Legitimacy as the Sign of the Right

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ABSTRACT
Legitimacy constructs and constitutes society, including the law. Here possible conclusion, that legitimacy is the feature of the law. However not all agree with this point. For representatives of legal positivism, as for jus natural supporters legitimacy is not the feature of the law. Classical law sociology stand legitimacy as feature of the law, but not takes her power, constructed by nature. From post-classical methodology point, features of law are human proportionality, iconic mediation, construction of law, the contextual and dialogic features of law. All these features of the law assume the legitimacy as their content. Legitimacy as recognition of the rule of law is a condition of its existence.
Keywords: legitimacy of law, legal understanding, post-classical right methodology

Legitimacy in its broad sense is a condition for perdurance of a society.[1] Mutual recognition of the other fact constructs and constitutes sociability. Special significance is given to mutual recognition of a risk in the postmodern society when, owing to ontological and epistemic uncertainty, unavailability of direct access to the reality (to be more precise, with constructed social reality), one has to trust the authority of an agency: the scientific community (science), the power, a reference group. So, today the role of culture increases, the most important function of which is a legitimizing one — "legalizing", giving a phenomenon the status of accepted / adopted / worthy, justifying and establishing its necessity. <...> The legitimizing function of the culture is directly connected with the creation of a system of references (both positive and negative) by the community, including through the approval of a certain register of references. <...> In general, we may say that through the approval / disapproval of these or those events, actions, behavior by the community, through imposing certain evaluations on certain representatives, through enforcement of certain rules and certain patterns, the community creates / preserves / transforms its system and hierarchy of values, which are an integral part of any culture".[2]

Does legitimacy refer to the legal range of problems, to the subject of legal science? Is legitimacy the sign of law, or "a normal lawyer" (in the parlance of M. V. Antonov) and jurisprudence in general perceive it — the sign of law being interpreted like that — as excessive? In the opinion of M. V. Antonov, "legitimacy of law reveals plenty of meanings which are in conflict with each other and render accurate scientific use of this term difficult..." In his opinion, legitimacy performs the function consisting in "cancellation of rules of law on account of their illegitimacy".[3] I think that theoretically, this problem is quite important, though it is appropriate to stick to less rigorous understanding of the concept "legitimacy of law": the current legislation (in a broad sense including all forms of external manifestation of law) shall be observed and fulfilled by everybody, and those who wish may use it. Nonetheless, the criticism of legislation is possible and even necessary, if only to amend it in due time. One of the variants of such a critical theoretical approach is establishing correlations between "the law which is properly established by lawful authorities" and those insights into its legitimacy which evolve among the public and executors of law. If the law is recognized (legitimate), then it is positively assessed, repeatedly and commonly used and, as a rule, demonstrates its effectiveness. So, we may assess

[1] "The category "recognition", Yu. A. Vedeneev writes, forms a universal social and cultural concept, institute and process which accompanies virtually all aspects of organization and functioning of social and political systems in both traditional and modern societies". — Vedeneev Yu. A. Grammar of Law: monograph [Grammatika pravoporyadka: monografiya] / science editor V. V. Lazarev. M. : RG-Press Publ., 2018. P. 113 (In Rus).

[2] Krasnykh V. V. Psycholinguoculture as the science of a person speaking through the prism of linguoculture [Psikholingvokul'turoloriya kak nauka o cheloveke govoryashchem skvoz' prizmu lingvokul'tury] // (Neo) psycholinguistic and (psycho) linguistic cultural studies: a new science about a person speaking. [(Neo)psikholingvistika i (psikho)lingvokul'turologiya: novye nauki o cheloveke govoryashchem]. I. A. Bubnova, I. V. Zykova, V. V. Krasnykh, N. V. Ufimtseva / Ed. V. V. Krasnykh. M.: Gnozis Publ., 2017. P. 215, 2016. (In Rus)

[3] Antonov M. V. Legitimacy, recognition, validity and repeal of legal norms in legal usage [Legitimnost', priznanie, deistvitel'nost' i otmena pravovykh norm v yuridicheskom slovoupotreblenii] // Russian Journal of Legal Studies. [Rossiiskii zhurnal pravovykh issledovanii]. 2018. No. 2. P. 119. (In Rus).

as reasonable the statement by N. V. Varlamova that the force of legal regulation "arises out of its legitimacy and effectiveness".[4]

Revealed illegitimate law, in my opinion, should not be considered as a basis for its non-observance or non-fulfillment, but should become a matter of discussion (deliberation) for further correction by an authorized body, including, for example, popular initiatives or experts' recommendations. So, I do not agree with the statement about the triviality of the term "legitimacy of law" — "law will be legitimate if it is established according to the current law and order".[5] Even if we agree that it is true etymologically, the meaning of this term when it is used by discursive practices in various "language games" (according to L. Wittgenstein) is not equal to legality today, but rather supposes official law evaluation. A. V. Polyakov criticizes such a positivistic approach thoroughly and in detail and gives strong, convincing arguments in favor of the fact that legitimacy is an essential sign of law. However, before we can speak about legitimacy as a sign of law, it may be appropriate to consider its other modes of existence. A meaning as the application or use of a sign is the principle idea of the philosopher L. Wittgenstein.

Traditionally, the signs of law in legal positivism include its derivativeness from the rule-making of state authorities, formal definition (textual fixedness) and provision of public enforcement. However, without denying the importance and significance of these characteristics of law, we cannot but accept their limited nature. Thus, for example, legal customs and international legal rules are not created by state authorities. Formal definition is an important principle of positive law. However, today it stands as an ideal, rather than as reality. Permanent variability of legal reality, its dependence on the social and cultural and political context force us to admit that the real condition of law is more of uncertainty than of logical completeness, stability and consistency.[6] Moreover, full and completed systems cannot be logically relevant as K. Gödel proved in 1931, and any attempt to give a complete and accurate substantial definition to anything stumbles on the "Münchhausen trilemma" stated by H. Albert in 1970.[7] Thus, formal definition is always a relative sign of law. The same refers to compulsoriness of law. Enabling rules of law cannot be enforceable by default: they provide for mutual and free will of subjects; under duress, enabling legal regulation is technically impossible. Moreover, non-fulfillment of an enforceable mandatory provision in the form of a penalty stipulated by the legal norm sanction (it is such enforcement that is provided for by legal positivism as an essential sign of law) does not cause enforcement as a penalty: here we need reformulation of non-fulfillment of an obligation as a prohibitory rule of law. In most cases, such reformulation takes place, but not always. In any case, not all rules of law are enforceable in the formal legal sense, but only prohibitory ones. That is why, this sign of law is also a relative one.

The most difficult issue, however, for acknowledging the adequacy of the signs of law formulated by legal positivism is that they do not allow for assessing the current legislation. Any act adopted by a competent authority in accordance with the established rule-making procedures is declared a legal act, irrespective of its content. In this case, can we think that fascist legislation is legal, for example? From the formal legal — positivistic — point of view, yes, of course. However, not everybody agree with such way the question is put. Thus, naturalists actively argues against identification of law by its formal signs attributed by positivists. They postulate an immanent relation between law and morals. With the knowledge that in a modern, highly structured society it is quite difficult to find positive content of justice, naturalists, thanks to G. Radbrukh, as a criterion for evaluation of legislation, take "negative justice" — such rules which are perceived by all or by an overwhelming majority of the population as extreme injustice, or "crying justice". The law turns "unjust" "when the current law becomes incompatible with justice to such extent that the law as "unjust law" denies justice".[8] This formula (which is interpreted by legal liberalism as "prohibition against aggressive violence") may be used in a society which has a

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[4] Varlamova N. V. Heterarchy of the Modern Legal Systems and Post-Soviet Theory of Law [Geterarkhichnost' sovremennykh pravovykh sistem i postsovetskaya teoriya prava] // Problems of Post-Soviet Theory and Philosophy of Law: collection of articles. [Problemy postsovetskoi teorii i filosofii prava: sb. statei]. M. : Yurlitinform Publ., 2016. P. 46. (In Rus).

[5] Antonov M. V. Op. cit. P. 119.

[6] A famous Canadian philosopher and legal theorist B. Melkevik states that law exists in the modern society "in all its multivaluedness, incompleteness, if not to say, in all its relativeness". B. Melkevik. Legal practice in the mirror of legal philosophy / ed.-in-chief M. V. Antonov. SPb.: Alef-Press Publ., 2015. P. 53. (trans. from fr. and eng.)

[7] The principle of adequate substantiation as a postulate of classical rational thinking is unreachable as complete substantiation including substantiation and knowledge to which the substantiated point of view comes down leads either to regression to infiniteness, or to a vicious circle, or to an interruption of the substantiation process. — Hans Albert. Traktat über kritische Vernunft. Tübingen: J. C. B. Mohr (Paul Siebeck), 1970. P. 41.

[8] Radbrukh G. Legal philosophy. M. : Mezhdunarodnye otnosheniya Publ, 2004. P. 234 (In rus).

moral consensus concerning "intolerable violations" of human rights. But even in this case it is not applicable to moral evaluation of most regulatory legal acts because in most cases they are morally neutral. Even such a marquee event as destruction of the Twin Towers in New York on September 11, 2001, was perceived by some people as the most grievous tragedy, while other people (residents of European countries who had come from Muslim states and went on welfare) perceived it as the triumph of justice — so, what moral consensus can we talk about?

From the perspective of the sociology of law, the signs of law are rooted in the society: in social assumptions of law and in the effect the law has in the society. Law exists not for itself — in order to be formally consistent, logical, completed — but for normal functioning of the society. That is why by analyzing the society we can reveal the signs of law. We may reasonably refer here social conditioning of law and its effectiveness. From the perspective of the sociology of law, legitimacy should be regarded as an essential sign of law as legitimacy demonstrates that law meets people's expectations, that law adequately expresses social suppositions and is effective. At the same time, while accepting that it is the sociology of law, out of all classical types of legal consciousness, is the most substantiated and adequate for the modern society theory of law, we cannot but note that it is — in its classical version — free from certain shortcomings. These should include the fact that in the classical sociology of law, the signs of law are postulated as some objective reality opened by the all-knowing lawyer Hercules (the image of W. Blackstone actively promulgated by R. Dvorkin). From the perspective of post-classical philosophy an theory of law, "objective reality" is intersubjective acceptance of existence. We may say in another way: what is perceived as real is real. Thus, the signs of law are something that the authority (in a broad sense including the scientific community) attributes as the signs of law. In this connection, we can agree, subject to certain reservations, with B. Melkevik's ambitious statement: "…law has no real or empirical "existence" in this world. Law has no physical or material existence in the social or political world, and even less — existence from the perspective of availability or reality, still less to be or to have, and finally, that one should act and think in an appropriate manner... The modality of "existence" is not applicable to law. In this sense, there is no "object" which is called "law". In the real, material, actual or just "tangible" world law is not anything "in itself" or does not have this attribute, and we do not possess such a means of scientific cognition which would allow us to establish what is a real, actual or objective correspondence for this symbolic representation called "law". <…> We should better state that the issue about law is resolved in practice in the real world with people flesh and blood and, eventually, is the conclusion of a dispute settled in a procedural, discursive, persuasive, dialectic way through a relevant court ruling. <…> Law is established in practice and *post factum* (retrospectively — Latin) by jurisprudence in a single form, and that is all!"[9] I think that real or empiric existence of law can be seen in such manifestations as legal texts or actions (legal relations, simple forms of enforcement of law). What is different about it is that actually external fixation of law manifestations depends on the position of an observer granted with an authoritative status of official or unofficial (theoretical) description, categorization and qualification which provide attributes for such phenomena and processes considered and accepted as legally significant. That is why we can agree that "talking of the word "law", one can state that it exists in a definable form only due to "a new narrative about law" (Orwell's language — *I. Ch.*)… Conflicting tendencies inside the "new legal narrative" compete with each other for the right to determine a specific choice in this respect, <…> It must be understood that language is Power! One can master the word "law", — not within the framework of a law suit in front of an independent arbitrator, i. e. in front of a state or non-state judge, — and use it as an ideological element and as a weapon for discouragement and horrification, as a powerful symbolic sword which (if we use a literal allegory) can efficiently strike enemies".[10]

Post-classical methodology postulates pluridimensionality and potential inexhaustibility of law attributes as its modes of existence. Law interacts with all other social phenomena (and not only social ones) and cannot simultaneously reveal all its properties. In this regard, law is inexhaustible in its actual relations, so the attributes of law ascribed to it by power and science are also potentially inexhaustible. From the perspective of the post-classical social and cultural dialogical approach developed by the author for the last 15 years, law possesses not only the attributes discussed above but also such characteristics as human-sizedness, sign-oriented and symbolic mediation and discursiveness, structuredness, contextuality, dialogueness. All these characteristics are somehow connected with legitimacy.

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[9] B. Melkevik. Legal practice in the mirror of legal philosophy / ed.-in-chief M. V. Antonov. SPb.: Alef-Press Publ., 2015. PP. 139, 147. (trans. from fr. and eng.).

[10] See ibid. PP. 79–80.

The intrinsic property of law is primarily its *human-sizedness.* A human being is a basis, a center of the legal system: it is a human being who forms (constructs) it and reproduces — legitimates — with their practices and mental activities (narratives and meanings). It is a human being, rather than an abstract, impersonal subject or "a person in general" (according to M. M. Bakhtin), that is an irremovable substance of legal reality.[11] A human being is included into the social and cultural context, so behavior (including legally significant behavior) is determined by a complex combination of cognitive and situational components (assessment of a situation). A fundamental mistake of attribution is disregard of the most important role of the situational context where a certain human being is included.

Another characteristic of law giving concrete expression to its formal definition is *sign-oriented and symbolic mediation, discursiveness of law.* A human being thinks with the use of signs. So, significance is an immanent aspect of sociality, and consequently, of law in any of its interpretations: beyond or without denotation (nomination and lodgment with meaning), no social (and legal) phenomenon is possible as such.[12]Discourse as "pronouncing a text" provides for the use of language in legal practices. At the same time, discourse acts as a means of constructing and legitimating rules of law through checking their claim to legal significance, as defined by J. Habermas.

We cannot but mention such an aspect of law existence as its *structuredness.* The post-classical paradigm in the socio-humanistic knowledge and in jurisprudence, in particular, draws attention to structuredness, rather than to the givenness of the social world (and, consequently, of law). Social constructivism, by denying the givenness of the social world (and the world of law), acknowledges its variety, its ability to change for the better and, consequently, personal responsibility for its modern state. By opposing "naive social realism", it prohibits to pass private, individual interests and endeavors off as public and, in such a way, to speak for the society.

Another sign of law, in my opinion, is *its social and cultural contextualism.* Law is a social and cultural phenomenon. Its social and cultural conditioning is expressed primarily in its social nature. Law does not exist for itself (that is why the system of law cannot be self-sustaining, self-referential). Law is constructed for provision of normal functioning of the society, and in this its functional significance manifests itself. Moreover, the criterion of "normality" is defined based on the prevailing values by which the social reality is evaluated and by which the law policy is supported (law nomination or denotation of social situations). This gives us an important conclusion: *there are no "pure" legal phenomena (laws, regulatory and individual legal acts, legal relations) that are not simultaneously mental (as L. I. Petrazhitsky once wrote), economic, political etc. — in a broad sense — social and cultural phenomena.*

The aspects of law existence outlined above demonstrate its internal *dialogueness,* which manifests itself in the interdependence of the considered aspects of law existence, and particularly of a legally significant act and a legal structure as a social image of legal due in the law reproduction mechanism. The content of law dialogueness is its *legitimacy* — recognizance by people, bearers of the status of a legal subject. The substantiation of this thesis is worth looking at.

If we look at law as an aspect of the society, the process of reproducing a regulatory order in the society ensuring,[13]in my opinion, its — the society's — self-preservation, then an immanent attribute of law is mutual acknowledgment of legal interactions (legal rights and obligations), which is correctly stated by A. V. Polyakov,[14]legal institutions and a legal system of the society in general. Law cannot be

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[11] "One should always take into account that law is performed through actions and through actors performing them — everything that is performed as "law" is performed by us and for us," — B. Melkevik rightly states. — See ibid. P. 4.

[12] "In its intrinsical essence, a legal text, — Yu. A. Vedeneev rightly states, — is, first of all, the meaning and name of social practices in terms of this or that legal language by means of which they exist and reproduce themselves. Legal reality manifests itself and represents itself in the system of legal names — categories and definitions, classifications and qualifications. To name means not only to confirm, but also to construct new legal practices. That is, to admit the fact of their formal existence — emergence of new legal subjects and objects, legal discourses, new regulatory bounds in conversation systems". — Vedeneev Yu. A. Grammar of Law: monograph [Grammatika pravoporyadka: monografiya] / science editor V. V. Lazarev. M.: RG-Press Publ., 2018. P. 98 (In Rus).

[13] "Legal, or regulatory due is such a fundamental property of social reality which ensures existence of a social order in the form of a legal order as the most adequate and regulatory supported form of order per se. <...> The existence of any society is connected and defined by the system of legal networks or communications. ... Certain forms of legal discourse are the derivatives of historical context of law existence — social and political practice and legal culture". — Vedeneev Yu. A. Grammar of Law: monograph [Grammatika pravoporyadka: monografiya] / science editor V. V. Lazarev. M.: RG-Press Publ., 2018. PP. 66, 93 (In Rus).

[14] "Law itself is regarded in this case as the field of human interaction and mutual understanding, agreement and compromise, freedom and responsibility, equality and justice, which provides for its development and improvement to that effect. <...> Such coordinated interaction between legal subjects based on the interpretation of legitimate

reduced to formal "sources" only — forms of external expression of legal standardization. Legal reality is formed by executors of law, ordinary people who, by a twist of fate, turned out to be in the field of law, their actions, including legal acts, consequences, implements used by people. It is people's actions that construct rules, institutions, branches, a system of law. Law, however, exists as a social phenomenon only if rules — patterns of legally significant behavior — are realized in practices of people being the bearers of legal statuses. Social reality of law, according to R. Alexy, is more important that positive and even moral reality.[15]

It is this very important moment — social reality as effectualness — is ignored by legal normativism. In fact, a practicing lawyer need not to bother with issues on how effective an applied, observed, fulfiled or used rule of law is. However, legal science cannot ignore this question if it aspires to propose projects for improvement of the legal system. If a social effect of legal influence is not known, we cannot speak of evaluation and, moreover, of changing of the existing legal order.

On the other hand, the term of a rule of law cannot but include a procedural aspect of its social effect as a legal rule is a variety of social rules, and the attribute of standardization is defined by the prevalence, multiple use and positive assessment of a behavior pattern. Moreover, from the perspective of J. Habermas's communicative approach, which is supported by B. Melkevik, "a claim to effectualness of rules can be satisfied only if a rule has got universal evaluation from the perspective of universal turn of the tables in order to satisfy the interests of all and everybody".[16]

The above inevitably lead to the conclusion: a rule of law will be a common, repeatedly used and positively assessed behavior pattern only if it is legitimate — accepted by both its actual and potential actors. In a fundamental study of a communicative action, J. Habermas writes: "A rule exists or has social significance (*soziale Geltung*) if it is accepted as efficacious (*gueltig*) or legitimate to its addressees. … The fact that a rule acts in an ideal plane means that it deserves consent of all interested persons as it regulates issues associated with the act in their common interests. The fact that a rule actually exists means that a claim to signifiance contained therein is acknowledged by all interested persons, and this intersubjective acknowledgment justifies the social reality of the rule".[17]

Thus, we can draw the conclusion: *legitimacy as recognition of law is an internal, mental (subjective) side of standardization expressed in positive assessment or psychological recognition of legal rules, institutions, a system of law, the whole legal reality. Legitimacy is an existence condition for a rule of law and normativity of a legal system of any society.*

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[15] "In a situation where a system of norms or a separate norm is absolutely deprived of social reality, in other words, where they do not have social effectualness even to a small extent, such system of norms or such norm cannot be legally operative. Consequently, the term of legal reality obligatorily includes elements of social reality." — R. Alexy. The Concept and Validity of Law (Reply to Legal Positivism). M.: Infotropic Media Publ., 2011. P. 107 (Trans. from germ.)

[16] B. Melkevik. Jürgen Habermas and the communicative theory of law / science editor A. V. Polyakov. SPb. : Alef-press Publ., 2018. P. 57. (Trans. from fr.)

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