

DISCIPLINARY PERSPECTIVE OF THE THEORETICAL AND LEGAL PROFILE OF THE LEGITIMACY OF LAW

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Abstract. The *subject* of the study is the definition of the disciplinary perspective of the theoretical-legal profile of the legitimacy of law. *Methodology.* The methodological basis of the study are methods of induction and deduction, dialectical-materialistic method, the method of analysis and synthesis, the historical method, which allowed to objectively understand the content and essence of the issues under study. The *aim* of the article is to investigate the theoretical concept of legitimacy of law in the context of its correlation with the concept of legitimacy in the modern state of law. The *results* of the study showed that the disciplinary perspective of the theoretical-legal profile of the legitimacy of law is defined. Namely: proposed a modern theoretical and philosophical genesis of the legal understanding of the legitimacy of law and legality; investigated the relationship of legality, legitimacy of law and legal consciousness in the theory of state and law; identified conceptual directions in the study of the phenomenon of legitimacy of law. *Conclusion.* Legitimacy is both a constructive and a destructive concept. In its strict form, this concept characterizes a certain moment of attitude toward the law and the problems of its effective functioning. However, in philosophy or legal theory, for example, legitimation should thus mean communicating a legitimate-legal character to the law. It appears that this concept, which has a purely legal etymology – legitimate, excludes from the law its value essence, shifting the center of gravity to the practical assimilation of the law in the public and individual consciousness. This gives rise to a rather peculiar construction. Law can be anything, the main thing is that it corresponds to a formal procedure. The right thus legitimized enters a new stage – assimilation and acceptance in the public and individual consciousness. If it is not accepted voluntarily, it does not cease to be a right, but suffers from a lack of legitimacy. In essence, legitimacy captures two essential points: the first is the orientation toward dialogue with society and with each of its members individually, that is, the final sanction in the minds of the people or its majority; but, on the other hand, it is not the law itself that possesses some internal attribute of supreme legitimacy, but only its collective psychological perception and justification. In other words, the central issue in this approach is, on the one hand, the role of individual consciousness and, on the other hand, it creates a very wide scope for technological, in the sociological and political sense, influence on collective consciousness.

Key words: legitimacy of law, legitimation, legality, theory of law, legal nature, logical-conceptual construction, socio-practical construction, legal norms.

JEL Classification: K10, K39

1. Introduction

Research interest in the concept of legality traditionally increases during periods of radical transformations and revolutions, when society seeks to free itself from the fetters that hinder its development, and the idea of law begins to experience the influence of the political factor. Under these conditions, society begins to actively appeal to the idea of "pure law," capable of establishing true legal principles in society. These trends can also be observed in modern

Ukraine during the formation of civil society and the rule of law.

The study of theoretical problems of legality and legitimacy of law is repeatedly updated and complicated by the fact that for domestic legal science is characterized by a purely positivist dogmatic approach to the consideration of the problems of legality. Traditionally, the legality is considered solely from the external, formal side and is interpreted as a strict compliance and enforcement of the law. The



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internal, substantive aspect of legality is left out of the brackets of the above formula, which leads to the use of legality as an instrument of the will of the state, expressed in the law.

The vulgarization of the category of legality in legal science is vividly illustrated by the unjustified narrowing of its content exclusively to "prohibitive-prescriptive norms". New approaches to law, the modern "transition from the logic of equality to the logic of freedom" urgently require a broader perspective on the rule of law. Once basic inalienable human rights are recognized, the concept of "mere legality" is no longer sufficient. In this regard, the rule of law, including vast layers of normative acts, is primarily designed to "speak of rights," oriented toward the authorization and perception (acceptance) of laws by the population (legitimacy) (Berger, 1998).

The relevance of the problem from a practical point of view is due to a combination of objective and subjective prerequisites.

In Ukraine, which turned into a "reform state" at the end of the 20th century, strengthening the rule of law has become one of the main directions of further development. However, formal legality, legality not filled with legal content, is not able to serve as a reliable mechanism for limiting state power and a means of protecting human rights. It is necessary that, not only in name but also in content, the laws and the lawfulness corresponding to them should express the ideas of a state governed by the rule of law and not violate legal principles and requirements (Primova, 2013).

Legal nihilism, conflicts of laws, the development of "decree" law, difficulties in law enforcement, the imperfection of judicial activity actualize the development of the problem of legality as a "tool" for the practical implementation of the legal principles that form the rule of law state.

Primitivization of the construction of legality actually deprives Ukrainian citizens of the right to demand change or cancellation of "infringing" laws that restrict or violate human rights. The formal concept of legality contributes to the preservation in Ukrainian society of the stereotype of a "culture of complaint," according to which any attempt to appeal to a court is seen as something useless.

A simplistic understanding of the rule of law within a dogmatic positivist framework greatly complicates the administration of justice. Faced with an "infringing" law when deciding a particular case, judges have no effective leverage to overturn it, resulting in a formal "infringing" decision.

Thus, from a theoretical and practical point of view, the problem of legitimacy is of great importance and relevance.

2. Theoretical and philosophical genesis of the legal understanding of legitimacy and legality

The problem of legality is one of the cross-cutting themes for the entire history of legal thought and political and legal practice, over the explanation, understanding, clarification and development of which many generations of philosophers and lawyers have worked. At its core, it is related to the awareness and realization in the joint life of people of the beginning and the requirement of order, perceived as a necessary component of human sociality, his social essence. At the same time, at different stages of historical development the problem of legality has acquired a variety of interpretations, due primarily to the understanding of the original principle of order in the framework of mythological, religious, philosophical, political-legal, moral, everyday and other ideas about the rules of relations between people.

The diversity of approaches to the understanding of law in the modern world, including various disciplinary perspectives of philosophical-legal, theoretical-legal, socio-legal and psychological-legal profiles, has significantly complicated the logical-conceptual and socio-practical construction of legality. Thus, traditionally in the philosophy of law the requirement of legality appears as legitimate justice or in the context of the distinction between legality and morality. However, in the modern perception the transfer of the center of gravity on individual, often very remote, manifestations of this essence, turning the latter into something distinct and independent, substitutes the problem of the essence of legality (Kovalchuk, 2013). For example, the attempt to distinguish in law as a text and as a fact, characteristic of some variants of legal realism, revealed and illuminated important facets of the problematics of the concept of law and its practical empirical action. At the same time, however, it limited the problem of the essence of law to its original setting and significantly influenced the understanding of legitimacy. On the one hand, legitimacy in the structure of the formula "law as text" is limited to the analytical or hermeneutical technique, and on the other hand, the empirical component – "law as fact" reproduces only the factual side of legitimacy, which removes the problem of the proper, in this case legitimacy as requirement. In sociological approaches to law, especially in connection with the works of M. Weber, the distinction between legality-legality and legality-legitimacy prevails. In the legal and political science literature, the works of K. Schmitt are of similar importance (Weber, 1998).

The new trend in Western legal thought, dubbed "new legal realism," typically articulates an attitude of radical pragmatism about the irrelevance of the rule of

law (Maksimov, 2010). In the context of this tendency, legality is not proper or even empirically uniform, but only factual, characterized only through descriptive techniques by pointing to the factors that influenced legally significant behavior in a particular case, i.e., the extremity of relativism. In other words, if any solution is just, only in its own way, the problem of legitimacy is completely removed; in the context of such a paradigm, there is not and cannot be any place for the demand for legitimacy or the rule of law. Since there is no general or unified scale of justice, or at least no general requirement of legality, there can accordingly be no question that law means some universal criterion, even if reflected through the generalization of the sociocultural experience of mankind. That is, the actual behavior of the judge or other official relevant in the relevant paradigm, far from even a decision, is a random and disordered expression of some uniquely predictable empirical substratum of law (Yuriychuk, 2010).

Today, the problem of legitimacy is often translated into a discussion of the problem of legitimacy, which is presented as the highest legality or legitimacy. It, meaning legitimacy, should, as it were, precede legality. At the same time, the root of these words is the same – "law", legality and legitimacy create confusion in the modern legal lexicon. The concept of legality, which is actively used in legal science, in its main development has a socio-political nature and in relation to the legality, as a legal concept, forms a legal, socio-political image of legality (Nevidomiy, 2011).

D. Zadykhaylo outlined the problem of "legitimation of legal norms", which he considered as an essential part of the disclosure of the problems of the social foundations of law and which, in his opinion, has not received due attention in legal science. According to D. Zadykhaylo, the problem of the legitimacy of legal norms becomes more relevant in connection with the implementation of so-called "regulatory strategies". The essence of the latter lies in the fact that they, as a program "guided by the subjects of lawmaking, wishing to achieve with the help of law the main results of social development," "provide a more or less smooth transition of facts from one of their states to another, ... proceed to the breakthrough of reality." Such transformative intentions and the programs that embody them have a legitimizing character, that is, they contain as a matter of course "something substantiated, ontologically and ethically justified, corresponding to the meanings of politics, law and morality." D. Zadykhaylo adhered to the distinction between legality and legitimacy, widely known in foreign legal literature. Legality is, according to D. Zadykhaylo, "a category that expresses the compliance of any act, action, event with the law and its norms. It refers entirely to the legal sphere, expressed in

a well-known legal concept of legality." "Legitimacy is a broader category that goes beyond jurisprudence; it allows certain acts, actions, and events to be recognized as justified from the standpoint of the proper... To recognize something as legitimate, i.e., to recognize the conformity of a certain object with higher laws and higher principles, social, moral and legal values." Hence the legitimacy of the legal norm (the law itself), which states that the latter must be moral, expedient, widely endorsed in society (Zadykhaylo, 2007).

3. Correlation of legality, legitimacy of law and legal consciousness in the theory of state and law

Problems of legality and legal consciousness were considered in the works of S. Zykova. According to S. Zykova, legality is "a complex and multifaceted phenomenon, the essence of which can be revealed through a whole system of definitions, through the analysis of various aspects of its social purpose." The explanation of the essence of legitimacy from the position of S. Zykova should take into account or focus on four essential aspects:

- firstly, legality is understood as "a special method of state management of society";
- secondly, as "a certain regime established as a result of the application of this method";
- thirdly, as a "principle of legal consciousness";
- and, finally, fourthly, as a "legal value" (Zykova, 2013).

Legality as a method of public administration of society is the organization of social relations through the publication and strict, steady execution of a system of legal norms, expressing the will of the people and aimed at achieving the goals of social construction.

Legal consciousness contains an understanding of the objective necessity of lawfulness in society, scientifically validated views and ideas about the ways and means of establishing lawfulness, about its guarantees. It acts as a necessary ideological and socio-psychological precondition for the creation of legal norms and institutions. Regulatory action of law, the law, its impact on the development of social relations is objectified only through the consciousness and will of people. In this sense, legal consciousness gives life to the legal system, as if it sets in motion the entire system of legal norms. The clear functioning of the system of legal regulation creates in society a certain legal regime – the regime of legality. Legality acts as an objective result of all elements of the system of legal regulation: legal consciousness, the system of legal norms and various ways of their implementation. Hence the organic connection between legal consciousness and legality. Legality is the result of purposeful activity of millions of workers, flowing in legal forms, based on the creation and implementation of state-legal norms (Novachenko, 2016).

The interpretation of legality proposed by S. Zykova's interpretation of legality and its correlation with legal consciousness reveals a broad set of characteristics and properties of legality as a method, regime, principle and value. At the same time, it seems that S. Zykova's in-depth analysis can be supplemented (Zykova, 2013). First, as a method and regime, legality refers entirely to the activities of official bodies and officials; as a principle of consciousness and value, it can refer both to officials and bodies and to individuals. In this totality, legality does not act as a general (universal) socio-practical or socio-political requirement for all members of society, i.e. as a certain social task that logically and practically follows from the consciousness of the social (socially necessary) value of law. The fact is that the recognition of legality as a principle or value in the mainstream of modern social theory, and any legal theory is also social, does not mean that they automatically, by virtue of some internal regularity, become an integral element of practical activity and social action. In the sociological context, it is possible to say that in the conditions of modern society, the requirement of legality is imposed mainly on officials, which in itself is certainly correct, but not on society itself. Consequently, according to the author, there is a stark gap between official legality and "living" (actual, real) legality, which for various reasons is not recognized and not used by society as a whole as a necessary guide in practical activity and coexistence. In addition, officials, who are also part of modern society, reflect the general views and attitudes dominant in society. At the same time, legitimacy should not be understood as "working" solely for the good of the state and the general social interest. On the contrary, it should be recognized and realized as a socially necessary condition for the stability and sustainability of human sociality, the existence and development of society (Matveev, 2014).

The presence of a legitimate norm is a prerequisite of legality, a condition of law and order. Legitimization of new legal norms consists in the voluntary acceptance by people of these norms for execution, in the formation of the obligation to obey the law.

Y. Obertov held to an understanding of legitimation derived from social-eudemonic ideas, that law and law should serve society as a whole, not individual groups. In doing so, he proceeded from the fact that for each participant of legal communication the problem of legitimacy of the norm is put separately, only the individual himself intellectually and emotionally accepts it as due, is aware of all the grounds and motives of his own duty formed by him (Obertov, 2010).

In Y. Obertov's understanding, the problem of legitimacy is reconstructed as a special expedient technology of successful application in society of

a normative strategy – a guiding program developed by a legislator and implemented by state power in accordance with the best socio-cultural achievements of mankind, conditioned by conditions of a particular historical period, for improving the quality of life, social and individual existence (Obertov, 2010). In other words, legitimation is the setting for effective legal policy. A necessary element of legitimation is the moment of feedback, the voluntary acceptance by society of the norms established by the state as due, as an internal duty. In this dialogue of social structures and actors involved in the development and adoption of legal norms, and every individual as a social being, the legitimacy of legal norms is realized.

4. Conceptual trends in the study of the phenomenon of legitimacy of law

The definition of legitimacy as an interrelated process, on the one hand, of the legislator, and on the other hand, of each individual, is a crucial characteristic of the effective functioning of law. However, it seems that the concept of legitimacy of legal norms needs certain clarifications.

First, the legal norm in this conception is neither legitimate nor illegitimate. It acquires this quality only in its "process of life," its two-way path. Thus, legitimacy is a right in life. If a right is voluntarily acquired and accepted by its addressees, then it can become legitimate. This is already a moment of collective psychology or a socio-legal characteristic of the norm. At the same time, since acceptance of a norm, i.e., its legitimization, is an individually conditioned process that depends on the totality of an individual's cultural, ideological and other attitudes, both psychological and sociological factors become significant. In A. Mishchenko's interpretation, legitimation, quite in the spirit of Weber's sociology of law, has the character of a purposeful action, both at the level of the original instance, the legislator, and at the level of the addressee of the norms (Mishchenko, 2010). At the same time, the requirements ("higher principles") to be met by a legitimizing regulatory strategy remain completely unclear. And besides, the individual, as an indispensable participant in legitimation, is endowed by the author with a set of important, yet very high requirements that imply a completely conscious choice of the imperative norm as a way of proper behavior, that is, the question is not of the individual as such, but of a highly developed and highly moral individual.

Similar points can be found in the legal theory of G. Hart, who proceeded from the understanding of a "healthy legal psyche" and formulated in this connection the task of forming, on the one hand, the politics of law as a new disciplinary form of legal science, and on the other hand, legal pedagogy,

which should contribute to the development of the individual (Hart, 2005).

Second, on the one hand, a legal norm as part of a regulatory strategy must meet a number of high requirements, and on the other hand, its legitimacy is conditioned on its recognition as such by members of society. Hence, several questions immediately arise: how should the situation be assessed when a legal norm meets the highest standards of its development, moral and legal criteria, i.e., is it a kind of work of art, but practically not applied, not recognized by society as a legal norm due to excessive difficulty of understanding or non-compliance with the needs of the historical moment, and so forth? Or, in the absence of a formulated norm, is it actually recognized in society as a right and applied as a proper rule in social relations?

Third, the moment of recognition is often already contained in the concept of law itself, especially when it comes to the types of legal theories that are based on the use of psychological arguments. For example, O. Bandura wrote: "Law is a mental factor of social life, and it acts mentally. Its action consists, firstly, in excitation or suppression of motives for various actions and abstinence (motivational or incentive action of law), secondly, in strengthening and development of some inclinations and features of human character, in weakening or eradication of others, in general, in education of national mentality in accordance with the nature and content of the direction of the existing legal norms (pedagogical action of law)" (Bandura, 2000).

Another authoritative jurist, A. Baumeister, wrote that law is that which people "living together in a community mutually recognize as the norm or rule of their life together" (Baumeister, 1998).

Y. Kalyuzhnaya wrote: "Law is rooted in conviction. Its provisions are, by their very nature, statements of reason about the limitations of the will that are necessary for a just order of life" (Kalyuzhnaya, 2012).

These examples show that, for representatives of the psychological school of law, the moment of recognition or belief is already immanently included in the very notion of law. Therefore, from this perspective, only that which is recognized as such can be considered a right. Moreover, in this context, the notion of legitimacy loses its meaning altogether. The formula "legitimizing the right" or "legitimation of the right" would mean, in terms of a psychological approach to law, justifying as a right what is already a right, regardless of any external circumstances. Various sociological versions of the understanding of law often do the same (Kelsen, 2004). They see law as a social fact or as a socially conditioned phenomenon. Moreover, in this sense, the legal norm emanating from the legislator is only a reflection, more or less

successful, of what is recognized or established as law in society. In other words, legislative norms are only a logical and conceptual form of reflection or expression of law. In this case, the formula "legitimation of law" is also overloaded and contradictory (Kozlov, 2014). In other words, in sociological versions of interpreting law, law either exists or it does not, it is born in society. It is possible to speak of the recognition of law or of its expression in legal concepts, legislative norms, judicial practice, but law is already present before its normative formulation and objectification, as an established order or an expedient way of resolving conflicts, etc.

In addition, the voluntarily formed obligation to obey the norm represents the morality of law, of which O. Skakun wrote (Skakun, 2008). Morality as a valuable moral and spiritual characteristic of humankind means recognizing the value of human beings as rational beings.

5. Conclusions

Legitimacy is both a constructive and a destructive concept. In its strict form, this concept characterizes a certain moment of attitude toward the law and the problem of its effective operation. However, in philosophy or legal theory, for example, legitimation must thus mean communicating to the law a legitimate-legal character. It appears that this concept, which has a purely legal etymology – legitimate, excludes from the law its value essence, shifting the center of gravity to the practical assimilation of the law in the public and individual consciousness. This gives rise to a rather peculiar construction. Law can be anything, the main thing is that it corresponds to a formal procedure. The right thus legitimized, that is, formally legitimized, enters a new stage of assimilation and acceptance in the public and individual consciousness. If it is not accepted voluntarily, it does not cease to be a right, but suffers from a lack of legitimacy.

In essence, legitimacy captures two essential points: the first is the orientation toward dialogue with society and with each of its members individually, i. e., the final sanction in the minds of the people or its majority; but, on the other hand, it is not the law itself that possesses some intrinsic attribute of supreme legitimacy, only its collective psychological perception and justification. In other words, the central issue in this approach is, on the one hand, the role of individual consciousness and, on the other hand, it creates a very wide scope for technological, in the sociological and political sense, influence on collective consciousness.

At the same time, the question remains open, for example, how a right that is not expressed in formal legal norms (customary law or *de facto* law, "living"

or special psychological experiences, imperative-attributive emotions) should be assessed. It has gained recognition in society, but it has not become part of the regulatory strategy or part of the rulemaking. Obviously, it must be recognized as illegitimate. Moreover, the problem of legitimacy devalues the very notion of law, which is no more than a formal requirement. What counts is not the quality of the law or its legal nature, but the conviction of the addressees, for which there is obviously a wide range of possibilities, especially in the modern era of high technology. In the context of legitimacy, the role of the concept of law as a whole also remains completely unclear. That is, some empty form of law is recognized, which must be legitimized – to acquire content, but only that which will be reflected and voluntarily assimilated in the

mind of the addressee. However, this interpretation is only appropriate in strictly defined versions of legal theories.

Thus, a right can be legitimate but illegal. On the contrary, it may be legal but illegitimate. However, at the same time, in both cases this does not affect the essence of the right. Law in this paradigm is, as a rule, a set of norms, imperative dictates or logical-conceptual constructions in the form of judgments about the proper, but in any case, in this paradigm for legal science as a central question is offered not about the essence of law, but, first, about the formal technology (procedure) of its development and adoption, and second, about the degree of its justification in the minds of people. At the same time, as a rule, legitimacy is never complete, but is implied a priori as a graded value, more or less legitimate.

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