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Concept of Law-Making Technology as Approach to the Problem of "Origins of Law"

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Abstract

In the present article an attempt to offer new approach to a problem of sources of the law, traditional for the Russian jurisprudence, is made. Authors set as the purpose the description of the mechanism during which various factors of law education lead to emergence of this or that form of the law: law, custom, judicial act, etc. As the category allowing to solve an objective, authors offer law-making technology as it describes the human activity (a law source in dynamics) proceeding by certain rules and predetermines the set result (a law source in a statics, or the form is law). In article the main signs of a source of the law in dynamics are analyzed. Special attention is paid to structure of law-making technology, the list of its elements is offered. Through a doctrine prism on objective and situational legal regulation the short sketch of the main forms of the law and technologies which lead to their emergence is given. In the conclusion key questions on which it will be necessary to give the answer during further development of understanding of a source of the law as law-making technology are formulated, and it is suggested about the further prospects of application of author's approach in legal researches.

Keywords: Law education; Law-making; Law-making technology; Law source; The form is law; Legal regulation; Legal dynamics.

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1. Introduction

It is represented that the understanding of forms and sources of the law in jurisprudence which sources go back to the second half of the 19th century ceased to meet requirements of practice and has to be reformulated. Now there were two approaches to a ratio of categories "law sources" and "a law form". At narrow approach they are considered as synonyms, and designate ways of an external objectification of precepts of law. At broad approach understand law education factors as sources of the law, however the mechanism of influence of factors of law education on a concrete form of the law still represents a scientific problem (Pogodin, 2008; Rozin, 2006).

2. Methods

The traditional theory of a source of the law demands specification, addition and development according to modern achievements of science and practice. The methodology offered by us represents an alternative to deductive reasoning on a ratio of concepts a source of the law and a form of the law, and is based on studying of legal practice. The last allows seeing close connection between factors of law education and a form of an external objectification of precept of law through category of law-making technology (Pogodin, 2013).

Elements of the theory of sources of the law, according to our approach, are knowledge:

1) About activities of specially authorized subject for law creation (a law source in dynamics) and about results of this activity (a law source in a statics, or a form it is law), i.e. the source of the law is included by process of creation of rules of law and its result, and a law form - result of activity therefore a law source - whole, and the form is law - its integral part (Pogodin *et al.*, 2018).
2) About factors of influence on law creation process (factors of a norm-forming or factors of law education).

4. Results

Let's consider in more detail the first element. The existing synonymic number of terms (a law source in dynamics, law-making, it is possible to carry the term "standard and legal regulation" here) reflects technology of creation of the law: this synonymic number of terms fixes theoretical knowledge of features of technology of activity of the person in extremely general form as direct source of the law.

The technology in the most general view represents set of methods and tools for achievement of desirable result. In the course of law-making desirable result is the law form which is effectively expressing outside precepts of law. The activity directed to creation of precepts of law and proceeding on a certain technology is a law source. In other

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words, historically developed and various technologies of standard and legal regulation, various sources of the law proved the efficiency.

In the offered interpretation the source of the law has the following main signs:

1. Specially authorized subject, using a law source, creates the objective law governing the uncertain set of the public relations or the situational law governing the concrete relation.

2. Is in a certain system interrelation with other sources of the law. At the same time it should be noted that the system of sources of the law in itself can be considered as a peculiar legal metatechnology. So, traditionally noted normative legal act priority in the Romano-German legal family and a judicial precedent - in Anglo-Saxon is that other as a certain way of forming of hierarchy of sources of the law.

3. The concrete form of the law - obviously or estimated expressed text containing precepts of law, suitable for perception by addressees, is result of functioning of a source of the law

4. In the conditions of the legal systems of the present the source of the law is legal - in the sense that both the technology and result are definitely enshrined in the law. The source of the law has to be either is provided, or not forbidden by the law, its validity has to be recognized as laws. For example, the law adopted with violation of the established technology has no validity, as well as the custom which the parties cannot prove existence will not be applied by court in concrete business. At the same time the actual interrelations between sources of the law can differ from the law priority presumption proclaimed by the state.

5. The law source in a statics (the form is law) is addressed to subjects who are defined territorially or around persons. Besides, it has temporary limits of the action.

6. Each source of the law and the form corresponding to it perform certain functions in legal regulation. So, the judicial act resolves the concrete legal conflict, the law regulates concrete practice, etc.

7. Each source of the law has specific technology of creation. The research of elements of this technology and also the description of mechanisms of how the concrete technology provides such, but not other result, leads to emergence, let us assume, of custom, but not a judicial precedent, offers prospects for a research of ways of increase in efficiency of law-making activity therefore we will consider this sign in more detail.

4.1. Elements of Technology of Creation of Forms of the Law

The technological understanding of a source of the law assumes the description of structure of technology. We consider necessary to include the following elements in structure of technology:

1. Subjects and institutes (organizational structures). Not only those who represent the state, for example, legislature and deputies, but also those who have the non-state nature, for example, of structure of local government and appropriate subjects treat them. By nature subjects of law-making, besides form and content of rules of law, ways of ensuring all-obligation of norms depend. So, the custom created by practice of behavior of an uncertain set of legal entities is protected by participants of practice by the either the public or supranational authorities in case participants of practice can prove its existence (Chestnov, 2012).

2. Law source object, i.e. different types of socially significant practice or its separate elements which are exposed standard legal to regulation. These are concrete economic, political and other relations (practice in dynamics, regulatory and dynamic function is law) and conditions, the external environment for normal functioning of the relations (practice in a statics, regulatory and static function is law). At the same time an object through sense of justice of subjects makes active return impact on a source of the law and becomes the most important factor of a law forming.

Factors of law education include: political, economic, social, ideological, spiritual and moral, culturological, actually legal, geopolitical, national, religious peculiarities regulated the practician. For example, traditional values of modern Russian society determine gay propaganda recognition by question legal (but not moral) regulations, and at the level of the federal law.

3. Methods and procedures of creation of the law. It is necessary to understand that these methods and procedures as specific instruments of activity of subjects are a technology core, however not they are fixed in all cases de jure that results in need to reveal them de facto. Methods and procedures are the main factor for classification of technology of creation of the law.

4. The material resources providing law-making activity. It is necessary to carry to those buildings, constructions, office supplies used for implementation of technological operations, etc.

5. The information resources providing efficiency of law-making activity. Active informatization, for example, discussion of normative legal acts on platforms on the Internet, is a part of technology. In a case with common law a role of such resource is played by myths and legends. Rule of law, important for a specification, activity of help legal systems is. The most important element of technology is means of bringing content of precepts of law to addressees.

6. Result of use of technology, i.e. this or that form it is law or as a synonym, one of types of sources of the law in legalistic sense. The technology of creation of the law has the result the text expressing precept of law to some definiteness.

As law-making activity does not exist "at all", it is concrete so far as it always proceeds on a certain technology. The amount of steady technologies of course, also leads to emergence of various forms of the law. Technological features of law-making process are complex criterion of classification of sources of the law in a statics which, certainly, can be a subject of a further discussion and will allow proving the viability of the concept offered by us empirically.

5. Discussion

5.1. Classification of Sources of the Law

1. Legal custom. The custom is created first of all by practice, a habit of repetition of certain actions by an uncertain great number of participants of any social practice. To consider that the custom was created, it has to receive the sanction as legal: either from the state, or from community. In modern conditions the technology of custom in view of the low level of formal definiteness is applied in a combination with other technologies of fixing of legal texts: for example, it is mentioned in the contract, formulated in the text of the normative legal act. Sometimes customs are formalized (so, the rules INCOTERMS-2015 representing customs of the international private law) by the written codification (Hlopov, 2011).
2. Contract. Method of creation of contracts is coordination of will of the parties. The set of procedures is essentially invariable irrespective of any factors of law education, but always assumes presence of at least two equal subjects. In case participants of the contract are public educations, the contract can gain value of a form of the objective law instead of situational and legal value. Civil contracts, cooperation agreements with the investigation, collective agreements in the labor law, the administrative contracts, contracts having the constitutional value the federal contracts, international legal contracts having the features are known to practice. Anyway, it is in most cases the written document with the text agreed by all interested parties.
3. Order. The technology of the order assumes the imperious command given by the subject capable to apply coercion, sufficient for his realization. The method of the order is radically opposite to a method of the contract and does not assume any coordination of will. The order is used for creation of both the objective, and situational law. Among technological features it should be noted efficiency of the edition and cancellation of orders. In most cases the subordinate normative legal act becomes result of use of mandative technology, however in monarchic republic the order of the monarch can stand in hierarchy of forms of the law above, than the law.
4. Lawmaking. Is the most fully developed technology in the modern world which is rather in detail regulated? Its result is the text containing standards of the objective law, which is brought to the attention of the greatest possible number of addressees. Ideologically the law supplements technology of the order, connecting an arbitrariness of the persons giving orders defined to requirements what in practice is expressed in the legality mode (Druzin, 2015).
5. Referendum. The technology of a referendum represents vote concerning approval of this or that statutory act or the contract in which all adult and capable population of the state participates anyway. Being a form of direct democracy, this technology shifts responsibility to a direct source of the power - the people therefore it is used for adoption of the most important acts - for example, Constitutions or contracts on accession to other state. Concerning lawmaking the technology of a referendum demands considerably big expenses of material and information resources.
6. Judicial act. This technology is unique as under certain circumstances, initially being created as a form of the situational law, can gain character of a source of standards of the objective law. Its development is in many respects connected with development of the theory of interpretation of maintenance of other sources of the law, first of all, of the law, and assumes the solution of a question of special and ordinary values of legal terms. Hybrid use of this technology together with technology of the order or a law order is of special interest. In this case the Supreme or Constitutional court act as the negative legislator or a law maker and repeal the normative legal act inappropriate to the law or the Constitution created on other technology.
7. Legal doctrine. Is based on detailed theoretical studying of the law in force and development of certain recommendations. As it is noted in literature, in the most obvious look it was demanded in early the period of dismantling of the legal system of feudalism based on the order however keeps the value and today. So, informal comments to the legislation can affect sense of justice of private and public law off takers; serve developments of a certain legal position of the judge when overcoming a gap in the law, etc.
8. The principles and norms of religion are rather archaic technology. Unlike customs its result differs in bigger degree of social stability and relies on divine authority. Most often is the personal law of representatives of this or that faith, however can be in the conflict relations with the state sources of the law or on the contrary, to be supported by the state and to be legitimated in normative legal acts.
9. Joint activity of the state and institutes of civil society. Is rather new technology. Its modern example is tripartite agreements of representatives of labor unions, associations of employers known to the labor law and the state. Unlike the contract does not assume coordination of will, and rather its account. The state capable to formulate conditions on which she can essentially enter joint regulation of the public relations acts as one of participants of such agreements. In fact is the weakened referendum form as assumes not such full coverage of will of citizens, however increases legitimacy of the normative legal act (Lee and Mouritsen, 2018).
10. Law creation by institutes of civil society. Such technology as a matter of fact can be called technology of the local order or lawmaking. Assumes the legitimation in normative legal acts of higher hierarchical level, and itself says in creation of local normative legal acts, the corporate acts containing individual or all-standard instructions (Windeyer, 1973).
11. Creation of the international legal act. Is rather difficult technology using a contractual method? The main difference from basic model is that the role of law-making institutes is played finally. For lack of the surpassing sovereign of the party are forced to absolutize contractual mechanisms even when using imperative means and to independently provide the compulsory force of precepts of law.
12. Creation unilaterally law source natural person. It is applied to creation of situational legal regulation. A classic example is the civil transaction, for example, the will creating norms of distribution of property after death. Is based on custom, the normative legal act or the contract.

13. Use of conclusive actions. Extremely operational technology of creation of the order (for example, a wave a staff of the inspector of traffic) or contracts (silent exchange of money for goods in shop). It is usually legitimated by custom or the normative legal act which attaches to corresponding conclusive actions significance defined semantic.

6. Summary

1. During the research it was established that in the modern Russian theory of the state and the law traditional views of a problem of a ratio of a source and a form of the law prevail. When approaching which can be characterized as narrow concepts of a source and a form of the law are identified, and mean a way of external existence of precepts of law, a way to which they become available to perception by subjects of law realization. At broad approach sources of the law are understood as various factors of law education, and the way of an objectivization of the law is called as a law source in legalistic sense (Mieville Ch, 2005).
2. Any of these approaches does not reflect requirements of modern practice and jurisprudence. Narrow approach ignores communication between a form of the law and factors of law education. Wide, calling these factors nevertheless ignores the mechanism of their influence on law education process.
3. The key category allowing describing as a uniform complex process of law education from the moment of the beginning of influence of factors of law education until creation of an external form of the law available to addressees is the technology. It allows to present law sources as result of the human activity proceeding by certain rules, and the end result directly depends on the chosen ways and means of such activity. Elements of this theory is knowledge:

1.o activities of specially authorized subject for law creation (a law source in dynamics) and about results of this activity (a law source in a statics, or a form it is law), i.e. the source of the law is included by process of creation of rules of law and its result, and a law form - result of activity therefore a law source - whole, and the form is law - its integral part.

2.o factors of influence on law creation process (factors of a norm forming or factors of law education).

4. The structure of legal technology can be presented as set of the following elements:

a) subjects and institutes (organizational structures);

b) law source object, i.e. different types of socially significant; practices or its separate elements which are exposed standard legal to regulation;

c) methods and procedures of creation of the law;

d) the material resources providing law-making activity;

e) the information resources providing efficiency of law-making activity;

e) result of use of technology, i.e. this or that form it is law or as a synonym, one of types of sources of the law in legalistic sense. The technology of creation of the law has the result the text expressing precept of law to some definiteness.

5. The amount of steady technologies of law education of course, also leads to emergence of various forms of the law. Technological features of law-making process are complex criterion of classification of sources of the law in statics. As we believe that it is possible to refer legal custom to them, the contract, the order, lawmaking, a referendum, the judicial act, the legal doctrine, the principles and norms of religion joint activity of the state and institutes of civil society, law creation by institutes of civil society, creation of the international legal act, creation unilaterally of a law source by the natural person, use of conclusive actions are rather archaic technology.

7. Conclusions

In the conclusion it is advisable to note that article has rather program character. Identification of internal structural interrelations of elements of legal technology is required. It is necessary to stop attentively for classifications of sources of the law in statics, on wide empirical material to show how technological features of creation of a form of the law influence its regulatory potential, to reveal degree of variability of each technology.

The solution of these problems will promote formation of new approach to a problem of sources of the law combining advantages of a static and dynamic view of legal forms.

In any legal system of the present various sources the laws are used. Each source as specific technology of creation and existence of the law acts as an object of a theoretical research that allows to upgrade significantly the theory of a source of the law, having reoriented it from the description of empirical material granted by history of the law, sociology and comparative jurisprudence on identification of deep regularities of external expression of system of the law to establish connection of sources of the law with other legal phenomena, to define the place of extra-legal factors in law-making. Also such research approach offers prospects of the applied researches connected with identification of imperfections of law-making technologies and methods of their correction not only in relation to the legislation but also to all system of sources of the law in formally legal sense in general.

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References

Chestnov, I. (2012). *The Post-classical theory is law, SPb.* An aleph press. 650.

Druzin, B. (2015). Social norms as substitute to law. *Albany Law Review,* 79(1): 67-100.

Hlopov, K. (2011). Incoterms 2010, appointment, changes and differences. *Russian external economic messenger,* (1): 60-65.

Lee, T. and Mouritsen, S. (2018). Judging ordinary meaning. *Yale Law Review,* 127: 788 - 879

Mieville Ch (2005). *Berween equal laws, marxist theory of international law.* BRILL: Boston-Leiden.

Pogodin, A. (2008). The situational law regulating complex, statement of a problem, scientific notes of the Kazan state university. *Humanities, T,* 150(5): 45-50.

Pogodin, A. (2013). The situational law and all-regulatory legal relationship in law realization. *Legal World,* (2): 64-68.

Pogodin, A., Krasnov, E. and Valiev, R. (2018). The structure of practice and quality of the objective Law, helix. 8(1): 2447-50.

Rozin, V. (2006). Concept and modern concepts of the equipment, M. IF RAS. 255.

Windeyer, V. (1973). History in law and law in history. *Alberta Law Review,* 11: 123-39.