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TRANSFORMATIONAL PROCESSES OF 21st CENTURY: INSTITUTIONAL CONTEXT

Abstract. The space of transformations — system-wide dramatic changes in public, legal, economic, political and other structures — is being expanded in a contemporary world. The instrumental role in this process is given to the institutional support of changes in domestic and international relationships. More broadly, the community can be presented as a single big system consisting of interrelated institutes. The institutes as a part of socio-cultural system perform different functions: streamlining social interactions, maintaining order, sharing information and social experience etc. In order to respond to social changes in a timely manner, the institutes should enjoy "adaptive efficiency".

Institutionalization as a way of streamlining social interactions is directly linked with a globalization process that affects an increasing number of governments with different political, economic, social and cultural systems and necessitates their adaptation to universal standards of interaction, formed at a new stage of the global historical development. The success of transformational processes depends on equitable engagement of all governments in addressing the most crucial problems of the contemporary world, in particular, in global value chains. The development of civilizational and cultural researches showed flaws in Eurocentric approaches, commitment to western universalism ignoring the uniqueness and identity of institutes, cultures, principles of human interaction, traditional values of various communities and governments.

Transformation as a dramatic reform constitutes a value-driven process, the purpose of which is to ensure freedom of a human being, his/her personal inviolability, right to life, property and adequate standard of living. Especially complex are transformational processes in post-soviet communities demonstrating a unique practice of reverting to the past social-economic models amidst new historic context. The adoption by post-socialistic countries of proven (in global history) institutes of peoples' authority, human rights, separation of powers etc. with due regard to the specifics of their communities might contribute to successfulness of a democratic transformational process which is currently distinguished not only for stagnation but for regress too.

Keywords: social institute, legal institute, institutionalization, standards, values, political system, economic system, transformation, revolution, evolution, post-socialistic development

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LAW AS A LINGUISTIC PHENOMENON: ANALYTICAL APPROACH

Abstract. Law as a regulator of the conduct of social subjects cannot be directly equated with other methods of controlling the behavior in society. The grounds of legally significant actions allow determination of the context of the application of legal rules. The meaning of each legal term, as argued by L. Wittgenstein, depends on its "context of use" and the conventions of use at the moment. Therefore, the interpretation of the rules cannot be based solely on the principles of logic and be completely neutral. On the one hand, "we follow the rule blindly", but at the same time, the repeatability of the behavior of other people and the ability to observe their behavior (by analogy with the mathematical concepts of addition and sum) encourage "learning" the rules and acting in accordance with the rules.

The ascription of the legal language and the "imputation" principle of the legal interpretation of facts allow defining a key concept that cannot exist beyond the constructed social reality. The attempts to analyze non-legal factors appeal not to legal arguments but to other phenomena. The legal term in its nature not only describes empirical facts but also encourages action.

The most dismal example of a change in philosophical argumentation and legal reasoning in the philosophy of law is the influence of Quine's arguments. In the context of the methodology of legal explanation, the naturalization of the epistemology of law is possible only when the limitations and specifics of traditional methods of interpretation of legal reality are considered.

The article focuses on the analysis of some arguments made by the analytical legal philosophers regarding the linguistic content of legal rules with no reference to any social determination or formulation of the significant judgments about the linguistic nature of legal reality.

Keywords: analytical legal philosophy, normativism, legal rules, rule-following problem, imputation, ascription, linguistic turn, naturalization of jurisprudence, legal realism

1. Introduction. Normativism as a Methodological Basis of Analytical Legal Philosophy

Analytical Legal Philosophy as an intellectual current was formed in the 40's–60's of the 20th century as a result of the rethinking of the problems in legal philosophy from the positions of the *empirical study of law, the analysis of the empirical content of legal constructions, and the study of the legal language and the logic of legal reasoning.* Considering the detailed elaboration of the methodology of study of legal phenomena and legal constructions, the purpose of the discussions among analytical legal philosophers was to clarify the specifics of legal language. The widespread popularity and citation of philosophical works written by the representatives of the analytical legal philosophy (H. Kelsen, H. Hart, P. Hacker, J. Raz, etc.) contributed to the formation of academic community and specific intellectual environment. In the second half of the 20th century, the development of the analytical tradition in philosophy of law was influenced by the general principles and methods of analytical philosophy (mainly, from the Oxford school of linguistic analysis and ordinary language philosophy), as well as by classical theories of philosophy and law.

Normativism is one of the best-known concepts in the philosophy of law and analytical jurisprudence, it is also known as the "pure theory of law." Methodologically, this means that the essence of law is described as disregarding the political, sociological and psychological factors that define the social and historical grounds for legal system development. However, some aspects of Kelsen's theory along with the available publications of the later "American period" in life (1943–1973) provide more details on his scientific and philosophical views on state and law.

Kelsen's approach to ontology contains the important methodological assumptions that allow him to organize the legal norms in a single integrated system, while the explanation of the grounds for the system is provided. One of the foundations of the system is the assumption that the search principles used to establish cause-and-effect relations are not fully applicable in the theory of law due to the specific logic of the legal reasoning: "it is evident that the science of law does not at all aim at a causal explanation of phenomena, that in the propositions by which the science of law describes its object the principle of imputation, not the principle of causality, is applied"[1]. By tracing the evolution of the concept of causality from ancient philosophy, H. Kelsen characterizes legal reality as a specific area of relations where causality cannot

[1] Kelsen, H. (1950). Causality and Imputation. *Ethics*, 61(1), p. 3.

be shown empirically. Just as during the fire, we do not rely upon natural disasters but we are looking for causality in human actions; in normativism, the imputation principle allows to classify actions as legally significant if the authorized subjects attach legal meaning to such actions. Essentially,

> H. Kelsen seeks not to expand the legal sphere to the whole array of social relations but rather to narrow it to the regulation of these relations by legal norms as the responsibility for the wrongful act can be "imputed" only for individual actions: "Since the connection between delict and sanction is established by acts the meaning of which is a prescription or a permission, or, what amounts to the same, a norm, the science of law describes its object by propositions in which the delict is connected with the sanction by the copula 'ought'. I have suggested designating this connection 'imputation"[2].

Hence, the object of the legal science is a system of legal norms that in the course of their application act as the grounds for the legitimacy of the specific actions. Thereby, the scientific conclusions should be consistent with the principle of cognitive objectivity that H. Kelsen interprets in a traditional way as a consistency with reality: "The postulate of the separation of science from politics presupposes that the object of science is reality, that scientific statements are statements about reality as opposed to value judgments in the specific sense of the term"[3].

This reasoning provides a basis for determination of the object of the legal science as a single complex consisting of positive legal norms that are created by the actions of individuals, and which, in the legal sense, constitute the acts of the law-making, while the hypothetical legal norms are used as criteria for assessment of individual behaviors.

2. The Linguistic Turn in Legal Philosophy

The "linguistic turn" in the legal philosophy originated not only as the result of the influence of the analytical philosophy methods used to clarify the meanings of the terms of the legal language but it also served for the purposes of justification of the conceptual analysis as the main method of resolving possible contradictions. The nature of legal statements began to be interpreted in the context of the linguistic content of legal rules. Additionally, in some cases, the social context began to be considered not from the viewpoint of law and social reality relations but as a context in which the

[2] Ibid., p. 2.

[3] Kelsen, H. (1951). Science and Politics. *The American Political Science Review*, 45(3), p. 648.

legal terms are used, for example, in judicial argumentation or in the process of ascribing the legal significance to actions[4].

The range of issues that relate to the analytical tradition in legal philosophy has not expanded significantly but has received a new impetus for further philosophical and legal research on the legal concepts. Based on the classic arguments of J. Austin and H. Kelsen, H. Hart updated the methodology of resolving the philosophical and legal issues. The rule-following problem and the possibility of its application to the legal language led to long discussions in the analytical legal philosophy[5].

Along with conceptual analysis, the methodological basis of interpretation was introduced in the philosophy of law; and various forms of interpretation of the legal norms that may have a theoretical significance came to be acceptable. These methods of interpretation have become particularly important due to the complexity of resolving the issues related to judicial discretion and the "open texture" of law, and for the first time, they were reviewed in the philosophical and legal concept of Ronald Dworkin.

R. Dworkin himself formulated a number of original arguments against legal positivism but, from a methodological viewpoint, he followed the views of the positivists, supplementing them with arguments; thus, he rather improved legal positivism than opposed it. Therefore, Dworkin's theory of a "constructive interpretation" hardly can be viewed as the theory that opposes the legal positivism; rather, R. Dworkin is an opponent of some aspects of Hart's concept, but, ultimately, a contributor to their development.

Another important phase of the development of analytical legal philosophy was the project of the "naturalization of epistemology". Based on the ideas of W. Quine, the project partially addressed the realistic argumentation against legal positivism, and largely induced legal philosophers to discuss the extent to which Quine's arguments were applicable in the legal sphere. Despite the fact that, since the beginning of the 20th century, legal realism developed as an independent current of legal philosophical study, its

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[4] In: Ogleznev, V.V. and Surovtsev, V.A. (2016). *Analiticheskaya filosofiya, yuridicheskii yazyk i filosofiya prava* [Analytic Philosophy, Legal Language and Legal Philosophy]. Tomsk: Tomskii universitet Publ., pp. 126–142.

[5] Analysis of this conception in more details represents in papers of V. Ogleznev and S. Kasatkin (Ogleznev, V.V. (2012). *G.L.A. Khart i formirovanie analiticheskoi filosofii prava* [H.L.A. Hart and Formation of Analytic Legal Philosophy]. Tomsk: Tomskii universitet Publ.; Kasatkin, S. (2014). *Kak opredelyat' sotsial'nye ponyatiya? Kontseptsiya askriptivizma i otmenyaemosti yuridicheskogo yazyka Gerberta Kharta* [How to Define Social Concepts? The Conception of Ascriptivism and Defeasibility of Legal Language of Herbert Hart]. Samara: Praim.).

naturalized version can be attributed to discussions in the area of analytical legal philosophy.

The legal language characteristics and the ways of its philosophical study are determined by the specific functions of law that is a regulator of legally significant actions. There are a number of theories in the philosophy of law that focus on the issue of how legal phenomena are reflected in legal statements. Particularly, in Kelsen's normativism, law is presented in the form of the system of the interrelated legal norms that have a common and individual nature. These legal norms contain a model of a "proper" social relations development and methods of their regulation; however, traditional notions of the causality and effect are not applicable to such social relations as the empirically observed actions can get a legal meaning and significance only if there is an act of an authorized subject. In other words, legal reality is reflected in the legal language differently than the other objects in the world. Similarly, H. Hart notes the ascriptive nature of legal statements, since the use of grammatical constructions in law, unlike other areas of knowledge, suggests the simultaneous performance of a legally significant action, qualification and assessment of ongoing events and actions, and in some cases, prosecution[6]. Epistemological questions arise specifically during the analysis of interactions of the legal norms, legal relations, and actions.

3. The Rule-following Problem

The rule-following problem, formulated by L. Wittgenstein in the late period of his work, became one of the fundamentals of the so-called linguistic turn in the philosophy of law and the analytical tradition formation. Discussions of modern legal philosophers are still focused on the theories of L. Wittgenstein because the conceptual apparatus in the legal sphere is formed on the grounds of the basic philosophical categories of analytical philosophy.

The classical formulation of the rule-following problem of L. Wittgenstein is viewed as a paradox that has many linguistic interpretations, and it is formulated as follows: "This was our paradox: no course of action could be determined by a rule, because any course of action can be made out to accord with the rule"[7]. Wittgenstein's concept of "rule" confuses many legal

[6] In: Hart, H.L.A. (1951). The Ascription of Responsibility and Rights. In: G. Ryle and A. Flew, eds. *Essays on Logic and Language*. Oxford: Blackwell, pp. 145–166.

[7] Wittgenstein, L. (2001). *Philosophical Investigations*. 3rd ed. Oxford: Blackwell Publishers Ltd., p. 88.

philosophers but it emphasizes the normative consequences that apply to a variety of language practices where actions can be seen as right or wrong. Such assessment by its essence allows interpretation of the rules by describing the "language game" and determining the content of a rule.

The key philosophical issues are the search for a method of adequate interpretation, the elimination of contradictions in linguistic expressions, and the formulation of a rule that has been agreed upon by the linguistic community. However, following Wittgenstein's ideas, the interpretation of a rule often allows replacing one formulation with another while the question of the level of degree to which the empirically observable actions reflect the rule remains open.

Wittgenstein's arguments on the rule-following problem led to a number of ambiguous interpretations of this philosophical problem in the analytical legal philosophy, in particular, with regards to the issues of certainty and prescriptions of legal rules. Realists point out that law by its nature is a fundamentally vague phenomenon, and the reasons behind this is the ordinary language. The uncertainty of the language and its constructions inevitably lead to an uncertainty of legal statements because the function of legal norms (containing the rules of behavior) is to reveal the diversity of human actions and relations.

Realists largely rely on the interpretation of Wittgenstein's arguments given by S. Kripke. If the mathematical concept of addition is used intuitively (for example, if we need to continue the numerical series according to the rule of "add 2"), then we always find the right answer conducting the mathematical operations[8]. Realists believe the same thing happens when legal decisions are taken. When a judge makes a decision, he relies not on a formal legal rule that is vague in content and has gaps but on existing social practices of application of the rule, as well as on other social factors defining the context of the decision (the moral, ideology, professional standards, etc.). Realists emphasize that uncertainty is insurmountable and is present in every case. Legal rules initially contain a number of alternative interpretations, the choice of which is exercised by a judge or other officials, with the exception of formal limitations (for example, appeal and revocation of a decision by a higher authority).

Is that a correct way to interpret Wittgenstein's ideas? The opinion of one of the discussion participant, Brian Bix, is that Kripke's interpretation of Wittgenstein's views raised a number of questions a long time ago, and

[8] In: Kripke, S.A. (1982). *Wittgenstein on Rules and Private Language*. Cambridge: Harvard University Press, pp. 8–9.

its extrapolation into the sphere of law is unacceptable[9]. L. Wittgenstein emphasizes the conventional nature of the language and the variety of "language games" but this fact does not imply the absence of at least a temporary consensus on the use of words. This consensus can have a political and ideological foundations, and, thus, the application of the rules can be flexible and sufficiently defined.

Realists do not consider another consequence of using the Kripke's interpretation which is a skeptical argument that distorts the ideas of L. Wittgenstein. The skeptical argument is a situation when we don't know whether we follow a rule or not ("we follow a rule blindly"), and that does not allow to justify the process of following a rule. At the same time, L. Wittgenstein emphasizes the question of how the rule determines the actions. If the structure of the rule does not contain all the signs and symbols sufficient to define the certain actions to be performed, then, the addition of signs and symbols may not cure the uncertainty. Along with many other realists, David Peirce shares the idea of the skeptical argument pointing out that the language can be used regardless of its relation to the environment: "no rule can be completely laid down in words, and the complete expression of any rule must include its actual applications"[10]. Thus, following a rule is inseparable from actions that correspond to it or do not correspond to it: "and hence also 'obeying the rule' is a practice. Moreover, to think one obeying the rule is not to obey the rule. Hence it is not possible to obey the rule 'privately': otherwise thinking one was obeying the rule would be the same thing as obeying it"[11].

B. Bix suggested a simplified realistic approach in the legal philosophy to the interpretation of Wittgenstein's views, which has led to unreasonable conclusions about the specifics of the legal language. The core of the problem of following a rule is the concept of the language as a "form of life", and the distinguishing the simple cases of its usage from the complex cases. In simple cases, we apply the rules identically. For example, we can continue the statement following the rule of "add 2" as follows: "1000, 1002, 1004"[12]. The word "we" in this case refers to everyone who shares the same "form of life", and who learns the same rules, in the same way. However, the fact

[9] In: Bix, B. (1993). *Law, Language and Legal Determinacy*. Oxford: Clarendon Press, p. 46.

[10] Pears, D. (1988). *The False Prison. Volume 2: A Study of the Development of Wittgenstein's Philosophy.* New York: Oxford University Press, p. 468.

[11] Wittgenstein, L. (2001). *Philosophical Investigations*, p. 88.

[12] In: Bix, B. (1993). *Law, Language and Legal Determinacy*, p. 48.

that we act in the same manner does not mean that we act in accordance with a rule. Certain criteria of a correct usage of words should be defined, or we should rely on the notion of "rule-following" in the use of linguistic expressions.

In simple cases, according to L. Wittgenstein, there are no factors that may define the actions precisely: no mental state, no inner voice, and no metaphysical idea. There is nothing that could justify or explain why we act in a certain way, using the rule of "add 2". It is the case when people learn to act in a similar way following the same rules[13].

The question of why we consider a way of following the rule as a correct one arises in discussions about the problem of following a rule in the philosophy of law. Thus, Dennis Patterson considers two possible answers: the belief that the rule itself determines how to act, or the social consensus makes one approach more correct than the other. He believes that the interpretation of the rules can be broad, and its limitations are defined by the social context of the application of the rule[14]. In the legal language, a combination of various linguistic constructions often allows the interpretation of the legal norm; thus, providing an adequate explanation of its meaning. For example, a judge gives an explanation on enforcement of judicial decision, and the legislative body defines the terms embodied in a law. In the countries of the Common Law legal system, cases of the interpretation of legal rules by legal doctrine are common, and that allows to apply the relevant legal norms uniformly. These convenient practices of interpretation, according to D. Patterson, allow overcoming the paradoxes of following a rule in the legal language. Similar arguments are given by Brian Langill, who argues that "the idea of Hart on judges using social rules from an internal point of view, is the application of basic argument of Wittgenstein on rule-following to the legal rule"[15].

B. Bix, along with the other anti-realists, does not support an arbitrary interpretation of Wittgenstein's arguments in relation to law because the law is a reflection activity, participants of which consider, discuss and argue their actions and decisions[16]. Unlike the example with the concept

[13] Baker, G.P. and Hacker, P.M.S. (2009). Following Rules, Mastery of Techniques, and Practices. In: Baker, G.P. and Hacker, P.M.S. *Wittgenstein: Rules, Grammar and Necessity*. Volume 2. 2nd ed. Chichester: Wiley-Blackwell, p. 136.

[14] In: Patterson, D. (1990). Law's Pragmatism: Law as Practice and Narrative. *Virginia Law Review*, 76(5), p. 937.

[15] Langille, B. (1988). Revolution without Foundation. The Grammar of Scepticism and Law. *McGill Law Journal*, 33(3), p. 498.

[16] In: Bix, B. (1993). *Law, Language and Legal Determinacy*, p. 48.

of mathematical addition, violations of legal norms imply non-following the rules provided by legal norms. In addition, the terminology used by L. Wittgenstein has nothing to do with legal terminology. For example, in his view, the term "grammar" is a completely different concept that includes the practices of words usage, criteria and grounds of an adequate word usage. He believed that many philosophical problems arise from the violation of the grammatical rules. Thus, outside the linguistic context and "language games", it is impossible to detect the problem of following a rule by analogy.

Anti-realists also deny the thesis that ordinary language is fundamentally vague. It is not implied in the Wittgenstein's arguments, that the stable meaning of expressions and conventions with respect to word usage cannot be reached. Following the rules is determined by the social context of the expressions usage; and learning to understand the rules contributes to certainty (B. Langill, A. Marmor, and others)[17]. The practice of application of law allows resolving complex court cases and contributes to the continuous clarification of the legal provisions.

The arguments above interpret only the ways of application of Wittgenstein's theory but do not affect the specifics of the legal terminology use. The legal norm not only has a linguistic content and is formulated based on the rules of grammar but also performs the regulatory functions, that is, it contains instructions, violation of which leads to legal liability or other forms of liability. H. Hart fairly points out the ascriptive nature of legal concepts and legal statements, as the key function of legal terms is to provide a qualified assessment of the actions performed, and to establish a link between the legal rules and social relations[18]. In this sense, legal norms are imperative and can not be viewed from the perspective of the truth or falsity of their content as they act as an instrument of social regulation. However, the normative prescription in the structure of the legal norm is the rule, and in complex cases, the uncertainty of the rule may lead to gaps in law, or uncertainty in the legal qualification of actions, which makes it difficult to apply the legal norm. Hence, Wittgenstein's arguments in the legal sphere are still relevant and actual.

One of the questions is whether legally significant actions can be defined by legal norms. Based on Hart's concept, the primary and secondary rules

[17] Langille, B. (1988). Revolution without Foundation. The Grammar of Scepticism and Law, pp. 451–505; Marmor, A. and Sarch, A. (2015). The Nature of Law. In: E.N. Zalta, ed. *The Stanford Encyclopedia of Philosophy*. [online]. Available at: https:// plato.stanford.edu/archives/ fall2015/entries/lawphil-nature/ [Accessed 12 June 2018].

[18] In: Hart, H.L.A. (1951). The Ascription of Responsibility and Rights, pp. 145–146.

form the foundations of the legal system and the course of its development[19]. Primary rules that regulate the social relations directly, record the expressions of ordinary language in the legal form, permitting alternative behaviors. While the secondary rules define at the meta-level the legal procedures, authorities, and mechanisms for making legal decisions. In other words, the secondary rules contribute to the stability of the legal system and fill in gaps in the primary rules. However, an "open texture", or a room for interpretations, may occur in the system of rules, where the primary rules do not establish a way of social relations regulation. Unlike the approach in realism, Hart does not admit the fundamental uncertainty of the rules, because the judicial discretion is limited by the purposes and principles of the legal system development, and by the minimum of moral content in legal norms.

The second important issue is the inf luence of the rule-following problem on the conditions of legitimacy of legally significant actions. The problem of following a rule eliminates the arbitrary nature of legal decisions, while the judgment is based on the legal qualification of empirical facts and events. Hart's concept corresponds to the thesis of a "rule of recognition" that ensures the interaction of the rules levels and contains criteria for the systemic legal regulation[20], and, in some cases, the fundamental values of the legal system as a whole. The rule of recognition acts as a conceptual foundation and a condition for the formation of the rules of other types, which contributes to certainty and stability of the interpretation of regulatory prescriptions and legal decision-making.

There are arguments by H. Baker and P. Hacker that the interpretation of the rule prior to its application is impossible, hence, the facts of a rule application create its interpretation [21]. The practice of using judicial precedents in the countries of the Common Law legal system corresponds to this thesis. Normative prescriptions to the reasoning part of the precedent contribute to more flexible decision-making, application of the analogy of the law and right; and, generally, they are interpreted in the process of their application. The legal language specifics is demonstrated by the notion that situation of following the legal rules can also take place in the process of passing a law (compliance with parliamentary procedures, or definition of

[19] In: Hart, H.L.A. (1994). *The Concept of Law*. 2nd ed. Oxford: Clarendon Press, p. 94.

[20] Ibid., p. 95.

[21] Baker, G.P. and Hacker, P.M. (1984). *Scepticism, Rules and Language*. Oxford: B. Blackwell, pp. 128–129.

general concepts in law, for example, the concept of "vehicle" by H. Hart), which is before the occurrence of legal regulation; later, during the process of law enforcement, the explanation and interpretation of the rules are necessary for their appropriate application. The legitimacy of procedures determines the further appropriation of actions of legal subjects and serves as a basis for certainty in legal decision-making. Thus, the analysis of the positions of realism and anti-realism, as well as skeptical arguments about the problem of following a rule in the classical works of L. Wittgenstein and his followers is important for understanding the legal language and legal statements specifics.

4. The Theory of Ascriptive Legal Statements by H. Hart

Relying on the new tradition of linguistic analysis in the philosophy of law, Hart reconsiders the ontological propositions of the legal philosophical theory. While the basic thesis of legal positivism regarding the dependence of nature of law on social facts still applies. In one of the early works of 1949, H. Hart states that there is a special kind of linguistic expressions, the function of which is not in describing the specific situations but in the expression of legal requirements and legal qualifications of events, states, and actions, that ascribe legal significance to natural and social phenomena. Therefore, a philosophical analysis of human behavior in the legal sphere is performed with the use of ascriptive statements that express legal acts, assign responsibility for actions, and, in a broad sense, ascribe legal significance to empirical facts[22]. Thus, in case of drafting a will, we can observe the process of a text creation by a person as the physical activity (an empirical fact). If witnesses are present and the legal form of the document is appropriate, then the notary acting as an authorized official who "ascribes" the legal significance (the text becomes a will with all of its legal consequences upon a notary's certification) to the relevant empirical facts observed (writing the text). Oral expression of words by a person will have an ascetic nature if the person performs acts of legal significance at the same time. The person may express the intent on the future state of the property and set conditions on those to whom it shall be transferred. The person may define certain conditions underlying the transfer of property to a specific heir (in case of a disclaimer will), or may refer to the inheritance procedure established by law in a will, and determine the order of transfer of property. This freedom of choice creates the legal reality of a will as a unilateral deal, and the state

[22] In: Hart, H.L.A. (1951). The Ascription of Responsibility and Rights, p. 146.

recognizes the legal consequences of such transaction. Even the analytical philosophy sees the transformation of reality through linguistic forms.

In fact, H. Hart reinterprets the problem of following a rule of L. Wittgenstein by applying the concept of ascription: aligning with the legal rule means "ascription" of the legal meaning to certain actions, which characterizes the constructive and pragmatic sides of legal activity. However, the ascriptive approach defines the structure of the ontology of legal reality and characterizes the specifics of the legal language application.

Analyzing the specifics of judicial activity, H. Hart points out, in the first place, the impossibility of applying the descriptive model to the legal statements and further verification of their "truth/falsity". Since the final phase of the legal process is the making of a judicial decision, then its function is not only to determine the truth of the facts ("Smith put poison in coffee in wife's cup, and as a result his wife died"), but also in ascription of legal consequences to these facts ("Smith is guilty of murder, and court ordered a sentence to him and defined order of its execution")[23].

If the judicial activity only refers to the legal qualification of behavior, then it is unclear how the facts support or oppose the legal conclusions. H. Hart describes the judicial decision as a mixture of empirical facts and legal norms. However, he criticizes the model of descriptive legal statements, as the judge's purposes are more complex than simply agreeing on facts, for example, of the necessary and sufficient conditions of the contract conclusion as provided by law. When the judge reviews a contract to establish its legal validity, his function is not to interpret the facts correctly but to recognize the existence of agreement through the accurate qualification of the actions of the parties fulfilling the obligations. Further, "the Treaty exists in the timeless sense of the word 'is' concerning legal decisions"[24]. Thus, the judge does not make deductive conclusions because the legal decisions are not based solely on the empirical facts.

In the new positivist interpretation of legal reality, the mechanism of "ascription" is a universal cognitive method that is used to prescribe the ascriptive form to empirical facts that become normative facts afterward and serves to differentiate the legal sphere from other spheres of nature and

[23] Therefore in Hart's legal theory to describe the "intention" for the action means that any human activity in the legal sense depends (of) on this intention as some authors argued (Stern, K. (1959). Mr. Hampshire and Professor Hart on Intention: A Note. *Mind: A Quarterly Review of Psychology and Philosophy*, 68(269), pp. 98–99; Boden, M. (1959). In Reply to Hart and Hampshire. *Mind: A Quarterly Review of Psychology and Philosophy*, 68(269), pp. 256–260).

[24] Hart, H.L.A. (1951). The Ascription of Responsibility and Rights, p. 155.

society. Further, normative facts are embodied in the structure of legal norms (laws, and precedents), and they get the status of legal facts acting as the basis for the origin, change or termination of legal relations. The dismal example provided by H. Hart is the one regarding the different meanings of the statement "he was writing a will". This may refer to the person's physical actions (empirical fact), the performance of a legal act (normative fact), or, if the necessary conditions are met (appropriate citizenship, presence of witnesses, signature of the will, and the record of the testator's death), to a legal fact as the basis of regulation of the relationships by inheritance law.

5. Quine and the Legal Epistemology

Nowadays, the discussions about the naturalization of epistemology in the analytical legal philosophy and the development of a naturalized jurisprudence are based on the well-known statement of the American legal philosopher Brian Leiter about the "naturalistic turn" in the philosophy of law: "While each of the major areas of philosophy — meta-ethics, philosophy of language, epistemology, philosophy of science, philosophy of mind — have undergone a naturalistic turn in the last quarter of a century, the Anglo-American philosophy of law remained untouched by this intellectual trend" [25]. One of the most significant factors underlying the evolution of the legal epistemology in this direction was the effect of the ideas and arguments of classical legal realism on the explanation of the legal reality and the essence of law. The criticism of traditional jurisprudence in legal realism emphasizes the significant difference of the analysis of the essence of law and the actual practice of legal proceedings and judicial decision- making under the concepts of legal positivism. Additionally, the popularity of ideas of naturalization in the legal epistemology in the second half of the 20th century, is associated with a multiple contradictions in the explanation of the objectivity and normative nature of law, which allow, in the context of the classical philosophical and legal concepts, to form an idea of a single and logically closed system of legal norms capable to influence the practice of law application comprehensively (H. Kelsen, H. Hart). The concepts of normativism and new positivism in the philosophy of law have been most criticized in modern interpretations of legal realism, since the notion of law as an interrelated system of legal norms does not contribute to explanation of

[25] Leiter, B. (1998). Naturalism and Naturalized Jurisprudence. In: B. Bix, ed. *Analyzing Law: New Essays in Legal Theory*. Oxford; New York: Clarendon Press; Oxford University Press, p. 80.

the boundaries of judicial discretion in the decision-making process, as well as to reflecting the influence of other social factors on the judicial system. In this view, Hart's concept of "open texture" of law and the development of the concept of ascriptive legal statements were considered as methodological means of modeling and forecasting the practice of legal norms application. However, the complex process of interaction of legal norms at the time of qualification of the legally significant behavior of participants of legal relations, as well as the need to follow the formal procedures in the judicial decision-making, have actualized the issues of the new descriptive concept of legal proceedings development.

The grounds for the development of the naturalistic approach in the philosophy of law is the attempts to draw an analogy between the philosophical arguments of W. Quine on the criticism of a priori knowledge and classical epistemology, which is focused on the use of abstract philosophical concepts, and arguments related to the explanation of the need for the philosophy development in the context of empirical sciences[26]. One of the factors contributing to the possibility of drawing an analogy in the philosophy of law was the convergence of the argumentation of legal positivism and legal realism in reasoning the system of legal rules in the structure of the legal system. Based on Hart's concept, the secondary rules (rule of recognition, rule of change, and rules of adjudication) in their essence serve to set up the formal requirements and procedures for development and enforcement of legislation, and for appointment and allocation of the powers on the governmental officials.

What is the nature of these rules? If the primary rules have a regulatory function and are formulated based on the practice of existing legal relations, then, it is possible to provide their empirical justification, which the judges can use in settling disputes. At the same time, the secondary rules, such as rule of recognition embodied in the Constitution and constitutional laws, are not empirical in their nature. The political compromise is required to recognize the legitimacy of the rules, and this compromise should be reflected in the Constitution; additionally, the confirmation of compliance with the constitutional rules in everyday practice by officials is required. Such compromise is a factor that influences the formation of the legal system but it should be considered as a non-legal factor. J. Raz notes that without practical application, it is impossible to determine which legal norms refer to rules of recognition, while this methodological aspect in Hart's concept and legal

[26] Quine, W.V. (1953). *From a Logical Point of View, 9 Logico-Philosophical Essays.* Cambridge: Harvard University Press.

positivism is often ignored as unimportant[27]. In the project of the naturalized epistemology of law, a positivists' discussion about secondary rules is viewed as a manifestation of traditional epistemology, in which a priori knowledge rarely relies on empirical facts of legal sciences as a basis of the explanation of philosophical and scientific conclusions. Hence, formulated by analogy with Quine's argument, the proposal to replace the classical normative theory of law with other descriptive theories contributing to the study of the practical application of law was presented in the most conceiving way by B. Leiter. The philosophy of law, according to B. Leiter, and its development should be based on the branches of legal science, both in terms of continuity of knowledge and continuity of methods.

However, the analogy with Quine's critics on the classical epistemology fundamentalism is difficult to apply in the philosophy of law. The closest relevant examples are the normativism of H. Kelsen and new positivism of H. Hart.

In Kelsen's normativism, the law is a system of legal norms. A legal norm acts as an object of cognition in jurisprudence, and the legal norms classification is based on the recognition of the a priori existence of a "basic norm" with the highest legal force. As the content of the "basic rule" is the basis for maintaining the legal order and the functioning of the state, the hypothetical nature of these rules does not allow their embodiment in the international conventions or in the text of the constitutions. The "basic norm" is postulated as an existing, and, at the same time, a transcendental category; the logic of the constructed hierarchy of legal norms and their practical application cannot be ensured without the "basic norm". B. Leiter states that according to Kelsen's concept, the essence of the law is defined by the possibility of applying the sanctions embodied in the structure of the legal norm; this idea contributes to the further development of normativism in the naturalistic perspective[28]. However, such restatement and conclusions cannot be taken for granted as the main purpose of normativism was the development of a "pure theory of law", within which the methodology of investigation of legal reality cannot be based on the methods of other sciences and other non-legal factors. Additionally, the normative concepts of legal qualification and identification of the legal significance of specific actions of the individuals, in some cases, provide grounds for an effective explanation

[27] In: Raz, J. (1985). Authority, Law and Morality. *The Monist*, 68(3), p. 297.

[28] In: Leiter, B. (2008). Naturalizing Jurisprudence: Three Approaches. *University of Chicago Public Law and Legal Theory Working Paper*, [online] (246). Available at: https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1200&context=public_law_and_legal_theory [Accessed 17 June 2018].

of the nature of the legal norm application, as well as the judicial decision-making. Therefore, in the context of law application and regulation of legal relations, classification of legal norms into common and individual is based on a priori knowledge of the content of the "basic rule", and, at the same time, on the legal interpretation of empirical facts and the behaviors of legal subjects. The naturalization of the concept does not contribute to the expansion of scientific knowledge about the essence of law or the legal system.

Another example of the viewpoint on the naturalized epistemology of law is Hart's new positivism. In new positivism, the basic concepts and methods were modified to understand the problem of the correlation between normative and descriptive essence in the legal system. H. Hart becomes the founder of the "linguistic turn" in the philosophy of law while relying on the ideas of analytical philosophy. At the same time, B. Leiter states that Hart's theory can be disclosed in a naturalistic perspective because it is based not on the traditional concepts but on the attempts to describe these concepts with reference to theories of "ordinary language" and "open texture" of law which permit judicial discretion[29]. Hart recognizes the possibility of gaps in the law and the uncertainty of the content of legal norms that the judges apply in the decision-making process. Even in this case, the naturalization of epistemology facilitates the distortion of the original purposes of new positivism in the philosophy of law on the following grounds.

Firstly, the concept of H. Hart (including the context of Raz's arguments) provides the unification of the legal system into the system of primary and secondary rules solely through the legal means, such as compliance with the principles of the legislative process by parliament, constitutional compliance, and the prohibition of the broad judicial interpretation without the legal language consideration. While a priori secondary rules limit judicial discretion and become a practical guide in the development of legislation branches.

Secondly, the epistemological significance of Hart's concept of ascriptive legal statements is that it provides the basis for ascription of legal significance to empirical facts; this is important for prevention of judicial arbitrariness and violations of legal principles.

The examples provided above show the uncertainty of the term "naturalism", which has various specific meanings, and each of the meaning is applicable to different areas, such as legal positivism, legal realism, and

[29] In: Leiter, B. (1997). Rethinking Legal Realism: Toward a Naturalized Jurisprudence. *Texas Law Review*, 76(2), p. 296.

theories of natural law. In particular, the term "legal naturalism" is applicable to metaphysical concepts of natural law, where the natural law is viewed as a form of manifestation of the laws of nature or rational representations of natural and inviolable human rights. In this case, the classical concepts cannot be naturalized within the frames of epistemology because they are based on a conceptual apparatus and arguments that are not related to empirical methods of the final conclusions justification.

However, the discussion about the naturalization of the legal epistemology, in addition to the development of Quine's arguments in the legal philosophy, covers attempts of B. Leiter to analyze actual practices in legal proceedings in the context of legal realism. B. Leiter reviews an analogy with the Quine's thesis on the uncertainty of the translation and explains the concept of the uncertainty of legal norms and the impossibility of predicting the court decisions by using legal norms. The uncertainty that characterizes the content of the legal norm is caused by the use of legal concepts that are not relevant to empirical facts. Thus, the interpretation of legal norms in the course of decision-making by officials and judges is required. In legal realism, the traditional methods of philosophical and legal reasoning do not apply, while the judicial decision is explained by the analysis of facts performed by a judge on the basis of the existing legal norms (Hart's concept), which are not defined in its content and expand the possibilities of judicial discretion[30].

B. Leiter claims that the epistemological foundation of legal realism is based on philosophical ideas of naturalization, while the process of scientific research of legal phenomena should be based on empirical facts, such as the actual procedures for decision-making by judges and practical activity of the administrative governmental bodies. The uncertainty of the boundaries of judicial discretion causes the legal realists to refuse the standard model of legal explanation where the content of the legal norm is determined by the judges. Instead of the standard model, they formulated a descriptive concept of a judicial decision that functions as a tool to predict the actions of a judge in making a decision depending on social and psychological factors, which serve as empirical evidence of the truth. Thus, the theory of law in the naturalized perspective turns into a scientifically-based theory of judicial decision-making.

The analogy with Quine's argument on the epistemology as part of psychology, as well as the need for the empirical justification of our beliefs and intuitions, were considered by B. Leiter in his statements on the

[30] In: Leiter, B. (2001). Legal Realism and Legal Positivism Reconsidered. *Ethics*, 111(2), p. 281.

fundamental uncertainty of laws. The uncertainty of the law implies multiple identically legitimate methods of interpreting its provisions, also it accepts the revisions of prior court decisions and precedents. If the content of the law does not allow to predict the identical judicial decisions in similar cases in a reliable manner, then, according to B. Leiter, it is necessary to investigate further and search for other grounds for explanation of judges' decisions. The traditional assumption in legal realism is that a judge has an unlimited choice of alternatives in making a judicial decision, and this assumption undermines the scientific nature of the legal prediction and forecast.

What is the foundation of the judicial discretion and possible forecasts? In actual judicial practice, the discretion of the judge in regards to the interpretation of laws can be based on the existing economic model, or on the attempt to make the best decision given the social and economic conditions. Thus, the naturalized theory of law preserves the traditional conceptual apparatus but it can use the empirical facts of the social sciences to study the social mechanisms of making judicial decisions. Therefore, other concepts and terms in the legal sphere are subject to conceptual analysis, and this slightly distinguishes the views of legal realists on the legal reality from the views of positivists.

However, such interpretation of Quine's philosophical argumentation and legal realism concepts used to explain the naturalistic approach in the philosophy of law is unreasonable. As some legal cases require additional explanation and interpretation in various ways, the revocation of the court decision by the appellate instances does not mean there was a methodological error in the decision-making or error in the methods used by scientists during the investigation of the judicial practice. Further, from the theory of law perspective, the justification of a decision made by a judge or a governmental official implies not only the search and systematization of empirical facts but also the reasoning behind the legal nature of the decision, and its compliance with legal principles and legal norms, which is subject to verification by a higher court. The relevant principles cannot be revised due to the discovery of judicial errors and are used only to clarify the content of the judicial precedents to be implemented by the judges in the future decision-making cases.

Arguments of legal realists criticize the formalism in law and interpretation of the letter of the law; these arguments distort the actual practice of judicial proceedings because compliance with formal procedures as provided in law by all participants of the process is the basis to make the legitimate judicial decision, and in situation of not following the requirements, the decision should be reconsidered or revoked. Thus,

the rationalization of a judicial decision does not depend on the possible uncertainty of legal norms, but on the search and application of legally significant argumentation, which does not require the naturalization of epistemology in the radical version, as presented by B. Leiter.

Thus, the versions of the development of the naturalized epistemology of law described above are based on the application of Quine's arguments by analogy in the area of legal philosophy, but with certain limitations. Examples of direct application of Quine's arguments to the critics on the a priori and uncertainty of legal norms in judicial practice (legal realism) and to the critics on the traditional positivist epistemology in terms of the limits of judicial discretion (Hart's concept) prevent the search for an adequate legal argumentation to provide reasoning to the conclusions. Refusal to comply with formal legal rules turns the process of judicial decision-making and law enactment into a political process due to the influence of ideology and current moral concepts, and prevents the possibility of compliance with legal principles and development of the effective legal system. Thus, in the naturalized perspective, the uncertainty of law is increasing.

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THE FOUNDATIONS OF THE VALIDITY OF LEGAL ORDER AND THE PROBLEM OF THE JUSTICIABILITY OF THE "POLITICAL": C. SCHMITT ON THE LIMITS OF JUSTICE

The article was prepared within the framework of the scientific project № 18-011-01195 "Validity and efficacy of law: theoretical models and strategies of judicial argumentation", supported by the Russian Foundation for Basic Research.

Abstract. The controversy of C. Schmitt and H. Kelsen on the guardian of the constitution held in the 1930s clearly demonstrates the relationship between the postulated basis of the validity of law, the definition of the essence and limits of justice and the model of the guarantee of constitution.

C. Schmitt identifies three grounds of the validity of law: norm (normativism), decision (decisionism), order (institutionalism). Based on the assumption of law as a specific order, the author proposes his own model of constitutional guarantee — the guardian of the constitution "in an institutional sense", which is the head of state who preserves order by extraordinary and potentially unlimited powers. In his opinion, president is such a guardian in the concrete constitutional order of the Weimar Republic.

The court is interpreted by a German lawyer as an institution of a particular order. C. Schmitt's concrete-order thinking defines the boundaries of justice — it is "political", which is understood as an extraordinary degree of intensity division into public "friends" and "enemies". Going beyond these boundaries the court finds itself in the sphere of political struggle, where independence, neutrality and objectivity, and, consequently, justice are impossible. These ideas on the essence and limits of justice constitute the theoretical basis on which C. Schmitt builds criticism of the H. Kelsen's judicial model of the guarantee of constitution.

H. Kelsen reduces the legal order to a hierarchical system of norms, the validity of which arises from the so-called "basic norm". The thesis on the identity of lawmaking and law enforcement follows from the normative point of view of H. Kelsen which, combined with the independence of the judiciary, constitutes the theoretical base of the judicial model of guaranty of constitution.

Criticizing the views of H. Kelsen, C. Schmitt argues that a constitutional judge, by resolving doubts regarding the substance of the constitutional norm, creates its substance independently, i.e. makes a political decision, and, consequently, acts as a constitutional legislator. The politicization of justice is a particular case of escalation of the "political", from which the guardian "in an institutional sense" is intended to protect the order. Consequently, the constitutional judge reveals himself as a new sovereign at which point a threat of a sovereign's duplication and a collapse of political

unity emerges.

Thus, the origin of disagreement between two significant lawyers does not lie in the field of pragmatic reasoning on the feasibility and effectiveness of constitutional guarantee models, but it occurs because of different interpretation of the basis of validity of legal order, which predetermines their diametrically opposed approaches on defining the essence of justice and its boundaries.

Keywords: constitutional justice, guardian of the constitution, the validity of law, judicial interpretation, normativism, decisionism, institutionalism, C. Schmitt, H. Kelsen

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OPENING UP OF A PANDORA'S BOX OR HOW THE RIGHT TO SELF-DETERMINATION INFLAMES DECEPTIVE PASSIONS (SOME INTERNATIONAL LEGAL ASPECTS OF KOSOVO'S INDEPENDENCE)

Abstract. The declaration of Kosovo's independence in 2008 and its international recognition by a majority of Western countries is viewed ambiguously from the perspective of the contemporary international law and continues to be a debatable political challenge. Furthermore, several states (as well as politicians and lawyers) treat the situation with Kosovo as *sui generis* by virtue of a set of contextual and historical circumstances and emphasize that the given case does not cause a precedent to address ethnical and political problems existing in other countries. However, the case of Kosovo in many aspects is similar to the situation in Abkhazia, South Ossetia and Nagorno-Karabakh. Others underscore that the recognition of Kosovo's independence is of precedent-setting nature and in this regard they express concerns that it might contribute to secession and separatism in other regions across the globe. It is understood that the advocates of both standpoints exaggerated the significance of actual circumstances and evaded a regulatory analysis. The only difference between them consisted in the fact that one of the parties pushed for Kosovo's independence and the other — against its independence. In addition, this very fact led to politicization of this problem to the detriment of its judicial discussion.

The recognition of Kosovo's independence may not be regarded as the establishment of a new customary international right to a unilateral "remedial secession", i.e. the right to secession in exclusive cases related to grave human rights violations on the part of the state.

There are neither objective (existence of the respective international practice featuring for duration, consistency and prevalence) nor subjective (existence of *opinio juris sive necessitatis* — firm conviction of the states that the given practice is of regulatory and generally binding nature) conditions.

However, the recognition of Kosovo's independence encourages and will encourage leaders of other separatist movements to implement their political aims. It is obvious that the problems of regulating the ethnic conflicts facing the international community have become much wider and intensive particularly after and not prior to decision on Kosovo's status.

Besides, the recognition of Kosovo's independence and the arguments underpinning this decision demonstrate the politicization of international law and withdrawal from its regulatory binding nature.

Keywords: Kosovo, international law, right to self-determination of peoples,

territorial integrity, UN, International Court of Justice, remedial secession, customary international law, *sui generis*

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PERSONAL DATA PROTECTION IN THE DIGITAL ERA: RUSSIAN LAW IN THE EUROPEAN CONTEXT

The article was prepared within the framework of the scientific project № 18-011-00406 "Human rights in the Internet era: Public Law aspect", supported by the Russian Foundation for Basic Research.

Abstract. With the development of digital technologies, the problem of personal data protection has become particularly relevant. In the majority of countries, the right to personal data protection is treated as a fundamental one since pursuant to the European approach it emerges from the privacy right. The respective issues are at the top of the agenda of UN, OECD, Council of Europe and European Union. The international and supranational levels distinguish the personal data protection, in broad terms, and the personal data protection in automated processing, where the latter is exposed to a more detailed regulation.

Originally, the Russian legislation on personal data protection was developing in the context of the European law. However, while a wide interpretation of personal data suggests a judicial interpretation in Europe, Russia largely focuses on explanations of a competent authority. Our country has been at the forefront in regulating the right to oblivion at the legislative level. Along with this, the measures to ensure security by way of regulating the Russian Internet segment are taken. The introduction of a privacy inspector position is a question of the near future for Russia.

Meanwhile, in the light of digitalization there appear to be a conflict between the requirements to personal data protection and actual failure to comply with them due to such data accessing in the Internet. The article highlights different angles of personal data protection in the digital era which imminently causes various conflicts (between data protection and public interest; between data protection and limited access information; between data protection and big data processing technology; between data protection and freedom and neutrality of the Internet; between data protection and other human rights; between data protection and employer's rights; between data protection and public accessibility of data). The private law interests of personal data owners are "opposed" by public law interests of personal data localization. When analyzing conflicts in the area of monitoring the employees' electronic mails by the employers, the difference between the European and Russian approaches becomes apparent. While in the practice of the European Human Rights Court the bullet point was the legitimacy of verification of an employee's e-mail, the RF Constitutional Court totally disregarded this aspect.

The analysis of the Russian judicial practice indicates that often the open mode of publicly available data prevails over data protection. It illustrates the accelerating contradiction between the transparency, a remarkable trend in developing the public law, and the "inaccessibility" of an individual within the system of private law, that manifests itself in the personal data protection and the right to respect for private life, at large.

Keywords: human rights, Internet, personal data, transparency, protection of private life, big data

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ADMINISTRATIVE DISCRETION IN THE ECONOMIC SPHERE: GROUNDS AND LIMITS

Abstract. The legal impact on the economy is leveraged both through legal measures and in the process of applying the law. All legal instruments for leveraging the economy are based, to varying extents, upon application by public authorities, officials or other entities, vested with public authority and powers, of the discretion suggesting a choice of an alternative solution or action, the fact that presents a risk of abuse of the powers conferred. The probability of abuses in implementing the administrative discretion is particularly high. In this context, it is essential to determine types of economic relationships, where the administrative discretion is deemed necessary, as well as the constraints ensuring effective and legal use of the administrative discretion as a driver for national economic development. The research focused on discretional standards and powers (mandates) applicable in the economic sector. The aim of the research was to determine regulatory and factual grounds for use of the administrative discretion in economy, its limits and a mechanism of action.

The regulatory grounds for the administrative discretion are the legal uncertainty in respect of the terms, scope and implications of enforcing the powers, where the solution choice is not fully predetermined by legal provisions. There are types of relationships where it is impossible to rule out legal uncertainty, which is offset by vesting discretional powers on the enforcement authorities.

The administrative discretion has regulatory and objective limits. The effect of regulatory limits of the discretion is illustrated on the example of the administrative offence: concerted actions of the economic entities impeding competition. The objective limits of the administrative discretion are framed as economic laws

applicable throughout all stages of human history and dynamic economic regularities manifesting themselves at a certain stage of development of economic relationships.

Keywords: legal regulation of the economic relations, legal uncertainty, a decision under a condition of uncertainty, gaps in the law, administrative discretion, discretionary powers, limits of discretion

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THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE — A NEW BODY IN THE INSTITUTIONAL SYSTEM IN THE EUROPEAN AREA OF FREEDOM, SECURITY AND JUSTICE

Abstract. The creation of the European Public Prosecutor's Office (EPPO) has been initially an ambitious project, as for the first time in the EU history, a body with a certain procedural authority was established within the institutional system of the Union. The EPPO is responsible for investigating, prosecuting and bringing to judgment the criminal offences affecting the financial interests of the Union.

The EPPO was established within the so-called "enhanced cooperation". Only 20 of 28 Member States has participated in adoption of the EPPO regulation. At the moment, there has been created only the legal basis of EPPO, the body itself has not yet been created. It is expected that it starts its operation by the end of 2020.

Despite the fact that the EPPO is established as a single EU body, in fact its structure is integrated into the national law enforcement system. Thus, the EPPO officials will exercise their procedural powers according to the national criminal procedure and substantive law.

The EPPO occupies a special place in the institutional system of the European area of freedom, security and justice. The current EU legislation presupposes close cooperation between the EPPO and key agencies that represent the so-called law enforcement unit — Eurojust, Europol, as well as the European Anti-Fraud

Office (OLAF). At the same time, Eurojust and Europol continue to coordinate the activities of national law enforcement agencies, while the EPPO is involved in the procedural investigation. The EPPO and OLAF form a hybrid system of fighting against crimes affecting financial interests of the Union in which the OLAF carries out administrative investigations, and the EPPO will be responsible for the criminal ones.

The analysis of the legal status of the EPPO in the Russian scientific literature has a fragmentary character, although the creation of EPPO has a great importance not only for EU, but also for EU partners, including Russia. The present study is aimed at presenting to the Russian scientific community a comprehensive analysis of the legal status of the EPPO.

Keywords: judicial cooperation in criminal matters, European area of freedom, security and justice, EU financial interests, European Public Prosecutor's Office, Eurojust, European Anti-Fraud Office

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FORESIGHT SESSION: "INFORMATION SECURITY IN THE 21ST CENTURY: CHALLENGES AND LEGAL REGULATION"

Abstract. The first foresight session "Information security in the 21st century: challenges and legal regulation" was held on September 27, 2018 in the Institute of the State and Law, Russian Academy of Sciences. The relevance of the topic of this academic & research event is driven by a series of circumstances. The number of internal and external information security threats and the extent of their adverse impact on citizens, government and community are dramatically growing year to year. These threats are transboundary, the fact that causes new challenges for the entire system of international information security. However, the national and international legal regulation is invariably lagging behind such challenges, thus the government is capable of responding only to single cases of negative impact of information technologies on social existence. The analysis of the basic directions and trends in the science of information law evidences that the scope of professional expertise of researchers extremely rarely comprises the alternative approaches to the system of legal regulation of information security. Solely the conventional approaches to information security are heavily discussed among a range of issues in this specific area. Along with this, a systematic analysis of holistic operational models of information security is lacking in legal science; the peculiarities of interaction and mutual influence of certain levels and elements of such systems between each other and with environment are virtually not studied.

Additionally, other causes stipulating the need for special attention from legal science and legislator to the issues of legal regulation of information security have been identified and presented in the course of discussion at the foresight session.

The main thesis under discussion at the foresight session consists in the fact that big challenges within formation community prejudge a need for universal, inter-disciplinary, complexly organized mechanisms of legal regulation and provision of information security with due regard to the patterns of transformation of contemporary law in its comprehensive interrelation with technical, moral and corporate standards. Furthermore, the prospective trends in development of legal regulation of information security with regard to implementation of the Strategy of scientific and technological development have been reviewed during the foresight session.

Keywords: information, information threats and challenges, cyber security, information security, international cooperation, international information security, robotics, artificial intelligence, legal liability

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LATEST GERMAN RESEARCHES ON LEGAL PLURALISM: CRITICAL OVERVIEW

The review was prepared within the framework of the scientific project № 16-03-00291 "Juridification as the effect of legal regulation", supported by the Russian Foundation for Basic Research.

Abstract. Three monographs in German devoted to legal pluralism were published in 2016. The term "legal pluralism" has been intensively used in the science since the end of 1970, first with regard to the states that broke free from colonial dependency and preserved the local customary law and former metropolitan law in their legal systems along with the new legislation. A new meaning of the expression "legal pluralism" (or "multi-normativity) has started shaping since the mid-1990s when scientists began to use it in respect of the emerging transnational systems of regulation in the context of globalization which in a number of relationship areas

operate along with the public rules of law and in most cases appear to be much more effective.

The peer-reviewed publications cover both traditional (a judicial decision- making process with regard to local customs is being analyzed from case studies in Africa and Latin America) and new understanding of legal pluralism, however, they do not offer an integrating concept for these phenomena. This task seems to be hardly achievable since nowadays the term "legal pluralism" incorporates far too different phenomena, which share the only common idea that the entire range of social institutes exerting a regulatory influence on people is not limited to the official public authorities and the rules and guidelines emanating from them. The peer-reviewed monographs also highlight the theoretical aspects of the question under research and the applied ones. Meanwhile, the authors do not address a task of *a priori* transcendental rationale for legal pluralism, however, attempt to propose a theoretical interpretation of a certain set of facts, the existence of which does not cause any doubts from the point of view of common sense and is traditionally qualified as "legal pluralism". The authors of each

of the peer-reviewed monographs assert that the substantive discussion of legal pluralism or multi-normativity is impossible without a prior definition of the essence of law; however, in reality they merely discard strictly normative and statist conceptions on the law, but do not rationalize its substantive interpretation of the nature of the law. In general, they proceed from the fact that the structuredness of legal texts, observance of legal procedures and other well-defined characteristics of legal life in a modern community do not lead to the unified conception of the law at all. Presently, one type of multi-normativity changes for the other; the traditional structures as "generators of normativity" give place to the transnational ones.

Keywords: legal pluralism, legal norm, legal system, multi-normativity, customary law, adjudication, law enforcement, transnational legal orders

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