METHODOLOGICAL ASPECTS OF EMPHASIZING THE ESSENCE OF LAW IN THE LAW-FORMATION PROCESS

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The issue of perception and study of the essence and content of law has been and still remains the challenge of top priority ever emerged for the worldwide legal thought. In this respect, the greatest thinkers of all times have suggested various, and sometimes even mutually exclusive concepts of study and perception of the essence of law, as a result of which, the legal thought could not achieve an unequivocal perception of the essence of law. In this regard, genius German philosopher Immanuel Kant, classifying law as one of the philosophic sciences, states that "In mathematics, definitions are the concept (ad esse), in philosophy definitions explain the concept (ad melius esse). In philosophy, the definition with its specificity and clarity should complete the work, rather than launch it. It is always pleasant to come to a definition, but very often, it is rather difficult. *Lawyers have so far been searching for their definition of law*.[2]

In respect of the above mentioned issue, the concepts of natural law (jusnaturalism), leggism, as well as libertar-juridical concept[3] are more widespread. The past and modern concepts regarding the essence of law which are more or less developed, as a combination of theoretical knowledge on law (essence and phenomenon), differ from each other, first of all, by their methodological approaches to the study and perception of the subject. This is conditioned by the fact that the methodology of legal and philosophic theories of past

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[2] Kant I. The Critic of Pure Reason. Translated from German by N.Lassky. 1998, pp.730-731. [Кант И. Критика чистого разума, Пер, с нем. Н. Лосского.- Мн.: Литература, 1998, С. 730-731].

[3] Nersesyan V. S. Philosophy of Law: Liberal-legal concept, *Issues of Philosophy, 2002, # 3, pp. 3-15.* [Нерсесянц В. С., Философия права: либертарно-юридическая концепция, Вопросы философии, 2002, N 3, С. 3-15].

and present has been limited to the framework of the subject of their concept, and the same phenomenon (law) within the scopes of different concepts has obtained totally different substantive expression in the sense of its recognition and meaning. For example, the concept of non-conflict society and that of the conflict society, which is opposed to the latter, establish different methodological systems with respect to the essence of law, wherein the description of phenomena and the complex of conclusions regarding the causal logical links not only contradict each other, but also do not intersect at the level of conceptual terms and may not have common theoretical standards with respect to carrying out comparative assessment. Particularly, Soviet socialist economic planning law could not be compared to the capitalist commercial law, as it did not differentiate between public and private law and, moreover, considered it impermissible. Though from the perspective of positive law these two as systems for ensuring compulsory rules of conduct were practically equivalent.

The emphasis of the essence and content of law is conditioned by the issue of origin or *formation of law*, which makes it possible to understand the quality of laws, whereof the ensuring of balance and harmony of all social processes is dependent. The understanding of law and its functional mission (assignation) presupposes the formation of a respective concept. If ignored, it will create a systemic conflict, which nowadays is expressed in the form of recurrences of critical and actual disruptions, such as, for example, the overthrow of multicultural model of society in the territory of the European Union. As a bright example of the abovementioned fact, let us take the confession made by Angela Merkel, Chancellor of the Federal Republic of Germany, one of the key countries of the European Union, in her speech at the meeting held in Potsdam with the youth wing of the political party "Christian Democratic Union", which particularly underlined that the idea of multicultural society within the territory of the country completely failed.[4] This systemic conflict emerged when Germany decided to solve the problem of lack of

[4] For more details visit: http://www.newsru.co.il/world/17oct2010/merkel409.html.

workforce not through the systemic scientific-methodological, but through situational approach, that is by the means which was the easiest and fastest one at that moment. Particularly, for the purpose of involving cheap workforce in the economy, the gates to the country were hospitably opened for the billions of working migrants from Turkey, Greece, Spain and Yugoslavia, who were completely satisfied with the German standard of living. As a result, the systemic integrity and homogeneity of the German civil society, which was then at its highest level of development, was disrupted. Such phenomena also influenced France and Great Britain.

Meanwhile, the essence of law requires a deep scientific methodological study, with the availability of a serious methodological toolbox of law formation. The law formation process starts at the law creation level, which should have scientific logical formulation, and if we do not study natural law, it will be understood as a God-given reality. The methodological approach of natural law presupposes the existence of objective harmony, the essence of which should be scientifically studied irrespective of the fact whether it functions and ensures functional balance of social relations or not. In this respect, the issue of law itself becomes the ensuring of functional balance, the standards whereof shall be based on the objective logical model of the concept.

But if a person does not set himself a task to study the essence of harmony and emphasize the essence of law, he or she will get use of the law so long as it is still in force. Thus, we see that the formation of law may not take place without the perception of the essence and nature (not as a fact) of law, and the essence of law should be emphasized with certain paradigm of law.

In our view, in the concepts suggested from the perspective of methodological approach of emphasizing the essence of law in the law formation process, a number of key questions have been left unanswered; particularly, the question of whether the law has originated spontaneously or it always existed; whether it has originated at all, or is simply a God-given reality; if originated, then how it happened; whether it has originated by itself, or as a result of

conscious perception of the essence of law and development of law formation mechanisms on the basis of the latter, which is the space of coordinates of law; how to move from the space of "non-law" coordinates to the level of coordinates of law, and vice versa; how to prevent the transfer of law to the level of "non-law" coordinates, and a number of other questions. As a result of synthesis of the mentioned questions, we get the following conceptual question, comprehensively summarizing the issue:

"Is it possible to establish rules of conduct and value judgements, which may, for all the people, be objectively true and at the same time be defined by a person himself, and not forced by "authority"?

The answer (Yes or No) to this question serves as a basic principle, which predetermines the central aspect of dividing the methodological approach of emphasizing the essence of law in the law formation process within the framework of a relevant concept.

In case if the answer is "No", we get such a conceptual approach of emphasizing the essence of law, which predetermines a separate methodological direction (branch) by adopting the basic thesis, according to which the ability of a person to establish accurate objective rules of conduct is rejected.

As a result, a principle is formed, according to which value judgements are not objectively credible and are simply arbitrary, unreasoned preferences and antipathies of an individual, which at the end becomes the subject and norm of law with its subsequent formulation in the legislative system (by using the whole methodological toolbox of creation of positive law).

In this case, the whole conceptual base is formed on a model of value system, whereto the definition of any desirable weal is assigned, and here the desire becomes a measure of value, and not vice versa. Naturally, in this case the legal essence (nature) of value is defined and generated at the subjective level within the framework of desires and preferences of an individual.

Such subjective formation of law (value based formation of norm) is based on the idea that if pleasure is weal for a person, and

suffrage – evil, the principle according to which the desires serve as a determinative factor for the assessment should apply, that is, only those desires may serve as a Value, the fulfillment of which gives pleasure, and all the others may not.

Such extreme subjectivism in its nature is not compatible with the idea of comprehensiveness of ethic norms and their availability for all the people and, therefore, may not serve as a basis for the formation of compulsory rules of conduct for the society. And if such subjectivism was the only form of legal ethics, we would have to face a choice between ethical authoritarianism and rejection of all the claims to having comprehensive ethical norms ensuring objective rights of a person.

What arguments can be brought for people, who reject the ability of a person to establish objective accurate rules of conduct? In this case, as an argument we choose the answer "Yes" by applying totally controversial methodological direction of defining the essence of law, which is based on the concept of acknowledging and accepting the objective nature of values. Based on this logic, Jean Jacques Rousseau, leading conceptual thinker during the French revolution, suggested a concept, which was based on the principle that "Everything that is considered to be weal and corresponds to the order, is considered as such by the nature of things and is not dependant on the agreement between people".[5]

As a result of such ideological approach a principle is formed, according to which values are of objective nature, value judgements express objective credibility and may be presented in the form of formal logical models of a norm by enshrining them in a respective law in the scopes of a complete legislative system. Thus, the whole methodological toolbox of creation of a norm of natural (objective) law is put to use.

In this case the establishment of logical models of norms shall be based on the knowledge obtained as a result of systemic research and further learning process. The mentioned process shall take place within the framework of science on law, wherein the essence of law

[5] Руссо Ж.-Ж., Указ соч., С. 176.

is emphasized as a key issue of top priority.

It is important to mention that the conceptual basis for the perception of law, which predetermines the law formation and enforcement process, is formed at the level of choosing the ideological platform.

The category of "essence" should include such qualitative features, without which the subject, the essence whereof is discussed in this article, cannot exist in general.[6] Particularly, the essence of law should be emphasized in such a way so as to reveal and describe the essence and semantic content of law as a genesis of law, which includes all its qualities, goals, features, reasons of its existence and historic destinies.

Otherwise, within the scopes of legal regulation system a systemic conflict of "conceptual default"[7] emerges, which results in the absence of metrics of methodological adequacy of the legislative system in all of its stages (development, introduction and operational enforcement of law).

"Conceptual default" may be emerged for the following reasons:

a) The conceptual position stating that the essence of law does not exist in general;

b) The "NO" answer;

c) In case of the "YES" answer, the absence of a complete system of the complex of uniform unequivocal concepts, which would make it possible to reveal and describe the essence and semantic content of law as a genesis of law, which includes all its qualities, objectives, features, reasons of its existence and historic destinies.

Therefore, the issue of comparative legal studies also remains

[6] For more details see Leist O.E. The Essence of Law: Problems of Theory and Philosophy. Moscow 2002, P. 8. [Лейст О.Э., Сущность права, Проблемы теории и философии права, Москва, Зерцало-М., 2002, С. 8].

[7] For a more detailed description of the term see Vardan Ayvazyan, Legal Aspects of Conflictology and legitimacy. *Jurisprudence, #139.3, Yerevan, 2013, p. 15.* [Вардан Айвазян, Правовые аспекты конфликтологии и легитимность, Вестник Ереванского университета, общественные науки, Правоведение, 139.3, Ереван, 2013, С. 15.]

unsolved, as *without a common definition of "law" it is impossible to define law of different times (eras), and decide on what should be compared with what.* At the same time, it becomes impossible to explain the reasons of succession (continuity) in law and theory of law.

It is obvious that the essence of law may systemically be emphasized only within the framework of scientific-disciplinary learning at the fundamental level. The problem is that the law formation process in any case takes place according to the presumption that any complex social process, official powers or society may not be situated within the framework of this or that legal regime – outside the management system prescribed by the relevant legislation, aimed at preventing ungovernability and chaos. As a result, from the perspective of practical priority of ensuring law order, taking into account the lack of time and content of academic reservoir of knowledge, the whole methodological complex is replaced by a rapidly introduced methodical toolbox of the hastily developed legislative system. As a rule, this takes place by borrowing other ready-made laws and through their transplantation into tissues of state structure. It is obvious that in this case the aspects of the discussion of the essence of law at the methodological level simply collapse. Meanwhile, according to the French thinker C. Montesquieu "Law is human intelligence, as it governs all the peoples on the Earth, and the political and civil laws of any nation should be nothing else but a separate expression of that intelligence". They should correspond to the physical characteristics of the country – its climatic conditions (cold, warm or mild), soil quality, its state, size, way of living of its inhabitants (farmers, hunters or shepherds), level of freedom ensured by the state regime, religion, habitudes, wealth, number of population, trade, morals, and habits. Lastly, they are linked to each other and are conditioned by their origin, legislative goals, fitness of things, on the bases of which they are approved.[8] In the law formation process the consideration of the

[8] Charles Loui Montesquieu, Selected Works on the Spirit of Law. Moscow 1999, P. 16. [Шарль Луи Монтескье, Избранные произведения о духе законов, Москва, Мысль, 1999, С. 16].

above mentioned facts predetermines the aspects of methodological approach of the essence of law.

Though the systemic conflict of "conceptual default" of the essence of law exists in practice at the systemic level, it is officially considered as a non-existing phenomenon, as it is not discussed in general and is not seen.

Naturally, if there is no essence of law, the metrics of methodological adequacy of the technically approved legislative system is also absent. In this case, the legal content of a norm is narrowed down to the scopes of the feature of imperative obligation, wherein all the other features arising from its model of legal content are absent. As a result, law is viewed not as a *legal*, but *juridical* object, and the legislative system – as a *system of obligatory rules*, and never as a *system of legal regulation* which involves the essence of law. In this case the semantic structure of the complex of concepts and the structure of conceptual hierarchy of the legal model of the society, state, complex social process either collapse, or are replaced by technical implants borrowed from different legislative systems, which create a legal confusion (collage) and are not subject to any contextual assessment. As a result, the *legal* nature of law is transformed into *juridical* one taking the law formation to the technical level of norm creation.

The above mentioned facts give reasons to state that *the systemic conflict of "Conceptual default" serves as a means to separate the law (legal relations) and statutory law (legislation, state regulatory acts and orders), which is very important in defining the logic of legal nature of all public relations systems, which in combination may in a consolidated manner and in legal format present the essence of law already as a philosophic-legal category.*

At the same time, such approach, in our view, makes it possible to perform operational refinement at the level of methodological adequacy of the legal nature of legal perception system of this or that "legal world-view" (for example, leggism, jusnaturalism, libertar-juridical), which gives a conceptual description of the origin, sources and goals, nature, role and designation of law and of legislation.

Besides, it also makes it possible to give the typological description of legal systems, based on the criteria parameters of methodological adequacy of the legal nature of law formation in the process of their genesis. For example, it becomes possible to study the formation of *systems of conditional, conventional or situational law* in the context of displaying the legal dimensions of natural and positive law, as well as to ensure their navigation within these legal dimensions.

Nowadays, in the context of emphasizing the essence of law, it is very important to study and reveal the legal nature of the new manifestations, such as the system of relations in the virtual space of internet, where more and more social transactions within the framework and in a new format of global interaction are transferred in a high speed, thus transferring the system of public relations to cyberspace. In this respect, our era becomes a witness of dynamic junction of constitutional rights and digital sphere.[9]As a result, public relations of new qualitative format are formed, where the public relations are transferred to a completely new cyberspace. Such are for examples social network, social communications, commercial and payment transactions, business intercourse, legal transactions in the format of electronic signatures and documents, even any emulation of online interaction in legal format, such as the remote court sittings.

All these facts predetermine the necessity to elaborate a new type of cyber legislation in an unprecedented form of expression of the essence of law. In this case the current tendencies of applying "mechanism of leggism" aimed at giving post factum legislative formulation to the relations practically existing at the non-law coordinate space through the introduction of an operative norm creation process becomes ineffective and sometimes even useless. And again, it takes place as a result of systemic conflict of "conceptual default" existing in the legal regulation system of cyberspace, in case of which the law formation concept at the

[9] Michel Rosenfeld, Andras Sajo, Constitutionalism: Foundations for the New Millenium, New Millenium Constitutionalism: Paradigms of Reality and Challenges, Njar, Yerevan 2013, page 11.

cyberspace is not studied in the context of the essence of law or is completely absent. It is replaced by the aspects of informational-technological description of the norms regulating relations. In this case, as a rule, the attention of the powers is concentrated on the elimination and exclusion of the existing and developing recidivism, as a result of which the these give orders for the elaboration of prohibiting and preventing mechanisms. Meanwhile, the description of the legal context of a norm should serve as a basis for the comprehensive elaboration of legal regulation system, on the basis of which the legislative system will be able to fundamentally solve the issue. The unsolved issues of protection of copyright, imposition of taxes, information security, and private information space of a person, as well as those on protection from illegal impacts system in the sphere of education, moral development, entertainment, exclusion of the exploitation of global network resources for the purpose of organized crime and others, which from the perspective of law enforcement on cyberspace are in critical condition, are classified among such issues.

At the same time, the peculiarity of cyberspace is described by the fact that within this space such high technological instruments for the implementation of relationship systems are dynamically initiated, in comparison with which the traditional technology of social interaction and communication, with its inertia, is simply incompatible. Besides, the origination of crime and the elaboration of mechanisms for deviating from the prescribed legal norms develop with extremely high speed. That is, crime, as well as legal regulation, law enforcement and the whole law enforcement system have completely different mechanisms of functional implementation in the traditional legal environment and within the cyberspace.

The given judgments bring forth the following question "*Is it possible to establish rules of conduct and make value judgments, which may, for all the users of global network, be objectively accurate and, moreover, be defined by users themselves, and not simply forced by 'authority'*".

In our view, we do not have a "No" answer for this question.

But in that case, in order to give a "Yes" answer, it becomes necessary to solve the issue of revealing the essence of law in cyberspace by excluding the systemic conflict of "conceptual default". The solution to the problem may be given only in case of availability of a basic concept of the legal model of global network, which should be elaborated at the level of a methodological synthesis of all the sciences regarding the application and development of law and global network. Here the key point is the methodological ability of formatting of all processes in the sphere of global system, by emphasizing the legal nature of each of them. The key factor of law formation is the study and revelation of legal nature of information through elaboration and implementation of the key conceptual principles of libertar-juridical model. It gives an opportunity to preserve the open and common functional nature of global system, as a key peculiarity of ensuring the global processes. The unsolved issues regarding the legal context of information, due to their double nature (useful or harmful) make it necessary to deviate to some extent from its open nature and introduce relevant censorship and nationalize the global network through the authorized "authority" performing restricting and prohibiting functions. As a matter of fact, it may result in the change of the global system as a means for development and of libertar-juridical status or even to its elimination creating a new substance with the possible tendencies of moving towards default and stagnation.

From the legal perspective, an example may be the vague definition of the prohibition or authorization of information containing negative content (for example, suicidal ideas, child pornography, pedophilia, homosexuality, nationalism, religious intolerance, terrorism and other types of propaganda). It may be viewed as a positive method of legal regulation for the purpose of preventing the repetition of the negative precedence. At the same time, the referred information may potentially have the peril of stimulating non-compliance with the legal norm, leading to a number of offences. Crystallization attempts have in this context been undertaken; however, it is still not clear whether the concepts

stimulating the prevention of offences may be used for classifying the legal content of information and defining standards. It is obvious that describing the content of information from a limited technical perspective may form a conceptual default in the context of the essence of law (data protection law), adversely affecting the formation and enforcement of law in its every aspect.

From the perspective of emphasizing the essence of law, the main issue remains unsolved also in the context of global law formation and formulation of international law. Here, too, the central question is the following: *"Is it possible to establish rules of conduct and discuss such values which may, for all the member states of the UN, be objectively true, and be developed by the UN within the framework of international law and defined by the member states, instead of being forced by "authority" on behalf of a group of super powers or supranational unions and groupings which formulate the geopolitical position."*

This question may not be answered negatively, since the whole historical process of the formation of international law, starting with the postwar period until present has been based on the idea of precedence of international law over use of force. This means that the applied formula was not based on a negative answer; furthermore, it was based on a positive answer, resulting in formation of law on the global level by developing, applying and coercing international law. This basically implied large-scale centralization of ideas concerning law from all over the world for the development of the conceptual basis of international law which would define the legal content of globalization. The latter, in its turn, had to ensure the legal model of the world, including all the issues, for the purpose of ensuring the balance between supranational and national legal territories.

This means that the solution of the problem first required development of a system of methodological tools, which would allow to clearly define the essence of law through comprehensive categories, ensuring the legal integration of all countries within the framework of a single international law. While it is currently based

on the formula not involving a "negative answer", it is still possible, depending on the interests of states possessing geopolitical powers.

As a matter of fact, it was the first major attempt of law formation on the basis of systems, by abandoning the practice of leggism, considering that during the pre-war colonial period the main model of international law used leggism as the most practical and favorable method of legitimizing and legalizing geopolitical dominance in all its aspects. In particular, taking into account the conflicting nature of the two ideological systems based on the geopolitical blocks and super powers, as well as the responsibility of nuclear disarmament, the competition between socialism and capitalism, the fundamental potential of legal systems required the development of international law, the methodology whereof would include such comprehensive legal means which would be able to combine two incompatible legal models within international law (socialism and capitalism). In particular, this approach predicted both the unique significance of the UN and the impossibility of disregarding the key importance of their research. This circumstance undoubtedly promoted the development of law for both scientific and application purposes minimizing the simplified and easy approach based on leggism, making it thus possible to balance the development of the legal system and legal norms in a single process of legal formation within the international law system.

This all predicted the growing role of international law, and the UN was viewed as both a scientific methodological center for the development of international law and governance system, and a system for applying the international law through the mechanisms of Security Council. As a result, since the formulation of the UN and conclusion of international treaties, international law norms have played a key role in the international and domestic relations.[10]

Thus, the complexity of the main issue of the essence of law was indirectly addressed on the level of a specific system and received respective solutions, excluding the systemic conflict of

[10] For more details see Harutyunyan G.G., Judicial Power; From European cooperation development experience, Yerevan, "NJAR", 2002, page 14.

"conceptual default" (conceptual lack). Furthermore, the assertion of the absence of the essence of law was completely excluded, whereas the global community refused to accept the idea of an irresponsible nature of law, possibility of chaos and the coercion of tyranny through wars, taking into account the fresh memories from the Second World War. As a result, global developments made it impossible to use leggism for the purpose of colonization and legalization of occupation.

In this regard, a respective chain of law formation was formed which developed the conceptual model of all political, economic and cultural aspects, political unions, decolonized countries, supranational integration unions, *excluding the self-forming principle of law formation.* As a result, such law formation processes, as the formation of British cooperation, restoration of Europe and Japan, were implemented in strict compliance with systemic programs (for example, the Marshall plan). Such law formation processes included also the formation of European cooperation, economic cooperation, as well as of the OSCE, NATO and Warsaw agreement, which lasted until the collapse of the USSR.

Following the collapse of the USSR, this process was unfortunately terminated, and a new positioning was formed where the advantage of geopolitical authority was transferred to the USA, as a matter of fact causing instability in the system of global governance. From this perspective, on the one hand, the cornerstones for the stability of the international systems are still being developed, whereas on the other hand the current international institutions serving that purpose are losing their former significance.[11]

We think that this circumstance in its turn affected globally the development and deepening of global cataclysms happening around the Earth (for example, the Arab spring or the crisis of financial and monetary systems).

As a result of lack of the key significance of the international law, the practice of leggism was revived, for which reason the issue of recognition of countries having acquired independence was

[11]See ibid, page 12.

transferred from the UN level and from the jurisdiction of international law to the level of coalition law resulting in a tendency of transferring law formation within the regime of *coalition leggism*. For this reason, the conflicts concerning the Nagorno Kharabakh, Abkhazia, South Ossetia and Kosovo have not yet been resolved. Whereas one of the key principles of international law, *i.e.* the right of nations to self-determination acquired an unclear legal content, causing tendencies of its subjective perception and interpretation, depriving it of its significance and, consequently, the only possible way of its implementation was an armed conflict. Examples of coalition leggism may include the Group of Eight, the Group of Twenty, etc., which minimize the role and significance of the UN and thus hinder the development of the system of international law. From the perspective of legal methodology, this stimulates the rebirth of the concept of legal chaos, which does not recognize any essence of law. This results in tendencies of conceptual anarchism, which transfer the system of global governance to the *level of self-formation*, officially allowing "conceptual default".

We thus think that the resolution of the issue requires development of a system of comprehensive methodological tools which would enable a more complete, clear and comprehensive perception of the essence of law.