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BETWEEN NATURALISM AND LEGAL INTERPRETATION: MODERN DEBATES ON THE NATURE OF LEGAL REALISM

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The relevance of the topic of this paper is due to the insufficient study of the problems of the legal realism in the modern philosophy of law. The problem of substantiating the thesis of the social grounds of the court practice on the basis of rational argumentation of scientists and legal realists arguments considered in the paper. *The subject of the research* is to analyze the methods of legal argumentation in the works of representatives of the legal realism. *The purpose of the work* is to theoretically reconstruct the essence of the debate on the nature of legal realism in the field of legal epistemology naturalization. *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 legal realism, set out in the scientific works of Brian Leiter, the need to rethink traditional ideas about the theory of legal realism. *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 legal realism conception. It is proved that from the point of view of this concept, the law has social grounds, and judges in some cases use sociological reasoning when making court decisions.

Keywords: legal realism; legal positivism; naturalism; legal interpretation; judicial practice; W. Quine, B. Leiter.

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Introduction

Contemporary debates about the naturalization of epistemology in analytical legal philosophy and the possibilities of building a naturalized jurisprudence based on the famous approval of American legal philosopher Brian Leiter about «naturalistic turn» in the legal philosophy: «While each of the major areas of philosophy – meta-ethics, philosophy of language, epistemology, philosophy of science, philosophy of mind – have undergone a naturalistic turn in the last quarter of a century, the Anglo-American philosophy of law remained untouched by this intellectual trend» [10, p. 80]. One of the most significant reasons for the evolution of the legal epistemology in this direction was influenced by the ideas and arguments of classical realism in the legal interpretation of the legal reality and the nature of law as a social phenomenon.

Criticism of traditional jurisprudence in legal realism emphasizes the significant gap between the analysis of the essence of law from the actual practice of judicial and legal decisions in the concepts of legal positivism [2, p. 154]. In addition the popularity of the ideas of the naturalization of legal epistemology

in the second half of the XX century is associated with a number of contradictions in the justification of objectivity and normative nature of law, which allows in the context of traditional philosophical and legal concepts form the idea of a unified and coherent closed system of legal norms capable of providing a comprehensive impact on enforcement practices (Hans Kelsen, Herbert Hart). That concepts of normativism and new positivism in the legal philosophy have undergone the most criticism in modern interpretations of legal realism, since the submission of the law as a coherent system of legal norms did not contribute to the explanation of the boundaries of judicial discretion in decision-making, as well as the reflection of the influence of other social factors on the judicial system. In this aspect concept of «open texture» of law in Hart's conception and concept of ascriptive legal statements considered as methodological tools for modeling and prediction of the practice of the legal rules [15]. However, the complex process of interaction between the legal rules in the classification of legally significant behavior of participants of legal relations, as well as the need to integrate formal procedures in judicial decisions actualize again the issue of developing a new concept of descriptive proceedings.

Materials and Methods

The paper uses the works of famous scientists Brian Leiter, Hans Kelsen, Herbert Hart, Kenneth Himma, 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

Basis for the formation of the naturalistic approach to legal epistemology are attempts to carry out the analogy between philosophical arguments of W. Quine in his criticism of a priori knowledge and classical epistemology, based on the use of abstract philosophical concepts, as well as the need for justification Quine development of philosophy in the context of the empirical sciences [16]. One of the reasons for the possibility of such an analogy in the legal philosophy has been the convergence argument of legal positivism and legal realism in the justification of the system of legal rules in the structure of the legal system. The content of secondary rules (rule of recognition, rules of changes, decision-making rules) in Hart's conception are the formal requirements and procedures for the preparation and adoption of the legislation, as well as the appointment and definition of the powers of officials of the government.

What is the nature of these rules? If the primary rules perform a regulatory function and are formulated from the practice of the existing legal relationship, then perhaps their empirical support, which can be used by judges to resolve disputes. At the same time secondary rules, such as rules of recognition, enshrined in the Constitution and constitutional laws, are not empirical in legal nature. To recognize their legitimate need to reach a political compromise is usually reflected in the provisions of the Constitution, and officials confirm compliance with such constitutional rights in daily practice. Such a compromise is a factor in the formation of the legal system, but it is treated as a non-legal factor. Without application in practice, as noted by J. Raz, to determine which law is the rule of recognition, it is impossible, but this methodological aspect in the conception of Hart and legal positivism is often ignored as insignificant [17, p. 297].

The draft law is not accidental naturalized epistemology and this positivist argument about secondary rules shall be considered as a manifestation of traditional epistemology in which a priori knowledge is rarely based on empirical data branch jurisprudence as a means to justify the philosophical and scientific conclusions. Hence modeled on the argument Quine's proposal to replace the classical normative theory of law to other descriptive theory, contribute to the successful study of the practices of law enforcement, most fully substantiated in studies of B. Leiter. Legal philosophy in the presentation of B. Leiter in its development should be based on industry jurisprudence both in terms of continuity of knowledge and continuity methods [1, p. 60].

However, the analogy criticized of fundamentalism by Quine in classical epistemology difficult to draw in the legal philosophy. The closest in meaning may be exemplified normativism of H. Kelsen and legal positivism of H. Hart.

In Kelsen's normativism law is a system of legal norms that have a logical hierarchy. Legal provisions are the object of knowledge in law, and their classification is based on the recognition of a priori existing «basic norm», which has supreme legal force. Since the content of the «basic norm» – the basis of the legal order and the functioning of the state, the hypothetical nature of this category cannot find it either in the content of the international conventions, nor in the text of the Constitution. «The basic norm» postulated as existing, but it is a transcendental category, without which the logic of constructing the hierarchy of norms, as well as their application in practice cannot be achieved [6]. Leiter argues that the concept of Kelsen nature of the law determined by the possibility of sanctions laid down in the structure of the legal norm and this representation facilitates the further development of normativism in a naturalistic perspective [12, p. 4]. We cannot agree with such a reconstruction and affirmation, because the main objectives were to develop in normativism «pure theory of law», in which the research methodology of legal reality cannot rely on other methods of science and take into account non-legal factors. In addition the concept of normativist legal qualification and identification of the legal significance of specific actions of the individual allows in some cases successfully explain the nature and application of the law and judicial decisions. Classification of legal rules on general and individual in the context of law enforcement and regulation of legal relations, thus relies on a priori knowledge of the contents of the «basic norm», and at the same time on the legal interpretation of the empirical data and the behavior of the subjects of law. Naturalization of such a concept does not contribute to the increment of scientific knowledge about the nature of law and legal system.

Research Results

Another example of a consideration in terms of naturalized legal epistemology is new Hart's legal positivism. In legal positivism basic concepts and methods have been modified to understanding the problem of correlation of normative and descriptive in the legal system. Hart became the founder of the «linguistic turn» in the legal philosophy, using the ideas of analytic philosophy [4]. At the same time the Hart's legal theory, as Leiter notes, may be disclosed in a naturalistic perspective, because instead of the traditional concepts presented their attempts descriptive description in the light of «ordinary language» and «open texture» law that permits judicial discretion [13, p. 296]. H. Hart admits the possibility of legal gaps and uncertainties content of legal rules that judge take into account when deciding cases. But in this case, the naturalization of epistemology promotes distort the true aims of legal positivism in the legal philosophy on the following grounds.

Firstly, in Hart's conception (including in the context of Raz's arguments) unity of the legal system as a system of primary and secondary rules are provided solely by legal means – the principles of the legislative process when parliament making laws, constitutional legality and the expansion of non-judicial interpretation without taking into account the letter of the law. In this case a priori secondary rules limit judicial discretion and become a benchmark in practice for the development of areas of legislation

Secondly, the epistemological significance of Hart's conception of legal ascriptive statements is that this concept allows to attribute legal significance empirical facts, which is important to prevent judicial arbitrariness and violation of legal principles.

These examples illustrate the uncertainty of the term «naturalism», which has a number of specific values and different areas – legal positivism, legal realism and theories of natural law. In particular the term «legal naturalism» is applicable to the metaphysical concept of natural law, in which the natural law is seen as a manifestation of the laws of nature, or of rational ideas about the natural and imprescriptible human rights. In this case, these classical concepts cannot be naturalized within epistemology, because they are based on the conceptual framework of reasoning and non-empirical methods justify the final conclusions.

However, in the discussion of naturalization of legal epistemology in addition to the spread of Quine's arguments in the legal philosophy, Leiter analyzes attempts to consider the actual practice of justice in the legal realism. The analogy with Quine's thesis of indeterminacy of translation accounted for Leiter in substantiating the thesis of indeterminacy of legal norms and the inability to predict the judgments with the law. Uncertainty characterizing the content of the legal rules relating to the use of legal concepts that are not related to the empirical facts. Hence the need for interpretation of the law when deciding authorities

and courts. Legal realism based on justified rejection of the traditional methods of philosophical and legal grounds on which the judgment is due to analysis of the facts by the judge on the basis of existing law (Hart's conception) that the content of vague and empower judicial discretion [9, p. 281].

Leiter believes that the epistemological basis of legal realism is based on the philosophical concepts of naturalization, when the process of scientific investigation of legal phenomena must be based on empirical data, which may be the real decision-making procedures and practices of the judges and administration activity in the state. That uncertainty boundaries of judicial discretion allows legal realists abandon the standard model of a legal explanation, when the content of the legal norm determines the output of the judge. Instead of the standard model, they formulate a descriptive conception of the judgment serving as a prediction judge's actions in the decision, depending on the social and psychological factors, which are the empirical evidence of the truth of such conception. Thus the theory of law in the future becomes naturalized in a scientifically based theory of judicial decision-making. Leiter notes that «the law, or, more precisely, the theory of judicial decisions is a» naturalized «as becomes a realist section of psychology (or anthropology and sociology)» [7, p. 36].

The analogy with the argument about Quine's epistemology as part of psychology and the need for empirical justification of our beliefs and intuition manifests itself in the assertion of Leiter about fundamental uncertainty of laws. The uncertainty of the law implies a set of equally legitimate to use the methods of interpretation of its provisions, as well as a revision of the assumption of previous court decisions and precedents. If the content of the law does not allow to reliably predict the same court decisions in similar cases, evidence, that according to Leiter you need to explore and find other grounds, allow explaining how judges make their decisions. The traditional legal realist assumption that the judge has unrestricted choice of alternatives when making judgment calls into question the scientific legal prediction and forecasting.

Discussion

What is the basis of judicial discretion and possible predictions? In real jurisprudence judge's discretion in the interpretation of laws can be based on the current economic model, or an attempt to make the best decision in the current socio-economic conditions [3]. Thus naturalized theory of law preserving the traditional conceptual apparatus may use empirical data of the social sciences to study social mechanisms of judicial decisions. This implies that some concepts and terms in the legal field are subject to conceptual analysis that is slightly different from the views of the legal realists and positivist notions of legal reality [5].

However this interpretation of Quine's philosophical arguments and legal realism to justify the naturalistic approach to the legal philosophy is unreasonable. Given that the specific legal cases require interpretation and legal interpretation in different ways the abolition of the judgment on appeal does not mean methodological error of the judge when deciding the cases or scientists in the study of jurisprudence. Moreover the rationale of the judgment or decision of the authority in terms of the legal theory involves not only search and systematization of empirical data but also to study the legal nature of the decision, its legal principles and legal rules that are subject to review by a higher court instance. Relevant principles cannot be reviewed due to the detection of judicial errors and only clarify the content of judicial precedents on which to rely in the future when judge making decisions.

Arguments of legal realists regarding criticism of formalism in law and conform to the edicts of the law also distort the actual practice of legal proceedings, since it is the observance of formalities by all participants of the trial of the law, is the basis for the legal recognition of the judgment and in all other cases entails retrial or cancellation. Thereby streamlining the court decision does not depend on the possible uncertainty of legal rules, and of the search and application of legally significant argument that essentially does not require a naturalization of epistemology in the radical version presented in the Leiter's conception.

Thus the considered building a naturalized epistemology version of law based on the application of Quine's arguments by analogy in the field of philosophy of law can only be used with certain restrictions. Examples of direct application of Quine's arguments to criticize a priori uncertainty and legal rules in the jurisprudence (legal realism) and criticized the traditional positivist epistemology, the question of

the boundaries of judicial discretion (conception of H. Hart), hinder the search for an adequate legal reasoning to support conclusions.

Analyzing the specifics of judicial activity, H. Hart points out, in the first place, the impossibility of applying the descriptive model to the legal statements and further verifi-cation of their «truth/falsity». Since the final phase of the legal process is the making of a judicial decision, then its function is not only to determine the truth of the facts («Smith put poison in coffee in wife's cup, and as a result his wife died»), but also in ascription of legal consequences to these facts («Smith is guilty of murder, and court ordered a sentence to him and defined order of its execution») [18].

If the legal activity only refers to the legal qualification of behavior, then it is unclear how the facts support or op-pose the legal conclusions. H. Hart describes the judicial decision as a mixture of empirical facts and legal norms. However, he criticizes the model of descriptive legal statements, as the judge's purposes are more complex than simply agreeing on facts, for example, of the necessary and sufficient conditions of the contract conclusion as provided by law. When the judge reviews a contract to establish its legal validity, his function is not to interpret the facts correctly but to recognize the existence of agreement through the accurate qualification of the actions of the parties fulfilling the obligations. Further, «the Treaty exists in the timeless sense of the word 'is' concerning legal decisions» [19]. Thus the judge does not make deductive conclusions because the legal decisions are not based solely on the empirical facts.

In the new positivist interpretation of legal reality, the mechanism of «ascription» is a universal cognitive method that is used to prescribe the ascriptive form to empirical facts that become normative facts afterward and serves to differentiate the legal field from other fields of nature and society. Further, normative facts are embodied in the structure of legal norms (laws, and precedents), and they get the status of legal facts acting as the basis for the origin, change or termination of legal relations. The dismal example provided by H. Hart is the one regarding the different meanings of the statement «he was writing a will». This may refer to the person's physical actions (empirical fact), the performance of a legal act (normative fact), or, if the necessary conditions are met (appropriate citizenship, presence of witnesses, signature of the will, and the record of the testator's death), to a legal fact as the basis of regulation of the relationships by inheritance law.

Conclusion

Thus the versions of the development of the naturalized epistemology of law described above are based on the application of Quine's arguments by analogy in the area of legal philosophy, but with certain limitations. Refusal to comply with formal legal rules turns the process of judicial decision-making and law enactment into a political process due to the influence of ideology and current moral concepts, and prevents the possibility of compliance with legal principles and development of the effective legal system. Thus in the naturalized perspective the uncertainty of law is only increasing.

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Натурализм мен құқықтық интерпретация арасында: құқықтық реализмнің табиғаты туралы заманауи пікірталастар.

Бұл мақала тақырыбының *өзектілігі* қазіргі заманғы құқық философиясындағы құқықтық реализм мәселелері зерттелуінің жеткіліксіз болуында. Мақалада ғалымдардың ұтымды дәлелдері мен құқықтық реалистердің дәлелдері негізінде сот практикасының әлеуметтік негіздері туралы тезисті негіздеу мәселесі қарастырылады. *Зерттеу пәні* – құқықтық реализм өкілдерінің еңбектеріндегі құқықтық дәлелдеу әдістерін талдау. *Жұмыстың мақсаты* – құқықтық гносеологияны натурализациялау саласындағы құқықтық реализмнің табиғаты туралы пікірталастың мәнін теориялық тұрғыдан қайта құру. Тақырыптың *жаңалығы* оқу және ғылыми әдебиеттерде Брайан Лейтердің ғылыми еңбектерінде баяндалған құқықтық реализмді дәлелдеу ерекшеліктеріне арналған зерттеулердің болмауына және құқықтық реализм теориясы туралы дәстүрлі идеяларды қайта қарау қажеттілігінің туындауы. Мақалада қолданылатын *зерттеу әдістері* – бұл аналитикалық құқықтануға тән әді-

стер, соның ішінде логикалық және лингвистикалық талдау әдістерін, сондай-ақ арнайы құқықтық әдістерді (нормативтік талаптарды түсіндірудің ресми-құқықтық әдісі) қолдану. *Мақаланың негізгі тұжырымдары* – құқықтық реализм тұжырымдамасының негізгі дәлелдерін ашу болып табылады. Бұл тұжырымдама тұрғысынан заңның әлеуметтік негіздері бар екендігі дәлелденді, және судьялар кейбір жағдайларда сот шешімдерін қабылдау кезінде социологиялық пайымдауды қолданады.

Түйінді сөздер: құқықтық реализм; құқықтық позитивизм; натурализм; құқықтық түсіндіру; сот практикасы; В. Квин, Б. Лейтер.

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Актуальность темы данной статьи обусловлена недостаточной изученностью проблем правового реализма в современной философии права. В статье рассматривается проблема обоснования тезиса о социальных основаниях судебной практики на основе рациональной аргументации ученых и аргументов правовых реалистов. Предметом исследования является анализ методов юридической аргументации в работах представителей юридического реализма. Цель работы – теоретически реконструировать суть дискуссии о природе правового реализма в области натурализации правовой эпистемологии. Новизна темы обусловлена отсутствием в учебной и научной литературе исследований, посвященных специфике аргументации правового реализма, изложенной в научных работах Брайана Лейтера, и необходимостью переосмысления традиционных представлений о теории правового реализма. Методы исследования, используемые в статье, – это методы, характерные для аналитической юриспруденции, в том числе связанные с использованием методов логического и лингвистического анализа, а также специальных юридических методов (формально-юридический метод толкования нормативных предписаний). Основные выводы статьи заключаются в раскрытии ключевых аргументов концепции правового реализма. Доказано, что с точки зрения этой концепции закон имеет социальные основания, и судьи в ряде случаев используют социологические рассуждения при принятии судебных решений.

Ключевые слова: правовой реализм; юридический позитивизм; натурализм; юридическая интерпретация; судебная практика; У. Куайн, Б. Лейтер.

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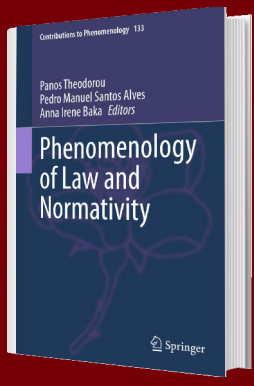

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