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INCLUSIVE LEGAL POSITIVISM: BASIC ARGUMENTS

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The relevance of the topic of this paper is due to the insufficient study of the problems of inclusive legal positivism in the modern philosophy of law. The problem of substantiating the thesis of the inclusion of morality in law on the basis of rational argumentation of scientists and legal practice data considered in the paper allows an innovative analysis of basic legal concepts. The subject of the research is to analyze the methods of moral, ethical and legal argumentation in the works of representatives of inclusive legal positivism. The purpose of the work is to theoretically reconstruct the essence of the debate between inclusive and exclusive legal positivism. The novelty of the topic is due to the lack of studies in the educational and scientific literature on the specifics of the argumentation of inclusive legal positivism, set out in the scientific works of Will Waluchow and Kenneth Himma, the need to rethink traditional ideas about the theory of legal positivism. The research methods used in the paper is the methods characteristic of analytical jurisprudence, including those related to the use of methods of logical and linguistic analysis, as well as special legal methods (formal legal method of interpretation of regulatory prescriptions). The main conclusions of the paper are to reveal the key arguments of the concept of inclusive legal positivism. It is proved that from the point of view of this concept, the law has moral grounds, and judges in some cases use moral reasoning when making court decisions.

Keywords: inclusive legal positivism; normative prescriptions; moral foundations of law; moral obligations; judicial practice; judicial discretion; W. Waluchow, K. Himma.

Introduction

Over the past few decades modern legal positivism has turned into an extremely heterogeneous philosophical and legal current, within which there are no clear methodological boundaries and criteria for thematic affiliation. That is why, on the one hand, Ronald Dworkin easily falls into the number of positivists with his attempts to write a chronicle of the history of positivism after Herbert Hart; theorists of the 'new natural law' Lon Fuller and John Finnis, forced to share a number of theses and arguments of legal positivism in their arguments, as well as new realists in the person of Brian Leiter, who with his argumentation offers a new version of the convergence of realism with positivism in the field of legal philosophy. At the same time the works of Will Waluchow and Kenneth Himma are reasonable attempts to fix the criteria for determining the nature and grounds of *inclusive legal positivism* as a research program that convincingly solves the question of the relationship between morality and law in comparison

with other research approaches using philosophical methods. After all, according to Kenneth Himma, «conceptual jurisprudence is nothing but the metaphysics of law»[1].

The division of modern legal positivism into two branches by itself – exclusive and inclusive, which finally took shape in the 70s of the XX century with the appearance of the key works of Joseph Raz at first step may seem conditional. The fact is that from the initial arguments of Herbert Hart, set out in the book *The Concept of Law*[1], it followed that in the structure of the legal system there are only two levels of legal rules (primary and secondary), allowing courts to resolve any incidents and disputes exclusively within the rules system itself. Thus the place of legal principles has not been determined in the legal systems, which by their nature differ from legal norms and rules, since they contain evaluation criteria and can most often express legal values enshrined in positive law. Hart's subsequent reservations in the polemic with R. Dworkin that legal principles can be easily 'incorporated' into the legal system along with legal norms did not remove the question of whether it is possible to detect moral grounds of law in the content of legal principles or the need to take into account moral arguments when making judicial decisions. Proponents of *exclusive legal positivism* (Joseph Raz, Andrey Marmor and Scott Shapiro) believed that law cannot include principles, and even if it happens that the law refers to principles, then the judge actually acts as a legislator who should use the interpretation of these principles to settle the legal dispute that has arisen[2]. In exclusive legal positivism there is no room for the transformation of moral principles into legal ones since the nature of law followed the social facts and special types of sources of law. Law and morality are different regulators of human behavior and therefore the possibility of even a partial overlap of their boundaries is excluded. *Inclusive legal positivism* (Matthew Kramer, Jules Coleman, Will Waluchov and Kenneth Himma) arises as a theoretical position that allows the conceptual possibility of using moral criteria to determine the operation and content of law[3]. The most original justification of this position from the point of view of judicial practice and the theory of semantics of possible worlds can be seen in the works of Waluchow and Himma, and counterarguments in favor of the fallacy of such an argument – in the works of Dworkin.

Materials and Methods

The paper uses the works of famous scientists Will Waluchow, Kenneth Hima, as well as other scientific literature on the problems of theory and legal philosophy. The paper uses research methods characteristic of analytical jurisprudence, including those related to the use of methods of logical and linguistic analysis, as well as special legal methods (formal legal method of interpretation of regulatory prescriptions).

Main Provisions

As a criterion determining the nature of the argumentation of inclusive legal positivism, Himma offers a justification for the thesis about the inclusiveness of morality[4]. By itself this thesis presupposes the conceptual possibility of modeling a legal system with the moral foundations

[1]Himma K. E. The Logic of Showing Possibility Claims: A Positive Argument for Inclusive Legal Positivism and Moral Grounds of Law // Revus – Journal for Constitutional Theory and Philosophy of Law. 2014. № 23. P. 87.

[2]Hart H.L.A. Concept of Law. Second Edition. Clarendon Press, 1994.

[3]Raz. J. Legal Principles and the Limits of Law // The Yale Law Journal. 1972. Vol. 81, № 5. P. 823–854; Marmor A. Exclusive Legal Positivism // Positive Law and Objective Values. Oxford: Clarendon Press, 2001. P. 49–70; Shapiro S.J. On Hart's Way Out // Legal Theory. 1998. Vol. 4, № 4. P. 469–507.

[4]Waluchow W. J. Inclusive Legal Positivism. Oxford: Clarendon Press, 1994; Kramer M. H. In Defence of Legal Positivism: Law without Trimmings. Oxford: Oxford University Press, 2003; Himma K. E. The Rule of Law, Validity Criteria, and Judicial Supremacy // Law, Liberty, and the Rule of Law / Eds. I. B. Flores, K. E. Himma. Dordrecht: Springer, 2013. P. 153–173.

of law but not concrete irrefutable arguments. That is why it is easy to attribute Ronald Dworkin to the supporters of such a thesis who substantiates the moral foundations of any legal system with various options for turning moral values and moral principles into legal prescriptions. Unfortunately Himma in his writings of recent years does not allow such a possibility believing that he is arguing with Dworkin and does not take a similar position with him. Thus among the key issues that need to be addressed in terms of the relationship between law and morality Himma calls the justification of the status of the grounds of law as legal, which emphasizes the special nature of the legal validity of legal prescriptions (as opposed to empirical facts)[5].

The next issue to be resolved is the determination of the reasons for granting legal status to any social regulations or regulators. In the case of legal positivism it is the practice of applying conventional rules as conditions for making legal decisions that acts as such a reason. However it is obvious that other philosophical and legal concepts can formulate the conventionalism of rules as a means of decision-making, so this issue cannot serve as a significant sign of inclusive legal positivism.

Research Results

Are there correct examples of empirical grounds for moral judgments in law? What is the basis of the assumption about the need to justify inclusive legal positivism? Thus Waluchow as an example of the use of moral arguments in making judicial and legal decisions cites cases from judicial practice on the recognition of unconstitutional provisions of laws to the basic source of law for the legal system of Canada – the Canadian Charter of Rights and Freedoms. Moral reasoning, in his opinion, is regularly used in the interpretation of the Canadian Charter of Rights and Freedoms. The provisions of the Canadian Charter should be interpreted on the basis of the objects and interests that it is designed to protect, which opens up a certain scope for the use of ethical standards of conduct[6]. It can also be noted that the authors of the Canadian Charter when listing fundamental rights and freedoms used ethical terminology, which occupies an important place in almost all modern moral theories. Such ethical concepts include the right to equality, freedom, justice and many others. Since these concepts have a moral basis Waluchow comes to the conclusion that ethical factors can be included in the content of law[7]. Moreover the judges themselves are guided by moral judgments when resolving disputes.

An example of moral argumentation is the court's decision in the case of *Andrews v. Law Society of British Columbia*[8]. In this case the question was considered whether the requirements of Canadian citizenship for practicing law contradict the provisions of article 15 of the Canadian Charter of Rights and Freedoms, according to which every person has equal rights without any discrimination[9]. The focus of the court's attention was the question of whether the requirement of Canadian citizenship is discrimination. To answer it, it was necessary to determine what should be understood by discrimination in general, which means that the answer itself inevitably had to become moral in its meaning.

The Court considered several definitions of discrimination among which it chose the most appropriate one. Such definitions had an ethical content[10]. At the same time the court noted that the definition of discrimination should be objective that is the provision of the law can be recognized as discriminatory regardless of whether the legislator and those who act under the guidance of the law consider that it is discriminatory.

[5]Himma K. E. The Logic of Showing Possibility Claims: A Positive Argument for Inclusive Legal Positivism and Moral Grounds of Law. P. 78-79.

[6]Ibid. P. 80

[7]Waluchow W. J. Inclusive Legal Positivism. P. 144-145.

[8]Ibid. P. 143.

[9]In detailes see: Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143.

[10]Ibid. P. 149.

Are Waluchow's arguments convincing in this case? Its interpretation from the point of view of judicial practice is not strictly reasoned. After all the concept of discrimination could be used by analogy from other court decisions that have a precedent character. By itself the interpretation of legal norms by virtue of judicial discretion will not be a reason for judges to leave the moral plane and ethical assessments. Rather on the contrary judges will try to give a procedural and formal legal character to their judgments in the motivational part of the judgment, so as not to encounter moral relativism, which very often accompanies any reflections on the justice or injustice of specific legal regulations.

Another question is that the theory of inclusive legal positivism could develop a certain approach to understanding the essence of moral obligations that influence law and the legal system. After all the law itself rarely contains successful and exhaustive definitions. The law, fixing this or that concept only refers to its definition in the relevant field of activity[11].

Morality can be considered as prescriptions for proper behavior or as a description of the ideas existing in society. But in any case for a well-founded theory, it is important to argue to which type of moral prescriptions the court can appeal when considering cases including the recognition of norms as unconstitutional. And in this regard several arguments can be noted.

Firstly, if the court proceeded from the understanding of morality as a regulator of social relations, it would have to find a suitable ethical definition in society every time. At the same time it should be borne in mind that morality is characterized by a higher degree of uncertainty than for a legal regulator since society as a rule has several moral attitudes at once including those that contradict each other. But then it is completely unclear how the court will resolve the conflict between different ethical definitions and choose the most appropriate one. Let's say the court will be able to establish the prevailing ethical attitude in society. Does this mean that the definition of the concept should reflect its content? Obviously not as it may be completely unacceptable for the purposes of justice.

How then can the court find a suitable ethical definition? The only criterion for its choice is how harmoniously it fits into the system of current law and is combined with its principles. And this means that the court when resolving the dispute will be guided by the understanding of morality as a prescription for what is due and not what is. The definition may reflect the ethical attitude of a minority in society or the court will not be able to find a suitable moral attitude at all, which however will not become an insurmountable obstacle to making a legal decision on the procedure. Therefore there is no need to start searching for an appropriate ethical norm in society it is enough to choose a definition that fits most successfully into the context of the legal system.

In the decision of the Supreme Court of Canada in *Andrews v. Law Society of British Columbia*, the term 'discrimination' was considered in the context of the entire legal system including in relation to the concept of 'equality'. At the same time the court's decision noted that the norm on the prohibition of discrimination should be interpreted flexibly since in the future new cases of discrimination may appear that have not previously been encountered in society. This also indicates that the court proceeded from an ideal understanding of morality when defining the concept of discrimination. In addition the interpretation of morality as actually existing norms would create additional difficulties for judges since then they would have to search for a moral norm in force in society.

Secondly, when understanding morality as rules existing in society the concept used in legislation would be made dependent on the moral standards in force in society. In case of their change the court will be forced to find a new definition that meets the requirements of the changed norms of ethics. Waluchow himself admits that the moral arguments that are included in the content of law are closely related to the linguistic, philosophical and historical context. Thus, we could reconstruct the following sequence of Waluchow's reasoning: law is closely related to morality, which in turn is conditioned by linguistic, philosophical and historical con-

[11] Ibid. P. 150-152.

text[12]. A change in the context leads to a change in the content of the law, which makes it less definite and stable. Moreover law is sometimes seen as a tool for changing ethical standards in society. However such an approach would make law dependent on morality, which would entail the complete loss of such a function.

Waluchow believes that moral arguments can be taken into account by courts when determining the content of law. Inclusive legal positivism offers, in his opinion, a more successful theoretical explanation of the procedure for recognizing laws as unconstitutional due to their contradiction with the rules of the Canadian Charter of Rights and Freedoms than exclusive positivism. This is due to the fact that the theory of inclusive positivism provides a better account of the moral arguments that are taken into account when recognizing a law as unconstitutional.

Discussion

However what happens if the judges behave differently? Himma with his arguments and quoted fragments of Stephen Perry 's works casts doubt on this approach from the point of view of the argument of legal validity[13]. Should judges, when determining the legal validity of any prescriptions, turn to moral arguments? It is obvious that they have no strict obligations because the interpretation of legal norms can be carried out in a formal legal way or logically except in complex and confusing cases. And this means that there are no more boundaries between moral judgments about law and legal judgments in inclusive legal positivism than in Dworkin's reasoning.

One of the main arguments of Himma after the criticism of Dworkin and Waluchow in favor of a positive justification of the nature of inclusive legal positivism is the reasoning about the recognition of the logical possibility of the existence of a legal system with moral grounds. Based on some vague variations in relation to the philosophical concept of the semantics of possible worlds (as a possible methodological basis of conceptual jurisprudence) he believes that by analogy with the ontological proof of the existence of God as a way of comprehending him in a logically consistent form it is possible to distinguish the properties of such a legal system. For example, one of the constructed properties of Himma recognizes the modeling of a legal system where individuals are morally impeccable, even if their real behavior is not such[14]. There is already a contradiction in this reasoning. After all if moral integrity as a value does not serve as a basis for a person's inclination to do morally right (and not just to do legally) in the real world, what advantages does its hypothetical postulation give? Compared with empirical arguments from judicial practice fixing the problems of the positivist interpretation of legal practice the conceptual argument about possible worlds, in which there are no contradictions, does not essentially bring anything new to the understanding of legal reality as an ethically loaded concept.

Conclusion

Thus inclusive legal positivism has long been the subject of deep disputes between representatives of legal positivism. However despite sophisticated and rational arguments the theory of inclusive legal positivism turns out to be limited and incomplete. The reason for this state of affairs lies in its focus on solving only one philosophical and legal issue - analysing the necessary connection between law and morality. This question turns out to be secondary when considering the structure of the legal system or the dynamics of legal institutions, as well as when using the method of conceptual analysis in order to clarify legal concepts.

[12]Ibid. P. 96-97.

[13]Ibid. P. 145.

[14]Himma K. E. The Logic of Showing Possibility Claims: A Positive Argument for Inclusive Legal Positivism and Moral Grounds of Law. P. 92.

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Осы мақалалының тақырыбының *өзектілігі* қазіргі заманғы құқық философиясындағы инклюзивті құқықтық позитивизм мәселелерінің жеткіліксіз зерттелуіне байланысты. Мақалада қарастырылған ғалымдардың ұтымды дәлелдері мен сот практикасының деректері негізінде адамгершілікті заңға енгізу туралы тезисті негіздеу мәселесі негізгі құқықтық ұғымдарды жаңашыл талдауға мүмкіндік береді. *Зерттеу пәні* инклюзивті құқықтық позитивизм өкілдерінің еңбектеріндегі моральдық-этикалық және құқықтық дәлелдеу әдістерін талдаудан тұрады. Жұмыстың *мақсаты* – инклюзивті және эксклюзивті құқықтық позитивизм арасындағы пікірталастың мәнін теориялық қайта құру. *Тақырыптың жаңалығы* оқу және ғылыми әдебиеттерде Уил Валучов пен Кеннет Химманың ғылыми еңбектерінде баяндалған инклюзивті құқықтық позитивизмді дәлелдеудің ерекшелігі туралы зерттеулердің болмауына, құқықтық позитивизм теориясы туралы дәстүрлі идеяларды қайта қарау қажеттілігіне байланысты. *Зерттеу әдістері* ретінде аналитикалық құқықтануға тән әдістер, соның ішінде логикалық және лингвистикалық талдау әдістерін қолданумен байланысты әдістер, сондай-ақ арнайы құқықтық әдістер (нормативтік талаптарды түсіндірудің ресми-құқықтық әдісі) қолданылды. Мақаланың *негізгі тұжырымдары* инклюзивті құқықтық позитивизм тұжырымдамасының негізгі дәлелдерін ашу болып табылады. Бұл тұжырымдама тұрғысынан құқықтың моральдық негіздері бар екендігі негізделеді, ал судьялар кейбір жағдайларда сот шешімдерін қабылдаған кезде моральдық дәлелдерді қолданады.

Түйінді сөздер: инклюзивті құқықтық позитивизм; нормативтік нұсқамалар; құқықтың моральдық негіздері; моральдық міндеттемелер; сот практикасы; судьялардың қалауы; У. Валучов, К. Химма.

А.Б. Дидикин, д.фил.н., Associate Professor, Высшая школа права, Maqsut Narikbayev University (Астана, Казахстан), член Аристотелевского общества (Великобритания), член Канадской философской ассоциации: **Инклюзивный правовой позитивизм: базовые аргументы.**

Актуальность темы настоящей статьи обусловлена недостаточной изученностью проблематики инклюзивного правового позитивизма в современной философии права. Рассматриваемая в статье проблема обоснования тезиса о включенности морали в право на основе рациональной аргументации ученых и данных судебной практики позволяет новаторски проанализировать базовые юридические понятия. *Предмет исследования* заключается в анализе способов морально-этической и правовой аргументации в трудах представителей инклюзивного правового позитивизма. *Цель работы* состоит в теоретической реконструкции сущности дебатов между инклюзивным и эксклюзивным правовым позитивизмом. *Новизна* темы обусловлена отсутствием в учебной и научной литературе исследований о специфике аргументации инклюзивного правового позитивизма, изложенной в научных трудах Уила Валучова и Кеннета Химмы, необходимостью переосмысления традиционных представлений о теории правового позитивизма. В качестве *методов исследования* применялись методы, характерные для аналитической юриспруденции, в том числе связанные с применением методов логического и лингвистического анализа, а также специальные юридические методы (формально-юридический метод толкования нормативных предписаний). *Основные выводы* статьи заключаются в раскрытии ключевых аргументов концепции инклюзивного правового позитивизма. Обосновано, что с точки зрения данной концепции право имеет моральные основания, а судьи в отдельных случаях при принятии судебных решений применяют моральную аргументацию.

Ключевые слова: инклюзивный правовой позитивизм; нормативные предписания; моральные основания права; моральные обязательства; судебная практика; судейское усмотрение; У. Валучов, К. Химма.

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НОВЫЕ КНИГИ

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Настоящая монография является результатом коллективного творчества авторов, представляющих теорию права и отраслевую науку, проявляющих научный интерес к процессуологии в общетеоретическом формате.

В современных условиях наблюдается недостаточное внимание правоведов к углубленной разработке правового регулирования, в то время как указанная проблема имеет существенное познавательное и большое практическое значение. Теория процессуального регулирования как особого вида правового регулирования не создана и находится на первоначальной стадии своего формирования. Тогда как в перспективе она может способствовать не только повышению эффективности правового регулирования в целом, но и совершенствованию правотворческой и правоприменительной практики путем задействования всего арсенала процессуальноправового инструментария. Наряду с этим требует совершенствования процессуальное законодательство, имеющее дефекты, противоречия, неполноту, разбалансированность и др. Процессуальное регулирование эффективно лишь тогда, когда имеется качественное и адекватное законодательство, а функционал обеспечительного механизма совершенен.

Адресована ученымюристам, преподавателямправоведам, студентам, а также правоприменяющим субъектам в сфере регуляции общественных отношений.