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LEGAL TENDENCIES IN RUSSIA

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LEGAL TENDENCIES IN RUSSIA³

The law is a difficult social phenomenon determining the social life and even the international interaction of subjects. There is no uniform direction of its functioning, but it is possible to determine various parallel aspects that describe legal development.

National tendencies of legal regulation predetermine the whole functioning of a legal system, which is a broad concept including not only positive regulation. This paper analyses the following tendencies:

- expansion of legal regulation;
- forms of legal regulation;
- institutionalization;
- execution of legal requirements;
- technical progress.

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Introduction

The modern world has many challenges concerning economic, political, social and other phenomena. The government and the law are special institutions designed for taking up these challenges. It helps to regulate crucial points of social life. The law has been the focus of different scientists for ages because its development and the establishment of a fair and unambiguous normative system improves and facilitates social relationships.

The law is a difficult subject, with no united understanding of its concept. There are a great number of legal schools: positivism,⁵ the sociological school,⁶ natural law,⁷ the libertarian juristic school,⁸ the institutional law school⁹ and many others. Nevertheless, the absence of a united definition does not mean the absence of common directions of legal development. It is possible to determine various parallel aspects that provide such a direction. Some of them have already been mentioned in the recent article,¹⁰ but the authors would like to elaborate on some particular issues.

National tendencies of legal regulation predetermine the whole functioning of legal system, which is considered a broad phenomenon including not only positive regulation. Thus the following tendencies are being analysed in the paper:

- the expansion of legal regulation;
- forms of legal regulation;
- institutionalization;
- execution of legal requirements;
- technical progress.

Legal tendencies

The expansion of legal regulation

Governmental agencies suggest that the law is the only autonomous regulator which can address the problem separately. They usually do not take into account other major phenomena besides the enactment of a legal act including law-enforcement, the opportunity of real execution,

⁵See, for example: Hart H. L. A. *The Concept of Law* Oxford: Clarendon Press, 1994.

⁶See, for example: Erlich O. *Osnovopolozhenie Sociologii Prava*. Translation: Antonov M.V. Saint-Petersburg. Universitetskiy Izdatel'skiy Konsortium. 2011.

⁷See, for example: Novgorodtsev P.I. *Nravstvenniy Idealism v Filosofii Prava (K Voprosy o Vozrozhdenii Estestvennogo Prava)*. Moscow. Norma. 2002.

⁸See, for example: Nersesyants V.S. *Filosofiya Prava*. Moscow. Norma. 2002.

⁹See, for example: Chetvernin V.A., Yakovlev A.V. *Institutsionalnaya Teoriya Prava*. Moscow. 2009.

¹⁰Tihomirov Y.A. *Pravo v Sovremennom Mire: Vektory Razvitiya*. Gosudarstvo i Pravo. No 5. Pp. 5-10. 2017.

legal consciousness, etc. Therefore, there is the presumption that problems can be resolved only by the enactment of laws. This causes two significant problems: “the devaluation of the law” and “dead acts”. “The devaluation of the law” means that the law is regarded as a panacea for addressing challenges. If the problem is not solved, a negative attitude to the law is formed and the law is depreciated. This is especially true in the conditions of globalization and the influence of international law. The recent North Korean missile tests along with threats to “fire off missiles towards the US island territory”¹¹ can depreciate the credibility of international law. The states’ actions contradict the United Nations Security Council Resolutions calling on North Korea to refrain from its illicit activity.¹²

“Dead acts” are acts that cannot be executed for various reasons, including technical, organizational, mental etc.¹³ An example of a dead act is the law, concerning the prohibition of anonymizers.¹⁴ It is almost impossible to control the internet in total, especially to provide the non-functioning of anonymizers.

The Yarovaya initiative, which caused public outcry with regard to amendments to the Russian Criminal Code, may be considered such a dead act. This amendment is related to the failure to report crime.¹⁵ However, the established Article 205.6 of the Russian Criminal Code seems to be ineffective inasmuch as ambiguous and moral categories do not encompass within the scope of criminal legislation. Thus, the expansion of legal regulation should be balanced to prevent abovementioned problems.

Law enforcement practice is crucial in the process of legal regulation and the possible execution of legislation. There is no united understanding of “law enforcement” in the scientific literature. Russian legal scholars mostly mean the form of reaction to legal norms. Law enforcement contains several essential blocks:

- Behavioural. Behaviour often differs from the ideal notion which is presented in legal acts. Many sciences investigate human behaviour in order to improve the governance, economics and society.¹⁶

¹¹ North Korea-US tensions: How worried should you be? // <http://www.bbc.com/news/world-asia-40882877>.

¹² For the past decade the United Nations Security Council has adopted eight major sanctions resolutions with regard to North Korean nuclear and missile activities, including Resolution 1718 (2006), Resolution 1874 (2009), Resolution 2087 (2013), Resolution 2094 (2013), Resolution 2270 (2016), Resolution 2321 (2016), Resolution 2371 (2017), Resolution 2375 (2017).

¹³ Senyakin I.N., Suhova N.I. Neispolnimiye Normy Rossiyskogo Prava. Vestnik Saratovskoy Gosudarstvennoy Yuridicheskoy Akademii. No. 1.Pp. 27-36. 2017.

¹⁴ Federal Law № 276-FZ of July 29, 2017 “On changes in the Federal Law ‘On information, information technologies and information protection’”. Published in Sobraniye Zakonodatel’sstva RF. No. 31. St. 4825. July 30, 2017.

¹⁵ Federal Law № 375-FZ of July 06, 2016 “On changes in the Criminal Code of the Russian Federation and Criminal Procedural Code of the Russian Federation in part of establishment of additional measures dedicated to counter-terrorism and security”. Published in Sobraniye Zakonodatel’sstva RF. No. 28. St. 4559. July 11, 2016.

¹⁶ The major example of such science is behavioral economics. See, for example: Bernheim D.B., Rangel A. Behavioral Public Economics. The New Palgrave Dictionary of Economics. Second Edition. Ed. by Durlauf S.N., Blume L.E. Palgrave Macmillan. 2008; Kapelyushnikov R.I. Povedencheskaya Ekonomika i Noviy Paternalism. Voprosy Ekonomiki. No. 9-10. 2013.

- Regulative. There are several levels of regulation: legislative, departmental and local. Some correspond with each other, but sometimes they contradict each other. Furthermore, they have a great impact on law enforcement.
- Institutional. The government is not the only institute that establishes legal framework. It is necessary to take into account at least existing business associations (e.g. Opora Rossii, Chamber of Commerce and Industry, Russian Union of Industrialists and Entrepreneurs) and civil society.
- Controlling. This is concerned with executive bodies and presumed indicators that have to be achieved. There are also program documents which set forth performance targets in various spheres.¹⁷
- Evaluative. Law enforcement can be evaluated by means of various methodologies such as legal monitoring, regulatory impact assessment, *ex post* assessment.¹⁸

Thus, systematic law-enforcement practice based on the fundamental effective principles must be a “headliner” in establishing of a normative system.

Forms of legal regulation

Apart from the traditional form of the law, there is secondary legislation that can be adopted in various forms by the Government of the Russian Federation, ministries, agencies and services. Moreover, there is legislation of the territorial entities of Russia. Local acts of enterprises and its associations also exist.

When the requirements of systematic regulation are not satisfied, norms on different levels often contradict each other. All such variations can cause chaos in the legal sphere.

The most problematic form of acts, in the authors’ opinion, are recommendations confirmed by orders.¹⁹ These recommendations apply non-obligatory force providing guidance that may be followed or not. On the other hand, orders of government agencies are valid and legally binding. Thus, only the formal name of a legal act leads to such a paradox.

¹⁷ See, for example: Decree of the Russian Government № 30 of 21 January, 2015 “On the Federal Special-Purpose Programme “Development of Physical Education and Sports”. Published in Sobraniye Zakonodatel’sstva RF. No. 5. St. 810. February 2, 2015; Decree of the Russian Government № 91 of 17 February, 2011 “On the Federal Special-Purpose Programme “Development of Pharmaceutical and Medical Industry”. Published in Sobraniye Zakonodatel’sstva RF. No. 12. St. 1628. March 21, 2011.

¹⁸ Pravovye Akty: Otsenka Posledstviy. Ed. by Tikhomirov Y.A. Moscow. Jurisprudenciya. 2011.

¹⁹ See, for example: Order of the Federal Archive Agency № 76 of 23 December, 2009 “On the Confirmation of Methodological Recommendations about the Manual of Document Management in the Federal Executive Authorities”. Available at: http://www.consultant.ru/document/cons_doc_LAW_96081/; Order of the Ministry of Justice № 91 of 15 March, 2000 “On the Confirmation of Methodological Recommendations about Particular Notarizations by Russian Notary Officers. Published in Byulleten’ Minjusta RF. No 4. 2000.

A systematic approach requires strict consistency of legal acts with respect to hierarchy. Nevertheless, there is still no law on legal acts in Russia, despite many initiatives.²⁰ This results in widespread conflicts between laws.

Institutionalization

New social institutions at different levels are being created steadily. At the national level these include, for example, Ombudsmen in various spheres (human rights, children's rights, entrepreneurs' rights, etc.). There are also a number of international institutions: Eurasian Union, Commonwealth of Independent States, European Union, the Council of Europe, Association of Southeast Asian Nations, which have their own regulation causing issues of correlation and interaction.

Institutionalization has a direct influence on the correlation of national and international regulators. First of all, there are various international courts. For example, a recent decision of the European court of justice contradicts the Russian Constitution, in the opinion of the Russian Constitutional Court.²¹ There is only one possible way to enforce such decisions. It involves a resource-consuming amendment of the Constitution.

Nowadays some scientists agree on the subject of legal vagueness.²² It allows the interpretation of legal provisions in several ways. Hence, government agencies try to “avoid taking sides” when different institutional regulations are in conflict.

The execution of legal requirements

The efficiency of legal regulation is an opportunity to execute its provisions. Legal acts should prescribe only truly effective requirements, while the promulgation of “unreal” norms might be detrimental to legal credibility.

To assess the consequences of the enactment of a law it is necessary to apply procedures, including regulatory impact assessment. Regulatory impact assessment is an instrument to assess the efficiency of legal acts *ex post*. As defined, “the purpose of a regulatory impact assessment is to explain the objectives of proposal, the risks to be addressed and the options for delivering the objectives. In doing so it should make transparent the expected costs and benefits of the options for the different bodies involved, such as other parts of Government and small businesses, and how compliance with regulatory options would be secured and enforced.”²³ Nevertheless, it

²⁰Boshno S.V. Zakon o Normativnyh Pravovyh Aktah: Proshloe, Nastoyashee i Perspektivy. Pravo i Sovremennyye Gosudarstva. No 2. 2015. Pp. 7-22.

²¹Ruling of the Constitutional Court of the Russian Federation № 21-P of 14 July, 2015. Published in Sobraniye Zakonodatel'stva RF. No. 30. St. 4658. July27, 2015.

²²Vlasenko N.A. Problemy Pravovoy Neopredelennosti: Kurs Lektsiy. Moscow. Infra-M.2015.

²³Kirkpatrick C., Parker D. “Regulatory Impact Assessment: An Overview”. Regulatory Impact Assessment. Towards Better Regulation? Ed. by Kirkpatrick C., Parker D. Cheltenham, UK. Northampton, MA, USA. Edward Elgar. 2007. P. 3.

requires a systematic approach to the procedure. On the contrary, as it has been proved, regulatory impact assessment has a lot of drawbacks.²⁴

Technical progress

Technical science is developing in a number of ways which can be applied in social sciences as well. The global trend is the use of “Big Data”, – a huge massive of information, which can assist us in drawing conclusions about legal regulation. Correlations got by Big Data investigations allow us to analyse various legal phenomena faster and more objectively.²⁵ Enterprises and governmental bodies cannot just ignore Big Data.

Technical progress is also directly related to new subjects and objects of legal regulation. The recent bill on robotization is a striking example.²⁶ Artificial intelligence plays an important role in the modern world. However, its involvement causes new legal problems, concerning, above all, its legal capacity and liability.²⁷

Legal capacity depends directly on the fundamental conception of robot self-sufficiency. In the authors’ opinion, it is possible to agree that “a robot is a constructed system that displays both physical and mental agency but is not alive in the biological sense”²⁸. Such a definition does not solve all legal issues, however it facilitates the distinction between natural rights, which are not appropriate to robots, and positive rights which are. The problem of liability means the necessity to determine the subject liable for any harm suffered. There are at least the following options: the manufacturer, the owner, or the robot itself. An opinion that the current legal system is able to effectively and efficiently moderate victim protection and the possibility of technical progress exists.²⁹

Some recent technologies, especially block chain technology and digital cryptocurrency, remain to be regulated. The State Duma has publicly called for a study of block chain technology, the market for digital exchanges, and risk assessment of their use, entitled

²⁴ See, for example: Reguliruyushee Vozdeystvie: Metodiki I Opyt. Ed. by Tikhomirov Y.A. Moscow. Jurisprudenciya. 2016.

²⁵ Cukier K., Mayer-Schönberger V. Bolshye Dannye. Revolutsiya, kotoraya Izmenit to, kak my Zhivem, Rabotaem I Myslim. Moscow. Mann, Ivanov and Ferber. 2014. P. 59.

²⁶ http://robopravo.ru/proiekt_y_aktov.

²⁷ The term “robot” hereinafter used in a wide sense as the artificial intelligence.

²⁸ Richards N.M., Smart W.D. “How should the Law Think about Robots?” Robot Law. Ed. by Calo R., Froomkin A.M., Kerr I. Cheltenham, UK. Northampton, MA, USA. Edward Elgar Publishing. 2016. P. 6.

²⁹ Karnow C.E.A. “The Application of traditional Tort Theory to Embodied Machine Intelligence”. Robot Law. Ed. by Calo R., Froomkin A.M., Kerr I. Cheltenham, UK. Northampton, MA, USA. Edward Elgar Publishing. 2016. P. 50.

"Legislative regulation of the implementation and uptake of modern financial technologies."³⁰
The results of this study will constitute the basis of a future bill on cryptocurrency.³¹

Conclusion

Modern law seems to be developing in parallel vectors, each of which can be assessed as positive, neutral or negative in specific situations. Nevertheless, it is impossible to ignore such a multilateral “legal development”. Among the vectors are:

- expansion of legal regulation;
- forms of legal regulation;
- institutionalization;
- execution of legal requirements;
- technical progress.

All these tendencies operate simultaneously and they should be taken into account by law-making and law-enforcement bodies. Only such a broad understanding of the legal system will enhance the legal system.

³⁰ Procurement №0173100009617000107 // URL: <http://zakupki.gov.ru/epz/order/notice/ok44/view/common-info.html?regNumber=0173100009617000107>.

³¹ The State Duma would postpone the Bill on cryptocurrency and study block chain and ICO // <https://bits.media/news/gosduma-otlozhit-zakonoproekt-o-kriptovalyutakh-i-budet-izuchat-blokcheyn-i-ico/>.

Bibliography

1. Bernheim D.B., Rangel A. Behavioral Public Economics. The New Palgrave Dictionary of Economics. Second Edition. Ed. by Durlauf S.N., Blume L.E. Palgrave Macmillan. 2008
2. Boshno S.V. Zakon o Normativnyh Pravovyh Aktah: Proshloe, Nastoyashee i Perspektivy. Pravo i Sovremennye Gosudarstva. No 2. 2015. Pp. 7-22.
3. Chetvernin V.A., Yakovlev A.V. Institutsionalnaya Teoriya Prava. Moscow. 2009.
4. Cukier K., Mayer-Schönberger V. Bolshye Dannye. Revolutsiya, kotoraya Izmenit to, kak my Zhivem, Rabotaem I Myslim. Moscow. Mann, Ivanov and Ferber. 2014.
5. Erlich O. Osnovopolozhenie Sociologii Prava. Translation: Antonov M.V. Saint-Petersburg. Universitetskiy Izdatel'skiy Konsortsium. 2011.
6. Hart H. L. A. The Concept of Law Oxford: Clarendon Press, 1994.
7. Kapelyushnikov R.I. Povedencheskaya Ekonomika i Noviy Paternalism. Voprosy Ekonomiki. No. 9-10. 2013.
8. Kirkpatrick C., Parker D. "Regulatory Impact Assessment: An Overview". Regulatory Impact Assessment. Towards Better Regulation? Ed. by Kirkpatrick C., Parker D. Cheltenham, UK. Northampton, MA, USA. Edward Elgar. 2007. Pp. 1-16.
9. Novgorodtsev P.I. Nravstvenniy Idealism v Filosofii Prava (K Voprosy o Vozrozhdenii Estestvennogo Prava). Moscow. Norma. 2002.
10. Pravovye Akty: Otsenka Posledstviy. Ed. by Tikhomirov Y.A. Moscow. Jurisprudenciya. 2011.
11. Reguliruyushee Vozdeystvie: Metodiki I Opyt. Ed. by Tikhomirov Y.A. Moscow. Jurisprudenciya. 2016.
12. Robot Law. Ed. by Calo R., Froomkin A.M., Kerr I. Cheltenham, UK. Northampton, MA, USA. Edward Elgar Publishing. 2016.
13. Senyakin I.N., Suhova N.I. Neispolnimiye Normy Rossiyskogo Prava. Vestnik Saratovskoy Gosudarstvennoy Yuridicheskoy Akademii. No. 1. Pp. 27-36. 2017.
14. Tihomirov Y.A. Pravo v Sovremennom Mire: Vektory Razvitiya. Gosudarstvo i Pravo. No 5. Pp. 5-10. 2017.
15. Vlasenko N.A. Problemy Pravovoy Neopredelennosti: Kurs Lektsiy. Moscow. Infra-M. 2015.

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