ARTICLES

Oleg Latynin
Chairman of the Twenty-First Arbitration Court of Appeal, Doctor of Legal Sciences, Associate Professor of the Department of Civil and Arbitration Procedure of the Crimean branch of the Russian State University of Justice

THE DOCTRINAL AND METHODOLOGICAL BASIS OF THE LAW ENFORCEMENT RESTRICTIONS IN THE SPHERE OF CIVIL CIRCULATION

DOI: 10.30729/2541-8823-2023-8-2-40-59

Abstract. *The category of "right restriction", associated mainly with formal technical-legal tools, taking into account the purpose and patterns of meaning formation, needs some rethinking. In particular, it is necessary to better emphasize its substantive aspects in the context of ensuring a proper balance between the interests of the citizen and society. In turn, we note that the unity of methodology, doctrine and judicial enforcement forms a certain specific triad, which has a certain heuristic potential for the study of existing mechanisms of judicial protection and their improvement in the conditions of modernization, globalization, and integration processes in the modern post-industrial world. As a visualization of this provision, we propose a kind of fractal. The formation of meanings in the legal sphere, which also has the features of a fractal, is of special scientific interest to us. Taking into account the fractal properties of law, as outlined in this study, let us delve into the reasoning of the triad consisting of methodology, doctrine and judicial enforcement. Judicial practice, represented as the third, lower tier of our imaginary triad, in this connection appears as a kind of empirical platform where impulses are simultaneously received "from above".*

Keywords: *law restraint, law enforcement, legal triad, methodology, doctrine, judicial law enforcement.*

In solving any intellectual problem, a moment of subjectivity is inevitable, expressed, in particular, in what way is chosen to achieve the goal in this particular case. In this study, which generally has a practical orientation, we proceed from the principle of unity of methodology, doctrine and judicial enforcement and, accordingly, we begin with an explanation of its substantive content.

We suggest that the unity of methodology, doctrine and judicial enforcement forms a certain specific triad, which has a certain heuristic potential for the study of existing mechanisms of judicial protection and their improvement in the context of modernization, globalization, and integration processes in the modern post-industrial world. As a visualization of this provision we propose a kind of fractal — a continuously rotating figure of an equilateral triangle in slowly pacing with corresponding names of vertices, all of which are clickable, and as a result, one can simultaneously get access to a variety of information on the current state of judicial practice as a subsystem of Russian law through hyperlinks. Just as the "one-stop-shop" platform optimizes the provision of state and municipal services, the principle of unity of methodology, doctrine and judicial enforcement, in our view, is the window through which the best prospects for a more complete, comprehensive and in-depth understanding of the Russian legal system and the trajectory of its development for the common good are opened.

In mathematics, a fractal is a self-similar figure. We deal with fractals whenever we observe multilevel objects consisting of parts similar to the whole. For example, a single branch of a tree, with all its knots and smaller branches, resembles an entire tree. Another example of a fractal is natural language. In the social aspect, it is nothing but an agreement on a certain fragmentation of the surrounding world into multilevel categories and assigning them verbal labels composed of a finite number of elements — letters and sounds. The depth and direction of thoughts depend on what fractals a person has learned, i.e., how he is able to search for, create, combine and scale meanings, combine separate sounds into words, combine words in sentences, paragraphs, and entire texts serving to express meaning[1]. The focus on the search for and realization of meaning is a fundamental human feature. At that, meaning is by no means a subjective category: a person does not invent it, but finds it in objective reality, expands and deepens it, or, on the contrary, stabilizes it in the process of making vitally important decisions[2].

---

[1] *Kukushkin N.* Khlopok odnoy ladonyu: kak nezhivaya priroda porodila chelovecheskiy razum [The clap of the palm: how inanimate character gave birth to the human mind]. M.: ANF, 2020. Pp. 468–469.

[2] *Leontyev D. A.* Psikhologiya smysla: priroda, stroenie i dinamika smyslovoy realnosti [The psychology of meaning: the character, structure and dynamics of meaningful reality]. M.: Smysl, 2019 // [Electronic resource]: URL: https://lib.uni-dubna.ru/search/files/psy_leo_psy_smisla/1.pdf (date of address: 25.05.2021).

The formation of meanings in the legal sphere, which also has signs of a fractal, is of particular interest to us. We were finally convinced of the existence of fractal properties of law under the influence of the fundamental work of the judge of the Constitutional Court of the Russian Federation, Professor G. A. Gadzhiev[1]. Here is what he writes: "In all human communities, all peoples to a greater or lesser extent appear the same needs, expectations. One of them is the need for justice. It is this need that contributes to the fact that different peoples form approximately the same legal conceptual views"[2]. These include, inter alia, such universal legal concepts as the subject of law, the will of the State, objective truth, the rule of law, presumptions, fictions, legal relations, formal sources of law, etc. There are thousands of them, and all of them are ideal matter, intellectual constructions invented by mankind in order to find the right answer to any legal question posed. A person buying a house in real life is interested in the consumer qualities of the house, but in legal space he is interested in who is the owner of the property and what is the content of the state registration documents. In the legal conceptual space, the subjects and objects of rights and other phenomena "live"[3].

As G. A. Gadzhiev emphasizes repeatedly, the conceptual part of normative regulation developed objectively, as man realized that he lives in a society of his own kind, where it is not profitable to deviate from objectively necessary rules of joint existence, which, in turn, should not contradict either the physical or the spiritual layers of existence, existing in accordance with the inherently immanent laws. "Man only cognizes and recognizes the naturalness of the legal order that has arisen, just as he must recognize the physical or economic laws or the laws of thought. Legal constructions are not only created by the intellect of man, but are reproduced, discovered. Man, of course, has a creative beginning and, meeting objective givenness in the structure of society, develops objective givenness in the form of a legal concept, one of the most ancient"[4].

Therefore, legal thought leads to the realization that within the objectively existing real, embodied reality around us there is also a special reality — legal reality: an independent enclave, a specially created semantic field, self-sufficient, including for the resolution of legal conflicts by an impartial judge in a reasonable time[5]. All legal formulas meaningful in legal usage, such as "dignity of the

---

[1] *Gadzhiev G. A.* Ontologiya prava: (kriticheskoe issledovanie yuridicheskogo kontsepta deystvitelnosti) [The ontology of law: (a critical study of the legal concept of reality)]. M.: Norma, 2013. 319 p.

[2] Ibid. P. 285.

[3] Ibid. P. 14.

[4] Ibid. P. 281, 287.

[5] Ibid. P. 8, p. 291.

individual", "economic freedom", "rule of law", etc. — are more than mere words. They accumulate the achievements of humanity's evolving legal reason and natural-law intuition, and behind the linguistic shell there is a vast, deep and multilayered legal meaning, sometimes called the "spirit of the laws"[1]. For the most rational resolution of legal disputes, it is important to correctly extract this meaning from a predetermined range of sources of law in a state of hierarchy, provided that the court's interpretation of the law is subject to the principle (idea) of certainty of law[2].

We emphasize: not to imagine, not to introduce a subjective element of arbitrary interpretation in the solution of a dispute about the right, attributing to the content of the norm something that is not there and cannot be — namely to extract. According to the explanatory dictionaries, to extract — means "to pull out, take out, choose, pull, separate the important, essential"[3] (V. I. Dal); to get from within, from the composition of something, make appear somewhere from the depths. In our case, this depth is the entire legal reality as a whole, in an objectively logical combination of statics and dynamics, a combination of formal-dogmatic representations of law with its other ontological representations. Everything that is "on the surface" of legal reality and observed directly through legal texts — norms, institutions, legal relations, the mechanism of legal regulation — is embodied in the "depth", due to such phenomena and processes as goal-setting, ideological content, legal genesis, legal formation, legal values and their perception, competence, and competence of jurisdictions, law mobilization and effectiveness of legal action, etc.

The subject who resolves a legal dispute has to appeal to both the surface and the underlying levels of legal reality, to combine and scale the legal meaning identified through the interpretation of norms and institutions from various branches of law. The thinking actions carried out in this case are in one way or another in a relationship of self-similarity with the processes of meaning-making, which in their time led to the invention of law as such, as an instrument of reconciliation of conflicting interests and maintaining the atmosphere of order necessary for the sustainable development of socium.

The confirmation of this we find from the positions of ontology of law, substantiated by G. A. Gadzhiev. As a result of the settlement of especially important for society legal disputes in a certain historical moment was found a balance of legitimate interests of subjects of legal life, then it was enshrined in the positive law,

---

[1] *Gadzhiev G. A.* Op. cit. P. 7.

[2] Ibid. P. 191.

[3] Slovari.ru // [Electronic resource]: URL: https://www.slovari.ru/search.aspx?s=0&p=3068 (date of address: 25.05.2021).

and then has already been improved over the millennium. As for the rationality of the basic legal constructions and their common ultimate goal — the settlement of legal conflicts, they have remained and remain unchanged[1].

To illustrate these points, consider the following analogy. Biology teaches that the development of a multicellular organism begins with a single germ cell, which contains all the information necessary to build a complex multicellular body. For example, the human embryo originally contains the same germ cells as the evolutionary predecessors of humans — fish, reptiles, etc. Externally, a human embryo at 29 days old is difficult to distinguish from a river eel embryo at 36 hours old, but later the same germ cells in the human embryo develop not the gills that fish breathe, but very different organs — the neck and head fragments[2].

An analogy is seen in the fact that some "germ cells" exist in legal reality as well. Its point of origin is goal-setting. Since the conflict is an objective aspect of human existence, the very fact of people's life in specific conditions of existence already generates the problem of coordination of interests and prompts an active search for its solution. In the conscious striving to resolve conflicts is a single deep basis for the formation of meanings, which later unfold into a coherent, orderly system of ideas and perceptions, which can be called the legal conceptual space. In terms of goal-setting, both archaic and contemporary societies have a high degree of similarity, since everyone needs social order at all times. Another thing is that the realization of a common goal is determined by values, technical and legal possibilities and many other factors, not at all the same throughout the history of mankind. As a result, such strikingly different systems of legal regulation as archaic and modernized law emerge from the same "embryonic cell" of goal-setting.

Generalization of all the above provisions leads to the conclusion that the legal concept of reality is a fractal — a discrete semantic integrity, consisting of many systematically interrelated elements, in turn, formed from legal representations of lesser order, each of which is the result of the evolution of this or that ideological content, traced over a more or less long period of historical time. Accordingly, the depth of legal analysis also depends on what fractals are assimilated by the subject of knowledge of a legal phenomenon and how it can operate them in solving a specific practical problem, combining the different components of the identified legal meaning in compliance with the principle of legal certainty.

---

[1] *Gadzhiev G. A.* Op. cit. p. 281.

[2] 200 zakonov mirozdaniya [200 laws of creation] // [Electronic resource]: URL: https://elementy.ru/trefil/21184/ Ontogenez_povtoryaet_filogenez (date of address: 20.05. 2021).

Thus, characterizing the mechanism of legal relations, P. P. Serkov says, in particular, that each rule of conduct is formed by the ideological content of not one norm, but a complex of norms. The burden of combining this content is borne by each element of legal relations. Further, "each such aggregate in each element of a legal relation "meets" the concreteness of the facts of the regulated situation and has an impact on the subjects of legal relations"[1]. To this indisputable thesis it remains only to add that the adequate identification of the ideological content of legal norms implies a sufficiently highly developed skill of combining meanings or, in another terminology, operating with fractals.

Here is another example. In fact, about fractals and the ability to combine the meanings extracted from the text of the norm, the judge of the European Court of Human Rights in 2003–2017. Kh. I. Gadzhiev, when he points to the non-identity of judicial lawmaking and legislation (italics below is ours — *O.L.*): "Judges […] are in need of interpretation, that is, they are faced with the need *to be creative*. Using methods of interpretation well-developed by the theory of law, judges apply the most appropriate of them to the case at hand, deriving *various meanings* from the applicable rule of law. They are *free* to carry out this process, but the first thing they are guided by is the *text of the law* and the *materials of the case*; the second is *common sense*. Thus, an important constraint in any interpretation is the *text of the law* itself and the *facts of the case*. The other serious element is the *ideas* that guide the judge, his *experience*, and *knowledge* of the same social expectations, *the ability to find the required balance* between the interests of the individual and those of society on the way to the goal pursued"[2].

Therefore, when applying to the court, the parties present their position and the materials justifying it, which are a combination of meanings derived from their own interpretation of the law, practice in similar cases, standard samples of procedural documents and, possibly, some other sources. The judge gives them a legal assessment, guided by the meanings extracted from the existing legal norms in the process of their professional interpretation. Next, the judge has to make a reasoned decision on the disputed issue, which this judge considers just, based on the meanings, values, and attitudes that have developed as components of his worldview. As a result, the administration of

---

[1] *Serkov P. P.* Pravootnoshenie: teoriya i praktika sovremennogo pravovogo regulirovaniya. Ch. 2, 3: Ochertaniya pravovoy universalnosti. Ch. 3. Zakonomernost pravovykh zakonomernostey [The legal relationship: theory and practice of modern legal regulation. Part 2, 3: Outlines of legal universality. Part 3. Regularity of legal regularities]. M.: Norma, 2019. P. 1047.

[2] *Gadzhiev Kh. I.* Sudebnye doktriny i effektivnost pravoprimeneniya [Judicial doctrines and effectiveness of law enforcement [Judicial doctrines and effectiveness of law enforcement] // Zhurnal rossiyskogo prava [The Journal of Russian Law]. 2019. No. 6. P. 14.

justice becomes inseparable from the more or less successful processes of the generation of meanings (sense-making) within the legal conceptual space, and the corresponding thought operations are realized in the text of the judicial act, which reflects, among other things, the judge's qualifications and the entire professional and life experience.

On the basis of the above fractal properties of law, let us continue our discussion of the triad, which consists of methodology, doctrine and judicial law enforcement. It is known that the method of triad we are interested in was first substantiated back in the ancient era and until now is widely used in the humanities as a certain method of philosophical construction, a systemic tool of reasoning, organization and deployment of thought, it's structuring for the purpose of the most complete and comprehensive knowledge of systemic objects. The triad is a special type of deductive grouping, referring not so much to rows of terms or concepts, as to the very reality of open systems in need of ontological and epistemological research[1].

Note that the so-called trinitarian thinking, or "thinking in threes", is usually considered one of the features of archaic consciousness, the primary source of formation of abilities to abstract constructions of systemic type. As an illustrative example, we can give a variety of ternary symbols, firmly entrenched in the cultural heritage of mankind: three-headed mythical creatures, heraldic trefoils, tricolor flags and three-element armorial shields, trident, trident and many, many others — at one time the Celts alone invented over three hundred symbolic triads, which were given magical meanings for all occasions of life. At the same time, each triad was represented as a kind of "unwinding roll," allowing for the possibility of unfolding further, almost to infinity. The triad was characterized by complex interrelations of its components and was associated with the ideas of development, orderliness, and harmonious wholeness[2].

The triadic view of systemic phenomena implies, in particular, that the deployment of the triad occurs depending on which of its levels there is a tension that requires the restoration of the adequacy and integrity of the triad. For this purpose, aspects, attributes, and sides of other levels are selected and subjected to appropriate systemic changes. At the same time, the components of the triad are in relations between them more complex than hierarchical.

The upper in the triad is the primary system-forming, something that exists and gives existence to the middle and through it, already indirectly, to the lower. The bottom is a kind of malleable, changeable empirical material, and

---

[1] *Vakulenko N. S.* Ierarkhicheskaya triada kak metodologicheskiy printsip [The hierarchical triad as a methodological principle] // Khristianskoe chtenie [Christian reading]. 2018. No. 2. Pp. 173–184.

[2] Ibid.

it can contain anything. In terms of content, the relationship between the triad components can be both formative (structuring) and destructive (destructuring). Structurization "from above" occurs when life, being and the possibility of endless changes are introduced into the system, which is realized thanks to the multivalence and flexibility of intra-systemic connections. Structurization "from below" is expressed in the tendency to legitimize, to give finality to the system, and to give unambiguity and simplicity to intrasystem connections. Destruction means the emergence of such changes, which by the principle of conditional interdependencies of the type "if — yes, then …; if — no, then …" violate the flexibility of the system as a whole, make transitions from part to whole and vice versa impossible[1].

Certainly, the above statements do not exhaust the logical-philosophical problematic of the triad as a universal algorithm of thought operations. Nevertheless, this information is enough to state that the triad has long ago proven to be a valid means of expanding the analysis and understanding of phenomena of the surrounding reality, discovering new focuses of attention and seeing these phenomena both at the deep level of their existence and in perspective. Under such circumstances, we do not see any obstacles to extrapolating this method to the study of systemic objects of the legal sphere, which have fractal properties.

Therefore, methodology, doctrine, and judicial enforcement, taken as a triad, represent different aspects of modern Russian judicial practice, and each member of the triad mutually determines, creates, and develops the others. In our opinion, the trigger for the deployment of the triad, which determines the dynamics of changes at all its levels, are currently two interrelated circumstances.

Firstly, as the social relations become significantly more complex and the differentiation of interest subject to legal protection deepens, as well as the acceleration of the pace of updating legislation, it becomes more and more obvious that a purely formal application of norms and institutions of law, carried out in isolation from their ideological basis and, more generally, all values of society — does not fully meet the needs and challenges of the time.

Secondly, despite numerous reform efforts since the adoption of the Russian Constitution of 1993, it is the formal approach to resolving disputes about the law, adopted through Soviet practices and professional legal consciousness, that is inherited by the new cadres, and the preservation of this institutional inertia is predicted in the next two or three generations of Russian judges[2].

---

[1] *Vakulenko N. S.* Op. cit.

[2] Sudebnye doktriny v rossiyskom prave: teoriya i praktika [Judicial doctrines in Russian law: theory and practice] / otv. red. V. V. Lazarev, Kh. I. Gadzhiev. M.: Norma, 2020. P. 312.

According to N. A. Kolokolov, "the Soviet legal system occluded itself in a purely formal approach to law"[1]. From modern positions this is rather a significant disadvantage than a virtue, although it is impossible to eliminate the formal approach, which is one of the facets of law interpretation, from judicial enforcement. Moreover, it is necessary, sufficient, and even very effective in the consideration of simple cases, initiated also for the sake of consolidation by the judicial act of a certain *status quo* of the parties. Uncomplicated cases are in the majority, as evidenced by court statistics. For example, according to the data of April 2021, about 77% of civil cases, 90% of administrative cases and more than half of economic disputes are considered by the courts in the mandated and simplified order[2]. Moreover, in the conditions of technological modernization, artificial intelligence can independently and fairly well cope with cases where there is no dispute as such.

At the same time, this does not mean that at present we can neglect the improvement of legal consciousness and the development of professional skills, which provide a broader approach to the administration of justice than pure formalism. It is true that it is not artificial, but rather a human intellectual resource in justice — a key component, without which the full protection of the rights and freedoms of citizens is not possible[3].

In this regard, we evaluate positively the appearance in the literature of arguments in favor of strengthening the interdisciplinary basis of the judge in the judicial process. For example, according to E. A. Fokin, "the judges' assessment of good faith or bad faith behavior without involving at least minimal psychological knowledge, as well as knowledge about the economy, market structure, specifics of business create the risk of a formal attitude to the dispute under consideration. Thus, as of today, the expediency of using interdisciplinary approaches in complex economic disputes is obvious, which together will allow considering the case as fully as possible. As a consequence, there must be a certain rethinking of the requirements for judicial candidates, who must have not only deep professional experience (not limited to

---

[1] *Kolokolov N. A.* Pravo sovremennoy Rossii: istoki i sovremennost [The law of modern Russia: history and modernity] // Istoriya gosudarstva i prava [History of state and law]. 2014. No. 3. P. 39.

[2] *Momotov V. V.* Vystuplenie predsedatelya Soveta sudey RF na vebinare 18 aprelya 2021 g. dlya sudey gosudarstv — chlenov ShOS [Speech by the Chairman of the Council of Judges of the Russian Federation at a webinar on April 18, 2021 for judges of Shanghai Cooperation Organization member states] // [Electronic resource]: URL: http://www.ssrf.ru/news/vystuplieniia-intierv-iu-publikatsii/41745 (date of address: 25.05.2021).

[3] *Momotov V. V.* Vystuplenie predsedatelya Soveta sudey RF na plenarnom zasedanii Soveta sudey RF 25 maya 2021 g. [Speech by the Chairman of the Council of Judges of the Russian Federation at the plenary session of the Council of Judges of the Russian Federation on May 25, 2021] // [Electronic resource]: URL: http://www.ssrf.ru/news/vystuplieniia-intierv-iu-publikatsii/42229 (date of address: 25.05.2021).

work in the judicial system), but also substantive knowledge of, at least, human psychology"[1].

It is true that the named author immediately makes a reservation concerning the "noticeable signs of utopianism" of this idea for modern Russia, "especially in the conditions of the enormous workload of some Russian arbitration courts"[2]. With this, unfortunately, it is impossible not to agree. Nevertheless, we optimistically believe that this state of affairs is temporary. The processes of development in the system of administration of justice — just like any progress — cannot be cancelled, so there is no doubt that the situation described above will undoubtedly become a reality.

Once again, by virtue of his profession, a judge administers justice, that is, he renders a decision that would exhaust the legal conflict that has arisen and that would be fair. "The importance of making a judicial decision, the responsibility behind it — rightly notes Professor D. I. Dedov, acting judge of the European Court of Human Rights for the Russian Federation — puts it on the same level of importance as a survival decision, since such a decision has consequences in the long term for the human community as a whole"[3].

As a consequence, the exercise of state powers to resolve disputes about the law involves a high and intensive intellectual load. Judicial interpretation of the rules of law, the development of judicial legal positions, judicial discretion, judicial argumentation is, on the one hand, the functions of the independent administration of justice, and on the other — the thinking functions. Professional judgments of a particular judge, ideas about the meaning and content of those or other legal prescriptions, formulated in the course of legal assessment of the circumstances of the case, further somehow become part of the overall intellectual contribution of the judiciary to the development of the legal system, as well as society as a whole, as fair justice is a necessary condition for the well-being of citizens and the prosperity of the state.

It is clear and unquestionable that not every interpretation can deserve the highest legal authority and acquire a binding character. However, in any case, both judicial interpretation and judicial discretion in assessing the circumstances of the case and elaborating the position of the court are an integral part, even if not directly visible, but nevertheless very important and responsible work of the judge, namely, the process of intellectual search aimed at resolving a particular dispute of law. We believe that it would not be an exaggeration to say that the productivity of

---

[1] Sudebnye doktriny v rossiyskom prave: teoriya i praktika [Judicial doctrines in Russian law: theory and practice] / otv. red. V. V. Lazarev, Kh. I. Gadzhiev. Op. cit. p. 275.

[2] Ibid.

[3] *Dedov D. I.* Op. cit. p. 600.

such a search, its results, ultimately determines the minimization of risks of formal attitude to the case under consideration, as well as the degree of effectiveness of the judicial defense in general[1].

"It seems that such an approach cannot be supported since it does not consider the realities of modern social and legal development", believes V. V. Momotov, and we fully agree with this point of view[2].

V. V. Momotov supports it, in particular, by referring to the positivist theory of G. Kelzen, within the framework of which initially there was no doubt that the law is a totality of legal norms, including those contained in judicial acts, and any court decision creates a new norm, arising from a more general rule of law and specifying it[3].

For his part, let us add that G. Kelzen also writes about the fallacy of an absolute identification of law with law. The law does not contain a ready-made right, which has only to be expressed by means of a judicial agreement, i.e., in a judicial decision. "The function of the so-called pleading", argues G. Kelzen, "is far more constitutive; it consists in law-making in the proper sense of the word. If we have a specific fact that must and will be linked to a specific legal consequence, this link is made first and foremost through a judicial decision. A judicial decision is therefore an individual legal norm, an individualization, and concretization of a general or abstract legal norm, a transfer of the ongoing process of rule-making from the sphere of the general into the sphere of the individual"[4].

Therefore, the formalist approach, at a minimum, is a simplification, and at a maximum — even some distortion of the original content and essence of the positivist doctrine.

In fact, the development of social relations, especially so dynamic as in the modern era, objectively exceeds the dynamics of the development of normative-legal regulation. In the conditions of rapid scientific, technological, informational, socio-economic and other progress of society, interactions between different actors become significantly more complex and differentiated, so that there appears something fundamentally new, not known to the current legal regulation. Conflicts

---

[1] *Dedov D. I.* Op. cit. p. 30.

[2] Ibid.

[3] *Momotov V. V.* Tolkovanie pravovykh norm Verkhovnym Sudom Rossiyskoy Federatsii v kontekste sovremennoy pravovoy sistemy [Interpretation of legal norms by the Supreme Court of the Russian Federation in the context of the modern legal system] // Gosudarstvo i pravo [The State and Law]. 2018. No. 4. P. 33.

[4] *Kelzen G.* Chistoe uchenie o prave: vvedenie v problematiku nauki o prave [The pure doctrine of law: an introduction to the science of law] // Rossiyskiy ezhegodnik teorii prava [Russian yearbook of legal theory]. 2011. No. 4. P. 460.

arising in this connection inevitably turn into specific judicial disputes, and therefore, "judges are not only able, but also obliged to identify the applicable rules of law and correctly interpret them in relation to the relevant situations"[1]. Thus, the judge's professional thinking and the intellectual functions derived from it, such as judicial interpretation, judicial discretion, and judicial reasoning, are now much more demanding than ever before.

The choice between formalism and other possible approaches to the administration of justice, the interpretation of legal phenomena and the legal system as a whole is nothing other than the practical implementation of the top element of the triad we discuss, namely the methodology. Some issues of methodology will be the subject of our further consideration, but now, in order to avoid duplication of information, we will only refer to the opinion shared by us D. I. Dedov, who considers the most relevant methodological task of modern jurisprudence the identification of priority interests. As an alternative, the named author indicates the search for the balance of private and public interests and derived from it practical methodology of proportionality and legal certainty. In addition, the economical methods of law analysis, widely used in the practice of American judges, are mentioned[2].

It is also noted that dialectical materialism, which guided Soviet scientists in their research and to which "some Russian scientists continue to devote their articles", does not give us a point of reference for solving the specific problems of modern jurisprudence. There is no doubt that knowledge about the movement from the abstract to the concrete or about the unity and struggle of opposites remains a part of our cognitive arsenal and scientific picture of the world, but today we cannot do without this knowledge, or we need a new view of it from a different viewpoint[3].

In this regard, D. I. Dedov puts forward a hypothesis about the productivity of a new but useful method of integrating scientific knowledge from different spheres of scientific activity[4]. Given that society is a systemic form of human existence and law is a reflection of these systemic factors, it is possible to consider as necessary for the knowledge of law even those studies, the subject of which seems far from the law in its everyday understanding. The integration of knowledge "makes it possible to tie the law to life"[5].

---

1 Ibid. P. 32.

2 *Dedov D. I.* Op. cit. p. 5, 6.

3 Ibid.

4 Ibid. P. 9.

5 Ibid. P. 8–10.

However, the system of views and approaches presented in the methodology manifests itself at the next levels of the triad — in doctrine and judicial law enforcement. Being practice-oriented, it is aimed at finding ways to "bridge" between the general (abstract prescription of a legal norm) and the individual (concrete life case subject to legal solution)[1]. There is also a possible contamination of doctrine and judicial enforcement — judicial doctrine, the main feature of which "is that it is derived empirically, through the application of legal norms by the court to specific legal relations, using various methods of legal interpretation and legal reasoning, and requires the court to possess the necessary level of lawmaking technique to exercise judicial discretion in order to fairly resolve the conflict of the parties to the litigation by legal means"[2].

Each of the judicial doctrines has substantive and formal content and, in general, is an ad hoc adaptation of legal theory to solve the problems of the prompt response of the judiciary to social and economic processes relevant to society at this stage of its development. In addition, taking into account the fractal properties of law, judicial doctrine can be presented as a certain semantic concentrate, the result of inductive and deductive grouping of legal ideas suitable for the resolution of a particular legal conflict on the principles of legal certainty and justice.

As an illustration, we can cite the currently widely known judicial doctrines in the field of taxes and fees, including on the interrelated issues of taxation and civil turnover — for example, the presumption of good faith by the taxpayer, the doctrine of "lifting the corporate veil" and some others. It is noteworthy that judicial doctrines are formed mainly in those areas of legal regulation that emerged or received a new impetus for development in the post-Soviet legal field with the establishment of the separation of powers in Russia, the transition to a market economy, and the construction of an open society. We find the explanation primarily in the fact that the creation of judicial doctrine is influenced not only by the correct establishment of facts, but also by the degree of theoretical and legal development of the issue to be resolved by the court. We believe that much more important factors in the formation of judicial doctrine are the potential for judicial independence and the level of judicial discretion allowed by law.

Concretizing the mentioned triad "methodology — doctrine — judicial enforcement" in the aspect of the interrelations of its elements, we get approximately the following.

---

[1] Sudebnye doktriny v rossiyskom prave: teoriya i praktika [Judicial doctrines in Russian law: theory and practice] / otv. red. V.V. Lazarev, Kh. I. Gadzhiev. Op. cit. p. 11.

[2] Sudebnye doktriny v rossiyskom prave: teoriya i praktika [Judicial doctrines in Russian law: theory and practice] / otv. red. V.V. Lazarev, Kh. I. Gadzhiev. Op. cit. p. 22.

The general premise, the basis for the specificity of our triad and sine qua none of its development is the idea of social order generated by the conditions of social life, corresponding to the fundamental human desire to live, to continue the family, to transform the environment to meet their needs, to develop, and to strive for the best. Further, the reflexive attitude toward the problems of coexistence in society gives rise to the goal-setting we have already mentioned: to find a way to resolve conflicts that endanger the social order. This goal-setting gives the initial meaning to the activity unfolding in this direction, in the implementation of which, in turn, new meaning connections arise and new meaning centers are formed; from them again come meaning connections of the second, third, and more orders, and so on to infinity, in the perspective of "humanity as a civilization of law"[1]. In a particular law enforcement situation, the task is to correctly find the meanings necessary in a given case and combine them appropriately, making a legitimate and justified decision.

In our opinion, the most complete explanation of these processes is possible in a philosophical plan close to Aristotle's entelechy — the doctrine of act and potency, of the reality and finality of everything, as well as of what leads from a potential state to actual existence and keeps it in being[2].

By the purposive cause of a thing, it is meant that this thing contains its purpose in itself, i.e., it is created for itself, is purposive from the beginning, already at the moment of creation. Social order appears to us as such a thing. It is necessary for order, it is expedient in itself, as such, and all the rest are only concomitant circumstances in certain historical conditions. Objectively, the orderliness of life is necessary and important for all, that is how man is organized. However, the existence of a common target cause does not exclude, but rather presupposes the existence of methodological differences, i.e., the difference in how this goal can be concretized in the context of current tasks and what the ways of its realization are.

Thus, for example, the Russian pre-revolutionary newspaper "Poryadok" (Order), published in St. Petersburg since January 1, 1881, under the editorship of M. M. Stasiulevich, set the task of introducing the idea of legal order into the consciousness of society and declared that in an educated society "without a clear

---

[1] The term was proposed by V. D. Zorkin. See, for example: *Zorkin V. D.* Chelovechestvo mozhet vyzhit lish v forme tsivilizatsii prava [Humanity can survive only in the form of a civilization of law] // [Electronic resource]: URL: http://rapsinews.ru/publications/20210 518/307050383.html (date of address: 25.05.2021).

[2] *Boroday T. Yu.* Entelekhiya [Entelechia] // Novaya filosofskaya entsiklopediya [The new Encyclopedia of Philosophy]. T. 4. Pp. 444–445. M., 2001 // [Electronic resource]: URL: https://iphlib.ru/library/collection/newphilenc/document/HASH019 4d86f3ba748084f864994 (date of address: 20.05.2021).

and freely formed consciousness of each person of his rights and his duty" such an order is impossible[1].

A more recent example is the difference in the content of the goals of legal regulation, which D. I. Dedov points out: according to the Constitution of the Russian Federation, the foundations of the constitutional order are morality, health, rights, and legitimate interests of others, ensuring national defense and security of the state; according to the Treaty of Rome on the establishment of the European Union — improving the quality of life, environment, level of competition, and preservation of cultural values. Noting the mismatch of reference points, as well as the fact that the implementation of EU values limits the efficiency of the economy, D. I. Dedov sees inconsistency here, indicating that "we do not fully and clearly understand our values, and the current concepts of legal theory do not provide us with any algorithm for understanding this"[2].

It turns out that from the methodological, upper level of the triad, we logically move to the middle, doctrinal level. The search for ways to solve a problem relevant from the point of view of legal regulation inevitably leads to the development of new theories that can, in turn, improve methodology and optimize practice, i.e., from the middle level to influence both the upper and lower levels of the triad. It is at the doctrinal level that the process of extending the meaningful connections originally embedded in goal-setting itself takes place. Thus, having set a goal to build a certain socio-normative system or subsystem, we must fully realize what values we will be guided by. These values will form the point of reference in the spread of meaning from the leading meaning structures to the more particular ones, which are deployed as we solve a specific research or practical task.

A good example of the multidirectional development of the accumulated semantic experience at the doctrinal level can be found in attempts to rethink the Soviet legal heritage, which contains a lot of positive potential[3]. Its objective assessment, free from any bias, is possible only if we delve into both the essence

---

[1] Rossiyskiy liberalizm: idei i lyudi [Russian liberalism: ideas and people] / pod obshch. red. A. A. Kara-Murzy. T. 1: XVIII–XIX vv. M.: Novoe izd-vo, 2018 // [Electronic resource]: URL: http://www.rusliberal.ru/books/Ros_Liberals_ch_I-1912.pdf (date of address: 20.05.2021).

[2] *Dedov D. I.* Op. cit. p. 4–5.

[3] Sovetskoe yuridicheskoe nasledie: chto my pereosmyslivaem? [Po itogam mezhdunarodnoy konferentsii "Pereosmyslenie sovetskogo yuridicheskogo naslediya. Nash put k pravu", NIU VShE, 12 oktyabrya 2017 g.] [The Soviet legal heritage: what are we rethinking? [On the results of the international conference "Rethinking the Soviet legal heritage. Our Path to Law", National Research University Higher School of Economics, October 12, 2017]] // [Electronic resource]: URL: https://pravo.hse.ru/news/ 210843118.html (date of address: 20.05.2021).

of Soviet practices and the current legal situation at the macro level, i.e., at the concept level[1].

Further, judicial practice, represented as the third, lower tier of our imaginary triad, is a kind of empirical platform where impulses are both received "from above", from the first and second levels, and transmitted to the same levels "from below upwards", thus giving the triad a cyclical closure. Conditioned by the goal of an effective mechanism for resolving legal conflicts, methodological research leads to the development and improvement of doctrine, as a result of this contamination, judicial doctrines and legal positions are formed, but when life outstrips the dynamics of legal regulation, it is at the level of judicial practice that the demand for new methodological and doctrinal developments appears.

The outlined mutual transitions between the levels of the triad are periodically repeated, which is consistent with the character of social dynamics. As P. P. Serkov correctly mentions, social life by definition has no internal stability, as it is filled with numerous, diverse, and spontaneously arising interests. In response to the threat of chaos appears legal regulation — the purposeful, conscious, and formalized activity of society, the implementation of which requires not only static but also dynamic tools of coordination, harmonization of the complexity of social existence on the terms of justice[2].

Notice that all the above theoretical provisions somehow mention goal-setting as a conscious orientation of activity to create effective legal forms of social conflict resolution. Purposefulness is the root cause of meaning-making in the legal sphere, the "germ cell" of legal reality, as well as a determinant of the unity of methodology, doctrine and judicial enforcement.

Meanwhile, the emphasis on the teleological aspects of the implementation of justice implies some change in the interpretation of legal restrictions. Usually they are considered in the public-law plane, used as a sectoral jurisdictional tool, a technique of technical-legal consolidation of prohibitions, the establishment of formalized boundaries of legal freedom of subjects, and the demarcation of the space of choice of permitted options of behavior.

---

[1] Sovetskoe yuridicheskoe nasledie: chto my pereosmyslivaem? [Po itogam mezhdunarodnoy konferentsii "Pereosmyslenie sovetskogo yuridicheskogo naslediya. Nash put k pravu", NIU VShE, 12 oktyabrya 2017 g.] [The Soviet legal heritage: what are we rethinking? [On the results of the international conference "Rethinking the Soviet legal heritage. Our Path to Law", National Research University Higher School of Economics, October 12, 2017]] // [Electronic resource]: URL: https://pravo.hse.ru/news/ 210843118.html (date of address: 20.05.2021).

[2] *Serkov P. P.* Pravootnoshenie: teoriya i praktika sovremennogo pravovogo regulirovaniya (Ch. 2, 3) [The legal relationship: theory and practice of modern legal regulation (Parts 2, 3)]. M.: Norma, 2019. Pp. 86–87.

At the same time, the formula of Part 3 of Article 55 of the Constitution of the Russian Federation does not exclude the possibility of a broader and universal, teleological understanding of right restrictions, because the conditions of restriction of human and civil rights and freedoms are designated in the Constitution of the Russian Federation as constitutional goals of legal regulation and formulated as priority values subject to legal protection.

In such a case, right restrictions appear not just as a technical-legal tool, but as one of the fundamental ideas that form professional legal consciousness. We agree that it "should be as stable as the formula "twice two is four", where the symbols denoting numbers are created by man, but represent an undeniable truth within the framework of everyday reality, accessible by simple observation"[1].

For judges, the stability of professional legal consciousness is especially important. As rightly noted by V. V. Momotov, "law is not natural science. A judge cannot be neutral and free from subjective value judgments in a judicial dispute, even if he tries to treat the essence of what is happening "without anger and partiality". In the real social fabric, there are subtle processes of spiritual life that do not assume an unambiguous connection between cause and effect. It is in law that social practice is molded, which means that in order to understand the legal mechanism of a legal dispute, the judge needs to look at it through a social and human prism"[2].

As it seems to us, the teleological interpretation of legal restrictions corresponds to the idea of the common good, which consists in the fact that restrictions on the freedoms of a particular individual are legitimate when this restriction will give positive results for society as a whole, including this individual. That is, he must understand and recognize that the restrictions on him are ultimately for his own good[3]. The next presentation will be devoted to the development of a teleological interpretation of right restrictions.

Based on the principle of unity of methodology, doctrine and judicial enforcement discussed above, let us formulate a few final theses of general character.

The realization of the right of citizens to judicial protection and the improvement of the quality and efficiency of justice are primarily issues of

---

[1] *Dedov D. I.* Op. cit. p. 7.

[2] *Momotov V. V.* Elektronnoe pravosudie v Rossiyskoy Federatsii: mif ili realnost [vystuplenie predsedatelya Soveta sudey RF na zasedanii Kluba imeni D. N. Zamyatnina 26 maya 2021 g.] [Electronic justice in the Russian Federation: myth or reality [speech of the Chairman of the Council of Judges of the Russian Federation at the meeting of the D. N. Zamyatnin Club on May 26, 2021]] // [Electronic resource]: URL: http://www.ssrf.ru/news/vystuplieniia-intierv-iu-publikatsii/ 42272 (date of address: 20.05.2021).

[3] Ibid.

increasing the professional legal consciousness of judges, because justice is not reduced to a formal technical function, but is a complex intellectual activity: the process of implementation of meanings laid down by a solid cultural and legal tradition and adapted to the specific tasks of the current day in order to fairly resolve disputes over the legitimate interests of individuals and legal entities.

As such, meaning-making in the exercise of justice does not contradict the principle of legal certainty and is not a manifestation of any law enforcement selectivity. On the one hand, it is subject to the general laws of human thinking activity, on the other hand, it is subject to the equally objective laws of creation and functioning of the legal conceptual space. The element of subjectivity is introduced only due to the different qualifications of judges, different degrees of mastery of skills of extraction, and the combination of meanings in compliance with the requirements of legal certainty.

The starting point of meaning formation in the implementation of justice is general goal-setting — a conscious focus on the search for a mutually acceptable compromise in conflicting legal situations. Further, the range of development of meanings and the depth of their comprehension in each specific case are reflected in the results of judicial interpretation of legal norms and the degree of validity of judicial legal positions.

The category of "right restriction", associated mainly with formal technical-legal tools, in view of the purposefulness and regularities of meaning formation, needs some rethinking. In particular, it is necessary to better emphasize its substantive aspects in the context of ensuring a proper balance between the interests of the citizen and society.

The results of relevant research in the future could serve as a basis for the creation of judicial praxeology. We present it, hypothetically, in the form of a certain judicial "grammar of action" (the term of the founder of praxeology T. Kotarbinski) — a system of theoretically substantiated practical recommendations and algorithms for the adoption and presentation of judicial decisions, which in the future could minimize judicial errors and increase the legal protection of citizens and legal entities.

References

Gadzhiev G. A. Ontologiya prava: (kriticheskoe issledovanie yuridicheskogo kontsepta deystvitelnosti) [The ontology of law: (a critical study of the legal concept of reality)]. M.: Norma, 2013. 319 p. (In Russian)

Gadzhiev Kh. I. Sudebnye doktriny i effektivnost pravoprimeneniya [Judicial doctrines and effectiveness of law enforcement [Judicial doctrines and effectiveness

of law enforcement] // Zhurnal rossiyskogo prava [The Journal of Russian Law]. 2019. No. 6. Pp. 14–27. (In Russian)

Kelzen G. Chistoe uchenie o prave: vvedenie v problematiku nauki o prave [The pure doctrine of law: an introduction to the science of law] // Rossiyskiy ezhegodnik teorii prava [Russian yearbook of legal theory]. 2011. No. 4. Pp. 418–498. (In Russian)

Kolokolov N. A. Pravo sovremennoy Rossii: istoki i sovremennost [The law of modern Russia: history and modernity] // Istoriya gosudarstva i prava [History of state and law]. 2014. No. 3. Pp. 34–40. (In Russian)

Kukushkin N. Khlopok odnoy ladonyu: kak nezhivaya priroda porodila chelovecheskiy razum [The clap of the palm: how inanimate character gave birth to the human mind]. M.: ANF, 2020. 542 p. (In Russian)

Leontyev D. A. Psikhologiya smysla: priroda, stroenie i dinamika smyslovoy realnosti [The psychology of meaning: the character, structure and dynamics of meaningful reality]. M.: Smysl, 2019. 438 p. (In Russian)

Momotov V. V. Tolkovanie pravovykh norm Verkhovnym Sudom Rossiyskoy Federatsii v kontekste sovremennoy pravovoy sistemy [Interpretation of legal norms by the Supreme Court of the Russian Federation in the context of the modern legal system] // Gosudarstvo i pravo [The State and Law]. 2018. No. 4. Pp. 30–39. (In Russian)

Serkov P. P. Pravootnoshenie: teoriya i praktika sovremennogo pravovogo regulirovaniya (Ch. 2, 3) [The legal relationship: theory and practice of modern legal regulation (Parts 2, 3)]. M.: Norma, 2019. 1070 p. (In Russian)

Serkov P. P. Pravootnoshenie: teoriya i praktika sovremennogo pravovogo regulirovaniya. Ch. 1: Grani pravovogo nevedomogo [Legal relations: theory and practice of modern legal regulation. Part 1: Boundaries of the legal unknown]. M.: Norma, 2018. 511 p. (In Russian)

Sudebnye doktriny v rossiyskom prave: teoriya i praktika [Judicial doctrines in Russian law: theory and practice] / otv. red. V. V. Lazarev, Kh. I. Gadzhiev. M.: Norma, 2020. 344 p. (In Russian)

Vakulenko N. S. Ierarkhicheskaya triada kak metodologicheskiy printsip [The hierarchical triad as a methodological principle] // Khristianskoe chtenie [Christian reading]. 2018. No. 2. Pp. 173–184. (In Russian)

Information about the author

Oleg Latynin (Sevastopol, Russia) — Chairman of the Twenty-First Arbitration Court of Appeal, Doctor of Legal Sciences, Associate Professor of the Department of Civil and Arbitration Procedure of the Crimean branch of the Russian State University of Justice (21 Suvorova St., Sevastopol, 299011, Republic of Crimea, Russia; e-mail: 21aas.arbitr.ru).

Recommended citation

Latynin O. A. The doctrinal and methodological basis of the law enforcement restrictions in the sphere of civil circulation. Kazan University Law Review. 2023; 2 (8): 40–59. DOI: 10.30729/2541-8823-2023-8-2-40-59.