

Trust as a Factor in the Legitimization of the Law in the Digital State¹

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ABSTRACT

The article deals with a complex of issues related to trust in the legal system. The problem of understanding trust from the perspective of various types of understanding of law is revealed. The analysis of trust as a factor of legitimation of law is carried out. The author comes to the conclusion that trust in law allows us to reveal the issues of the effectiveness of the law. Trust in the modern digital state is connected with the principle of deliberation in the process of making public legal decisions.

Keywords: trust in law, legitimacy of law, social capital in the legal system, legal culture, the principle of deliberation in law-making, digital state

The theory of classical rationalism, created in the Enlightenment, proceeded from the possibility of universal laws for all peoples. The ideas of natural human rights, the concept of division of powers, and popular sovereignty proceeded from the common rational standards for all States. These ideas of Enlightenment are still the basis of international humanitarian law and are enshrined in the constitutional norms of most States. However, in the second half of the twentieth century, the ideas of the Enlightenment project began to be criticized. First, this is due to changes in society, which allowed us to call it a postmodern or late modern society. As domestic researchers of modern society point out: "Postmodernity is defined as an era characterized by a sharp increase in cultural and social diversity, a departure from the previously dominant unification and from the principles of pure economic expediency, an increase in the multi-variance of progress, a rejection of the principles of mass social action, the formation of a new system of incentives and motives for human activity, the replacement of material orientations with cultural ones, etc."² It is also noted that the distinctive features of this era are the trends that have manifested themselves in the cultural practice and self-consciousness of the West over the past two decades. We are talking about the revision of the cardinal prerequisites of the European cultural tradition associated with progress as an ideal and a scheme of history, reason organizing the whole cognizable world around itself, liberal values as a standard of socio-cultural arrangement, the economic task of a steady increase in material goods. Such a reversal of the usual — "modernist" — ideas (hence the term "postmodernism") covers a variety of spheres of cultural activity³. Thus, a well-known expert on this issue in relation to law, I. L. Chestnov, emphasizes that the postmodern situation is characterized primarily by cultural diversity. The scientific orientation of the previous epochs, based on the belief in the omnipotence of reason, was replaced by radical relativism.⁴ The theories of modernization of African societies after the Second World War, without considering the peculiarities of national culture, led only to the deterioration of the political and legal system of these countries. Therefore, it has now become obvious that for the effective operation of the law, it is necessary to have, in addition to improving legal technology, informal cooperation in society as well.⁵ In a postmodern society, this has led to an increased interest in political and legal science in the issues of legitimation of law in the context of cooperation.⁶

The complex of issues related to cooperation has been developed for a long time, and for the first time the importance of these issues was pointed out by Alexis de Tocqueville. He noted that the peculiarity of Americans lies in their tendency to create voluntary organizations that provide significant support to American democracy. A. de Tocqueville negatively characterized individualism, pointing out that it "at first only depletes the virtues of public life, but in the long term ... becomes an aggressor and destroys everything around, in the ultimate state no longer differing from pure egoism"⁷. Currently, the theory of cooperation and trust is an influential trend in social philosophy. Formal political and legal institutions are successful when they are supported by informal norms and traditions. The operation of law is related to the culture and norms of a particular society. The easiest way to verify this is by comparing the USA and Latin American countries, which, having achieved independence for their legal systems, took the USA as a model. Meanwhile, most of these States have not achieved

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² Inozemtsev V.L. Postmodernity. New Philosophy Encyclopedia. Moscow, 2010. V.3. P. 296.

³ Petrovskaya E.V. Postmodernism. New Philosophy Encyclopedia 2010. V.3. P. 297.

⁴ Chestnov I. L. Actual Issues of the Theory of State and Law. Epistemology of State and Law. St. Petersburg, 2004. P. 37–38.

⁵ Denisenko VV Legitimacy as a Characteristic of the Essence of Law. Introduction to Theory. Moscow, 2014, p. 76.

⁶ Bauman Z. Individualized Society. Moscow, 2002; Sztompka P. Trust. The Basis of Society. Moscow, 2012.

⁷ Tocqueville A. Democracy in America. Moscow, 1999. P. 240.

the effectiveness of political and legal institutions that exists in North America. The main reason is often pointed to the cultural factor: Latin America inherited the culture of the Iberian Peninsula. If Protestantism in the USA strengthened the tendency of society to unite in voluntary associations, then imperial and Roman Catholic traditions in Latin America, on the contrary, weakened civil society⁸.

Currently, modern sociologists designate the ability to cooperate by the category "social capital". F. Fukuyama defines social capital as generally accepted norms and values practiced by a certain group of people and allowing them to cooperate.⁹ When there is social capital in society, it is possible to talk about trust between subjects, allowing citizens to interact because of common values. One can join the opinion of sociologists who point out that the well-being of a country, as well as its competitiveness against the background of other countries, is determined by the level of trust inherent in its society.

A high level of trust is associated with the so-called spontaneous sociability, when new associations are created in society that are not related to state power, but also do not coincide with the family. M. Seligman points out that "in the modern era, trust arises as a specific form of generalized exchange, as an integral part of the system of unconditional concepts inherent in society, regulating not only the sphere of informal and private interactions, but also more formal, public and institutionalized spheres, such as the state structure and economy"¹⁰.

If there is a high level of trust in society that promotes the unification of citizens, then the legislation will achieve its goals. On the contrary, when values in society prevent unification, legal regulation is not supported by informal norms, which leads to its inefficiency. In cases of the destruction of norms and rules, formal institutions are ineffective, and a state of anomie occurs, described in the works of E. Durkheim. In the process of legal reforms, positive law should not destroy social institutions that promote social solidarity. Moreover, the legal policy of the state should be aimed at maintaining social ties that provide a certain level of public confidence in the law, as this is a necessary condition for its legitimacy. The role of trust and social capital is particularly relevant in modern Russian society, since "legitimation in it cannot be realized only through religious and traditional norms"¹¹. Many other things are important here: the presence of associations to preserve individuals' sense of belonging to social groups, and the growth of social capital in society, or, in other words, spontaneous sociability.

It should be noted that the criticism of individualism (in its negative sense) and the justification of the positive role of informal interactions does not mean the denial of the liberal democratic institutions of the state. The latter, indeed, have no alternatives, and the "end of history" for other ideologies came with the collapse of state socialism. We are talking about the criticism of the theories of J. Locke, T. Hobbes, when society was represented by a collection of rational individuals who united to meet their needs based on a social contract. Meanwhile, appeals aimed at denying universal liberal principles, in relation to the domestic political and legal system, should hardly be considered promising. It is appropriate to recall once again the words of Francis Fukuyama, who points out that in traditional societies that were based on various, primarily religious principles, a rather narrow circle of trust was formed, limited by family, religious community, race, or sect. These irrational reasons for unification led to social conflicts within the country or military conflicts in foreign policy because societies based on different principles were constantly in conflict¹². Therefore, it is the universal principles formed by the Enlightenment era, reflected in the concepts of individual rights and formal equality, that can ensure the development of society. The very idea of unlimited individualism is harmful to society, it justifies the destruction of any rules that bind society, while the principle of universal human equality, legally enshrined, is the only possible basis for state-legal development. In the foreign philosophy of law, the theory combining human rights, freedom and popular sovereignty is the concept of Yu. Habermas. In Russian legal thought, the ideas of freedom and formal equality are most clearly expressed in the theory of legal libertarianism by V. S. Nersesyants.¹³

In recent decades, modern society and the state have been radically changing under the influence of the processes of informatization and digitalization. In several countries, for example in France, laws on the digital state have been adopted. Informatization and digitalization of society and the state have formed a phenomenon that J. Baudrillard called "hyperreality", pointing to the specifics of the modern welfare state and legal regulation in the information society. In modern society, the economy is changing, "the superstructure determines the basis, labor does not produce, but socializes, representative authorities do not represent anyone. The modern era is characterized by a sense of loss of reality"¹⁴. The loss of reality is associated with the transition to digital or virtual reality when an individual cannot distinguish truth from fiction. In the situation of a postmodern society, "when reality turns into a model, the opposition between reality and signs is erased, everything turns into a simulacrum, that is, into a copy depicting something that either did not have an original at all, or eventually lost

⁸ Fukuyama F. *Trust*. Moscow, 200. P. 23.

⁹ *Ibid.* P. 8.

¹⁰ Seligman A. *The problem of Trust*. Moscow, 2002. P. 58.

¹¹ Denisenko V.V. *Legalization of Society and the Concept of Legal Regulation*. Bulletin of the Voronezh State University. Series: Law. 2008. No. 2 (5). pp. 56–62.

¹² Fukuyama F. *The Great Break*. Moscow, 2004. P. 380.

¹³ Denisenko V.V. *Legitimacy of law (theoretical and legal research): dissertation for the degree of doctor of legal sciences*. St. Petersburg State University. St. Petersburg, 2020. P. 124.

¹⁴ Baudrillard J. *Simulacra and simulation*. 1981. Rus. translation 2011, trans. A. Kachalova. Moscow: Ripol-classic, 2015. ISBN 978-5-386-07870-6.

it.”¹⁵ Baudrillard cites the 1991 Gulf War as an example of a simulacrum of political life. The scientist described this military campaign in the book “There was no War in the Gulf”, revealing for the first time the issues of the media, which no longer just distort reality, but create it. The image of the event on the TV screen seems to replace reality itself, making the event itself superfluous.¹⁶ In the context of the expansion of the sphere of digital relations, the problem of trust in the law is being actualized. First, we are talking about the sphere of public law decision-making in law. It is no coincidence that William Kymlicka points to the so-called “deliberative turn” that has taken place in the constitutional legislation of Europe since 1990: “... democratic theorists are increasingly focusing on the processes of discussion and opinion formation preceding the vote. Their attention has shifted from what is happening in the voting booth to what is happening during public discussion in civil society”¹⁷. To substantiate the legal force of the law and to ensure the necessary level of trust, deliberative procedures are recognized as necessary. The category of deliberation came to us from Ancient Rome, as it was first used in the works of Publius Cyrus (I century BC), to whom the legal principle “*Deliberandum est diu quod statuendum est semel*” is attributed. In ancient Rome, the word deliberation meant “to consult”, “to consult or to weigh the pros and cons”. In modern foreign scientific literature, the category of deliberation is used, which is translated into Russian as “an act of reflection, weighing and studying the reasons for and against the choice”¹⁸. The specifics of the deliberative model of democracy, its difference from other models, lies in special democratic procedures related to making political decisions directly by the population, without delegating the will. At the same time, “the principle of deliberation in the legal system should not be considered as simply synonymous with the institutions of direct democracy. The main thing in the deliberative model is the process of communication or discourse, which should be provided legally to all interested persons, not just a small group of representatives”¹⁹. Deliberative procedures are widely used at present in the process of constitutional reforms, as well as at the level of local self-government in the EU countries. These procedures make it possible to achieve the necessary level of support for the law in a digital state.

In conclusion, not all social institutions and practices need to be supported through legal policy. At the present stage of the development of statehood and law, the question of what values should underlie the institutions of civil society can be solved from the point of view of expanding the field of trust in society. Trust is currently impossible without formal equality and freedom, and the expansion of interaction between subjects in the legal field. This approach will help to overcome the crisis of legitimacy associated with modern social processes.

References

1. Bauman, Z. *Individualized Society*. Moscow, 2002. (transl. from English)
2. Baudrillard, J., *Simulacres and Simulation*. *Simulacres et simulation*. 1981. Translation from French 2011 of A. Kachalov. M.: Ripoll-classic, 2015. ISBN 978-5-386-07870-6.
3. Denisenko, V. V. Aleatory Democracy and the Problem of Simulacra in Law [Aleatornaya demokratiya i problema simulyakrov v prave]. In the book: *Legal Forms of Experiencing History: Practices and Limits : collective monograph* [Yuridicheskie formy perezivaniya istorii: praktiki i predely : kollektivnaya monografiya]. The Supreme Court of the Russian Federation; the Russian State University of Justice, North-Western Branch. St. Petersburg, 2020. P. 301–310. (in Rus)
4. Denisenko, V. V. Legitimacy As a Characteristic of the Essence of Law. Introduction to Theory [Legitimnost' kak kharakteristika sushchnosti prava. Vvedenie v teoriyu]. Moscow, 2014. 184 p. (in Rus)
5. Denisenko, V. V. Legitimacy of Law (Theoretical and Legal Research) [Legitimnost' prava (teoretiko-pravovoe issledovanie)]. Dissertation for the Degree of Doctor of Law [Dissertatsiya na soiskanie uchenoi stepeni doktora yuridicheskikh nauk]. St. Petersburg State University. Saint Petersburg, 2020. 323 s.
6. Denisenko, V. V. Juridification of Society and Concepts of Legal Regulation [Yuridifikatsiya obshchestva i kontseptsii pravovogo regulirovaniya]. Bulletin of the Voronezh State University. Series: Law [Vestnik Voronezhskogo gosudarstvennogo universiteta. Seriya: Pravo]. 2008. No. 2 (5). P. 56–62.
7. Inozemtsev, V. L. Postmodern, Postmodernity [Postmodern, postsovremennost']. New Philosophical Encyclopedia [Novaya filosofskaya ehntsiklopediya]. M., 2010. Vol. 3. P. 296.
8. Kimlika, U. Modern Political Philosophy: Introduction. Trans. from the English of S. Moiseev. M., 2010. P. 371.
9. Petrovskaya, E. V. Postmodernism. New Philosophical Encyclopedia [Novaya filosofskaya entsiklopediya]. 2010. Vol. 3. P. 297.
10. Seligman, A. The Problem of Trust. M., 2002. P. 58. (transl. from English)

¹⁵ Pechenkin O.A. The ethics of Jean Baudrillard's simulacra (analysis of the postmodern reception of the ethical). Abstract of dissertations for the degree of Candidate of Philosophical Sciences [Electronic resource] URL: <http://cheloveknauka.com/etika-simulyakrov-zhanabodriyara> (date of access: 20.08.2021).

¹⁶ The spirit of terrorism. There was no Gulf War. *La Guerre du Golfe n'a pas eu lieu* (1991); *L'Esprit du terrorisme* (2002); *Power Inferno* (2002): collection. Translated from French by A. Kachalova (2015). Moscow: Ripol-classic, 2016. ISBN 978-5-386-09139-2.

¹⁷ Kimlika W. Modern Political Philosophy: Introduction. Translated from English by S. Moiseeva. Moscow, 2010. P. 371.

¹⁸ See [Electronic resource] URL: <http://en.wiktionary.org/wiki/deliberation> (date of access: 20.08.2021).

¹⁹ Denisenko V.V. Aleatory Democracy and the Issue of Simulacra in Law. Legal forms of experiencing history: practices and limits: collective monograph. Supreme Court of the Russian Federation. Russian State University of Justice, North-Western Branch. St. Petersburg, 2020, pp. 301–310.

11. Tocqueville, A. Democracy in America. Moscow, 1999. P. 240. (transl. from French)
12. Fukuyama, F. Trust. M., 2006. 730 p. (transl. from English)
13. Fukuyama, F. The Great gap. M., 2003. 476 p. (transl. from English)
14. Chestnov, I. L. Actual Problems of the Theory of State and Law [Aktual'nye problemy teorii gosudarstva i prava]. Epistemology of the State and Law [Ehpistemologiya gosudarstva i prava.]. St. Petersburg, 2004. P. 37–38.
15. Shtompka, P. Trust — the Basis of Society [Doverie — osnova obshchestva]. Moscow, 2012. (transl. from Polish)