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TABLE OF CONTENTS

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PERSONALITIES

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DIGITAL RIGHTS — NEW GENERATION OF HUMAN RIGHTS?

Abstract. The digitalization substantially affects virtually all social relationships, the fact that requires reassessment of many basic legal concepts. Among them are human rights. It is now increasingly asserted that technological innovations result in the emergence of new digital rights being that fundamentally differ from conventional rights and form a new generation of human rights. The most frequent among such rights are a right to internet access, right to personal data protection and right to be forgotten (right to erasure). To assess the validity of such assertions it is necessary to clarify the grounds for classification of human rights by generations and to determine the correlation between new human rights and the conventional ones.

The classification of human rights by their generations offered in 1970 by K. Vasak can be based upon substantive (essential) and chronological criteria. In the latter case the number of new generations of human rights can be whatsoever high while the difference between them is insignificant. If to proceed from the substantive criterion, the rights of the first generation express claims of a human being towards individual freedom and assume the obligation of the State to respect and protect it; rights of the second generation are claims towards social assistance on the part of the State and society to maintain an adequate standard of living; rights of the third generation are a sort of projection of rights of the first and second generations to relations between social communities (international, in proper sense, non cross-border, relations). In such context to substantiate the emergence of a new generation of human rights it is necessary to prove that the related rights forming it have an absolutely different legal nature as compared to the rights of the first and second

generations.

The right for internet access in international acts, national constitutions and laws as well as in judicial practice is primarily treated as a condition and guarantee of exercise of conventional human rights. Along with this, with due regard to a special significance of Internet for exercise of many human rights, development of democracy and civil society, transparency of state administration the access to it may be recognized as an independent human right. However, the legal nature of such right is quite conventional, it includes claims related both to the first and second generation of human rights. As a right of the first generation it assumes negative obligations of the State not to prohibit and not to restrict an access to Internet (certain Internet resources) and its positive obligations to establish a statutory regulation of access to Internet and provision of protection against illegal restrictions, *inter alia*, on the part of private entities. As a right of the second generation the accessibility of Internet in its material and technical aspects may be regarded, the fact that assumes positive obligations of the State to establish a corresponding infrastructure, to subsidize the provider-supplied services, to organize public access points and to develop educational programs etc. Moreover, the currently applicable international and national regulation of this sphere of relations does not allow asserting that the legal recognition of the right to Internet access has taken place.

Keywords: human rights, generations of human rights, digitalization, digital rights, freedom of expression, freedom of information, right to communicate, Internet access right

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LEGAL VALIDITY AS A PSYCHOLOGICAL FACT: UPPSALA SCHOOL IN THE INTELLECTUAL CONTEXT OF CONTINENTAL LEGAL REALISM

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. There are two traditions of determining the foundation of legal validity — metaphysical and antimetaphysical. At the beginning of the 20th century the antimetaphysical tradition was supplemented by psychological realism, which was developed in the framework of the Uppsala School and the psychological school of Leon Petrażycki. It is possible to trace the common line of reasoning on the problem of legal validity within Continental or psychological legal realism: from Petrażycki (and his students) and Axel Hägerström (and his students, including Alf Ross) to Enrico Pattaro. Psychological legal realism is an approach to law that can be characterized by 1) an orientation toward the study of law in the context of facts of psychophysical reality; 2) the idea of the psychological nature of law; 3) recognition of the authoritative-mystical nature and objectification of legal experiences; 4) the irreducibility of law to the behavioral aspect; etc.

The term "Uppsala School of Legal Realism" denotes the

theoretical legal position of scholars from Uppsala — Hagerström and his most faithful students, Anders Vilhelm Lundstedt and Karl Olivekrona — within the framework of a broader Scandinavian legal realism as part of the continental realistic tradition. The philosophical foundations of the Uppsala School of Legal Realism include: rejection of subjectivism and metaphysics, naturalism, non-cognitivism. This school paid special attention to questions on the possibility of scientific knowledge about law, the construction of a value-neutral theory, and the search for reliable methodological foundations for the science of law. The revolt against subjectivism and metaphysics led to the assertion that there is — and can be the subject of scientific knowledge — only one reality, namely spatio-temporal, psychophysical. Since legal concepts do not directly correspond to the facts of such a reality, they are considered as illusions and even magical formulas, which, however, are based on actual psychological facts and have an effect on people's consciousness.

In the framework of the Uppsala School from a realistic point of view law appears as a machinery of coercion, as a factual order based on the organized social force. Within that order the rules of law are independent imperatives and motives of behavior, which have a suggestive, binding effect on the consciousness and behavior of people. The validity of law is determined by the power of organized social coercion and is regarded as a complex phenomenon of the people's inner world. As a complex psychical fact, legal validity is considered a psychological self-binding engendered by the physical coercion machinery in action and the influence of cultural, social and even biological factors.

Keywords: Scandinavian Legal Realism, Uppsala School, legal validity, coercion, force of law, organized force, Axel Hägerström, Anders Vilhelm Lundstedt, Karl Olivecrona

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PROBLEMS OF EXPLICATION OF CONCEPTS OF VALIDITY AND EFFICACY OF LAW IN E. BULYGIN'S LEGAL THEORY

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Abstract. Throughout his scientific work, the Argentine lawyer E. Bulygin repeatedly analyzed the problem of the validity and efficacy of law. Based on the formulations of H. Kelsen's pure theory of law, E. Bulygin sought to explicate the concepts of legal validity and efficacy, i.e. to replace them with new more accurate ones.

In the 1965 paper "The Concept of Validity" Bulygin entered into a polemic with H. Kelsen and A. Ross and formulated the concept of efficacy as a dispositional property of the legal norm reflecting its justiciability. Subsequently, however, the Argentine lawyer clarified his terminology and distinguished between the dispositional concept of efficacy (law in force) and the traditional notion of efficacy because of the conclusion on the expediency of using the old concept of efficacy along with the new one defined through justiciability. But the concept of efficacy as justiciability formulated by E. Bulygin faced a number of theoretical difficulties.

In the 1966 paper "Judicial Decisions and the Creation of Law" E. Bulygin made an attempt to explicate the concept of

validity. E. Bulygin points to three concepts designed to replace the traditional notion of validity: the validity of the norm in the system sense, the binding force of the norm and the existence of the norm. Each of these specified concepts was developed in theoretical constructions of the Argentine lawyer, however their using also generates the problems. Alternatively, the development of the notion of validity of law in the system sense can be considered "definitive" concept of validity proposed by E. Bulygin in collaboration with K.E. Alchourron in the monograph "Normative systems" (1971). However, this concept has significant differences from the originally formulated and has a very limited application. The concept of the existence of the norm does not receive independent development as a variant of the explication of the concept of the validity of law. The concept of the binding force of law, on the contrary, is divided by the Argentine jurist into two fundamentally different concepts — binding force in the metaphysical sense and binding force in the technical sense, which later E. Bulygin called "applicability". The concept of applicability was used by the Argentine legal philosopher to solve a number of problems of H. Kelsen's theory, however the concept of applicability itself leads to paradoxical consequences.

On the whole E. Bulygin's project of explicating of the concepts of validity and efficacy of the law didn't result in replacing them with series of new more precise concepts although refined in some way their meaning.

Key words: pure theory of law, validity of law, efficacy of law, justiciability, law in force, applicability of law, legal positivism, E. Bulygin, C.E. Alchourron, H. Kelsen, Hart, A. Ross

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THE TYPES OF THE CHARTER-PARTIES IN INTERNATIONAL COMMERCIAL SHIPPING

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Abstract. One of the most important tools for the use of sea and river vessels for the carriage of goods is a contract of affreightment (charter party). Under the terms of the charter-party, one party (the shipowner) transfers the vessel or part of its premises to the other party (the charterer) for the established remuneration (the freight).

Despite the fact that charter-parties have long been used in the practice of shipping, however, today both in doctrine and in practice there is no unified approach to their classification and understanding of their legal nature.

According to the author, at present all charter-parties can be divided into three main types: voyage-charter, time-charter and bareboat-charter (demise-charter). Attempts by some domestic and foreign scholars to identify other types of charter- parties, such as daily-charter, slot-charter, etc., are unreasonable, since other types of charter-parties do not have their own value and are essentially only special cases or combinations of the three above types of charter-parties.

A voyage-charter is essentially a contract for the carriage of goods by sea with a stipulation to provide an entire ship, or a part of ship, or specified compartments of a ship for the carriage of goods between ports. The shipowner in this case retains full control over the vessel without any exceptions in favor of the charterer.

Under the time-charter the shipowner undertakes to provide the charterer with the vessel and the services of the ship's crew

members for use for a certain period for the carriage of goods, passengers or for other purposes of merchant shipping for a specified remuneration (freight). If the ship is chartered for the carriage of goods, then we are dealing with a contract of the sea carriage. If the vessel is chartered for other purposes, such as marine scientific research, etc., then the time-charter party is a special type of contract (*sui generis*).

A bareboat charter party is a hiring of the ship alone without crew. Bareboat charter party and demise charter are actually equivalent concepts, if there are differences between them, they are minimal. Their legal nature is absolutely the same, which is based on the transfer of the vessel for a certain period in the full and undivided possession of the charterer.

Key words: contract of affreightment, charter-party, shipowner, charterer, freight, voyage-charter, time-charter, bareboat-charter, demise-charter, Master, ship

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REFERENCES FOR A PRELIMINARY RULING TO THE EUROPEAN UNION COURT OF JUSTICE: THE SUBSTANTIVE CRITERIA OF ADMISSIBILITY

Abstract. The preliminary ruling procedure as stipulated by Article 276 of the Treaty on the functioning of the European Union had a significant impact on the de- velopment of EU law and became a collaborative tool as part of the dialogue between supranational and national judges.

The mechanism of preliminary ruling enables to ensure a uniform interpretation and application of the provisions of EU law with all member states and constitutes an instrumental element for preserving the uniformity of the European legal system. When developing the mechanism of preliminary ruling at EU level one considered constitutional & legal traditions of member states, however, for long periods, the EU was perceived as "exotic" one and its impact on the national law was often underestimated. Initially there were no any clear concepts how the mechanism of preliminary ruling would work. The EU court encouraged national judges of member states to use this mechanism; however, gradually it started introducing certain acceptability criteria in respect of such requests.

The practice of the EU Court was summarized in the updated Rules of Procedure of 25 September 2012. During the period from 2014 to 2018, the number of cases submitted for preliminary ruling procedure was increasingly growing. Consequently, national courts had started using this procedure relatively intensively and the consolidation of acceptability criteria created no serious problems for them.

The imposition by the EU Court of minimal requirements towards the substance of requests does not reduce their number,

since the acknowledgement of a request as inadmissible does not prevent a national court from sending a repeated request. However, it contributes to the improvement of quality and efficiency of the preliminary ruling procedure.

The establishment of the respective requirements is necessary to ensure that the EU Court could provide national courts with an interpretation of EU law useful for resolution of a specific dispute and ensure constructiveness of the dialogue.

Keywords: CJEU, national courts, preliminary ruling procedure, request for a preliminary ruling, admissibility, judicial dialogue

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DER SCHUTZ VON KINDERN MIT BEHINDERUNG. DAS VERHÄLTNIS DES ÜBEREINKOMMENS ÜBER DIE RECHTE DES KINDES UND DES ÜBEREINKOMMENS ÜBER DIE RECHTE VON MENSCHEN MIT BEHINDERUNGEN

Abstract. Das Übereinkommen über die Rechte des Kindes (kurz: UN-Kinderrechtskonvention) ist nicht der einzige völkerrechtliche Vertrag, der sich der interna- tionalen und innerstaatlichen Anhebung des Schutzniveaus für Kinder verschrieben hat. Daneben enthält auch das Übereinkommen über die Rechte von Menschen mit Behinderungen (kurz: UN-Behindertenrechtskonvention) Bestimmungen, die speziell auf die Bedürfnisse von Kindern mit Behinderungen ausgerichtet sind und die- sen vor allem im Bereich der Bildung Chancengleichheit ermöglichen sollen. Einer (Mehrfach-)Diskriminierung von Kindern mit Behinderung soll nach Maßgabe der Konvention insbesondere durch eine zielgerichtete Integration in Gesellschaft und Schule abgeholfen werden. Ob dabei zwingend allein eine inklusive Beschulung zielführend ist oder auch weitere Formen von Partizipation denkbar wären, ist weiterhin umstritten. Abseits dieser teils hitzig geführten Debatte ergeben sich aus der UN-Be- hindertenrechtskonvention zahlreiche Anhaltspunkte für den einzelnen Staat, wie eine möglichst kindgerechte Persönlichkeitsentwicklung von Kindern mit Behinde- rung gewährleistet werden kann. Ob diese Bestimmungen die Vertragsstaaten jedoch in jedem Fall auch innerstaatlich binden, gilt es in diesem Beitrag herauszufinden. Ebenso ist das Verhältnis der UN-Kinderrechtskonvention zur

UN-Behindertenrechts- konvention zu erörtern, da nur so der konkrete Gewährleistungsumfang der Über- einkommen für das Kind im Einzelfall bestimmt werden kann. Auch wenn beide völkerrechtlichen Verträge jeweils einen möglichst umfassenden Schutz von Kindern bezwecken, gibt es doch einige feine Unterschiede hinsichtlich der gewählten Umsetzungsmethoden, die sich letztlich nicht unbeträchtlich auswirken können. Vergleichskriterien bilden beispielsweise die Durchsetzbarkeit der Vertragsbestimmun- gen sowie deren unmittelbare Anwendbarkeit im innerstaatlichen Bereich. Dabei ist auf innerstaatlicher Ebene auch die Rechtsprechung des Bundesverfassungsgerichts zu beachten, das sich bereits mehrfach zu der Auslegung des Grundgesetzes im Lich- te menschenrechtlicher Verträge geäußert hat.

Schlüsselwörter: Menschenrechte, Kinderrechte, Rechte von Menschen mit Behinderungen, UN-Kinderrechtskonvention, UN-Behindertenrechtskonvention, Diskriminierungsverbot, Chancengleichheit, Inklusion, Integration, Bundesverfassungs-gericht

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PROTECTION OF CHILDREN WITH DISABILITIES. CORRELATION OF THE UN CONVENTION ON THE CHILDREN'S RIGHTS AND THE UN CONVENTION ON THE RIGHTS OF DISABLED PERSONS

Abstract. The UN Convention on child's rights is not a sole international and legal treaty aimed at enhancing the extent of protection of children at both the international and domestic levels. In particular, the UN Convention on the rights of disabled persons contains prescriptions that are designed to ensure needs of

children with disabilities, including the equality of opportunities in the area of education. The elimination of diversified discrimination of children with disabilities in accordance to this Convention should, inter alia, be performed through their dedicated integration into society and school. Whether an exclusively school education contributes to achieving such goal or whether other forms are acceptable too — this is a question requiring qualified discussion. The Convention on the rights of disabled persons permits various options of ensuring full-fledged development of the personality of a child with disabilities within the limits of individual states. It is being discussed in the article whether the provisions of the Convention are compulsory for the member states in each specific case. Besides, the correlation of the Convention on the rights of children and Convention on the rights of disabled persons is under review since it is the only way to identify the specific scope of the guarantees of children's rights stipulated by the Convention. Regardless the fact that both international and legal treaties are aimed at ensuring the fullest protection of children, there are certain subtle differences in respect of the ways of their enforcement which might eventually appear to be material. The criteria for comparison are, for instance, enforceability of conventional provisions as well as their direct effect in domestic law and order. For Germany, for instance, the practice of the Federal Constitutional Court that repeatedly voiced about interpretation of the Basic Law of Germany in the light of international treaties on human rights.

Keywords: human rights, children's rights, rights of disabled persons, Convention on children's rights, Convention on rights of disabled persons, prohibition of discrimination, equality of opportunities, inclusiveness, integration, Federal Constitutional Court of Germany

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CRIMINAL LAW DOCTRINE AND PHILOSOPHICAL THEORIES. REFLECTIONS ON THE BOOK OF SERGEY A. BOCHKAREV (2019) FILOSOFIA UGOLONOGO PRAVA: POSTANOVKA VOPROSA [PHILOSOPHY OF CRIMINAL LAW: POSING OF THE QUESTION]. MOSCOW: NORMA, 2019. 424 pp.

Abstract. In the modern context the interest to researches in the area of philosophical doctrines of the branches of law and, in particular, philosophy of criminal law is increasing. The monograph by S.A. Bochkarev reflects new approaches towards the research of eternal problems of crime and punishment — interdisciplinary and socially significant ones, in its nature. They are based upon the attempt of synthesizing the philosophical and legal (criminal law) areas of expertise.

Having conducted the revision of philosophical and legal reflection since antiquity and up to the Modern times, the author makes a conclusion on the existence of own school of philosophy of criminal law in Russia, the achievements of which, however, turned out to be unclaimed by contemporary researchers. Among the drawbacks of cognizing criminal law reality the author underlines static ideological attitudes and inelasticity of the subject of cognition, imperfection of the methodology employed by them. S.A. Bochkarev also draws attention to the low level of development of criminal law-making and gaps in the law enforcement practice.

The author specially focuses on stereotypes that have formed in respect to "senseaking" categories of theory and philosophy of criminal law — crime and punishment, thus emphasizing the infeasibility of adequate research of these categories without analysis of their ontology-based backbone.

The standpoint of the author towards virtualization of

criminal law space is of tremendous interest. In his opinion, virtual law concept presents a conglomerate of many cultures and values; virtual space is immanently not connected with the territory, while virtual time does not negate and change the real one. Nowadays virtual reality is becoming a way of existence and interaction between people and with due regard to virtualization of criminal law space a series of norms of criminal law on the elements of crime needs to be adjusted.

The book is multidimensional and meaningful; it calls for thoughtful reading and reflections on what is being read while broad discussion of the issues raised in it will be conducive to development of the Russian legal science.

Keywords: criminal law, philosophy of law, philosophy of criminal law, crime, punishment, virtualization of criminal law space

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