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PHILOSOPHICAL FOUNDATIONS OF THE LEGAL LANGUAGE

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Abstract: This paper analyzes the essence of the philosophical foundations of the legal language as it is used in certain theories in the legal philosophy. The purpose of the paper is to provide a full study of the legal language theory to determine its place in modern philosophical legal thought.

The paper used methods of the history of philosophy, especially the method of rational reconstruction, and is based on the interpretation of the classical philosophical and legal texts (W. Waismann, J. L. Austin, H. Kelsen, H. Hart).

The main result of the paper is the justification that the unity of logic and epistemology became the ground of application of the analytical method in the field of legal knowledge from the legal language point of view.

The main conclusion of this paper is that the linguistic analysis of legal concepts for the justification of the legal decisions and their consequences expands the horizons of analytical legal philosophy and allows us to reveal the essence of legal reality in a new way.

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Keywords: legal reality, legal philosophy, epistemology, legal language, meaning, legal concepts, speech acts.

Introduction

Features of the legal language and its philosophical understanding are determined by the specific functions of law as a social regulator of social relations. There are several theories in the philosophy of law, that focus on how legal phenomena are displayed using legal statements. In particular, in the normativism of Hans Kelsen the law is a hierarchy of logically interconnected legal norms that have a general and individual character. Such legal norms, of course, contain a model for the proper development of social relations and ways to regulate them, however, traditional ideas about cause-and-effect relationships do not apply to such relations, since empirically observed actions can acquire legal meaning and significance only if there is an act of an authorized subject (Kelsen, 1941). In other words, the legal reality is reflected in the legal language differently than other objects in the world. Similarly, Herbert Hart notes the ascriptive nature of

legal statements, since the use of grammatical constructions in law, unlike other areas of knowledge, involves the simultaneous performance of a legally significant action, the qualification and evaluation of ongoing events and actions, and in some cases, prosecution (Hart, 1949; Ogleznev, 2018). It is no coincidence that epistemological questions arise precisely when analyzing the interaction between the content of legal norms, legal relations, and actions, as well as from the point of view of the completeness of reflection in legal norms of existing relations and the diversity of human actions.

The Nature of the Language of Law

The analytical tradition in the philosophy of law is characterized by a set of the most well-known problems, discussions about which determine the features of the legal language and the reflection of the phenomena of legal reality in it. One of the main problems for a long time is the problem of legal understanding, the search for a logically correct general definition of law as a social phenomenon and a regulator of human behavior, which would take into account the diversity of specific legal situations and the boundaries of the spheres of legal regulation. The British philosopher of law Herbert Hart (1994) noted that such aspirations inevitably led to the absolutization of certain aspects of law and ambiguity, the groundlessness of the original theoretical and methodological ideas in the philosophy of law (p. 277). However, a general idea of law also has practical consequences, since it can be used in law enforcement, when, in the process of making a legal decision, empirical facts can be brought under a legal norm and be described using general legal terms. The degree of validity of a legal statement in this case, and its verification, is determined by how fully the legal norm containing normative prescriptions regulates or describes the sphere of social relations of legal significance. However, the essence of verification in the legal sphere does not come down to empirical confirmation of legal prescriptions, but only to repeated comparison with the norms of the current legislation, which, in terms of content, can significantly distort legal reality (Ogleznev, 2022). Thus, the distinction between natural and artificial languages in the philosophy of law is as

important and relevant as in epistemology and the philosophy of science, since the specificity of legal terms reflects the same nature of posing and solving epistemological issues in the legal sphere. This largely determines the popularity of the philosophical ideas and arguments of the late L. Wittgenstein in the analytical philosophy of law in the second half of the 20th century, in particular, the problem of following the rule and the concept of "language games" (Didikin, 2018). The need to study everyday "natural" language and the perception of legal prescriptions in practice actualizes the problem of the objectivity of legal phenomena, in particular the mechanism for applying legal norms (Hart, 1994, pp. 279-280).

Speech Acts in the Language of Law

Initially, the origins of the method of logical-semantic analysis of natural language can be found in the works of early analytical philosophers - George Edward Moore with his concept of "philosophy of common sense", and Bertrand Russell with the idea of "knowledge-acquaintance" and description theory (Russell, 1911). The question of the relationship between language and reality in analytical philosophy is based on the division of the process of an intuitive comprehension of the concepts and objects of the external world, the existence of which is postulated in scientific knowledge. For analytical jurisprudence, the study of the legal language as a link between the legal reality and the actions of subjects of law avoids the problem of the lack of an adequate empirical substantiation of legal theories. If legal phenomena are not reduced exclusively to the world of empirical facts and are subject to rational interpretation, linguistic analysis in such a situation is necessary. However, as follows from the reasoning of L. Wittgenstein (2001) in the late period of his work, the search for the meanings of the terms of ordinary language involves the knowledge of the essence of the "language game" as a combination of a speech act and actions (p. 88).

In analytical philosophy the formation of the theory of speech acts known to modern linguistics as a branch of linguistic pragmatics, is associated with the ideas of J. L. Austin originally voiced at meetings of the Aristotelian Society

and then presented in his book *How to Do Things With Words* ("How to produce actions with the help of words" in more detailed) (Austin, 1962). As an example of special linguistic expressions not related to the description or statement of the state of affairs, Austin cites the symbolic procedure for naming a ship ("I call this ship Queen Elizabeth"). In this procedure the solemn pronunciation of a phrase is not only an expression of intention but also the performance of an action.

J. L. Austin (1962) calls such linguistic expressions performative sentences, performative usage, or *performatives*: "it indicates that the issuing of the utterance is the performing of an action – it is not normally thought of as just saying something" (pp. 6-7). The use of certain words is an important and integral part of the implementation of a certain type of action, but one cannot ignore the communicative situation: "it is always necessary that the circumstances in which the words are uttered should be in some way, or ways, appropriate, and it is very commonly necessary that either the speaker himself or other persons should also perform certain other actions, whether "physical" or "mental" actions or even acts of uttering further words" (Austin, 1962, p. 20).

However the criteria of truth and falsity do not apply to performative expressions, since "and that we do speak of a false promise need commit us no more than the fact that we speak of a false move. "False" is not necessarily used of statements only" (Austin, 1962, p. 11). Instead he talks about the rules that determine the success or failure of performative expressions. Violation of the rules leads to the failure of performative use but the degree of failure may be different. For example if the ship's naming ceremony is performed not by the captain, but by someone else, then this procedure becomes doubtful. But if you make an insincere promise that is without the intention of keeping it the promise will still be given and the action will be performed.

J. L. Austin emphasizes the difficulty of distinguishing between a statement constituting a subsequent action and a statement that completes a single action (for example, "I give" and the transfer of ownership, "I sell" and the completion of the transaction). As a prerequisite for the success of the performative, the truth of certain statements, as well as the semantic structure of

the sentence, can be distinguished. In this case, understanding the context of the use of expressions is of key importance for the conceptual analysis of performative statements. At the same time, Austin departs from the idea of a rigid distinction between constative expressions (which may be true or false) and performative expressions (successful and unsuccessful): "consideration of types of success and failure may affect statements, and consideration of types of truth and falsity may affect performatives (or some performatives)" (Austin, 1962, p. 55).

Thus among the types of speech acts Austin uses *commissives*, implying obligations with declared intentions. The essence of a commissive consist of giving the person who pronounces it (what is said is also fixed in the contract) the obligation to act in one way or another (Masaki, 2004). An element of a promise as a commission in the legal sense, for example, is an obligation and the possibility of demanding the fulfillment of this obligation. Austin referred to the words "I promise", "I agree", "I intend", "I plan", "I provide", "I allow", "I swear", etc. to commissions. Such speech acts may be particularly relevant in English contract law, as they express the intentions and intentions of the parties in the implementation of the terms of the contract. And as J. Searle, a follower of the theory of speech acts, notes, the performative correlates with the situation that he creates and therefore is directly related to the statements of the legal language (Searle, 1989). Those it is directly related to law. Performatives can be the basis of legal norms, acts issued by the legislator, declarations, and other sources of law.

Among the grammatical and semantic conditions for the use of performatives, Austin emphasizes the impossibility of defining an absolute criterion or even a list of precise possible criteria. From the point of view of linguistic pragmatics he highlights only an approximate criterion - a verb in the form of the first-person singular of the present tense of the indicative mood of the really (active) voice (for example, the expression "I promise that I will be there", and as Austin notes, "all performative uses that differ from our preferred form - starting with "I x that", "I x that" plus an infinitive" or "I x" - can be "reduced" to this form" (Austin, 1962, p. 64)). At the same time the meaning inherent in the speech act is determined by several types of actions:

- *locutionary action* that generates an utterance;
- *illocutionary action*, expressing the intention of the speaker;
- *perlocutionary action* as an impact on the addressee to achieve the result of the utterance.

It should be noted that the legal language uses speech acts for execution, prohibition and coercion to maintain social order, so the legal discourse has a performative character. Performative expressions in legal language are characterized by speech stereotypes due to repetitive procedures (for example, legal proceedings in a criminal process or court hearings). If we are talking about acts of application of the law, then from the point of view of their performative form, they are declarative, that is, they contain instructions and obligations of a legal nature. The illocutionary function of these sentences is to form a respectful attitude towards established norms, and the perlocutionary force is to impose compliance with these norms.

Normativity and the Search for the Meaning of Legal Concepts

For the modern theory of the legal language one of the important problems is the problem of normativity. On the one hand debates on the normativity of the legal rules and the legal system inevitably arise as the specifics and boundaries of legal reality are discussed. In this aspect the classical arguments of Hans Kelsen's normativism that normativity is an alternative basis for the perception of legal reality, rather than the principle of causality, are of great importance. Kelsen formulates this argument not only in the context of his new Kantian methodological program on which several primary sources and scientific papers have been published in recent years, but also because causal relationships cannot directly determine the legal assessment or interpretation of empirically observed actions committed (Kelsen, 1941). Thus even if a specific conclusion should follow from the empirical facts there may not be one in the legal justification even in areas that are affected by strict rules of regulation (in particular, in criminal law).

On the other hand, the problem of normativity is determined by the specifics of the legal language in which the facts are displayed. In this case, even if it is impossible to apply the corre-spondence theory of truth to legal relations and legal decisions, a simple transition to coherent or pragmatic theories of truth can change little. Legal concepts in the legal language are formed especially and the standard application of general scientific methods of cognition does not allow for avoiding the contradictions inherent in the normative nature of the language of the law. The well-known example of formulating a special type of ascriptive legal statements as a specific type of speech acts in the theory of H. Hart and its development in modern philosophical and legal studies does not exclude some debatable questions about the prospect of empirical verification of such statements (Hart, 1949). In addition it is necessary to search for a different way of substantiating legal judgments, both in terms of logical correctness and empirical verifiability. That is why such a search has already led to the emergence of some interesting conceptual solutions that update the perception of the normativity of law through the prism of the method of conceptual analysis.

The reason for the discussion about the ways of expressing the semantics of legal concepts in the language of the law was Dworkin's non-standard arguments, set out in one of the papers to the collection "Philosophy of Law" in 1977, called the theory of "natural types". The essence of Dworkin's arguments is that legal concepts, like any other social and political concepts have a "hidden essence" that explains their functional purpose, since "the dispute about the nature of law is a dispute that is within the boundaries of the philosophy of language and metaphysics" (Patterson, 2006, p. 545). Thus the legal concept can be divided into metaphysical and semantic components in the case of applying the analogy with the terms of "natural types". That is a lawyer can reveal the essence of rights and freedoms in the same way as a physicist can reveal the essence of the phenomena of the physical world. Establishing semantic links between legal concepts, rather than substantiating the criteria for their application, becomes possible when such an analogy is made. If we recognize the identity of "natural species" and their universality for any linguistic context, then after the discovery of the microstructure of a social phenomenon and the direct reference to it of the term "natural species", the semantic side of the legal concept will also be revealed.

D. Patterson (2006) formulates several inter-related arguments demonstrating the inconsistency of such an analogy and, in general, the possibility of implementing the concept of the term "natural species" in the legal sphere as incompatible, for example, with the function of administering justice. In this part, his counterargument continues Kelsen's well-known thesis that only an authorized subject (in this case, a judge) in a procedural context gives a legal assessment of empirical facts. Dworkin deliberately ignores this context, arguing in favor of the analogy with "natural species". Patterson (2006) believes that such a relationship is not obvious, and in many cases methodologically erroneous (pp. 546-547).

He gives a detailed example from the field of epistemology, referring to the concept of H. Putnam, who proposed to reveal the content of terms of natural species through the selection of the following properties: syntactic marker (number, gender), semantic marker (natural appearance, state), stereotype (color, taste, etc.), extension (for example, the molecular structure of a substance). Patterson does not give a concrete justification for whether natural species are objects of the physical world, or objects of a wider order (in particular, unobservable idealized objects in the structure of scientific theory). He only makes some reservations about Putnam's conception, which turn out to be important from the point of view of criticism of Dworkin's arguments:

1. despite the complete coincidence of the first three components, the value of some compared substances may not be identical (for example, water on the planet Earth with the chemical formula $H2O$, and water on the planet "Twin Earth" with the formula XYZ, which have the same characteristics but are different substances);

2. in public opinion, a specific term can be used without its specific meaning, and therefore, without comparing the compared objects, the use of the principle of analogy is premature;

3. a substance that does not meet certain stereotypes of a real entity, however, may have the properties of such a real entity;

4. scientific discoveries do not lead to a change in the meaning of the term, but to a change in the understanding of what objects this term means.

Ultimately, Patterson concludes that the existence of objects in the external world does not depend on the mind, and this does not require believing solely in the hidden essence of natural species. In the absence of an understanding of what the term a natural species is, the extension of the patterns of functioning of some phenomena to others is unreasonable. Patterson notes that he opposes "a reductionist approach to the theory of natural species and against those who solve the problems of legal theory through the use of natural species semantics arguments" (Patterson, 2006, pp. 551-552). Similarly B. Bix (1995) believes that "the difference lies in the fact that the categories related to human artifacts and social institutions do not form explanations in the form of a law, that is, we do not expect and do not find evidence of relationships that necessarily form a connection between these categories, between these categories and other phenomena" (p. 470).

Despite the unusual nature of the debate between Dworkin and Patterson, what remains outside of it is the perception of normativity, originally formulated by Dworkin as an argument in favor of an analogy with natural species. The content of an object can be revealed through the study of its DNA structure. Therefore, only by studying and establishing the structure of DNA, for example, a tiger as an animal, can we determine that a living being is a "tiger" and not another animal. In the social sphere, it is legitimate to speak not about the physical (biological) structure of DNA, but about the normative nature of legal concepts, which makes it possible to reveal their "deep connections". However, Dworkin does not go beyond the limits of such an analogy, mentioning only the analogy of the "deep connections" between biological and chemical objects and social phenomena.

In his publications of recent years, a detailed analysis of the normative nature of legal concepts is offered by the German legal philosopher L. Kähler. So, concerning the nature of legal concepts, he notes that "at a first approximation, it is difficult to understand whether they have a legal nature or a semantic one, or both" (Kähler, 2009, p. 81). For the philosophy of law, the position is quite common that the source of the formation of legal concepts is the surrounding social reality, within which groups of regulated social relations are distinguished. Meanwhile, the concept of "normative reasons" (normative reasons), to which most of L. Kahler's (2009) rea-

soning is devoted, turns out to be ambiguous and indefinite, given the evaluative nature of the interpretation of legal terms and the broad meaning of understanding normative reasons as grounds for legally significant actions (pp. 82-83). The reason for this is the complex relationship between empirical facts and the degree to which they are reflected in normative prescriptions. The methodological inadmissibility of reducing the "proper" (normative) to the "existing" (empirical) inevitably leads to the fact that the choice and justification of the legal concepts used, in contrast to the concepts in the natural sciences, will depend on the characteristics of normativity in law and the normative legal order in general.

When characterizing legal concepts, L. Kähler (2009) seeks to find an adequate criterion for separating morally neutral concepts and concepts with an indefinite assessment. In his reasoning he notes that certain legal concepts, in particular "property" or "possession", cannot be unambiguously assessed, since the obligations of the owner, even if he has an absolute right in rem, can follow from certain regulatory prescriptions (requiring the provision of property for use by another face) (Kähler, 2009, p. 83). Therefore the application of such concepts may not depend on the "normative merits of the situation to which they apply" (Kähler, 2009, p. 83). It would seem that in this part the author needed to determine the nature of the relationship and ways of displaying the actual circumstances in legal norms, but he avoids this issue in the direction of exclusively normative grounds for the emergence and choice of legal concepts.

Later L. Kähler's position on this issue becomes somewhat clearer. He argues that a concept can be legal, even if it is established in law that it must have the same meaning as in ordinary language. For even in this case, the reason why a concept in law has the same meaning as in ordinary language is not that there is some definition of this concept in ordinary language, but because its meaning is contained in the law itself (Kähler, 2009, pp. 91-92). It would seem that in this case we can recall that it is the normative nature of linguistic expressions in legal language that allows them to be distinguished from normative linguistic expressions in the language of ethics or other discourses. It is the combination of the formal and everyday aspects of speech practices in the legal language that often leads to con-

traditions in the interpretation of legal phenomena. But if for interpretation it is important to simply choose an adequate normative basis, what is the specificity of the content of legal concepts?

L. Kähler (2009) seeks to separate the understanding of the normativity of law from the practice of implementing legal norms (pp. 94-95). From the point of view of epistemology, the substantiation of the normative content of legal prescriptions from the facts of their application is obvious. However if the normative grounds for establishing the meaning of legal concepts are not logical, they can be formulated just from the requests of existing social practice outside the legal field. Therefore, a greater emphasis on the normativity of legal concepts "frees" them from errors and contradictions in law enforcement.

Normativity and Institutional Facts

There are several methodological approaches in the analytical legal philosophy to characterizing the relationship between empirical facts and normative prescriptions. Among the most well-known approaches we can mention the institutional theory of N. MacCormick, in which the nature of legal reality is considered in the context of institutional facts. Since legal norms contain hypothetical content with the possibility of legal consequences depending on the actual circumstances, N. MacCormick uses the term "operational facts". The very process of making decisions by these norms is a form of deductive thinking, which involves, firstly, the postulation of a general hypothetical rule, then the establishment and analysis of the facts that fall under this rule, and finally the receipt of a logical conclusion for a particular case which ultimately it constitutes a legal decision in a particular case. It is this logic of constructing a legal requirement or a legal decision, according to N. MacCormick (1992), that makes it possible to speak of its admissibility and legality (p. 183). At the same time such an approach to the correlation of facts and norms is only methodological, since a decision, like any statement, is an act of will, and acts of will never are determined logically. Ultimately decisions are made by an authorized subject but are not derived only in a rational way from a system of legal concepts. Of course, we can take into account all previous logical reasoning, but the final

decision itself will not be a direct logical conclusion, but an impression, an opinion based on a consideration of a set of legal norms and specific life circumstances. A similar conclusion can be found in Hans Kelsen's normativism that no decision is logically derived either from a norm, from a combination of norms and facts, or from specific facts, the decision is primarily an act of will, "the external course of human behavior", and then acquires legal significance due to the application of legal concepts (Kelsen, 1967, pp. 4-10). From the arguments of N. MacCormick, a well-known representative of modern legal positivism and legal institutionalism, it follows that it is not enough to find the normative grounds for choosing a concept or fixing it in a normative legal act. The logical analysis leaves out the important epistemological question of what is the source of the normativity of the decision and the establishment of the meaning of legal concepts.

Conclusion

The study of the specifics of the legal language by applying the traditional approach in the spirit of classical empiricism leads to several contradictions.

Firstly, linguistic methods and grammatical constructions are not fully applicable to legal terms. Thus when considering the social context (but not the social nature) of the application of legal norms, the question arises whether legal rules can be considered a kind of linguistic rule. Will adherence to the rules of grammar determine the effectiveness of legal discourse?

Secondly, the law as a specific regulator of the behavior of subjects of law cannot be fully reduced to other ways of regulating behavior in society. Hence, only an analysis of the grounds for the implementation of legally significant actions allows us to understand the context of the application of legal norms. Such grounds are largely a product of interpretation, even if there is a system of consistent and fairly certain sources of law. Each legal term depends on the context of use and those word usage conventions that exist at the moment. It follows that the interpretation of the rules cannot be based only on the principles of logic and be neutral.

Thirdly, from the point of view of methodological reflection, actions are the object of legal regulation. From an empirical point of view, every action, like the physical movement of objects in space, or the handling of things by people, can be "inscribed" in a legal context. But how do actions acquire legal significance? Is it enough for this simple selection of the necessary legal concepts or their interpretation?

From this question, it becomes clear that the behavior of the subject constitutes the content of legal relations that do not have an empirical analog in the outside world since the consequences of the actions of the subject of law are determined by their interpretation in the context of display in terms of the legal language.

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