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NON-LEGAL RULES: PROBLEMS OF THEIR DETERMINATION AND ENFORCEMENT (THEORETICAL ASPECT)

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The subject of the paper is the approaches to the concept of “non-legal rules”.
The main aim of the paper is to confirm or disprove the hypothesis that rules become non-legal when they contradict the principles of law and are totally ineffective.
The description of methodology. The authors apply methodology of different legal theories: natural law, libertarian-legal, sociological, communicative, normative and integrative approaches to law, using formal logical and sociological research methods (observation method).The formal-legal method is also used with regard to characteristics of particular Russian laws.
The main results and scope of their application. Legal rule may be unlawful for an external observer – in coordinates of another legal system or in comparison with law in a social sense. From the point of view of the internal observer, including the law enforcer, the following rules are non-legal: 1) regulations that were adopted, but initially or later it was officially recognized that they contradict the principles of law and the rules of higher legal force; 2) rules that could not be applied principally or that were not implemented until their cancellation.
Many rules widely assessed as unfair, immoral, not consistent with the principles of law could be a part of the current system of law for a long time and could not be officially qualified as defective. Most of the very ineffective rules are still implemented selectively, some of them become quite effective in the future. Rules that are obviously not in conformity with acts of higher legal force may not be recognized as illegal officially because of various reasons. All of the non-legal rules, however, are very problematic for the law enforcement officials in several respects:
– they may come into conflict with other regulatory systems of social regulation, including other social law of large (significant) groups and organizations, such situation entails difficulties in their legitimation and implementation;
– they may come into conflict with other acts (rules, legal principles) within this or a related system of legal law;
– they can be canceled (invalidated) in future, inter alia from the moment of their adoption.
Conclusions. Rules are also potentially illegal, when they: 1) clearly contradict the principles of law and the rules of higher legal force; 2) are extremely ineffective. Such acts of lawmaking are very problematic from the point of view of their legitimation and implementation. Such acts are relatively common in Russian reality. The orientation of the practice to check their legal nature within the framework of the norm control is important for movement towards effective, fair and non-contradictory law, and not in the opposite direction.

1. Approaches to the concept of "illegal law".

In domestic jurisprudence, the problem of a defective act of law-making is touched upon in different aspects.

In the literature devoted specifically to the defects of law-making (law-making errors), separately allocated the defects of legislative policy and legal techniques [1, p. 100]. Among both types of defective acts there are such subspecies, which traditionally attract special attention. For example, a characteristic defect at the level of law-making policy has always been recognized as "excessive law", initially not suitable to change public relations for the better. Already in the classic work of Herbert Spencer refers the advantage of such "sins of the legislators" [2, p. 82 – 139]. One of the most serious and typical defects of legal technique has always been the inclusion of ambiguous and contradictory provision in the text of the act.

Excessive or contradictory law remains in legal practice in most cases binding to the application of the legal act. However, some acts, because of their fundamental defects, many authors refuse to call legal and, as a consequence, generally binding. They use the term "illegal law", while referring to all fundamentally defective acts of law-making, including regulatory legal acts adopted in various forms. A number of questions arise here, including whether such acts exist and what are the criteria for their allocation.

Different types of legal understanding provide different answers to these questions.

This problem is most typical for the natural-legal approach to law, in which the illegal law is understood, depending on the assumptions used, the immoral law, the law that contradicts natural human rights, the unjust law, the extremely unjust law, etc. are widely known, for example, G. Radbruch's reasoning: "it is Impossible [within the meaning – unambiguously – S.] to distinguish between cases of "legislative law" and the law acting contrary to its unjust content. But it can be clearly defined: when justice is not even sought, when equality, which is its basis, is deliberately denied in the law – making process, then the law is not only an "unfair right", but even more so-it is illegal in nature". [3, p. 234].

Libertary approach continues the line of this doctrine in the version of G. Hegel in which natural law is not opposed to the positive, and declares a reasonable basis, and introduces the category of "wrong." We should agree with the E. V. Timoshina, that libertarian theory can be described as "monistic deontological anthropocentrists the theory of natural law with a historically changing content" [4, S. 58]. The concept of "wrong", used by Hegel to characterize the manifestations of special, individual will, was convenient to apply to a situation where the state apparatus expresses in the form of law special interests that are contrary to the interests of all [About this: 5, p.74]. Actually, V. S. Nersesyants was one of those researchers who used this opportunity. As a result, a law that does not meet the principles of formal equality, legal freedom and justice and (or) the General interest has become considered illegal. The question of differentiation of law was a qualifying characteristic, distinguishing the true law from legalism. Already in the works 1983 V. S. Nersesyants wrote that the distinction of law "makes a clear distinction between the concepts of two opposite types of legal thinking" [6, p. 360].

The sociological approach to law highlights the real ability of the normative position to be embodied in social relations. In this regard, the law, which is not implemented in practice, is not recognized as a right. We give here the famous saying of E. B. Pashukanis: "If it was published only by law or decree, but of their respective relations have arisen, then, was the attempt to create law, but this attempt has failed" [7, p. 26]. Therefore, for this approach, legal education does not end with the end of lawmaking and the entry into force of the law. Its legitimation, "socialization of positive law" is also necessary [8, p.10]. The continuation of this line can be considered, and the communicative approach, for which rule of law exists if it "is in the process of communication between a sender and a receiver" [9, p. 271].

Proponents of "pure" legal positivism, understandably relatively rarely use the term "illegal law". So, according to M. I. Baitin, the provision on anti-legal legality cannot be perceived differently than nonsense: "what is the legality, if it is "anti-legal"?". This "verbal manipulation" he says, contradicts the thesis of the unity of law and adversely affects the training of future lawyers, especially law-enforcement personnel" [10, p. 310, 314 – 315]. At the same time, it seems that one case of a non-legal law cannot but be recognized by consistent standard-setters. We are talking about the adopted law, which is officially recognized as not corresponding to acts of higher legal force. In this regard, it is logical the doctrine of G. Kelsen, according to which the law, originating in the international legal order and in the Constitution, is concretized from one stage to another up to judicial and administrative decisions. Therefore, each level of law and order is both a product of law-making and legal application ("reproduction of law") in relation to the level of the superior. In this sense, the Executive act and the law may be unlawful [11], in essence, unlawful.

Broad or integrative legal understanding is actually represented by different approaches depending on what primary approach (s) it is based on. Thus, in one case, which is quite typical for Russian science, broad legal understanding is an extension of the normative approach. As correctly noted by V. S. Nersesyants, the chain beginning with "due" and consisting of its modifications, remains at the level of a "proper" [6, p. 353]. With this approach, the conclusions of the normativity regarding the non-legal law do not change.

In another case, a real attempt is made to combine different views of the law. We refer, for example, is known today the definition of law R. Alexi [12, p. 157]. It can be concluded that among the non-

legal laws of the German jurist includes: 1) extremely unfair law; 2) the law, which in principle cannot be implemented; 3) unconstitutional law. As you can see, this approach inherits certain provisions of this doctrine, "sociology" and overly regulated. Such a synthesis is more or less typical for some Russian lawyers. So, for M. M. Borisevich of formal equality, legal freedom and justice as criteria of legal law, properly developed libertarian legal doctrine, needs to be complemented by praxeological criterion such as effective implementation of the law [13, p. 63].

The undertaken review of legal doctrines shows that the term "illegal law" is not a simple turn of speech. It is logically used within the framework of various concepts of legal understanding to characterize fundamentally defective laws. This term is essentially synonymous with the phrase "void [including regulations – S. B.] legal acts", which is also used in domestic law [14, p. 549, 550; 15, p. 8, 17 – 19]. However, the first concept is derived from the natural-legal approach, the second is introduced in the framework of legal positivism.

2. Illegal law from a position adopted in another system of law.

We are in discussions about the understanding of law believe that in various humanitarian Sciences, perhaps a different understanding of the law. Such opinion in Soviet times was reasonably expressed By I. E. Farber [16, p.59]. The concepts of law typical for different Sciences (law, sociology, psychology, ethics, etc.) should synthesize social philosophy, offering a generalized idea of law.

This generalized representation should probably include both the legal, official law of a particular state and other States, international law, and other law (law in the social sense) characteristic of primitive society and individual groups and organizations of modern society, capable for various reasons to form and maintain a body of their own legal norms [See para. read more: 17, 18]. In this regard, it is obvious that a legal law can be illegal from an external point of view: from the position adopted in another system of legal law (in another state) or in another social law (in a separate social group (organization) within society).

It is widely known, for example, that Russian regulations related to the annexation of Crimea to Russia are illegal for official Ukraine, as well as Ukrainian legislation on "temporarily occupied territories" is such for the Russian Federation. Less well known is that the Russian Orthodox Church has officially allows for the possibility to refuse to obey the state laws sinful, if "human law completely rejects the absolute divine norm, replacing it with the opposite" [19].

This position does not make the law illegal for a lawyer or other "internal" observer, but the very possibility of such an assessment of the law is not in doubt. Sometimes such an assessment is dangerous, and sometimes, on the contrary, fruitful and ultimately leads to the development of law.

3. Criteria of the illegal law from the point of view of the internal observer (law enforcement officer).

As for the problem of non-legal law within a specific system of legal law, public legal practice should be taken into account as a criterion of scientific truth for jurisprudence.

With regard to the problem of non-legal law, this practice clearly proves the following.

1. There are such acts that have been adopted, but initially or later it was officially recognized that they are contrary to the principles of law and the norms of higher legal force, both in content and in terms of violation of the procedure or competence in their adoption.

2. There are such acts, the implementation of which is impossible in principle or which were not implemented until their abolition.

In the first case, there are acts that are initially invalid due to the indication of a normative act of higher legal force or that have been in force, but are recognized as invalid from the date of adoption in the order of judicial or other regulatory control. For example, part four of article 8 of the Labor code of the Russian Federation, part 4 of article 30 of the Federal law of December 29, 2012 № 273-FZ "on education in the Russian Federation" directly say that certain local regulations in the field of labor and educational relations, despite their existence, are not subject to application.

As a typical case for the second paragraph, we point to the law that violates the objective limits of legal regulation (for example, due to the fact that the rule is outdated and all possible subjects of the relevant legal relations are no longer available). Thus, there are no, most likely, subjects, which are subject to the rules on veterans of hostilities in the part of the participants of the civil war of 1918-1922, formulated in the Federal law of January 12, 1995 № 5-FZ" on veterans " (see article 3, Annex to the law).

This kind of acts, continuing the established tradition of word usage, can be defined not only as defective and insignificant, but also as illegal. One of the features of the law is generally binding. Therefore, it is impossible to call a right what is officially denied in the General obligation, as well as what, in principle, could not or could not become mandatory.

4. Criteria of potentially illegal law.

On the other hand, legal practice shows that:

1. Many widely assessed as unfair, immoral, not consistent with the principles of the right rules for a long time to be part of the current system of legal rights and do not officially qualify as defective.

2. Most of the very ineffective laws are still implemented selectively, some of them become quite effective in the future.

3. Acts obviously not in conformity with acts of higher legal force may, for various reasons, not be recognized as such officially and actively applied.

4. All relevant acts of law-making, however, are very problematic for the law enforcement officer in several respects:

- they may come into conflict with other regulatory systems of social regulation, including other social law of large (significant) groups and organizations, which entails difficulties in their legitimation and implementation;

- they may come into conflict with other acts (norms, principles) within this or a related system of legal law, which is also fraught with their non-realization;

- they can be canceled (invalidated) in the future, including from the moment of acceptance.

Ignoring these problematic aspects can lead to negative consequences.

Such acts are relatively common in Russian reality.

So, in our, perhaps subjective, opinion, they include some innovations in the pension sphere, including the Federal law of December 29, 2015 № 385-FZ "on the suspension of certain provisions of legislative acts of the Russian Federation, amendments to certain legislative acts of the Russian Federation and the peculiarities of increasing the insurance pension, fixed payment to the insurance pension and social pensions" in terms of the abolition of indexation of pensions to working pensioners. It obviously contradicts the constitutional principle of equality of citizens before the law. The fact of subsequent compensation of this cancellation by a one-time payment actually means both implicit recognition of arbitrariness of cancellation of indexation of pensions for this category, and that social efficiency of this rule was doubtful.

Separate sanctions of the Code of the Russian Federation about administrative offenses are, as we know, quite "draconian". For example, failure to notify (and even violation of the form or term of notification) of the authorized body on the conclusion (termination) of an employment or civil contract with a foreign citizen shall entail an administrative fine for legal entities in the amount of 400 to 800 thousand rubles (part 3 of article 18.5). Similar actions related to failure to notify the educational organization of the fact of training, granting academic leave, deduction in respect of a foreign student entail a fine of 500 to 800 thousand rubles (article 18.9). Thus illegal employment or training of the foreign citizen form other administrative structures. In practice, one of the "disorderly" universities revealed about a hundred violations of the form and timing of such notifications in respect of various students, which, based on the letter of the law, should entail a separate fine for each offense for quite astronomical total. A practical compromise between the legality and fairness of punishment was the execution of a Protocol on the fact of one offense, including 95 episodes. Needless to say, this compromise, which arranged both the authorized body and the educational organization, itself contradicts the legislation?

According to article 3 of the Federal law of 12 February 2001 No. 12-FZ "on guarantees to the President of the Russian Federation who has terminated the exercise of his powers and members of his family", the former President of the Russian Federation may not be held criminally or administratively liable for acts committed by him during the exercise of the powers of the President of the Russian Federation. At the same time, he can be deprived of this immunity in a special order only in the case of initiation of criminal proceedings on the fact of committing a serious crime. It turns out that for the administrative offenses committed by it, crimes of small, moderate severity this person can't bear any legal responsibility that obviously contradicts both the known General legal principle, and part 1 of Article 19 of the Constitution of the Russian Federation. This is not to mention the fact that the existence of particularly serious crimes legislator is clearly forgotten.

The same regulations and specific regulations often valued in the legal, scientific, popular scientific periodicals as illegal [20, 21]. This is, on the one hand, evidence of the demand for the critical potential of natural law (libertarian law) and sociological (communicative) concepts, on the other-a reasonable or partly justified negative assessment of the normative act, formal or dialectical denial [22].

The actual legal assessment of the relevant acts must inevitably be more cautious, since only an official entity is able to express a legal position on the status of the disputed act. A particular law enforcement officer may have his or her own opinion or share the prevailing public opinion, but should not replace them with the requirements of the law.

However, in the formal legal approach of this kind acts, if the deficiency is obvious to many subjects in nature, and it can be defined not just as voidable [14, p. 551; 15, p. 8], namely as potentially unlawful. One can hardly believe that this alone is highly abstract principle of law as justice is the basis of law, but the law in General principles that reflect certain generally accepted social moral values that act as the matrix that distinguishes legal from non-legal approach. Therefore, clearly inconsistent with the principles of law or sharply opposed acts in society should be correlated with legal dysfunction, in which legal law performs unusual social functions (in particular, instead of integration of society leads to its disintegration).

5. Summary.

In General, we consider potentially illegal such regulations that: 1) clearly contradict the principles of law and the norms of higher legal force; 2) are extremely ineffective.

Such an interpretation of these acts does not contradict the thesis of the unity of law and order. It should focus practice on checking the legal nature of these acts, which is extremely important for moving towards an effective, fair and consistent law, and not in the opposite direction. At the same time, we believe that if such an act in the course of official verification is mistakenly recognized as a relevant act of higher legal force, it does not deprive the act of signs of controversy and potentially illegal nature. Practice shows that sometimes controversial acts can be subjected to re-verification.

Today, in the legal literature is widely represented by the opinion that modern legal law has absorbed the natural legal principle. So, V. M. Shafirov describes him as "naturally positive" [23], in some works of V.D. Zorkin, this, in essence, bound the absolute value of the Constitution of the Russian Federation [24, pp. 11 – 47]. This is quite a logical idea, initially due to the impossibility of doubling a particular legal system (its division into separate positive and natural law) and the desire for the perfection of law through law-making. At the same time, it should not lead to a misleading sense of the perfection of the existing system of law.

The well-known idea that the principles of law, including those reflected in the Constitution of the country, have a real law-making and law-enforcement function, is a criterion of the law, should take the place of the true natural-positive right to the place of the actual representation of the full freedom of law-making. In addition, in the case of adoption of law is fundamentally ineffective it should be eliminated from the system of legislation. In this part, natural and sociological approaches to law can and should be in demand.

In Russia, of course, there is a certain system of judicial and other regulatory control, both in terms of regulatory requirements to it, and in terms of real law enforcement practice. However, in all complex cases, the practical result of the rule of law depends heavily on the interpretation of the law, which determines whether the act is recognized as not relevant to the act having greater legal force. It would be desirable that the practice of this interpretation should always be based not only on the interests of stability and a literal reading of specific rules with higher legal force, but also on the identification of the meaning of the principles of law and the development of ideas about them. Only in this case we can speak of a true compliance assessment. Fortunately, sometimes there are such examples.

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