasks of social sciences, including jurisprudence, is identification of the modern humanity condition after the collapse of the postmodern philosophical and historical model was ascertained. Its solution involves the creation of a concept of reality that contains objective ontological attributes and can be used as a basis for searching for epistemological resources required for access to it. The article analyzes the possibility of using theoretical and methodological tools for these purposes, offered by two new intellectual practices, namely metamodernism and speculative realism. In particular, it concerns such concepts as the “structure of feelings” and “metaxis.” while within them, the concepts of “unity,” “general,” and “norm” displaced from it return to social cognition. The type of sensitivity characteristic of modern times is considered to be “common sense” which can become an objective basis for obtaining general knowledge about the world, as well as for clarifying the concept of “natural law” and its substantive content. The structure of reality proposed by speculative realism enables to overcome the legal relativism imposed by postmodernism and develop a consistent understanding of law and justice.

Keywords: metamodernism; speculative realism; structure of feelings; metaxis; norm; common sense; law; justice.

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Реабилитация здравого смысла: право и справедливость в перспективе метамодернизма

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АННОТАЦИЯ

Одной из актуальных задач социальных наук, в том числе правоведения, является идентификация состояния, в котором современное человечество оказалось после того, как был констатирован крах постмодернистской философско-исторической модели. Ее решение предполагает создание концепции реальности, которая содержит объективные онтологические признаки и служит основанием для поиска эпистемологических ресурсов, необходимых для доступа к ней. В статье анализируется возможность использования для этих целей теоретических и методологических средств, которые предлагают две новые интеллектуальные практики — метамодернизм и спекулятивный реализм. В частности, речь идет о таких концептах, как «структура чувств» и «метаксис», в рамках которых в социальное познание возвращаются вытесненные из него понятия «единого», «общего» и «нормы». В качестве характерного для современности типа чувствительности рассматривается «здоровый смысл», который может стать объективным основанием для получения общего знания о мире, а также для уточнения понятия «естественного права» и его содержательного наполнения. Предложенная спекулятивным реализмом структура реальности позволяет преодолеть навязанный постмодернизмом правовой релятивизм и выработать согласованное понимание права и справедливости.

Ключевые слова: метамодернизм; спекулятивный реализм; структура чувств; метаксис; норма; здравый смысл; право; справедливость.

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Landscape after the battle: State after postmodernity

At the beginning of the third millennium, social theorists noted the exhaustion of the civilizational project, which for the last thirty years had set the substantive and methodological framework for cultural and social research and greatly affected most social institutions and practices. It is postmodernism. Its distinctive feature was criticism of the ideology of modernism, while offering no clear positive program. The main objects of the postmodernist attack were the founding ideas and principles of the modernist model and its implementing institutions, including scientific rationality, political infrastructure, law, education, art, forms of mentality, and the way of life. In general terms, the accusation was that modernization was accompanied by the suppression, exclusion, and marginalization of alternative projects that did not correspond to the standard of rationality imposed by the theorists of modernism.

The manifesto of postmodernism was Leslie Fiedler's essay *Cross The Border—Close The Gap!*,¹ which called for rejection of single integrating, disciplining and controlling authorities and criticized the institutions and practices of modernism involved in, according to the theorists of postmodernism, forceful preservation of the unified and the shared at the cost of suppressing the different. These authorities included official (written) law, which was based on theoretical models of justice that excluded attention to difference as a mandatory criterion.

The temporary popularity of postmodernism is explained by the fact that it took advantage of psychological fatigue prevailing in individuals from long-standing ideas, values, and policies that were perceived by them as outdated, not matching their changed identity and ideas of justice. Bochkarev writes about this, noting the socio-psychological roots of postmodernism significantly affecting the concept of reality as it is presented in the papers of classical authors with an emphasis on its virtual nature [1, pp. 20–32].

Metamodernism as a possible replacement for postmodernism

Postmodernist experiments on humanity and the world, which lasted for about three decades, left ruins behind it in the form of a humanity alienated at all levels, misoriented individuals, and destroyed ontological, discursive and regulatory foundations, standards and provisions. One

"victim" of postmodernist madness was the law. In his speech at the IX St. Petersburg International Legal Forum, Valery Zorkin, Chairman of the Constitutional Court of Russia, stated, *inter alia*, that, "The modern crisis of law, deepening as we witness it, has its roots in versions of philosophizing proposed by postmodernism. In postmodernism philosophy, there is no place for such basic legal concepts as truth, objectivity, and justice. In this philosophy, all opinions may exist, all are equally right and wrong, all are optional for both others and the person who expresses these opinions."² In his opinion, this situation poses a particular danger for Russia, since it is fraught with chaos in public life due to the breakdown of legal tradition at the turn of the century and the difficulties in shaping a new legal system, caused, *inter alia*, by the dominance of postmodernist attitudes in social philosophy and the philosophy of law. Therefore, an urgent task is to reconsider the ontological foundations of the modern era and build a new philosophy of law on them that reflects spiritual values and ideas about justice specific to Russia.

Humanity has entered a new stage in its history characterized by uncertainty both of its current existence and a vector of its further development. Therefore, its identification is required, including an ontological foundation, methods of accessing its objects and selection of an appropriate name, i.e. a label that can be used for identification. Most proposed projects differ in prefixes to the word "modernism," but, according to Pavlov, the most discussed and promising is "metamodernism" and Valery Zorkin has great expectations of that it will become a theory capable of capturing new trends in social phenomena, including law [2, p. 3].

The authors of this project, Dutch art philosophers Timotheus Vermeulen and Robin van den Akker, explain their choice by the fact that the prefix "post-," which was a kind of "magic wand" for defining everything new, has depleted its semantic resource. Therefore, they decided to use the prefix "meta-," which, in combination with the word "modernism" in the meaning of modernity, should emphasize the special nature of the latter. Vermeulen and van den Akker translated "meta" as "between" suggesting that modernity is something intermediate, "Ontologically, metamodernism oscillates between modernism and postmodernism. As a compromise, it is in between modern enthusiasm and postmodern mood, between hope and melancholy, between naivety and knowledge, empathy and apathy, unity and plurality,

¹ L.A. Fiedler *Cross the Border—Close the Gap!* URL: https://openlibrary.org/works/OL19106168W/Cross_the_border (accessed on September 12, 2024).

² Valery D. Zorkin *Commitment to the Right Philosophy of Law Makes One Do Good*. URL: <https://www.ksrf.ru/ru/News/Speech/Pages/ViewItem.aspx?ParamId=86> (accessed on September 09, 2024).

totality and fragmentation, purity and ambiguity. Indeed, by oscillating back and forth or to and fro, metamodernism negotiates between modernism and postmodernism."³ They expressed this oscillation through the concept of "metaxis."

A very vague description, quite in the postmodernism style, which rather makes things more obscure than clear. The key words "between" and "oscillation" are least associated with stability and certainty sought by common people and theorists tired of postmodernist chaos.

The works of authors, who describe themselves as metamodernists, analyze works of fiction, movie theater, and architecture with expressive means conveying the peculiarities of the attitude of a contemporary human. First, it means that it is an aesthetic concept, "...metamodernism should be considered a 'structure of feeling' circulating within a certain moment of modernity" [3]. The structure of feelings is understood as non-rationalized and non-systematized properties of attitudes common to a human generation. This is a special type of sensibility characterized by focus on certain properties of the objective world that are considered essential.

Metamodernism offers a kind of sensibility different from postmodernism. It is characterized by an optimistic romantic perception of reality, a rejection of strict binary oppositions, a strategy of compromise, and attention to unity. However, like the postmodernist structure of feelings, the subject is the source of metamodernist sensibility, which projects it onto the world, fitting the latter into the Procrustean bed of his or her perception of reality. One way to eliminate the inevitable relativism is to find an objective basis for this sensibility. This brings us back to the issue of philosophy that metamodernism needs.

Speculative realism as a metamodernism philosophy

In his interview to a Moscow-based magazine *Metamodern*, Robin van den Akker named speculative realism as such, explaining that the latter redeemed the good name of and returned the metaphysical moment to philosophy, drew attention to objective, basic principles, "...based on which you can begin to think, devise and invent to create systems."⁴

Speculative realism versions differ by the ontological status they ascribe to objects of reality and the way

epistemological access to these objects is granted. The closest to metamodernism is object-oriented ontology (OOO). According to Harman, who suggested the name and is considered the most prolific author on the subject, reality is represented by a multitude of individual and autonomous objects, where each is a comprehensive manifestation of the being and does not need to be reduced to any original principle or the Absolute. These objects have ontological depth and none of their properties or abilities deplete this depth. A thing can exist in various contexts, be viewed from various perspectives without ceasing to be the same thing. For example, a house from a bird's eye view, at dusk, in rainy weather, from the front or the back is the same house, but looks different, "Reality is the rock against which our various ships always founder, and as such it must be acknowledged and revered, however elusive it may be" [4, p. 10].

Attention to the senses as an important channel through which we can access the object links speculative realists with metamodernists, who need a renewed concept of sensibility as the basis of artistic creativity. For this reason, according to objectively oriented ontologists, today, philosophy implements its functions through aesthetics in its original understanding, coming from Aristotle and especially from Kant, as a philosophical theory of emotions.⁵ The epistemological value of feelings directly depends on the concept of reality, its ontological properties. Speculative realists believe that the actual reality is represented by objects which substance is not directly accessible, but is comprehensible through indirect routes, through the surfaces of these objects represented by properties conveyed by the senses.

Common sense, its epistemological and socio-ethical abilities

By the new structure of feelings that, according to metamodernists, marks the time after postmodernism and which they try to describe by analyzing works of art, they mean a special type of sensibility inherent in artists, i.e. people distinguished by a refined sensitivity. Therefore, the expressive means they use to structure and explain reality are complex and understandable only to the confidants and the reality depicted through them has specific, but not common attributes. Meanwhile, the urgent task is to find common and integrating principles of reality and, accordingly, universal ways of its perception.

³ Timotheus Vermeulen & Robin van den Akker (2010). *Notes on metamodernism*, *Journal of Aesthetics & Culture*, 2:1, 5677. URL: <https://doi.org/10.3402/jac.v2i0.5677> (accessed on June 30, 2024).

⁴ URL: <https://metamodernizm.ru/robin-van-den-akker-interview-in-moscow/> (accessed on September 12, 2024).

⁵ Graham Harman *Aesthetics Is the Root of All Philosophy*. URL: <https://syg.ma/@burdina-anastasia/estietika-kak-pierviaia-filosofia-lievinas-i-niechieloviechieskoie> (accessed on June 10, 2024).

A possible way to solve it could be another interpretation of the structure of feelings different from the metamodernist one. We mean the concept of “common feeling” (*sensus communis*), which is one dimension of “common sense”—an important human ability better known as “ordinary reason.” The redeem of a good name of common sense in its epistemological and socio-ethical meanings will help to find a basis for universal ways of accessing objects of reality and developing similar positions of individuals on significant existential problems.

Historically, common sense is the first form of manifestation of human rationality implementing the same function as the self-preservation instinct in animals. Common sense is an innate ability that transforms the material of sense perceptions into general knowledge. It develops through experience and allows to gain the knowledge required to solve the main task—preserving the identity of an individual, group and species. It combines clarity and simplicity in perceiving the real world with a clear reference point, which is the shared benefit.

Common sense is a form of both individual and collective consciousness and the basis the so called “people’s psychology.” Any stable social group creates throughout history, through trial and error, institutions, regulatory systems, cognitive and spiritual practices allowing to preserve its identity and successfully solve current and extraordinary problems. People’s psychology, being a manifestation of collective common sense, is a foundation of more complex ideological constructions.

Common sense has been the main source of knowledge about the world throughout most of human history and this knowledge, accumulated and passed down from generation to generation, has been the foundation for science. Engels explained giving common sense nothing but a supporting role in knowledge by the fact that its abilities are limited by the “four walls of the home” [5, p. 17] and cease to be useful outside them. What he meant was that the essences of things associated with general laws are universal, hidden from direct perception, and can only be discovered by scientific methods. This conclusion is only partly true, because observation, which is an integral part of a scientific method, was borrowed from prescientific thinking, and some laws used by science were discovered by common sense. The inductive method, which is fundamental in the natural sciences, also originates from everyday knowledge.

In Roman philosophy, the term “common sense” was translated as “*sensus communis*” and had an additional meaning, along with the epistemological one. In particular,

it denotes a common feeling inherent in all people and manifesting itself as empathy and a desire to cooperate. The social dimension of common sense means that the vital feelings that an individual displays in his or her interactions with the world and with his or her fellows are common, the same for everyone, i.e. pain, pleasure, suffering, phobias, ideas about good and bad are shared by all people, just as they share the truth that two and two equals four. This is what Shakespeare meant when he put the below words into the mouth of a character in *The Merchant of Venice*, “I am a Jew. Hath not a Jew eyes? Hath not a Jew hands, organs, dimensions, senses, affections, passions? Fed with the same food, hurt with the same weapons, subject to the same diseases, healed by the same means, warmed and cooled by the same winter and summer as a Christian is? If you prick us, do we not bleed? If you tickle us, do we not laugh? If you poison us, do we not die? And if you wrong us, shall we not revenge? If we are like you in the rest, we will resemble you in that” [6].

Vico used the concept of common sense as the basis for the first philosophical and historical project, “Common Sense is a judgment without any reflection, felt in common by the whole class, the whole people, the whole nation or the whole Human Race. <...> Uniform Ideas, born among entire peoples, unaware of each other, must have a common basis of truth” [7].

The value of common sense as an important source of knowledge was restored in the fight against skepticism, which had become widespread in European philosophy thanks to Hume’s works. Reid, a representative of the Scottish school of common sense, wrote, “All reasoning must be from first principles, and for first principles no other reason can be given but this, that, by the constitution of our nature, we are under a necessity of assenting to them. Such principles are part of our constitution, no less than the power of thinking” [8]. In his essay *On the Intellectual Powers of Man*, Reid says that common sense is given to man by nature and cannot be learned. In this, it differs from reason that can be developed, “A man who has common sense can be taught reason. But if he has not this gift, no amount of training will enable him to judge of first principles or to reason from them” [9]. Reid considered all natural rights through the lens of common sense, believing that any public order should provide an opportunity for everyone to benefit, while respecting the freedom and private interests of all others. He noted that individual demands are legitimate rights only when they do not conflict with common sense, but contribute to it as much as possible. Satisfaction of demands for freedom, property

and services contributes to common sense and is actually a right for all [10].

Kant equaled common sense to practical reason. In *Anthropology from a Pragmatic Point of View*, he wrote, "In order to judge people by their cognitive ability (by intelligence in general), they are divided into those who should be recognized as having common sense (*sensus communis*)—and this, of course, is not ordinary sense (*sensus vulgaris*)—and people of science. The former know when to apply the rules (*in concreto*), the latter know the rules in themselves and before they are applied (*in abstracto*)" [11, p. 270].

To summarize, common sense appears as a set of principles and recommendations that most people follow when gaining knowledge about the world and solving current life problems. It includes:

- Simplicity, clarity, and understandability as criteria of knowledge;
- Trust in the natural and respectful attitude towards nature;
- Trial and error method in perception and practice, distrust of abstract reasoning not based on experience;
- Recognition of the mandatory nature of a provision, rule, model, or standard as a benchmark and evaluation criterion;
- Conservatism manifesting itself in rejection of innovations, unless their necessity is obvious;
- Balanced, middle position, avoiding extremes in relationships and actions;
- Sober assessment of one's capabilities, refusal of impossible tasks;
- Awareness of one's finiteness, belief in the existence of superhuman authorities;
- Sense of kinship, communality with other people, recognition of common values.

An analysis of the symptoms of postmodernism and the reasons that led to its collapse as a philosophy of history gives reason to assert that this is not least due to ignoring of the principles of common sense: rejection of any kind of standardization, belittling of the general and the apology of difference, epistemological and methodological relativism, distrust of the natural, the desire to replace and subordinate it, the priority of complex structures, encouragement of neverending experimentation and the search for novelty in the prejudice of stability and continuity, normalization of chaos, decentralization and demonization of order, and absolutization of the creative freedom of the subject and denial of canons.

Lessons for legal science

In addition to other social institutions and discursive practices, law has become infected with postmodernist viruses of relativism, pluralism, and normlessness and is currently going through a crisis of its identity. It manifests itself in idea that there are many answers to the question "What is law?" that represent authors' judgments with no objective basis destroyed by the postmodernist policy of apology of difference. Therefore, an urgent task is to design a concept of law proportionate to the socio-cultural situation in which contemporary humans find themselves. To address it, we may use the concept of reality proposed by the philosophy of speculative realism and the metamodernist concepts of the structure of feelings and metaxis.

To have rights is a privilege of an individual, which distinguishes him or her from a "trembling creature." The problem that all who attempted to conceptualize law have always faced is the inevitable link of the question "What is law?" with another question, "What do we, humans, have rights to?" The answer to the latter determines the authorities required to guarantee these rights. Human rights are a product of human freedom, which, in turn, is part of the species attributes of a human. Therefore, a human has the "right to those rights" that are required to be a human. "Required" means the least sufficient for this purpose. In the philosophy of law, they are called "natural rights." The word "natural" means, *inter alia*, self-evident, in accordance with nature, but disputes over the list of "natural rights" are still raging. Savenkov and Kolotova address this issue in an article dedicated to the 75th anniversary of the Universal Declaration of Human Rights [12]. The discrepancy is explained by the fact that natural rights include "non-natural" rights, i.e. those that are important for an individual to maintain and preserve his or her being in specific conditions of place and time. Unlike natural rights, which are universal, these rights are not required but contingent in the sense that they may or may not exist. Attempts to present them as natural disguise a desire to make someone's local civilizational ideas about law universal.

The requirements of common sense correspond to the basic principles of law, such as equality of all before the law, justice, humanism, and the unity of rights and obligations. An appeal to human nature, its morphological, physiological and mental attributes a criteria of common sense is a reference to determine the substantive parameters of most provisions of criminal and civil law. "Laws are made for common people, and therefore they must be based on common sense," Thomas Jefferson made a good

point on the question. Everyday legal consciousness, being the first level of legal consciousness where people begin their practical life, acts as a spiritual principle in law; it is capable of penetrating into the essence of law and is, as it were, common sense in law [13].

Pluralization of rights as a strategic postmodernist approach has led to the fact that basic, natural human rights have been buried under a heap of secondary, random, ad-hoc claims of individuals and social groups seeking to assert their specific and even exotic demands. As a result, postmodernist legal systems were unable to implement their governing and stabilizing function. Winners are the societies with legal systems based on traditional values with clear and understandable regulatory preferences for all citizens, which serve as social cement. There, the whole and the uniform have priority over the individual and the different, which the followers of the liberal model use as a reason to classify them as totalitarian and violating human rights.

Thus, the agenda is to update the list of protected natural rights amended with a view to national and cultural attributes and based on the generalized historical experience of how society dealt with crises threatening its stability, what drivers played a stabilizing role and a destructive role. For Russian legislators and law enforcement officers, a reference point here is Executive Order No. 809 of the President of the Russian Federation *On Approval of the Fundamentals of State Policy for Preservation and Strengthening of Traditional Russian Spiritual and Moral Values*, dated November 09, 2022.⁶

Common sense as the basis of the metamodernistic structure of feelings allows to find the foundations for a system of international law that excludes the dominance of national and local interests over universal human interests. Vico wrote about this back in the 18th century, "The common sense of the Human Race is the Criterion inspired by Divine Providence in nations for determining the Reliable in the Natural Law of Peoples; nations are convinced of it by assimilating the substantial Unity of such a Law, with which they all agree with various modifications" [7, p. 77].

The question of law is directly related to the question of justice, the criteria of which turned out to be as blurred as the boundaries of law. Although postmodernism promised to develop a new concept of justice, the result is a multitude of competing concepts that do not provide for social solidarity. As Zhukov notes, justice reflects the degree of social unity [14]; therefore, a fragmented society, as a postmodernist society appears to be, is not a society.

Most people indirectly judge about law through justice they perceive directly when they respond to decisions and actions of individuals and institutions affecting their vital interests, needs, and values. In doing so, they are guided by simple and understandable criteria developed based on common sense and the experience of individual and collective life. Opinion polls designed to find out what individuals understand as justice ultimately reveal their everyday, feeling-based assessments of events and social institutions. If they are not taken into account, it is impossible to develop a satisfactory theory of justice.

The fate of justice depends largely on the authorities that participate in enforcement of the law. In this process, there is a clash between people's routine ideas about justice and those that implanted in legal provisions and procedures and are a result of professional legislation. Jury courts composed of representatives of the main social and ethno-cultural groups help to reduce the differences between them. Common sense becomes of particular importance in criminal proceedings, when freedom, fate, health, and even life of a person are at stake. It is no coincidence that jury courts in Russia and abroad are treated as a most effective means of protecting human and civil rights, because they individualize the considered case and render a just verdict. By addressing issues of not law but fact, jurors, on the basis of common sense and personal life experience, answer the question whether the defendant is really guilty of the act committed by him or her [15].

In Czarist Russia, the Decree of Catherine II established Chancery Courts to consider certain categories of civil cases relying on the principles of "natural justice." They were ordered to be guided in their decisions by "humanity, respect for the person of one's neighbor, and repugnance to oppression."⁷

The social environment changes faster than the law, so the latter objectively lags behind the demands of the times and ceases to be a control of social relations. Hence, there is a need for criminal law pressure on people's behavior in the context of criminal law policy and common sense, which emphasizes the reciprocal influence of social relations and criminal law [16].

It is common sense that the public appeals to when seeing the irrationality of a legal decision, as was the case, for example, in 2017 with the "drunk boy" case, when a female driver killed a six-year-old child in Balashikha

⁶ URL: <https://www.garant.ru/products/ipo/prime/doc/405579061/> (accessed on September 11, 2024).

⁷ *Chancery courts* // Brockhaus and Efron Encyclopedic Dictionary. URL: <https://rus-brokgauz-efron.slovaronline.com/115258-Совестные%20суды> (accessed on August 06, 2014).

in a traffic accident. The initial forensic examination found 2.7 per mil of alcohol in the child's blood and the criminal proceedings were not initiated. It is the active discussion of this fact in the media that engaged the Prosecutor's Office and the authorities of the Investigative Committee of the Russian Federation and led to a trial and a three-year sentence in a minimum security prison (penal colony settlement) for the defendant.⁸

Common sense in the Russian law doctrine is considered as a legal principle associated with both the method of scientific knowledge and lawmaking [17] and law enforcement, which, despite the powerful means available to it (a comprehensive regulatory framework, deep dogmatic research, recommendations of the Supreme Court of the Russian Federation), is sometimes applied in violation of the law [18]. Legal science scholars recall common sense when other seemingly streamlined and tested tools fail. Here, we mean the assessment of categories that teetering on the edge, including public danger, insignificance, boundaries of criminal, administrative and

disciplinary jurisdictions, i.e. the concepts so vague that they are addressed by judge's discretion, which is actually based on common sense.

Common sense is repugnant to complex speculative constructions of justice allowing to hide or silence the facts of injustice, justifying them by political or economic expediency. "A thief must be jailed!" is an obvious demand of justice, but when it is applied selectively, "with regard to ranks and positions," it is perceived as a cynical violation of the law.

The concept of justice must be proportional to the ideas about it typical for the structure of feelings of our time and correspond to the natural human rights, his spiritual and moral values. Only then it will be a reliable barometer of public well-being.

To summarize: metamodernism, despite a problematic nature of its claims to be a philosophical and historical project, has some concepts and intuitions that can be used to address the issues of modern, including Russian, jurisprudence.

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⁸ She Served Her Full Sentence: Olga Alisova, Who Drove Over A "Drunk" Boy From Balashikha, Is Released. URL: <https://russian.rt.com/russia/article/686421-alisova-vygod-svoboda> (accessed on July 12, 2024).

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