Subjective Right in the Post-Classical Legal Science

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ABSTRACT
The writer formulates the content and characteristics of a subjective right in post-classical legal science context. Post-classical jurisprudence develop rethinking the objectivity of law. Therefore, objective and subjective law complement each other. The content of subjective law is formed by the legal actions of people, the results of actions and mental processes that mediate these actions.
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Post-classical legal science involves rethinking the main legal phenomena from the perspective of a new view of the world. This applies, among other things, to a different interpretation of subjective law in relation to the objectivity of law. Objectivity as the independence of social phenomena and processes is problematized by its human content and the sociocultural context in which the law exists. The interpretation of law as some kind of Platonic Eidos or "nature of things" means essentialism or vulgar naturalism that reifies legal reality. Today, this approach is overcome by recognition of the intersubjectivity of the social world and law as well. Law exists only in the case in which it is constructed by people (although not at their own discretion, but subject to external social and natural factors or circumstances). Further, the right exists only if it (as a set of rules of conduct) is fixed in a symbolic form, at least in the form of a custom or tradition, myth or ritual. It is also important that the existence of law presupposes the reproduction of the relevant rules of behavior by mental and behavioral practices of the broad population. Thus, human-centricity, constructiveness, semantic mediationality, sociocultural contextuality, and practical reproducibility are the main characteristics that distinguish the post-classical view of law.

A particularly important role in the post-classical concept of law is played by subjective law, which is found in a dialogic relationship with the objective law. Post-classical legal methodology does not deny, but reinterprets, the objective law. The latter does not exist without or out of relationship with the subjective law. This is due to the fact that the social world, including the world of law, is not people, actions, results of actions and objects (things) that mediate people's actions, but the meaning and import attributed by people to their actions, to themselves, the results of actions and objects. Thus, the external as "objective" or "material" (the "objective element" of lawful or unlawful behavior) is supplemented with internal, mental or mental aspect of the existence of the law (the "subjective element"). It is important that it is the mental aspect that motivates an individual to perform an action, acting as its "cause"[1] in the appropriate socio-cultural context.

Subjective law from the standpoint of post-classical legal science is the implementation of objective law, the implementation of deontic possibilities (what is allowed, required or prohibited) in legally significant behavior. At the same time the subjective law is a process of understanding the situation from the standpoint of personal motivation (a mental complex that includes interiorization of values, goals, interests, needs, and motives).

The importance of the study of the subjective law is that only through the subjective element of legal cases (legally significant practices) the external "objective" factors affect the law. How exactly? This is what the new post-classical theory of the subjective law is designed to explicate. In addition, it is focused on clarifying the way how the law acts.

The law itself does not "act". In our, hopefully, the best of all worlds, only people act. In this sense the subject of law in the empirical legal reality is always an individual. In some cases (legally significant situations) a man acts on his own behalf and in his own name, and in such case a person is legally recognized to be an individual. In other cases, a particular individual acts on behalf of and under a commission of a position held; in such case, he / she is legally referred to as an officer. Sometimes an individual acts (as a rule, enters into legal relationship) on behalf of a collective subject; technically from the standpoint of the classical dogmatics of law, this means that a legal action is performed by a collective subject, although in fact such person is a man made "of flesh and blood".

[1] I believe that there are no causes in the direct, literal sense of the word or "mechanical causation" in the social world. Behavior is conditioned by mental or mental phenomena and processes, namely, goal, interests, needs, motives.

The "act" of the law in this case means a correlation of personal expectations and behavior of a particular individual as a bearer of the subject of law status with the information formulated in the rule of law. Proceeding from such prospective of the subjective law analysis, the structure of the latter is formed by: people — holders of the subjects of law status, their interactions, result, mental mediation, including motivation of actors, understanding and evaluation of the interaction and result by actors and the observer from the positions of the prevailing legal values — legal social representations. In this sense, the trains of thought by representatives of the instrumental theory of private law B.I. Putinsky and S.Yu. Filippova are interesting and long-ranged in realization.

From the classical and traditional point of view the subjective law is defined as a measure of a person's legal freedom. In this connection such measure of freedom includes:

1) law as a measure of possible behavior of the subject;

2) the right as a possibility to demand certain actions (non-action) from the obligated subject.

At the same time, it is intended "not just a certain measure or a possibility but a legal possibility, i.e. a possibility secured by the coercive force of the state".[2] Such approach is based on a purely dogmatic, formal approach to interpretation of legal relationship, when the latter is considered as a "method of scientific thinking". "A legal relationship is an ideal (speculative, conceivable) "bundle" of rights and obligations, which represents reflection in the mirror of legal rules of specific actual relationship. The actual social relationship is an objectively existing relationship (for example, economic) between individuals, which is manifested in certain conduct (actions). With some of these actions the law associates the emergence of rights and obligations. Rights and obligations are ideal categories. They are inaccessible to human perception through the sensory organs. Nevertheless there is no doubt about their objective existence: regardless of whether people perceive them or not, a particular person has a certain opportunity provided by the coercive power of the state, i.e., a subjective right. Similarly, there are responsibilities, regardless of people's awareness of this fact. But legal relationship do not exist — they are only thought of. To think a subjective right together (in unity, in connection) with one's own support (as a rule — a legal obligation), i.e. within a single system, which receives the name of the relationship, is just convenient; it is this convenience which ultimately determines the use of the concept of legal relationship in scientific use as well as in the practical activities of the legal profession."[3]

Under this approach the legal relationship is deprived of the status of actual being (existence), which is directly proclaimed by its authors. Legal in this case is a kind of model of actual social relations, an intellective structure that is easy to use.[4] How does such a model-legal relationship differ from a model-rule of law? Moreover, the subjectively right as a "certain possibility", "existing objectively regardless of whether people perceive them or not", is an objective right! It turns out that the subjective law is a kind or an element of the objective law, isn't it?

I believe that the sociological approach, rather than a formal legal (dogmatic) approach[5] to analysis of both the subjective law and legal relations is much more promising. In the sociology of law the legal relationship is not a model of social relationship (the latter must be interpreted as specific interactions between two or more individuals, i.e. actors) but is the actual interaction itself, which is legally meaningful. Its "materiality" is expressed in specific behavioral acts and their results, accompanied by mental processes[6]. The model of social relationship is found in the rule of law, which is implemented in the legal relationship and/or simple forms of exercise of the rights, namely, compliance, performance or use (depending on the deontic modality of the corresponding rule of law, prohibiting, obliging or allowing certain conduct). In this case, the subjective right is not just a potential possibility formulated in a normative legal act or declaration that enshrines human rights but the actual implementation of this opportunity or measure of freedom.

Roughly in this manner this problem is approached by S.Yu. Filippova, who actively developed an instrumental approach (I would say a social and instrumental approach) in private law. She proceeds from the fact that "legal activity is only a moment of common human activity, which is unified in its integrity and meaning. This is due to the fact that in real life, the legal activity is not a special activity that

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[2] Civil Law: Actual Problems of Theory and Practice [Grazhdanskoe pravo: aktual'nye problemy teorii i praktiki] / Ed. V. A. Belov. M. : Yurayt Publ., 2007. P. 217 (In rus)

[3] Op. cit. PP. 210–211.

[4] In some ways, this resembles postmodernism (which, most likely, is beyond awareness of the authors of the stated point of view) — for example, R. Rorty's pragmatism or J. Baudrillard's simulacrum.

[5] This approach, of course, also has a right to exist, but at least it must be be supplemented by sociological approach in order to complete the picture of the subjective law.

[6] Not always conscious, but always mental, psychic.

differs from other types of human activity. ...In our opinion, it is impossible to think of independent, separate from legal, human activity. In every action, law and "non-law" coexist, i.e. both legal and non-legal aspects co-exist."[7] The legal activity under the instrumental approach is "the embodiment of legal means in the movement towards achievement of a legal goal". The features of legal activity, according to S.Yu. Filippova, include the following ones: "1) mutual relationship (interdependence) of a subject and object of the activity. The relationship between the subject and the object represents a single, integral system; 2) the legal activity, like any activity, consists in movement, change. This means that the actions of the subject represent activities only when certain changes appear in the external world for the subject; 3) expediency of the activity — the purpose and field of the activity is formed by an individual — a subject of the activity based on his understanding of the world around him; 4) only a person can be a subject of the legal activity, since only he can realize his own independence in relation to the rest of the world, set a goal and develop a path thereto. ... 5) the legal activity is a system."[8]

Important in this approach is the analysis of the goal-setting process, which includes: "1) the emergence of a need; 2) awareness of the need (in our opinion, this stage can be called the emergence of interest); 3) the appearance (setting) of a goal."[9] Why this point is important? Because, as it was correctly noted by S.Yu. Filippova, "if people, together with their interests and goals, are excluded from the sphere of law, then it is quite understood that the jurisprudence is unable to recognize their possibility to "create the law". This appears to be unnecessary, since the state knows all human needs (in a purified, generalized and dissected form), and therefore only it, the state, by virtue of its status, can create the best models. ...The verbal expression of wishes of the legislator will only affect the behavior of subjects when they themselves, by their behavioral and mental act, include the appropriate means in their own activities for setting and achieving legal goals."[10] I believe that this approach can be developed and refined by getting focused on the mental processes of perception, categorization and evaluation (legal qualification) of thee behavioral aspect of subjective law, and by analyzing how exactly external social phenomena and subjective law are interdeterminated. The perception of a legally significant situation is realized through its correlation with schemes available in the legal consciousness of the individual — frames and scripts, scenarios that form the content of typical models of such situations. Simultaneously with perception, the process of categorization or typing is performed — bringing of the sensible in accordance with the individual's narrative of a typical ("normal") situation and behavior therein. This, from a legal point of view, includes the process of qualification, which in a sociological perspective can be described as the correlation of one's own observation with the position of a socially significant ("normative") Other person — with the position of a supposed external observer.

"A frame is such a cognitive structure in the phenomenological field of a person," says well-known researcher of discourse analysis, M.L. Makarov, "which is based on probabilistic knowledge of typical situations and associated expectations about the properties and relationships of real or hypothetical objects. Structurally, the frame consists of a vertex (theme), i.e. a macroproposition, and slots or terminals that are filled with propositions. This cognitive structure is organized around a concept, but unlike a trivial set of associations, such units contain only the most essential, typical, and potentially possible information that is associated with this concept."[11]

"A scenario or, in other words, a scenario frame contains a standard sequence of events caused by a certain recurrent situation. Scenarios organize behavior and its interpretation. Scenarios are characterized by situational attachment and conventionality. Both the frame and the scenario must be interpreted in terms of memory. These are not only information structures, they report results, final states, which are remembered by us, because these are mechanisms that explain the achievement of understanding using previously accumulated knowledge, and preliminary knowledge is the type of information that is stored in memory.

The most remarkable thing about this argument is that the scenarios are not actually stored in memory in a "ready-state". Applying a scenario to discourse analysis represents reconstructions that we ourselves build scripts when the necessity arises, in the process of speech perception, in order to in-

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[7] Filippova S.Yu. Instrumental Approach in the Science of Private Law [Instrumental'nyi podkhod v nauke chastnogo prava]. M. : Statut, 2013. PP. 184-185. (In rus)

[8] Filippova, S.Yu. Op. cit. PP. 181-182.

[9] In this case, the motivation, according to S.Yu. Filippova, refers to awareness of the need. (See: Op. cit. PP. 42–43).

[10] Filippova, S. Yu. Op. cit. PP. 180, 119.

[11] Makarov M. L. Fundamentals of the Theory of Discourse [Osnovy teorii diskursa]. M.: Gnosis, 2003. P. 153 (In rus)

terpret the discourse, using the experience we have accumulated previously and information placed on different levels of memory."[12]

Through these scenarios (frames and scripts), social representations about external factors that set the context of a legal situation and how it is evaluated by a socially significant Other person (as it is legally qualified) are internalized. At the same time, social legal values acquire an individual meaning when they are correlated with personal motivation and expectations, i.e. expectations of "normal" behavior from the counterparty in this particular situation.

The foregoing seems to clearly indicate the need for further research on the subjective law. At the same time, the most promising approach to the study of subjective law today is the post-classical methodology of law.

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[12] Makarov M. L. Op. cit. PP. 154–155.