Legal Norms in the Focus of the Constructivism Theory

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ABSTRACT
Based on the theory of constructivism, the author explores the central concept of law: the legal norm. A consistent deconstruction of the legal norms is carried out, which allows us to distinguish its three components: "Normative proposition" or "Normative utterance" about the rule of conduct, "Normative rule", which serves as a model for assessing the behavior of a participant in legal communication in law enforcement, and "Rule of conduct" as the basis for the obligation of subjects of the legal communication. In the author's opinion, the proposed deconstruction allows asserting that the legislator speaking out on the acceptable form of legally significant behavior is limited by legalization factors based (having the external border of the normative proposition) on moral imperatives. They define the boundaries of a person's freedom and define the contours of his acceptable legal behavior. For a subject of law, a normative statement becomes imperative as a result of inclusion in legal communication. Such communication is possible only if there is a single code of legal communication. The aforementioned indicates the presence of structures of public consciousness (legal construction) that predetermine both the choice of the form of behavior of the participant in legal communication and the characteristics of the normative statement itself. Law as an objective phenomenon defined through the categories of truth or falsity exists only at the level of a normative utterance. In their turn, normative rules and rules of conduct are evaluated through the criterion of effectiveness (achievement of a legal goal). The impossibility of deducing the true state of affairs from a rule that have a normative dimension allows asserting that the components of the legal material that make up the content of any legal system have a constructive "nature". According to the author, the methodology of legal constructivism removes the opposition between the norm and the legal relationship, making it meaningless to search for the actual content of acts of subjects of legal communication in a normative matter. The application of the approach under consideration allows us to state that the subject of legal communication is a way of representing the corresponding legal structure through his target behavior.
Keywords: legal norm, normative proposition, normative utterance, normative rule, rule of conduct, legal construction, deconstruction, moral imperatives, legal facts

1. Deconstruction of the legal norm: problem statement

In the science of law, as well as in the philosophical and methodological reflection on the phenomena of the legal life of the society which goes beyond the subject of law, there has formed a generally uniform approach to the idea of what is called objective law with a certain degree of conventionality: it is generally understood as a system of norms that "regulate life in the society, the observance of which, in its turn, is guaranteed by public authorities"[1]. However, there is already no visible unity in views among researchers regarding the "primary cell" of objective law: the legal norm. The special legal literature devoted to the study of individual spheres of legal reality is characterized by the ambiguity of the term of "legal norm" (a generally binding rule of conduct established by the state and ensured by its force; a formally defined precept of a normative act; logical judgment of an implicative type)[2] or the multidimensionality of the concept under consideration (norms-precepts and norms-judgments)[3].

In our opinion, the issues considered in this paper may be solved through consistent deconstruction of the general legal category of "the legal norm" into its components, namely: the "normative statement" being the central element of the system of law, the "normative rule" serving as a model for assessing the behavior of a participant of legal communication in law enforcement activities, and the "rule of conduct" as the basis for the obligation of subjects of legal communication[4]. In case of sufficient clarity a normative statement is presumably equally perceived by the participants of legal communication,

[1] *Bergel J.-L.* General Theory of Law [Obshchaya teoriya prava] / Under. total ed. V. I. Danilenko / Transl. from fr. M. : Publishing house NOTA BENE, 2000. P. 15.

[2] See: Civil law: Actual Problems of Theory and Practice [Grazhdanskoe pravo: aktual'nye problemy teorii i praktiki] / Under Ed. of V. A. Belova. M. : Yurait-Publishing House [Yurait-Izdat], 2007. Pp. 94–96.

[3] *Mankovskii I. A.* Norms and Sources of Civil Law. Theoretical Foundations of Formation and Application : monograph [Normy i istochniki grazhdanskogo prava. Teoreticheskie osnovy formirovaniya i primeneniya : monografiya]. Minsk : International University "MITSO" [Mezhd. un-t. "MITSO"], 2013. P. 5.

[4] The idea of the need for a clear distinction between the above sections of the legal norm was prompted to the author by the works of Evgeny Bulygin (see, in particular: *Bulygin E.* On the Problem of the Objectivity of Law [K probleme ob"ektivnosti prava] // Problems of Philosophy of Law [Problemi filosofii prava]. 2005. V. III. No. 1–2. Pp. 7–13).

however, since identity is possible only at the level of a sign expression of events or phenomena, social consensus in case of a dispute is achieved due to their interpretation of the relevant normative statement. Thus, the need for the proposed differentiation of concepts is predetermined by the specific features of the reference to the acting subject of the terms of legal reality determined by these concepts, and, accordingly, the function performed by these terms in the process of legal communication.

2. Experience of deconstruction of the legal norm: normative statements, normative rules and rules of conduct

2.1. Foundations of normative statements

The proposed deconstruction of the concept of the "legal norm" and its consideration in the focus of the theory of legal constructivism give rise to several key questions, namely:

1. Is the conventional figure of the legislator as the exponent of the legally significant will historically accidental[5]?
2. Can the foundation of power be narrowed down exclusively to the social practice established in a particular society, that is, to the so-called "right to nomination" enabling the sovereign to accumulate the "legal capital" in his hands? 3
3. Should the established linguistic legal practice be recognized as a source of law displacing moral imperatives beyond the legal dimension?

Any normative statement (normative proposal) is known to be based on authority (*auctoritas*) which ensures its social legitimation, and is provided with measures of compulsory implementation brought into action by the subject performing the function of *potestas*, its essence being the ability of the subject of the political power to act. Such a subject is the sovereign acting personally, or a hypostatized entity which is the state acting on behalf of the people, the bearer of sovereignty. It should be noted that in the mind of the subject of legal communication, political power is perceived as a form of his dependence on the object perceived by him as a source (beginning) of the object establishing normative precepts. It is in the consciousness of the perceiver only that such an object is personified, endowed with the qualities of a subject, nevertheless, without being it for so long as it is impossible to enter into communication with it. The inclusion of subjects of legal communication into legal communication reflects the dynamic aspect of the legal order. According to G. Kelsen, the named aspect fixes the process of "creation and application of law, law in its movement" and is also "regulated by law", since "one of the most important properties of law is that it regulates its own creation and application"[6].

Note that the history of European law knows different approaches to the legitimation of normative statements. For example, at the dawn of the establishment of the Roman legal order, normative statements were deemed by the authority of the priestly colleges, later — by the authority of the legal experts who formed the *ius*, and the Senate of Rome; with the recognition of the Christian teaching as "absolutely true", the authority of the normative statement is deemed by the power of the emperor given by God, "… for there is no power not from God; the existing authorities are established from God"[7].

In this vein, normative statements were also perceived by glossators who considered the legal material of Roman law as *ratio scripata*, since the rational in the era under consideration was considered synonymous with the divine. Normative statements were recognized as such until the moment when the Christian concept of law was replaced by natural law — the new *ius* of the originally deistic and later secularized era, which eventually degenerated in the "East" into the authority of the will of the ruling class.

In their turn, modern methodological studies of the justification of normative statements in the "West" build upon the search for grounds for their effectiveness. Accordingly, the hypothetical effectiveness of

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[5] In a broader sense, this is a fundamental question about the degree of influence of cultural factors on legal phenomena and, accordingly, the question of the degree of determinacy of law by cultural factors external to it in a broad sense.

[6] *Hans Kelsen.* Pure Theory of Law. 2nd editon [Chistoe uchenie o prave. 2-e izd]. Transl. from German by M. Antonov and S. Loesov. St. Petersburg : Alef Press Publishing House, 2014. P. 94.

[7] The Epistle of the Apostle Paul to the Romans. (Rom. 13.1.) / Bible (Books of the Holy Scriptures of the Old and New Testaments) [Poslanie k rimlyanam apostola Pavla. (Rim. 13.1.) / Bibliya (Knigi Svyashchennogo Pisaniya Vetkhogo i Novogo Zaveta)]. M. : Edition of the Moscow Patriarchate [Izdanie Moskovskoi Patriarkhii], 1992. P. 1240.

a legal norm here appeals to the political and legal approach which is reduced mainly to an economically effective assessment of the operation of law: from the point of view of utilitarianism, the moral and, consequently, the legal value of conduct is determined by its usefulness[8].

2.2. Normative statements and moral imperatives

In connection with the above, the problem of the relationship between normative statements and moral imperatives seems to be significant. In our opinion, the ratio of legal and moral is determined by the very content of subjective law. In legal culture, power as the freedom of a person regarding the legitimately appropriated objects is recognized as a social value (good). The assessment of the social benefit in question, on the one hand, depends on the recognition by the society and the protection by the legal order and, therefore, cannot be indifferent to the legal order; on the other hand, it depends on the person who dominates the object, which, therefore, allows imposing the responsibility on him if the recognized boundaries of lawful behavior are violated. In this sense, subjective right is a measure of freedom of a person recognized and protected by law regarding the benefit legitimately appropriated by it: freedom from the variability of actual conditions.

According to the just remark of J. Habermas, "under the revolutionary premise, according to which everything that is not explicitly prohibited is rightly allowed, no longer obligations, but subjective rights form the basis for the construction of the legal system"[9]. Thus, it is the concept of subjective law rather than an order that makes it possible to overcome the dependence of the behavior of the subjects of legal communication on the world of the *fusis* by subordinating their behavior to the *nomos* — a self-sufficient sphere of legal reality isolated from other phenomena. At the same time, note that the connection between legal and non-legal phenomena is not lost, but as distinguished from the world of physical phenomena, it has a correlation rather than a causal nature. However, in the cases where social experience makes it necessary to "elevate the fact into law," factual phenomena are evaluated only in the context of the phenomena making up the sphere of legal reality.

This thesis clearly demonstrates the definition of the boundaries of subjective law outwardly enshrined in normative statements which is quite universal for all types of societies. The boundaries of a person's freedom in committing behavioral acts related with a legitimately appropriated limited resource are determined by the imperatives of the "morality of duty" and "morality of striving"[10] enshrined as fundamental principles in the text of the law. The "moral of duty" being the lowest limit of a person's freedom is aimed at preventing a conflict within the society, since the law ordains not to want someone else's property, to give everyone his due[11]. The ultimate upper limit of a person's freedom is determined by the freedom of other persons to dispose of legitimately appropriated limited resources ("the morality of striving"), because no legal order can function in any stable way imposing rather than creating opportunities for subjects in the appropriation, exercise and protection of subjective rights.

Thus, in its moral dimension the law proceeds from a well-known controversy: without allowing the establishment of normative precepts on how a person should to behave to achieve the best result, it demands compliance with the aforementioned "morality of duty" which imposes the duty of all and everyone to refrain from encroachment on the limited resource legitimately appropriated by a person. The said lower and upper limits of a person's freedom define the contours of his acceptable legal behavior. The recognized person's freedom to behave within the aforementioned boundaries serves as the natural legal foundations of the right in general and its main systemic element: a normative statement.

On the other hand, the legal possibility of acquiring, exercising, changing, terminating and protecting the subjective right is determined by the legal norm, which allows concluding that the essence of the law, its *essentia* can be determined in the focus of the ratio of the normative statement legitimizing the legally significant behavior of a person and a normative rule determining the legal consequences of

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[8] See: *Khalabudenko O. A.* Law and Economics vs Law and Moral: Some Methodological Observations [Pravo i ekonomika vs pravo i moral': nekotorye metodologicheskie zamechaniya] // Law and Business: Convergence of Private and Public Law in the Regulation of Entrepreneurial Activity [Pravo i biznes: konvergentsiya chastnogo i publichnogo prava v regulirovanii predprinimatel'skoi deyatel'nosti]. M., 2015. Pp. 49–62.

[9] *Habermas J.* The Concept of Human Dignity and the Realistic Utopia of Human Rights [Kontsept chelovecheskogo dostoinstva i realisticheskaya utopiya prav cheloveka] // Questions of Philosophy [Voprosy filosofii], 2012, No. 2. P. 71.

[10] The concepts of "morality of duty" and "morality of striving" were introduced into scientific circulation by American legal scholar Lon L. Fuller who investigated the specific moral requirements to law. See: *Fuller Lon L.* Moral Law [Moral' prava] / Lon L. Fuller; trans. from English T. Danilova, ed. A. Kuryaeva. M. : IRISEN, 2007. Pp. 14–20.

[11] D.1.1.10pr: «Iustitia est constans et perpetua voluntas ius suum cuique tribuendi. Iuris praecepta sunt haec: honeste vivere alterum non laedere, suum cuique tribuere».

such behavior. Indeed, normative statements establish values, whereas descriptive statements are aimed at describing facts. When, for example, we assert that it is forbidden to violate someone else's subjective right, in particular the right to performance, our goal is not to describe what the facts are, but to form a certain line of our behavior, according to which the obligated person, a debtor or third parties, must not violate the named right, and if they do, they will be held accountable. In other words, normative statements say how we should behave in a particular factual situation. Thus, it is not inferred from the presented normative rule that we *will* behave in exactly this way, but it is *a standard (model)* and, possibly, *our decision* on how we should act in a given situation[12]. Thus, both the regulatory and protective effect of the norm are of an evaluative nature: "no objective connections between facts and their legal consequences exist or can be established ..."[13].

A normative statement in itself does not answer the question why certain social relations are related with legal norms, suggesting, when resolving this issue, drawing on the belief in the rationality of the "legislator" who is able to determine which factual situation is worthy of recognition and protection, and which should be ignored. In this regard, let us take note of the fact that the fact and the right are not in a causal relationship analogous to the one inherent in natural phenomena and which can be described through its laws (fusis). The relationship between the cause and the effect is "factual and empirical", while the relationship between the foundation and the effect is "conceptual and logical"[14]. The foundation is not intended to influence the world of facts, but, on the contrary, the actual behavior, action or inaction, is assessed in terms of the legal effects provided for by the normative rule. For example, the performance under the obligation to transfer a thing (actual action) gives a legal effect: it terminates the obligation by proper performance because the disposition (sanction) of the norm shows the legal consequences of taking the relevant actions aimed at terminating the obligation.

Following the theory of L. I. Petrazhitsky, the rule itself affects human behavior and is experienced by him as a legal subject[15]. Based on the empirical argument of G. Hart, under the influence of legal norms certain types of human behavior are transformed from arbitrary into mandatory[16]. The duty expressed in the normative statement is related to the execution of the order of the sovereign, while the duty expressed in the normative rule, what the jurisdictional body is guided by, does not fully comply with the orders, "because it was introduced on the basis of well-known legal procedures that are generally obligatory and applying to many persons"[17]. (The noted, *a propos*, reconfirms the inconsistency of reducing the concept of law to the orders of the sovereign.) Hence, the algorithm of the interaction of a normative rule with legal effects is given by the sequence in which the legal norm determines (regulates) the behavior of a participant of legal communication implemented in certain legal forms, including in legal relations. In any case, there is no need for an intermediary in the form of a legal relationship between the legal norm and the legally significant behavior of participants of legal communication.

3. Issues of the logical relevance of normative statements and normative rules

In connection with the proposed deconstruction of the concept of "rule of law", a number of critical considerations also arise regarding the logical relevance of a normative statement and a normative rule. This refers to the well-known "Hume's paradox or guillotine" (*is — ought problem*) known to suggest two possible solutions: either complete rejection of the possibility of deducting what is ought to be from the things existent (the conclusion resulting from the concept of phenomenology of E. Husserl[18]), or the

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[12] *Ogleznev V. V.* G. L. A. Hart and the Formation of an Analytical Philosophy of Law [G. L. A. Khart i formirovanie analiticheskoi filosofii prava]. Tomsk : Publishing house of Tomsk University [Izdatel'stvo Tomskogo un-ta], 2012. P. 78.

[13] *Belov V. A.* Civil Law. A Common Part. T. I. Introduction to Civil Law : textbook [Grazhdanskoe pravo. Obshchaya chast'. T. I. Vvedenie v grazhdanskoe pravo : uchebnik] / V. A. Belov. Moscow : Yurayt Publishing House [Izdatel'stvo Yurait], 2011. P. 244.

[14] *G. H. von Wright.* Logico-Philosophical Research: Selected works [Logiko-filosofskie issledovaniya: Izbrannye trudy]: transl. from English / Total Ed. G. I. Ruzavina and V. A. Smirnova. M. : PROGRESS, 1986. P. 71.

[15] *Petrazhitsky L. I.* The Theory of Law and the State in Connection with the Theory of Morality [Teoriya prava i gosudarstva v svyazi s teoriei nravstvennosti]. St. Petersburg: Publishing House "Lan" [Izdatel'stvo "Lan'"], 2000. Pp. 270–274.

[16] *Hart H. L. A.* The Concept of Law [Ponyatie prava] / Transl. from English; under the general. ed. E. V. Afonasina and S. V. Moiseeva. SPb. : Publishing House of St. Petersburg University [Izdatel'stvo S.-Peterbugskogo universiteta], 2007. P. 14.

[17] *Johnson C. D.* Moral and Legal Obligation // The Journal of Philosophy. 1975. Vol. 72. No. 12.

[18] See: *Husserl E.* Logical research. T. 1: Prolegomens to Pure Logic [Logicheskie issledovaniya. T. 1: Prolegomeny k chistoi logike]. M. : Academic project [Akademicheskii proekt], 2011.

recognition that the obligation has an actual origin and goes back to social experience (the theory of action developed by J. Searle[19]).

Let us try to consider this problem through the prism of logical truth. Logical truth is known to be based on arguments applicable in deductive or inductive reasoning. In this case deductive reasoning presupposes the application of the criterion of validity (logical correctness). Valid reasoning is based on the fact that only correct conclusions follow from correct premises. It should be recognized that deductive reasoning is logically impossible for understanding the behavior of a participant of legal communication carried out by means of evaluation, when the behavior in question is brought to comply with the general rule that fixes the established ideas about what should be done. The point is that deductive reasoning is always strong: the cause is causally connected with the effect in them. The behavior of the subject of legal communication may be assessed by means of weak understanding taking account of the purpose of the performance of behavioral acts by the subject (teleological understanding and explanation as bringing to comply with the generally accepted truth). Weak understanding is problematic, inductive reasoning[20]. The scheme of weak understanding is: "A is the foundation of B. B is social benefit; therefore, A is probably also a benefit." For example, the actual possession of a thing (A) serves the foundation for protecting the relevant ownership situation of a bona fide owner (B), its stability being recognized as a social benefit; therefore, the actual possession of the thing is probably also a benefit. The probability here is that the normative rule presupposes the social value of ownership based on the probability of bona fide behavior of the person actually owning the thing. In any case, the question of what kind of actual possession is a social benefit is left to the discretion of the court which takes into account the accumulated social experience when making the decision.

Weak understanding of the assessment of the behavior of a participant of legal communication carried out by bringing it up to comply with the general rule, apart from the assessment of the behavior itself also includes the purpose to achieve which the subject behaves in the manner stipulated by the rule. According to G. H. Wright, the logical form of understanding the target behavior of a participant of legal communication is a practical syllogism serving as a supporting model for teleological explanation.

In practical syllogism, the initial premise speaks of some desired goal (goal of action); in a lesser premise the action as a means of achieving it is linked with the desired result; finally the conclusion is made about the use of the means to achieve the goal[21].

From the point of view of a teleological explanation, one can understand the behavior of the actor, or rather, the action of the very rule of behavior by which he is guided, at the same time it is impossible to reliably know whether the behavior of the actor has led to the desired result. Evaluation of the achievement of the intended result in case of a conflict situation is possible only in an inductive conclusion which assumes that particular prerequisites are related with the conclusion through certain factual grounds lacking a formal character[22].

4. Ontological and logical limits of measurement of the legal norm

Further logical analysis of the legal norm is determined by the correctness of the answer to the question: does law exist as an objective phenomenon? The result obtained determines the solution of two problems closely related with it: first, whether law (in the meaning of a normative statement) is the result of human experience, excluding rational or empirical apriorism; second, as a consequence of the first, is it permissible to recognize that there is no logical connection between law (in the meaning of a normative rule) and morality[23].

The question of whether a legal norm exists objectively can be answered positively if the legal norm is understood as a certain state of affairs as it really is, regardless of our opinions about it (metaphysical objectivity), in other words, when the concept under consideration is used in the meaning of a normative statement. On the other hand, it cannot be recognized that a legal norm in the meaning of a normative rule and a rule of conduct is a logical connection between a statement expressed in a descriptive sentence and a certain object existing in the world, and therefore that a legal norm estab-

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[19] See: *Searle J. R.* Rationality in Action [Ratsional'nost' v deistvii]. Transl. from English A. Kolody, E. Rumyantseva. M. : Progress-Tradition [Progress-Traditsiya], 2004.

[20] Philosophy : Encyclopedic Dictionary [Filosofiya : Entsiklopedicheskii slovar'] / Ed. A. A. Ivina. M. : Gardariki, 2004.

[21] *G. H. von Wright.* Op. cit. P. 64.

[22] *Ivin A. A.* Logics : Tutorial. 2nd Edition [Logika : Uchebnoe posobie. Izdanie 2-e]. M. : Knowledge, 1998. P. 112.

[23] *Bulygin E.* On the Problem of the Objectivity of Law [K probleme ob"ektivnosti prava] // Problems of Philosophy of Law [Problemi filosofii prava]. 2005. V. III. No. 1–2. P. 7.

lishes an objective connection between the behavior of a participant of legal communication and its effects.

The function of a legal norm is prescriptive ("the law ordains, allows, authorizes" but "does not speak out about the subject of cognition"[24]), therefore, normative rules, unlike statements about their existence (normative sentences), cannot be true either, nor false. Thus, normative statements about the rule of behavior (normative sentences) cannot be characterized as valid or effective, they can neither be observed nor violated, but they can be true or false. On the contrary, normative rules can be valid or invalid, effective or ineffective, they can be observed or violated, but they cannot be true or false[25]. Therefore, a normative statement is considered within the meaning of a social fact and established practice. For example, a normative statement about the assessment of the conscientiousness of a participant of legal communication can be true or false, while the effects of the relevant norm within the meaning of a normative rule determining the consequences of conscientiousness or unconscientiousness cannot be validated and, therefore, cannot be true or false.

Note that truth is always contextual; it is built in a dialogue with *another*. Indeed, it is "... only at the level of social interaction through linguistic communication that we create the foundations independent on the desire"[26] — the foundations of an obligation. An obligation exists in the normative form as a rule of behavior addressed to the subject that must be fulfilled; it is perceived as an appeal to another, and therefore an obligation has a communicative nature[27]. Nevertheless, it should be borne in mind that to start legal communication, it is necessary to develop a single code of communicative interaction. Effective communication is possible only when the participants of the process of legal communication preagree on a formalized method of communication clear for them. The development of such a method in the process of communication is basically impossible, since in this case the possibility of the beginning of *iuris communicatio* is excluded. In other words, a legally significant result of communication is possible only if "the method of transmitting messages has already been worked out and agreed upon"[28]. So, it is only the result of reception represented by the legal tradition (by what is transmitted) that provides a single code of legal communication ensuring effective communication between different legal cultures. Therefore, it is incorrect to say that in the actual acts of communication themselves (orders, promises, obligations) the grounds for normative judgments are created.

Hence, it is permissible to assume that the assessment of the person's behavior ordained by a legal norm (normative rule) may be correct or incorrect: the correct answer is not true, but it allows determining effectiveness through the prism of awareness of the rights and obligations, their compliance with or violation entailing certain legal consequences. However, the normative rule itself depends on the existing social experience, it is ambiguous. In any case, the certainty of the norm is achieved not in itself, but in the practice of its application: "only after the judge's decision can we find out which norm corresponds to the specified normative wording"[29]. In this sense, a judicial act performs the function of a determinative allowing determination of the final normative meaning of a rule. With regard to the question of the relationship between the legal norms and moral imperatives, this point of view allows asserting that the court will resort to the application of moral categories, the basis of judicial discretion, whenever a normative statement is incorrect from the point of view of social experience.

It should be noted that legal norms, like signs, are not entities, and therefore the "exist objectively" definition of their state is applicable to them, as noted above, only when they are defined as normative statements. The sign does not refer to the meaning of the thing outwardly, it refers to the meaning within its own boundaries. In this sense, the basic concept of law is identical to itself: law is law, its definition does not require a predicate. Nevertheless, legal norms are "directly or symbolically linked to specific acts that take place in real life"[30]: in the meaning of a normative statement — by the practice

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[24] *Hans Kelsen.* Op. cit. P. 95.

[25] *Bulygin E.* Op. cit. P. 8.

[26] *Ogleznev V. V.* Some Remarks on the Theory of the Grounds for Action [Nekotorye zamechaniya k teorii ob osnovaniyakh dlya deistviya] // Tomsk State University Bulletin: Philosophy, Sociology, Political Science [Vestnik Tomskogo gosudarstvennogo universiteta: Filosofiya, Sotsiologiya, Politologiya]. 2015, No. 2 (30). P. 215.

[27] *Polyakov A. V.* Rule of Law [Norma prava]. [Electronic resource] // URL: http://www.law.edu.ru/doc/document.asp?docID=1140109 (accessed: 05.20.2020).

[28] *Gasparyan D. E.* Introduction to Non-Classical Philosophy [Vvedenie v neklassicheskuyu filosofiyu] / D. E. Gasparyan. M.: Russian Political Encyclopedia (ROSSPEN) [Rossiiskaya politicheskaya ehntsiklopediya (ROSSPEHN)], 2011. P. 198.

[29] *Bulygin E.* Op. cit. P. 11.

[30] *Lloyd D.* The Idea of Law. The idea of law. Repressive Evil or Social Necessity [Ideya prava. Repressivnoe zlo ili sotsial'naya neobkhodimost'] Transl. from English: Yumashev Yu. M. (Scientific Ed.), Yumashev M. A. M. : Yugona, 2002. P. 295.

of legitimation and the procedure of adoption, in the meaning of a *normative rule* — by the practice of application, and in the meaning of *a rule of conduct* — by practical implementation. Therefore, law cannot be narrowed down (like chess) to a set of rules, according to which each element is determined by reference to another, but not to its substrate.

5. Constructive "nature" of legal norms

The fundamental impossibility of deriving the true state of affairs from a rule that has normative significance makes it possible to assert that the components of legal material, a special kind of structure making up the fabric of any legal system, have a constructive "nature". The links between the elements of legal reality reflect their constructive features set by political and legal imperatives or by "legal nature" in terms of natural law, but in reality by a special legal regime conventionally recognized and established by the legal order with regard to certain typified legal constructions corresponding to forms of social consciousness.

Accordingly, legal phenomena can be explained at the methodological level, and understood at a subsequent level only by fixing the constructive activities of human thinking carried out with specific goals and according to certain rules with rigidly established boundaries and precisely expressed in a specific language[31].

Being forms of social consciousness, legal constructions are desubstantiated: the meaning of a certain element here is determined by its location in it and the resulting function performed by it[32]. Recognition of the normative level of expression of legal constructions removes the problem of doubling the ontology of legal phenomena, eliminating the need to supplement the phenomenal dimension with the world of noumenal entities in the form of acts of will of the subjects of legal communication. "Understanding of legal constructions as the proper content of law, — according to the fair remark of N. N. Tarasov, — in addition to the designation of new heuristic horizons of legal research, seems extremely fruitful for overcoming the attitude to law as a form that does not have its own history, its own content that has developed within the framework of the paradigm of socio-economic determinism[33]. Thus, the methodology of legal constructivism removes the opposition between the search for the ratio of "factual" and "legal" in legal relations allowing consideration of the established forms of legal communication as a legally significant connection between subjects, without endowing such connections with the typification unusual for them.

On the other hand, the methodology of legal constructivism also removes the opposition between a legal norm and legal relationship, making it senseless to search for the actual content of acts of subjects of legal communication in a normative statement[34].

In this regard, it may be supposed that this or that legal structure precedes the normative statement, but at the same time, being enshrined in the normative material (normative statement), it retains its autonomy which allows resorting to its heuristic comprehension. The subject of legal communication in this sense is a way of representing the relevant structure.

Thus, the autonomous subject of legal communication ceases to exist, its place is taken by the named communicative community, the correspondence theory of truth is replaced by the concept of truth as a consensus, which eventually leads to the replacement of the epistemological subject with "intersubjectivity". According to J. Habermas, law is the result of communicative activities represented by "symbolically transmitted interaction" carried out in accordance with the obligatorily accepted norms

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[31] For comparison see the definition of constructivism in: *Antonovskii A. Yu., Kasavin I. T., Bernshtein V. S.* Constructivism / Humanitarian Encyclopedia: Concepts [Konstruktivizm / Gumanitarnaya ehntsiklopediya: Kontsepty] [Electronic resource] // Center for Humanitarian Technologies [Tsentr gumanitarnykh tekhnologii], 2002–2020 (last revised: 02/08/2020). URL: https://gtmarket. ru/concepts/7047 (accessed: 20.05.2020).

[32] In our opinion, constructions should be distinguished from constructs: both of them undoubtedly have rational grounds, their structure is logical (self-identical, consistent, substantiated, formally true). However, as distinguished from a construct, a construction is not only rational, but, if you will, socially useful, reasonable from the point of view of social experience. This explains the current practice of bypassing or even ignoring laws in which numerous constructs are enshrined in the textual form, the resort to them seeming unreasonable for the subject of legal communication.

[33] *Tarasov N. N.* Methodological Problems of Legal Science [Metodologicheskie problemy yuridicheskoi nauki] / Humanitarian University Press. Ekaterinburg [Izdatel'stvo Gumanitarnogo universiteta], 2001. P. 244.

[34] For more details on solving the issues related to the interpretation of the concept of "legal relationship" through the theory of legal constructions, see, in particular, *Khalabudenko O. A.* Some Questions of the Methodology of Law: Civil Law Prerogatives and Legal Constructions [Nekotorye voprosy metodologii prava: grazhdansko-pravovye prerogativy i yuridicheskie konstruktsii] // Bulletin of the Perm University: Series "Legal Sciences" [Vestnik Permskogo universiteta: Seriya "Yuridicheskie nauki"], No. 1 (2013). Pp. 174–187.

determining the mutual behavioral expectations, understood and recognized by at least two actors; moreover, as distinguished from technical rules and strategies that depend on the consistency of empirically true or analytically correct statements, the meaning of social norms is based only on an intersubjective agreement about the intentions and is guaranteed by a general recognition of obligations[35].

However, as noted above, with this understanding of legal communication, a logical circle is observed: communication is possible when a single communication code is developed which must necessarily precede its very beginning. In other words, the communicative theory of law does not provide an answer to the question of the a priori foundations of a particular legal discourse. The assumption that if "discursive formations are historically conditioned, they, therefore, are devoid of an a priori foundation, which means that each society has its own order of truth, its own policy of truth"[36], contradicts, by the way, the practice of an intercultural legal dialogue.

In his turn, in turn, to avoid self-referentialism, M. Foucault, one of the founders of radical constructivism, substantiates his views by the idea of searching for a quasi-transcendental basis of discursive practices which he identified with the discourse of total power: "panoptism"[37]. For legal discourse, the embodiment of total power is the legal norm.

In fact, legal constructions acquire the character of "substance" (in the meaning of *existentia*) when a participant of legal communication expresses will, thus setting their explicit dimension. From the moment of the expression of a legally significant will, the legal structure acquires a certain "center": the possibility laid down at the level of a normative statement becomes a legal reality. Thus, the "center" serves as a deep foundation not belonging to the structure itself, but holding the construction itself. Unlike the reasons that make us not free, the foundations depend on the free will of the subjects of legal communication. For a normative statement about the rule of conduct, such a center is *potestas*; for a legal norm in the meaning of the rule of behavior this is will, or rather the target behavior of the subject of legal communication. In case of a dispute, the gap between a normative statement as an abstract directive precept and a specific rule of conduct followed by the subject is filled with the meaning obtained in the practice of applying the normative rule.

An effective way to solve the problem of an endless search for the foundation of an episteme was proposed by G. Teubner who developed his views on constructivism in law on the basis of the *theory of autopoiesis* introduced into the sphere of cognition of social reality by N. Luhmann[38]. This concept borrowed from biology denotes a system that reproduces its elementary parts with the help of an operating network of the same elements and, owing to this, is delimited from the external environment. In the social and, as one might assume, the legal system, reproduction is carried out in the form of communication. Thus, *autopoiesis* is a way of reproducing a certain system identical to itself.

Autopoetic discourse allows asserting that the main element of the legal system is not a legal norm and not power as a form of perception of legitimate violence by the subject of legal communication, but a legal structure. G. Teubner states: "The law autonomously processes information, creates worlds of meanings, sets goals and tasks, creates constructions of reality and determines normative expectations, and everything is completely independent of the views of the world in the minds of lawyers"[39]. Being autopoietic, the legal system subordinates to itself the provisions established in other socially related systems, such as politics, economics, ecology, etc.

In other words, legal constructions absorb and recode any external meanings. In order to be recognized as legally significant, any empirical fact should be interpreted in the context of the constructions adopted by the legal community. It should be borne in mind that the normative component of the rule performs an ascriptive function[40] ordaining a legally significant status to a certain state of affairs. From

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[35] *Habermas J.* Technik und Wissenschaft als "Ideologie". Frankfurt a/M., 1968. S. 62. (Cit. ex: Communicative Rationality: an Epistemological Approach [Kommunikativnaya ratsional'nost': epistemologicheskii podkhod] / Ros. Acad. Sciences, Institute of Philosophy; Ed.: I. T. Kasavin, V. N. Porus. M. : IFRAN, 2009.)

[36] *Teubner G.* How the Law Thinks: Toward a Constructivist Epistemology of Law. In: Krohn W., Küppers G. & Nowotny H. (eds.) Selforganization. Portrait of a scientific revolution. Kluwer, Dordrecht: 87–113 [Electronic resource]. URL: http://www.univie.ac.at/constructivism/archive/fulltexts/2713.html (accessed: 20.05.2020).

[37] See: *Foucault M.* Psychiatric Power. Course of Lectures Delivered at the College de France in the 1973–1974 Academic Year [Psikhiatricheskaya vlast'. Kurs lektsii, prochitannykh v Kollezh de Frans v 1973–1974 uchebnom godu]. St. Petersburg : Science, 2007; *Foucault M.* Oversee and Punish. Birth of a Prison [Nadzirat' i nakazyvat'. Rozhdenie tyur'my] / transl. from French V. Naumov. M. : "Ad Marginem", 1999; also: *Teubner G.* Op. cit. note 40.

[38] See: *Luhmann N.* The Autopoiesis of Social Systems, in: F. Geyer and J. van der Zouwen (eds.), Sociocybernetic Paradoxes, Sage, London, 1986, 172 ff.

[39] *Teubner G.* Op. cit.

[40] *H. L. A. Hart.* The Ascription of Responsibility and Rights // Proceedings of the Aristotelian Society, New Series, Vol. 49 (1948–1949), P. 171–194.

the point of view of the theory of speech acts, this function is realized in a certain "constitutive rule"[41], which determines the possibilities of a new behavior from the legal point of view, thus creating a so-called "institutional" fact. An institutional fact arises at the moment when collective intentionality endows the empirically perceived objects with a certain status and a function corresponding to this status.

6. Facts and moral categories in the context of legal constructions

In their turn, the factual circumstances in resolving specific cases are assessed exclusively in the context of a certain legal construction. Without connection with a specific legal construction, the fact remains legally indifferent.

Facts and related legal consequences are known to have no causality relations between them. Thus, the logical connection of the implicative type established between the hypothesis and the disposition (sanction) of a legal norm should not be identified with the connection that participants of legal communication recognize between the occurred fact and the legal consequences recognized by legal order. The connection between actual circumstances and legal consequences is recognized by virtue of the essence of the construction itself and exclusively in the context of its components, regardless of the form of its expression. In the hypothesis of a legal norm (normative rule), the model (structure) of a legal fact is consolidated. In the presence of the relevant model features enshrined in the hypothesis, a specific fact is recognized as a condition for the occurrence of the relevant legal consequences.

However, the "fact-hypothesis" (logical antecedent) cannot be explained without referring to the basis of the explanation: the multitude of phenomena of reality that precede or accompany the "fact-foundation" of the emergence of certain legal consequences. A legal fact as the foundation of certain legal consequences from the point of view of logic is covered by a wider area of reality than "the sub-area to which causal explanations are given"[42]. While a causal explanation points to the past and it assumes a nomic connection between the causal factor and the effect factor (*because, quia*), its presence determining the validity of the causal explanation depends, the teleological explanation points to the future (*so that, ut*), in this case the nomic connection is not a decisive factor in determining the validity of the teleological explanation[43]. Consequently, a functional (invariant) approach to explaining legal phenomena cannot be recognized to be sufficient; the practical syllogism applicable for this presupposes the clarification of a specific goal of an accomplished fact (Latin *factum* — done): the object of teleological explanation (explanandum) describes a certain result of behavior that the subject has intentionally achieved.

As noted above, a fact can be explained as a phenomenon or process that entails certain consequences with the help of a "practical syllogism". The logical connection between the three proposed aspects of the regulative action of a legal norm looks, apparently, as follows: a large premise is a normative statement that consolidates social intentionality (available in a sign for perception), a smaller reference is represented by a normative rule linking a certain action (fact) with the aim of an action (achieving a legal result), considering such an action as a means of achieving the goal (the semantic content of a sign), a conclusion — the legal situation informs about the use of this means to achieve the goal corresponding, on the one hand, to social intentionality, and, on the other hand, to the legal result sought by the subject of communication.

Note that through the constructivist approach to law, the issue of the relationship between moral categories and normative rules is also resolved: moral and ethical imperatives can be assessed only in the context of the relevant legal constructions. The point of view expressed by G. Kelsen that "morality should be considered as part of law in the cases where law contains norms that make moral norms a condition for the use of coercion"[44], can be accepted if it involves not normative statements, but specific normative rules, their ensemble, with account of the practice of their application, forming a relevant normative construction. So, the idea of the inadmissibility of the commission of private legal acts that

[41] The concept of "constitutive rule" was introduced into scientific circulation by J. R. Searle, opposing it to the regulative rule "regulating the activities, the existence of which is logically independent of the existence of rules" (see: *John R. Searle.* What is a Speech Act? In: "Philosophy in America" ed. Max Black, London, Alien and Unwin, 1965, P. 221–239; *Searle J. R.* What is a Speech Act [Chto takoe rechevoi akt] // New in Foreign Linguistics [Novoe v zarubezhnoi lingvistike]. M., 1986, Vol. 17. Pp. 151–169). In our opinion, all legally significant rules, if we adhere to the classification proposed by J. R. Searle, refer to the class of constitutive rules, since legally possible behavior manifests itself only in the sphere of the obligation.

[42] *G. H. von Wright.* Op. cit. P. 53.

[43] Ibid. P. 116.

[44] *Kelsen H.* General Theory of Law and State. Harvard University Press, 1949. P. 374.

contradict the law or morality, the prohibition on the use of customs that violate morality, the inadmissibility of including conditions contrary to morality in the transaction — these and other prohibitions in practical application can be explained and cognized only in the context of the relevant legal constructions. The foregoing allows concluding that moral and ethical imperatives, being included in the legal context at the level of the relevant legal constructions, do not determine their essence, but are subordinate to them.

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