Validity of Law in Modern Theoretical Discourse

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ABSTRACT
The article deals with important category of "validity of law", which is not sufficiently deeply and fully elaborated in juridical literature. The author gives a detailed overview of interpretations of this category in the works of foreign philosophers of law (R. Alexy, R. Kaufmann and others). As a result of the analysis, the author concludes that a combination of positivist and jusnaturalist approaches that complement each other is necessary to adequately understand the validity of the law. This provides an opportunity to build an integrative theory based on the understanding of the validity of law as an order uniting the natural and will-established beginnings.
Keywords: validity of law, positivism, jusnaturaism, human rights, law, judgment, integrative theory of law

The validity of law is its essential feature. An invalid law is "outside the law" or even "contrary to the law". Solely a valid law guides the addressees of legal norms towards a certain behavior. "If invalidated, — G. V. Maltsev wrote, — a rule of law ceases to be a law, and is no longer capable to regulate social interactions"[1]. The effectiveness of law is one of the most important criteria for validity thereof, although this does not imply the identity of the concepts of validity and effectiveness of law.

The issue of validity of law arises or may arise in law-making practice solely in relation to particular norms (institutions), novel legislation. Legal validity of the entire relevant regulatory system can only be a point at issue in extreme instances only, where the social order as a whole appears to be under a threat of destruction. Then, it may well be the case where we have to state the existence of "beyond the law" and "against the law" status (E. Fechner).

The problem of the validity of law is complex and multidimensional. This problem is discussed in the context of the debate about the types of legal consciousness, about evolution of multiple theoretical approaches to law[2]. Therewith, the "focal" meaning (D. Finnis) of the problem of the validity of law is seen in some particular aspects of this problem: "...naturalists readily use the "validity of law" term, emphasizing the ideal nature of law; positivists tend to investigate the "normativity" and the formal aspect of law; representatives of psychological branches of law study the "binding force" of and even the sense of "being binded with" the law; legal realists seek to discover "effectiveness" of law"[3]. The question of the ideal nature of law as a basic concept of naturalism is actualized in modern theoretical discourse in discussions between advocates of positivist and non-positivist approaches to law, distinguished by recognition or non-recognition of moral values in law.[4]

Modern theories of the validity of law, including natural law theories, should be evaluated, bearing in mind their representatives' strive towards integrative (integral) conceptual, as well as methodologically overcoming (with appropriate particular positions substantiated) the pluralism of theoretical views on law. In this natural law doctrine this is expressed in the trend towards alignment of a priority ideal measurement for the given law branch with its real measurement, its naturality with the positiveness thereof, its validity with its effectiveness, towards finding a balance between them and thereby avoiding the dualism of the natural law and the positive law as the two normative systems opposed to each other, which is specific for classical theories of the natural law. Thus, according to the famous German legal theorist R. Alexy, various elements of the concept of law and concepts of reality — social reality (effectiveness), moral and legal validity, which correspond to the said elements, should be balanced and counterweighted in the unified structure of law.[5] The ultimate basis for the validity of law is the "claim

[1] Maltsev G. V. Social Grounds of Law [Sotsial'nye osnovaniya prava]. M., Norma Publ., 2007. PP. 589–590. (In rus)

[2] See information on the discussion of this problem in the context of legal positivism: Timoshina E. V. The Concept of Normativity of L. I. Petrazhitsky and the Problem of the Validity of Law in Legal Positivism of the Twentieth Century [Kontseptsiya normativnosti L. I. Petrazhitskogo i problema deistvitel'nosti prava v yuridicheskom pozitivizme XX v] // Jurisprudence [Pravovedenie]. 2011, No. 5. PP. 46–71. (In rus)

[3] Vasilyeva N. S. The Problem of Legal Validity in The Anti-Metaphysical Approach (Alf Ross's Conception) [Problema deistvitel'nosti prava v antimetafizicheskoi traditsii (kontseptsiya Al'fa Rossa)] // RUDN Journal of Law [Vestnik Rossiiskogo universiteta druzhby narodov. Seriya: Yuridicheskie nauki]. 2017. Vol. 21, No. 3. P. 397. (In rus)

[4] See: Alexy R. The Concept and Validity of Law (Reply To Legal Positivism). Moscow — Berlin, Infotropic Media, 2011. PP. 3-4 (Trans. from germ)

[5] About the author's given definitions of the validity of law; see ibid. PP. 105–108.

to correctness".[6] Such balancing, according to Alexy, "is in the very foundation of law. This balancing is a part of the nature of law".[7]

The idea of duality of law (rather than dualism) is based upon in unity and integrity of law and order sought for by R. Alexy through balancing of its multiple elements — positivity and naturality of law (correctness, moral justification). Positivity of law, as R. Aleksy emphasized, is necessary. It is not exclusive by nature, nevertheless. Otherwise, the aspiration of law to have substantive correctness (justice), which does not disappear even after institutionalization of law, would appear to be undervalued[8] Such substantive correctness applies solely to ideal dimension of law. Correctness of a different kind ("second- order" correctness, according to Alexy) applies to both justice and legal certainty, which is achievable solely in the sphere of positivity (the real dimension of law).[9] Justice as a "second-order" correctness sanctions the necessity in positivity of law, since this necessity itself "is proceeding from the moral requirements to avoid side-effects of anarchy and civil war and to achieve the advantages of social coordination and cooperation."[10] Therewith, R. Alexy believes, it is possible to link both the moral principle of justice and the formal principle of legal certainty with law. Their correct correlation is a condition for the harmony of the legal system.[11]

The most important element of the positivity of law, along with its proper establishment, is, according to Alexy, the social effectiveness (social validity) of law. According to him, norms that are not socially valid, cannot be legally valid either.[12] Criteria of social validity: compliance with norms and application of sanctions for non-compliance thereof.[13] These criteria are assumed from the principle of legal certainty and do not extend beyond the real dimension of law. Meanwhile, R. Alexy emphasizes that in contrast to positivism, according to which only elements of social reality are included in the concept of legal reality, in his non-positivist theory, this concept also includes elements of moral reality.[14]

R. Alexy builds his construction of law and order from the standpoint of the moral philosophy of law as a proponent of "soft" internalist non-positivism theory, following the famous G.Radbruch "formula". He echoes G. Radbruch asserting that, if the norms extend beyond a certain threshold of injustice, they lose their legal nature.[15] In a modern democratic constitutional state such "threshold" consists in the basic human rights, such as the right to life and security of person.[16]

R. Alexy builds his conception of human rights on the basis of the discourse theory of law, which he develops taking sue from J. Habermas. R. Alexy is the author of its original version as a procedural theory of practical rationality. According to Alexy, a discourse procedure is rational if it complies with certain rules concerning the adequate use of legal arguments (requirements for comprehensiveness of the argument, non-contravention, terminological clarity, etc.) and ensuring impartiality of the line of reasoning. The rules guarantee the freedom and equality of parties in the discourse as the basis of human rights.[17] "The underlying principles of a democratic constitutional state, i.e. freedom and equality, comply with these universal rules".[18] R. Alexy connects institutional procedures for legal framing with discursive ones.[19] At the same time he is governed by criteria of rationality of the discourse and the legal system's aspiration to correctness as a moral justification of the basic human rights.

According to Alexy the human rights are not being introduced from the outside but should be justified in the course of a rational discourse. Rights are valid if they exist, while existence of the rights consists in their justified status with respect to each and every one, who expresses a desire for participation

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[6] See ibid. PP. 41-42.

[7] Alexy R. The Dual Nature of Law [Dual'naya priroda prava] // Jurisprudence [Pravovedenie]. 2010, No. 2. P. 146. (Trans. from eng)

[8] See ibid. P. 145.

[9] See ibid.

[10] See ibid.

[11] See ibid. P. 146.

[12] See: Alexy R. The Concept and Validity of Law (Reply To Legal Positivism). P. 107

[13] See ibid. PP. 105-107.

[14] See ibid. PP. 107-108.

[15] Alexy R. The Dual Nature of Law [Dual'naya priroda prava] // Jurisprudence [Pravovedenie]. 2010, № 2. P. 59. (Trans. from eng)

[16] See ibid. P. 80.

[17] See: Alexy R. Legal Argumentation as a Rational Discourse [Yuridicheskaya argumentatsiya kak ratsional'nyi diskurs] // Russian Yearbook of the Theory of Law [Rossiiskii ezhegodnik teorii prava]. 2008, No. 1. SPb., 2009. PP. 446–456. (Trans. from eng)

[18] See ibid. P. 453.

[19] See ibid. P. 454.

in the rational discourse.[20] The constitutional rights shall "prevail over all other regulations".[21] But the existence of rights is not determined by a constitution, and inters alia, in a democratic constitutional state. The existence of rights is determined solely by their validity as a result of the intersubjective rational discourse. R. Aleksy's natural law concept, due to its debatable nature and in this meaning of its procedural construction, is not in line with classical natural law theories and thereby seems to have lost the absolute scale value, which is specific for natural law (ius naturale), for assessing the validity of law.

R. Alexy, however, insists that human rights as moral rights (moral requirements) "belong exclusively to the ideal dimension of law".[22] And further: "Their transformation to constitutional rights, i.e. to positive rights, constitutes an attempt to combine the ideal dimension with the real one".[23] The balance of ideal and real dimensions of the law seems to be achieved. But it is achieved within the framework of the positive law. Although the rational discourse is repeatedly renewed time and again, as moral requirements of the rights, which were not previously recorded in the Constitution are emerging, Alexy's ideal dimension of the law is destined to be absorbed by its real dimension, i.e. by the positive law. Non-positivism gives way to positivism.

The concept of procedurality of the natural law (according to Alexy, this is a rational discourse process), which is specific for the modern natural law, originates from the well-known formula of "the natural law with changing content" by R. Stammler.[24] At the same time, as early as in the beginning of the 20th century, the thesis of classical natural law theories about once and forever granted natural human rights was also questioned. The question of the existence of human rights outside the positive law still arises today when it comes to recognition of the human rights, which are not stipulated in the legislation.[25] This question is particularly relevant for constitutional law and constitutional justice theory.[26] The international law is not an exclusion here, the generally recognized principles and rules of international law, which have been currently referred to in international legal acts are deemed to be exhaustive. Beyond the scope of these acts, according to V.V. Lapaeva, "there will always ... remain some particular concepts, principles and rules, which have not been yet recorded in official documents, but, nevertheless, are already deemed (or may be deemed) recognized in the international community".[27] From the standpoint of the natural law such unipositive ideas, principles and rules are referred to ideal dimension of law. Should not we, therefore, also agree to the argument that "the natural law will always be featured by legal dualism, which had accompanied this approach throughout the whole history of development".[28]

The general theoretical discussions about the relationship between law and justice (law and morality) that erupted after the Second World War have not received the same attention in recent decades. More and more noticeable is the desire to shift this "key issue" of theoretical jurisprudence into the legitimation space of justice. This trend is supported by the idea of the integrity of law, which also covers law enforcement practice.

Thus, R. Alexy includes also the law enforcement procedure in the concept of law, distinguishing between rules (norms) and principles of law after the American philosopher of law R. Dvorkin. The law, he says, includes legal principles and normative documents that serve to justify the decision of an executor of law in the area of uncertainty of the law in order to comply with the claim to correctness. In this situation, R. Alexy's idea of balancing various aspects of law means balancing of rules (the real dimension of law) and principles (the ideal dimension). In substance, the judge renders a decision based on moral norms (principles) and in the form, he acts on the basis of legal principles.[29]

According to R. Alexy, the balance is also required between the principles themselves. This does not cause difficulties for the executor of law when it comes to the Constitution of a democratic and social state governed by the rule of law, which provides for the fundamental principles of personal dignity, freedom, equality, etc. The task of the judge then is to achieve a balance between the principles through

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[20] See: Alexy R. The Existence of Human Rights [Sushchestvovanie prav cheloveka] // Jurisprudence [Pravovedenie]. 2011, No. 4. PP. 21–31.

[21] Alexy R. The Dual Nature of Law [Dual'naya priroda prava]. P. 149.

[22] See ibid. P. 150; see also: Alexy R. The Concept and Validity of Law (Reply To Legal Positivism). P. 129.

[23] Alexy R. The Dual Nature of Law [Dual'naya priroda prava] P. 150.

[24] See: Stammler R. The Essence and Tasks of Law and Jurisprudence [Sushchnost' i zadachi prava i pravovedeniya]. M., 1908.

[25] See, for example: Gadzhiev G. A. Ontology of Law [Ontologiya prava]. M., Norma, 2013. P. 143. (In rus)

[26] See ibid. PP. 143–144.

[27] Lapaeva V. V. Types of Legal Understanding: Legal Theory and Practice [Tipy pravoponimaniya: pravovaya teoriya i praktika]. M., Russian Academy of Justice, 2012. P. 122. (In rus)

[28] See ibid.

[29] See: Alexy R. The Concept and Validity of Law (Reply To Legal Positivism). P. 96; see details: PP. 86–102.

their optimizing.[30] However, in other legal systems, a judge's decision implies a claim to correctness as correct moral validity. R. Alexy emphasizes referring to I. Kant, the regulative nature of the idea of correct morality as a goal to be pursued.[31] In this sense, human rights as morally justified demands for freedom, equality, justice and personal dignity, according to R. Alexy, take the universal form as a potential criterion for the validity of modern constitutional normative orders, which indicates the "right" way.

Has the natural law finally managed to find the "third way" — the way of synthesis of the natural law and positivism? A. V. Polyakov tends to believe that it was done successfully, for example, by German jurist A. Kaufmann (in the interpretation of his theory by A.V. Polyakov).[32] Indeed, A. Kaufmann, a representative of the phenomenological and existentialist philosophy of law,[33] proceeding from the polarity of natural and positive law, altogether emphasizes that the polarity does not mean their antinomicity. The ontological structure of the law becomes apparent in the duality of the essence and existence of the law, its naturality and positivity.[34] The reality of the law is "realized through the connection of the essential and existential elements, the naturality of the law with positivity, so that it becomes clear that the justice and the rule of law, the validity and the effectiveness, the lawfulness and the power, the legitimacy and the legality are not identical, antinomic but are interrelated as polar forces and are fruitfully changeably bound".[35] A. Kaufmann attention is not distracted from positivistic (sociological positivistic) nature of the criterion value of law effectiveness for determination of its validity. In contrast to positivism, A. Kaufmann writes, which perceives the validity of a rule as a pre-determined reality, the natural law doctrine recognizes reality as a criterion of validity.[36]

A. Kaufmann constantly reminds that the positivity and the essence of law (which is equitable by origin) cannot be separated from each other, and the essence of law is not super positive.[37] However, it turns out that as a possibility of law (in the Aristotelian sense) the essence is still super positive, although in its ideal being, according to Kaufmann, it does not yet possess the validity, which is first acquired through positivation.[38] First — in a positive law but finally and completely — in a "correct" law enforcement decision. Only in justice (acts of executive authorities, etc.) does the law become fully valid.[39] And thus, according to Kaufmann, it becomes effective as well.

According to Kaufmann's theory the law is just in nature, since it stems from the nature of things.[40] But the following question is unavoidable: how can we work out its oughtness for a legislator, a judge from the natural beingness of the law? A. Kaufmann has to resort to the natural rule (not natural law) concept as a ground rule, to the principle of logically (not ontologically) primary stage of the establishment of the law preceding the stages of positive law and law enforcement decision.[41] His special focus is on the fact that this is a law, not a right, that the law is primary logically not ontologically.[42] After all, the author himself criticized "all attempts to justify, along with the actual positive law, an ideal superpositive law (the essence of law)".[43]

Ultimately in order to overcome the dualism of the natural and positive law A. Kaufmann is trying to double the concept of justice (and legitimation): the rule, being an emanation of the will of the legislator, is "just in law," and the law is "just in nature".[44] That said the justice of the rule "in law" assumes that it is based on the principles and values of the law, which the legislator simply "believes to be given".[45] However, these principles and values, according to Kaufmann, are not in themselves a law, but in a

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[30] See ibid. P. 97.

[31] See ibid. P. 102.

[32] See: Kozlikhin I. Yu., Polyakov A. V., Timoshina E. V. History of Political and Legal Doctrines. Textbook. Ed. St. Petersburg State University [Istoriya politicheskikh i pravovykh uchenii. Uchebnik. Izd. Sankt-Peterburgskogo gosudarstvennogo universiteta], 2007. PP. 466–467. (In rus)

[33] A.V. Polyakov refers A. Kaufmann to hermeneutical branch in the philosophy of law (see ibid., P. 466).

[34] See: Kaufmann A. Ontological Structure of Law [Ontologicheskaya struktura prava] // Russian Yearbook of the Theory of Law [Rossiiskii ezhegodnik teorii prava]. 2008, No.1. P. 145.

[35] See ibid. P. 157.

[36] See ibid. P. 156.

[37] See: Kaufmann A. Ontological Structure of Law [Ontologicheskaya struktura prava] // Russian Yearbook of the Theory of Law [Rossiiskii ezhegodnik teorii prava]. 2008, No. 1. PP. 159 and etc. (Trans. from germ)

[38] See ibid. P. 158.

[39] See ibid. P. 173.

[40] See ibid. P. 171.

[41] See ibid. P. 173.

[42] See ibid. P. 172.

[43] See ibid. P. 159.

[44] See ibid. P. 171.

[45] See ibid.

"frozen" rule that does not possess, as he believes, a normativity, the law is not yet fully valid. But, one objects, it is through rules that the essence of the law is being actualized in the specific law enforcement decision, which as a creative product, "always stems from the nature of things".[46] So, "starting with the ontological structure of the law, Kaufmann unwittingly arrives at axiology. After all, the existence of law (making the right decision in a particular situation, taking into account the nature of things) is possible only on the basis of the law, that is, as it should be in the context of the values, which justify the law."[47]

If in the discursive theories, the procedurality of the natural law is determined by the discourse, in the context of Kaufmannische existence of universals the dynamism, procedurality is a way of the very existence of law as its never-ending updating and specialization, ultimately — in the "correct" decision of executors of the law. The law (the natural law), A. Kaufmann writes, is not static, it "possesses a temporal structure of historicity" and "should be constantly re-implemented in order to arrive at itself, it is not a finished law but at all times a becoming law".[48] The naturality and positivity of the law exist, he emphasizes, only against each other, and this is the relationship of continuous actualization, bringing them again and again in line with what should have been realized. On this count Kaufmann perceives the true meaning of the natural law problem.[49]

Legal doctrine of A. Kaufmann is human-centered. He reinterprets the natural law category of human nature from the personalistic philosophical standpoint, based on the proportionality of law and man as an individual (person) — both spiritual individuality and social individuality.[50] But Kaufmann still cannot possibly avoid in his theory a constant perceptible dualistic tension between spirituality and sociality of an individual, between the essence and the existence –the "appearance" of the essence, for example, to the judge as "given" in the nature of things and at the same time "foretold", in which, however, lies what "should have been realized". The consequence of such tension, which disturbs the ontological relativistic unconditionality of the existence of the natural law only in its relation to the positivity of the law, the ideal dimension of the law with its real dimension, is the inevitable absolutization of the axiological component of the law prevailing at ius naturale.[51] At the very least, it remains questionable whether Kaufmann was able to solve a problem task he set for himself, namely, "to find a synthesis between absolutivism and relativism, between significance and being…".[52]

The dualism of natural and positive law was significantly shaken in the natural law concepts of the early 20th century. (V. S. Solovyov, A.S. Yashchenko). It has not been overcome to date. Nevertheless, in the basic, "focal" sense the dualism of natural and positive law still is not in line with ontological natural law doctrines. The law and the rule appear in such doctrines in the existential-ontological relationship and, contrary to the criticism of H. Kelsen, not "on the other side of the positivity". In the unified structure of the law, the natural law concept quite organically coexists with the positivity of the law. This is especially noticeable in the doctrine by R. Alexy, who hardly hides his fluctuations between the natural law and the positivism.

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[46] See ibid. P. 169.

[47] Stovba A. V. Arthur Kaufmann: in Search of "Whole" Law [Artur Kaufmann: v poiskakh "tselogo" prava] // See ibid. P. 147.

[48] Kaufmann A. Ontological Structure of Law [Ontologicheskaya struktura prava]. PP. 165, 169.

[49] See ibid. P. 169.

[50] See ibid.

[51] A.V. Polyakov, having found the "third way" in the concept of A. Kaufmann, however, in his later general description of the natural law retains a reference to the absolutization of the axiological component of law inherent in ius naturale (see: Polyakov A. V. Communicative-Phenomenological Concept of Law // Non-Classical Philosophy of Law: Questions and Answers [Kommunikativno-fenomenologicheskaya kontseptsiya prava // Neklassicheskaya filosofiya prava: voprosy i otvety]. Kharkov, 2013. P. 103. (In rus)

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