THE LANGUAGE OF RULE-MAKING AND ISSUES OF LEGAL TECHNIQUES

Professor A.V. Polyakov, Doctor of Law

The most significant distinguishing feature between human and other living beings is language. Language is a means of communication between people, i.e. production, transmission, perception and keeping information. Language communication is the basic means of control of human behaviour. Language mediates relations between people, gives meaning to the cognitive experience of the outer world, enables people to articulate their thoughts, i.e. makes their thoughts accessible to the other people. No social phenomena can exist outside language and communication. Law is not an exception.

Language as a means of communication "lives" in texts. It means that rules of law also can exist only in the form of a text, documenting binding rules of behaviour, which define the rights and duties of the subjects, entering into relations with one another, and induce them to act appropriately. An interesting observation was made by A.A. Ushakov, who said that language in the law sphere is studied in the aspect of law-making (legislative technique), hermeneutics and stylistics. However, in the opinion of the scholar, the main point of studying language is not this, but to regard language as the only origin of law. "Law exists both in the actions of people and in the language, which is used not only for representation of law: it is created from the language, as well as its structure... In this perspective, law is a language phenomenon and language is its flesh and blood. Its origin, development and existence are impossible without language"[1].

[1] *Ushakov A.A.* Pravo, yazyk, kibernetika//Pravovedeniye. 1991. № 2. P. 25.

Both language and text are sign systems. A sign can be defined as a tangible object (phenomenon, or action), that represents another object, property, or relation. Therefore understanding of a sign is impossible without identifying its meaning. One of the sign types is a language sign. A language sign is a linguistic unit (e.g. a word, a word combination, or a sentence), that signifies objects or phenomena of reality and their relations. A text is an interrelated combination of signs, forming a semantic unity.

The concept of sign partly coincides with the concept of symbol. That means that law can also be understood as symbolic reality. The symbolic component of law is not identical to material signs, but it does not exist only in the imagination of the subjects. Law originates as an interpreted text, i.e. text perceived by consciousness, emotions and will of the subjects of social interaction.

One should bear in mind that a text can be expressed not only in verbal symbols-signs, but also by means of non-verbal symbols (images, gestures, actions). The further a researcher looks back in the depth of centuries, the more often he or she meets non-verbal signs, having direct relation to law. Particularly, numerous juridical rituals had such meaning. At present, the basic means of documenting, keeping and transmission of information in the course of law communication are verbal signs.

Via its verbal form law brings rational base to the social relations. Legal text implies that the subjects have logical mind, i.e. ability to understand and assess the meaning of the text and act consciously on the basis of this understanding. If nobody had such abilities, law as specific phenomenon would not exist. As it was already mentioned in the literature, language in relation to law performs two interdependent functions: reflective (outwardly expresses an imperative prescript of the legislator) and communicative (brings this prescript to the attention of the participants of the social relations). The objective of the law communication is to influence "the will and consciousness of the people, in order to create motivation to act legally, in compliance with legal instructions, using powers and performing legal duties".[2] In this way law communication is different from any other social communication (for example, economic or political one).

It is necessary to underline once again, that any legislative text gains law meaning through its perception and interpretation by the subject, but is not limited to the graphic system of signs, representing the content of a law. Any text has implicit (hidden, indirect) content, and scientists believe that correlation between explicit and implicit information in

[2] *Pigolkin A.S.* Vvedeniye // Yazyk zakona /Ed. A.S. Pigolkina. M., 1990. P. 8.

the text is approximately equal.[3] Therefore, a person receives much more information from the text, than it contains as a language and sign phenomenon. It is assumed that "identification... of the implicit information, combination, coordination of explicit and implicit information, i.e. "visible text" and "invisible subtext", is performed on the basis of the knowledge about the outer world and the language via logical operations (inference, logical conclusion, classification, evolving concepts). If the interpreter knows the aims of communication, it makes identification of implicit meaning of the utterance considerably easier..."[4]. In the context of legislative texts it means that a legislative act can't be expressed exceptionally by those linguistic units, which form its text.[5] This thesis is essential for understanding, how interpretation (explanation) of law is performed.

In order for the text to fulfil its function, it should comply with the stated goals and objectives. It is achieved by the right choice of linguistic units (words, word combinations, sentences), corresponding to the necessary text *style*.

The following text styles are usually defined: colloquial, fiction, journalistic, scientific, formal (the style of official documents). Normative legal (law-making) sub-style refers to the latter and it reflects the specific character of communicative properties of normative legal acts, created by the state.[6]

The features of normative legal style can be found in various types of state acts: in normative legal acts, in law enforcement acts, in contracts, or even in reports and memorandums. And the specific character of normative legal style is mostly manifested not in professional terminology of such acts, but in the inner organization of the text.

Such text has the following features:

- *formal character*. Law language is the language of a formal document, representing, first of all, the will of the state. The form of normative legal documents cannot be optional, it is set by the state, and the language, in which normative statements are formulated, becomes *the national language*. It is the language, in which laws and other normative legal acts, binding upon all the people they are addressed to, are written and published. In this respect the laws of a concrete language are closely connected with the juridical laws;

- *unemotionality*. Laws and other normative legal acts should not express anybody's feelings, emotions or affects. There should not be used any fictional images, pompous meta-

[3] *Lokshina M.D.* Problema povysheniya informativnosty zakonodatelnogo teksta // Yazyk zakona. P. 180.

[4] Ibid.

[5] Ibid.

[6] *Vlasenko N.A.* Osnovy zakonodatelnoy tekhniki: Prakticheskoye rukovodstvo. Irkutsk, 1995. P. 6.

phors or words used in vivid figurative meaning. Expressive neutrality is a feature of normative legal style. A law-maker, from our point of view, proceeds from the premise, that unemotionality reflects impartiality, which is one of the foundations of justice, and to achieve the latter he or she uses in normative documents "dry" expressions, complying with the requirement for precise and unambiguous understanding;

- *coherence and continuity*. Any text is a certain unity, which suggests coherence of its constituent elements. In a normative legal text there must not be any understatement, ambiguity, grammar or semantic absurdity. One should also avoid reiteration;

- *clarity and simplicity*. Rules of law can be observed only providing that their provisions are stated precisely. Precision of normative legal acts is another necessary condition of law communication. The requirement of clarity is also one of the requirements of legitimateness. "Dim and incoherent law-making may make legitimateness inaccessible to anybody..."[7]. In a legislative text it is recommended to use insofar as possible simple and clear terms, common constructions and short phrases. It is inadmissible to overload normative acts with elaborate grammar constructions: excessively use participial constructions or complex sentences with numerous clauses. There should be more full stops and fewer commas, dashes and colons in the text;[8]

- *precision and accuracy of expression*. Precision and accuracy of a normative legal text is determined by the degree of correspondence between the idea of the normative legal act and the linguistic form of its representation. Precision and accuracy of the law allows to avoid misinterpretation and ambiguity while its realization. A modeled example of an "elastic" legislative rule, which intervenes in law communication, was given in his day by the famous Russian scholar L. Petrazhitsky: "*Those who served with good faith and fidelity have a right to getting a lump-sum reward of a reasonable amount or an adequate retirement pension from those, whom they served*".[9] This rule cannot regulate corresponding social relations, because it does not define who exactly are the subjects of the legal relations under consideration, what it means "*to serve with good faith and fidelity"*, what is *"a reward of a reasonable amount*", etc. The scholar made the following conclusion: "The more indefinite and elastic the meaning... of the corresponding notions..., the more... numerous and harmful conflicts it can

[7] *Fuller L.L.* The Morality of Law. M., 2007. P. 81.

[8] Yazyk zakona. P. 20.

[9] *Petrazhitsky L.I.* Obshchaya teoriya prava i gosudarstva v svyazy s teoriyey nravstvennosty. St. Perersburg, 2000. P. 151.

cause".[10] While framing a legislative rule it should be assumed that there are no insignificant things in the legislative text, or any odd words, prepositions, punctuation marks. In a law there should not be phrases which are more important or less important. The requirement of simplicity for legislative texts and the requirement of precision can contradict to each other, as pursuit of precision often causes overload of law language and makes the simplicity of the text suffer. On the other hand, pursuit of legal text simplicity can affect its precision. As noted in the literature, "it is necessary to strike the right balance: precision and simplicity of the lawmaking style should combine with each other, complement each other and not violate one of the main functions of the law — communicate the meaning".[11] One should also admit that "vividness and elegance of expression of the law-maker's ideas, beauty of his speech is not in the usage of expressive means and imagery of the language, but in the logic, depth and coherence of statement, in the usage of unambiguous terms, in the maximum precision, clarity and consistency";[12]

- *formalism*. Formalism of the legislative text is expressed in the commonality of statement. The same idea is represented by means of the same linguistic constructions, arranged in a definite sequence. The external characteristics of the text structure (designation of headings, articles, sections, paragraphs, etc.), the usage of contracted forms, figures, etc. are unified.

So, in order for the law to perform its functions within the state framework some definite rules of behaviour should be recorded in written form in compliance with the necessary procedures. Such activity of the state, focused on creation of new textual rules of law or changing the existing rules of law, is traditionally called *law-making* or *legal rule-making*.

Such textual rule-making results in the appearance of special acts that are generally called *normative legal acts*. The most important for the state internal activity are *laws*. Laws are passed by a special state body (in the Russian Federation it is the State Duma) in accordance with certain procedures and have the highest validity. No other state acts can contradict a law, while a law can repeal or amend any inferior act. Creation of laws — law-making — is considered to be a constituent part of rule-making, which also includes issuance of normative by-laws: presidential edicts, government regulations, acts of local self-government, etc.

Legal rule-making is a process of formulating socially significant ideas, aimed at regulation of relations

[10] Ibid.

[11] *Vlasenko N.A.* **Osnovy zakonodatelnoy tekhniki: Prakticheskoye rukovodstvo.** P. 8.

[12] Yazyk zakona. P. 31.

between the members of the society, in the form of verbally formulated and textually represented rules of behaviour. It may be said that it is also a process of transformation of legal information: selection, interpretation, textual representation, procedural consolidation and giving it validation.

In this situation the subject of rule-making acts as transformer of legal reality, legal life of society, and the success of the attempt of such transformation will depend on how the new legal text satisfies the essential conditions of the law communication. One of these conditions, having direct connection with language, is formulating normative directions in such way, that they will be uniformly understood and obeyed. For this purpose it is necessary to write all the legislative texts in the generally comprehensible standard Russian language. Is it possible to achieve it to the full extent? Many scholars notice, that both creation of laws and their interpretation require special knowledge, and, therefore, are the business of professionals, high-qualified specialists, creating their own legal language, therefore texts of laws cannot be generally comprehensible.

The two positions have both proponents and opponents. The first proceed from the premise that special legal language may be adequately translated into common language. However, it was noted in the literature that "translated" legal text is inevitably falsified by the non-specialist, as it looses its essence in the result of the "translation". "Legal language is a special system, manifesting its own values, which are formed by the oppositions of special concepts and determined on the part of the current legislation... The decoding of this code requires special hermeneutical assumptions, special culture of thinking, formed by many generations of people with special juridical thinking".[13] The use of common words instead of special legal terms creates just an illusion of accessibility, and in this case understanding is only approximate.[14] One must admit that striving for simplification of the legal language should have certain limits. Therefore, alongside with the striving for simplicity and clarity of the text, one should also take into account another means of improving the efficiency of the law communication — developing the level of legal and linguistic

[13] *Golyev N.D.* O specifike yazyka prava v sisteme obshchenarodnogo russkogo yazyka i eyo yuridicheskogo funkzionirovaniya // Yurlingvistika Issue 5: Yuridicheskiye aspekty yazyka i lingvisticheskiye aspekty prava Barnaul, 2004. P. 42

[14] Ibid. Cf.: "Lawyers understand each other, but a lawyer and a layman can hardly understand each other, even if they speak about their national law. The abyss between a most educated layman and any modern lawyer is much wider, than the one, which could be between a lawyer of ancient Rome and an English lawyer, who has never heard of the Roman law" (*Ihering R. von*. Yuridicheskaya tekhnika. M., 2008. P. 22).

knowledge in the law sphere of all the members of the society.[15]

In the technical aspect the art of a law-maker lies in his or her ability to translate into the "legal language" the things, aimed at regulating human relations. One can reach this aim by means of legal technology, which is a system of knowledge about the ways, practices and methods of creating the most effective law communication. A consistent part of legal technology is *legislative technique* — a system of rules (practices), intended for formation of a lawmaking text and putting its directions into effect.

Legislative technique is a constituent part of legal technique, which does not radically differ from the first, but refers to all the legal texts, not only to the texts of laws. "Legal technique is the technique of communication in the legal environment".[16] Such understanding of legal technique arose a long time ago. Even the famous German scholar Rudolf von Ihering wrote in his time that legal technique answers the question "how law should be settled and organized, so that it could, via its mechanism, insofar as possible ease, simplify and ensure the application of legal provisions in every specific case...".[17] At the same time it is necessary to understand clearly, according to Ihering, that "technical imperfection of law is not just partial imperfection, not neglect of one separate *side* of law. *Technical imperfection is imperfection of all the law*, a defect, retarding the development of law and hindering all the goals and objectives of the law".[18]

Correspondingly, to the application area of legal technique one usually refers law making, law enforcement and interpretation of legal texts.

In the structure of legal technique, in terms of the issues under consideration here, in the first instance one should lay emphasis on such essential linguistic elements, as legal concepts (legal terms) and methods of interpretation of legal texts.

The success of all the process of legislative rule-making depends to a large extent on its legal-technique capacity. The language of normative legal prescriptions is a kind of law instrument, which helps to create the best conditions for correct understanding of normative legal acts and their realization in the behaviour of subjects. More and more attention has been given to these issues recently. There have been developed general scientific guidelines

[15] Ibid.

[16] *Aleksandrov A.S.* Yuridicheskaya tekhnika — sudebnaya lingvistika — grammatika prava // Problemy yuridicheskoy tekhniky: Collected works / Edited by V.M. Baranova. Nizhny Novgorod, 2000. P. 102.

[17] *Jhering R. von.* Yuridicheskaya tekhnika. p. 32.

[18] Ibid. p. 34.

for making normative legal acts in the Russian Federation.[19]

The primary role is played by the technical methods of using the national language for formulating normative prescriptions of legislative acts. For their proper application it is necessary to take into account the general principles of linguistic organization of normative legal prescriptions:

1) *Quantitative simplification*. It is necessary to reduce the quantity of normative material without deteriorating its quality. The less information there is to use, the easier it is to use it. The purpose is to get the most using minimum means. R. von Ihering called this principle "the rule of economy" and considered it to be the vital source of any jurisprudence.[20]

2) *Qualitative simplification*. The purpose is to achieve inner order, symmetry and unity of normative material.[21]

Among the most general rules of legislative technique (technical guidelines) the following rules are defined:

1) to avoid logical contradictions, i.e. situations, when a normative prescription contains provisions, contradicting each other;

2) to exclude normative provision from repetition in various legislative texts;

3) it is appropriate to place the normative provision, containing an exception to the general rule, in the same law, that contains this general rule;

4) a normative provision, which introduces amendments to the operative provision, should be supplemented with a direct reference to the structural unit and requisites of the law, which contains the provision under amendment;

5) a normative provision, which replaces an obsolete provision, should be supplemented with a reference to the requisites of the law and the structural unit, losing effect.[22]

The technique of formulating special legal concepts (terms). Three

[19] Cf.: *Rakhmanina T.N., Baranov V.M., Tikhomorov Y. A., Syrykh V.M.* Rekomendatsiyi po podgotovke i oformleniyu proyectov federalnyh zakonov // Problemy yuridicheskoy tekhniki: Collected works / Edited by V.M. Baranov, Nizhny Novgorod, 2000. P. 803–815; *Rekomendatsiyi* po podgotovke i oformleniyu proyectov federalnyh zakonov // Zakonodatelnaya tekhnika: Nauchno-prakticheskoye posobiye / Edited by Y. A. Tikhomirova. M., 2000. P. 259–271; *Apt L.F., Baranov V.M., Dorofeyeva T.A.* Metodicheskiye rekomendatsiyi po ispolzovaniyu definizyi v normativnykh pravovyh aktah // Zakonodatelnaya definiziya: logiko-gnoseologicheskiye, politiko-yuridicheskiye, moralno-psikhologicheskiye i prakticheskiye problemy: Materialy Mezhdunarodnogo "kruglogo stola" (Chernovtsy, 21–23 September 2006) / Edited by V.M. Baranov, Doctor of Law, P.S. Patsurkivsky, Doctor of Law, G.O. Matyushkina, Doctor of Law. Nizhny Novgorod, 2007. P. 1429–1434.

[20] Ihering R. von. Yuridicheskaya tekhnika. p.38.

[21] Ibid. P. 41.

[22] Zakonodatelnaya tekhnika. P. 168–169.

groups of concepts are used in the law-making activity:

1) *well-known* (common) concepts (father, mother, heir, native country, duty, etc.);

2) *specific* legal concepts (legal entity, legal person, jurisdiction, etc.);

3) *special* concepts (artifact, investments, innovations, etc.).[23]

The second group of concepts may be referred to *legal terms*. A term is a word or a word combination, intended to give an exact designation of a scientific or special concept. Correspondingly, a legal term is a word (or a word combination), which, being used in the legislation, is a generalized designation of a legal concept, having exact and definite meaning, and is marked by semantic unambiguousness and functional stability.[24] It is the terms that create the "special lapidary language", without which a legislative text cannot exist. They make its semantic basis. As the Russian thinker P.A. Florensky wrote about science (and it is as much relevant for the law-making activity): "to hammer out a good term from a word, which is current and indefinite, — it means to solve the stated problem. Every science is a system of terms. Therefore, the life of words is the history of science, any science — natural science, jurisprudence or mathematics... Don't seek for anything but terms, given in their correlations, in the science: all the content of the science, as it is, resolves itself to the terms in their connections, which (the connections) are primarily given by the definitions of the terms".[25]

It is also necessary to take into account the close connection between legal terms and the world-view and ideology of the political elite of the society, tasks and objectives, stated before them, and common culture, dominating in this particular society.

The following means are used for designation of concepts (terms) in normative legal texts:[26]

1) Derivation — creating a new word using the means of derivation of the Russian language: prefixes, suffixes, compounding (*грузополучатель* "consignee", *залогодержатель* "pledgee", *работодатель* "employer");

2) Semantic derivation — terminologisation of a common word, development of a new notion expressed by the word (*сторона* "party", *доказательство* "evidence", *халатность* "negligence");

3) Combination of words — representation of a new notion by means of a terminologised word combination, making a single semantic unity

[23] *Gubayeva T.V.*Yazyk I pravo. M., 2003. P. 52.

[24] Yazyk zakona. P. 65.

[25] *Florensky P.A.* U vodorazdelov mysly. Vol. 2. M., 1990. P. 229.

[26] Op. cit.: *Gubayeva T.V.* Yazyk i pravo. P. 52–53.

(общественная опасность "social danger", *явка с повинной* "acknowledgement of guilt", *принятие наследства* "acceptance of inheritance");

4) Borrowing — expressing a thought using the words taken in by one language from another (акцепт "acceptance", *виндикация* "vindication").

The use of any of these means requires a balanced approach. Creating a new legislative concept it is important to avoid constructions, which are overloaded and hard for comprehension. One should also carefully use such means as semantic derivation. In the methodological literature it is often considered to be inappropriate, as it impedes correct comprehension because of conventional common associations.[27] Terminologised word combinations are more preferable than one-word terms, because they give a more exact representation of the object of thought (*служебная командировка* "business trip", *расторжение трудового договора* "dissolution of labour contract", *уклонение от участия в примирительных процедурах* "evasion of participation in reconciliation procedures").

In the law-making activity one cannot do without loanwords, but one should avoid their unmotivated usage. It is necessary to take into account, that not everybody knows the exact meaning of the loanwords[28], and their meaning is often defined intuitively, through their practical use.

The system of concepts, used in a normative legal act, forms its terminological basis — *thesaurus.*

While organizing the text of a normative legal act, a law-maker can come across such linguistic phenomena as *synonymy* (several words, denoting the same object) and *polysemy* (one word, denoting several objects). In normative legal texts synonymy can be observed when several words are used in a parallel way for designation of the same object. For example, according to part 2 of Article 1 of the Constitution of the Russian Federation, the names *Russian Federation* and *Russia* are equivalent. Article 94 of the Constitution of the Russian Federation equates the names *the Federal Assembly* and *the Parliament of the Russian Federation.*

In such cases the use of synonymy is justified, but not always. It is noted in the literature, that grammatical synonymy is undesirable, i.e. when different variants of the same grammatical form of the word are used in a parallel way (for example, акты «публикуются» и акты «опубликовываются» — "acts are published").[29]

In the rule-making activity one should also avoid polysemy and

[27] *Gubayeva T.V.* Yazyk i pravo. P. 53.

[28] Ibid. p. 55.

[29] Ibid. p. 64.

homonymy or terms. Unlike polysemy, homonyms are two words with a different meaning, having the same spelling and pronunciation. Within a single text or several closely connected legislative texts homonymy can cause serious difficulties in comprehension of a legislative text. Such words as *брак* ("marriage, relations between spouses" and "release of defective goods"), *отвод* ("allotment of agricultural lands" and "challenge of a candidate"), *ссылка* ("reference" and "exile, deportation") are typical examples of homonyms.

The words, used in a normative legal act, should be understood in a unified way and defined in a uniform manner. For this purpose it is recommended to follow several rules:

1) To use words only in one meaning, chosen for the given normative legal act, and stick to this meaning throughout the whole text;

2) Not to use contractions;

3) In the same law spheres the same terms can denote different concepts only if the rules of law, they are used in, regulate different spheres of relations and do not interfere with the practice of law.[30]

Technique of normative definitions. There are no normative legal acts without definitions. Definition is a logical act, that is used for: 1) formulating criteria for differentiation of the object under study from the other objects; 2) creating the meaning of a newly introduced sign expression or adjust the meaning of an existing expression.

As the results of studying objects are represented in concepts, definitions are often considered as formulating the general content of concepts in explicit and concise form.

Special emphasis is laid on the definitions, contained in the laws. Such definitions are called *legislative definitions*. It is noted in the science literature, that "a legislative definition is a fundamental structural part of all the logical and lexical architecture of an act of the highest legal force... a fragment of theoretical learning that shows how the represented phenomenon manifests itself in reality, reveals its essence, and separates from the other objects... Definitions provide for consistency and coherence of the scientific research, along with the law-making process. They enable to protect law-makers from hasty populist rule-making innovations, which are often not connected with either current legal base or social reality".[31]

The necessity in legislative definitions arises, when:

1) a concept is created by means of semantic derivation from a com-

[30] Ibid. p. 67.

[31] Zakonodatelnaya definiziya. P. 14–15.

mon word or by using special lexis (including legal terms);

2) a concept is expressed by words, which bring forth numerous semantic associations;

3) a concept has specific character, determined by the objectives of the normative legal act under development;

4) a concept is interpreted in a different way by the legal science and legal practice.[32]

The definitions, in which the object defined is equal to the object by which means it is defined, are called explicit. Explicit analytical definitions are given by means of reference to generic assignment and generic difference. For example: "*A security shall be a document certifying, in compliance with the established form and obligatory requisites, property rights whose effectuation and transfer shall be possible only when presenting it.*" (par. 1 of article 142 of the Civil Code of the Russian Federation). In this case pertaining of a security to documents is its generic feature, but not all documents are securities. In order to demonstrate the specifics of securities as distinguished from other documents, it is necessary to define their generic difference, i.e. the fact, that all securities certify in compliance with the established form and obligatory requisites property rights whose effectuation and transfer are possible only when presenting them.

Another variant of a legislative definition is to give it by means of casuistic citation of all the characteristics of the concept. For example: "*As circumstances which mitigate the responsibility for administrative violation are recognized: 1) repentance of the person who committed the administrative violation; 2) preventing of harmful consequences of a violation by the person who committed the administrative violation voluntary compensation for damages or removal of the caused harm...*", etc. (article 4.2 of the Code of Administrative Violations of the Russian Federation).

The method of giving definition to a concept by means of generic feature and generic difference is more preferable. The second variant complicates a legislative text and creates prerequisites for legal deficiencies. However, it is not always possible to desist from using a citation of characteristics. One can also combine the two above mentioned methods.

Normative definitions should meet the following requirements:

1) They should record essential characteristics. Upon that one should use generally known terms, which are undoubtedly clear;

2) One should avoid a "vicious circle", when the definition directly or indirectly repeats the content of the defined concept. For example,

[32] *Gubayeva T.V.* Yazyk i pravo. P. 68.

the following definition contains a "vicious circle": "*Legal responsibility is the responsibility for committed crime*". Such mistake in a definition is called "idem per idem" Such definitions do not express the content of the concept: if we do not know, what legal responsibility is, the reference to the fact, that it is taken for a committed violation, does not contribute anything to our knowledge;

3) Normative definitions should be adequate, i.e. the extension of the defined concept must be equal with the extension of the defining concept, and these concepts should be interchangeable.[33]

All the normative definitions, included in a normative legal act, should be naturally built into the mechanism of legal regulation and the legal system of the society, there should not be any contradictions between them.

Specific role in this mechanism is played by interpretation. Interpretation is one of the key concepts of the modern social philosophy, within the limits of which the conception of reality depends on the grammatical, semantic and other rules of this or that linguistic system, used for the description of the world. Everything, that is individualized or generalized, described or explained, depends on the opportunities, provided by the linguistic system. Therefore, the limits of interpretation are at the same time the limits of our world and meaning.[34]

Interpretation of legal texts, regarded in the broadest sense, is inextricably connected with the law per se. Social reality gains legal meaning only when it is apprehended in the textual form by a social subject and is interpreted by him or her as normatively valuable and legally binding for the society. Therefore, the interpretation of legal texts includes cognitive and emotional components, i.e. rational and irrational levels, and is a constituent part of law communication. According to the British scientist Michael Zander, "legislative definition is a particular form of a general problem — the problem of understanding the meaning or, in a more comprehensive sense, the problem of communication. Like Jourdain in "The Bourgeois Gentleman" by Molière, who didn't know that he spoke prose, most people have very little idea to what extent their use of the language is directly based on interpretation".[35] Therefore, one should accept the opinion that "understanding of legal activity as interpretative activity... leads to recognizing the greatest importance of acquiring the knowledge of legal

[33] Ibid. P. 69–70.

[34] *Markov B.V.* Kommunikatsiya i interpretatsiya // Markov B.V. Znaky bytiya. St. Petersburg, 2001. P. 448–449.

[35] Zander M. The Law-Making Process. London, 1985. P. 72.

technique as ability to act in the sphere of law".[36]

Interpretation of legal texts in a narrow sense (in its practical, law-realization meaning) is not a social, but an individual mental process, aimed at, firstly, defining the *meaning of legal texts* in relation to the behaviour of the law subjects (apprehension of law), and secondly, at *elucidation* of this meaning to the other subjects of the law communication (elucidation of law).

The task of the interpreter is not only in apprehension and elucidation of the *logical* meaning of a legal text, but also in *understanding* it (its implicit information) through perception of the cultural environment, which "engendered" the text under study.

Interpretation of legal texts (legal interpretation) as understanding their meaning is an integral element of any legal activity, both lawmaking and law-realization. The second stage of interpretation — elucidation of this meaning to the other participants of law communication — comes to the fore, when various conflicts of law arise and particularly in law enforcement process.

Various methods are used for interpretation of legal texts. It is the existence of legal text, including imperative textual norms, that sometimes causes a certain contradiction between the form of expression of a legislative text and its meaning, obtained in the process of interpretation.[37]

The history of legal thought gives most diverse views on the problem of solution of the above mentioned dilemma. The most radical position is recognition of identity between legislator's will and the form of its expression in a law. According to the famous lawyer of the pre-revolutionary Russia E. V. Vaskovsky, such approach, suggesting, that there was idolatry of words, of the letter of the law, was characteristic of the peoples, being at the lower stages of development of legal system. "... All ignorant peoples consider a word, both written and solemnly pronounced (a formula), to be something mysterious; na ve faith ascribes supernatural force to it. Nowhere was this faith in a word stronger, than in ancient Rome. Worship of words penetrates through all the relationships of public and private life, religion, customs and law... In compliance with this principle, the lawyers of ancient Rome did not go beyond verbal interpreta-

[36] *Aleksandrov A.S.* Yuridicheskaya tekhnika — sudebnaya lingvistika — grammatika prava. P. 106.

[37] According to M.M. Bakhtin, two points make a text as an utterance: its conception (intention) and realization of this conception. Dynamic correlation of these points, their conflict determine the character of the text. (*Bakhtin M.M.* Problema teksta v lingvistike, filologiyi i drugikh gumanitrnykh naukah // Bakhtin M.M. Estetika slovesnogo tvorchestva. M., 1986. P. 298).

tion, considering the letter of the law inviolable sanctity and not seeking for the true thought and will of the law-maker».[38] The consequence was a prohibition on interpretation, as the prevailing opinion was that clear laws do not need interpretation and it can only result in their distortion. Another famous Russian lawyer and historian of law points out, that in his time Justinian acted in the same way, as well as later — Pope Pius IV according to the decrees of the Council of Trent. In Germany the prohibition on interpretation of law was discussed at various times in the 18th century. Napoleon I was appalled at the news, that there appeared to be the first commentary on his Code of Laws.[39] Charles Louis de Montesquieu and Cesare Beccaria were opponents of judicial interpretation.

However, life has shown that interpretation of law, including the determinative conditions of its application, is a necessary condition of practice of law as a form of social communication. In the literature there have been given numerous examples in support of this view. In earlier times there was a law in Bologna, which required "most severe punishment for shedding blood in the streets". Once one of the burghers had an attack of disease and fell down in the street. A doctor, who happened to be passing by, had to let blood to save the life of the patient. Following the letter of the law required a severe punishment for the doctor. But it so obviously contradicted to the meaning and the original purpose of the law, that the doctor was relieved from responsibility.[40]

However, recognition of the necessity of law interpretation on the assumption of its meaning causes new difficulties, connected with defining the essence of the interpretation procedure. For centuries there have been disputes over whose thought or will should be interpreted: the will of the law-maker or the will of the law itself?

If law is identified with legislation, expressing the will of the law-maker, then the answer is predetermined, — it is the will (thought) of the law-maker, i.e. what he said or intended to say, that should be interpreted. The so-called exegetical method of interpretation is based on this principle. The essence of the method is expressed in two sentences: "All law is limited by the written legislation; a lawyer just has to extract it from the text, following the

[38] *Vaskovsky E.V.* Civilisticheskaya metodologiya Part 1. Ucheniye o tolkovaniyi i primeneniyi grazhdanskih zakonov. Odessa, 1901. P. 63.

[39] *Shershenevich G.F.* Obshchaya teoriya prava. Riga, 1924. P. 727–728.

[40] The example is taken from: *Cherdantsev A.F.* Tolkovaniye prava // Obshchaya teoriya gosudarstva i prava. Akademichesky kurs; In 2 vol. Vol. 2. Teoriya prava. M., 1998. P. 326.

will of the law-maker".[41] Such view is also typical for the so-called analytical positivism, widespread in the modern English-speaking world.

Yet, if a law is understood not as just the will (arbitrary decision) of the law-maker, i.e. not as what he said or indented to say, but what he *should have said* on the assumption of the legal nature of things, principles of law, idea of law, idea of justice, supremacy of the people's will, etc., then in this case legislation should be interpreted having in mind all these ideal criteria. Both variants are embodied in the theory and in the legal reality in the form of various systems of law.

For example, according to the opinion of the famous American jurist Ronald Dworkin, the process of law interpretation is a process of combining the past (intention of the law-maker) with the present (view of modern moral principles, i.e. what is considered to be just in a definite society). In this case according to Dworkin the priority is given to the modern views. In other words, a judge, applying a law in new historical conditions, is not committed to the explicit linguistic content of the law. He should follow the ideal, for which the law was made.

Any interpretation of a text, including legal texts, is a communicative and dialogical process, determined by the "subject factor" and theoretically allowing various interpretations in various historical and social conditions. They are also determined by the relativity of all sign systems[42]. It is notable, that one and the same text of the U. S.

[41] *Bergel Jean-Louis.* Obshchaya teoriya prava. M., 2000. P. 425.

[42] Words, on which all our culture is built, "do not have and cannot have elementary semantic content. It has become possible... to talk about fuzzy semantic fields of the word, which have the function of probability distribution, and the human as a probability receiver... It has become clear, that metaphor is not a lifeless vestige, but a necessary component of the language. Metaphor is abandonment of formal logic, more exactly, of one of its basic laws — the law of excluded middle. Bohr's principle of complementarity principle is an open confession of the necessity of metaphoric thinking in science... Furthermore, any scientific theory is merely a metaphor: the described phenomenon behaves both like and unlike the theory says... What are the meanings of a word? They are single units, their characteristics and relations, classes of objects, characteristics and relations. Combination of all this is of the typology of the World, its general diversity. Each word is juxtaposed with a spot in the typology of the World. The fuzziness of the spot was always considered as a defect of the language. Everywhere, in science or in jurisprudence, we are trying to mark the contour of this spot, implicating the discreteness not only of individuals, but also of taxa. The ideal is to establish a one-to-one correspondence between discrete taxa and discrete words. Pursuit of such monosemy goes from Aristotle to scholastics and later to logical positivism... Probability model of the language resigns itself to the fuzzy semantic field of the word" (*Nalimov V.V., Drogalina Zh.A.* Realnost nerealnogo. Veroyatnostnaya model bessoznatelnogo. M., 1995. P. 17.).

constitution was interpreted for two hundred years in different ways, and this process will not finish until the constitution itself ceases to have effect.

For interpretation of legal texts special methods and means of interpretation are used. The following methods of interpretation are defined: philological, systematic, logical, historical, and functional.

Philological method of interpretation is also called grammatical, linguistic, or textual. The object of philological interpretation of law is texts of various legal acts and, in the first place, acts, containing rules of law (normative legal texts). Philological method of interpretation includes lexical and syntactical interpretation.

Lexical interpretation is apprehension of definitions of the separate words, contained in legal acts, and their terminological meaning. The legal science has worked out a number of rules of lexical interpretation, identical to the rules of examining the legislative definitions:

1) words and expressions should be given the meaning, which they have in the corresponding language, unless there are some reasons for a different interpretation; giving the words a meaning, which is different from their common meaning, should be justified;

2) if the legislator defined the meaning of the term himself, it should be used in this very meaning;

3) the meaning of the term, given by the legislator for some specific branch of law, cannot be extended over the other branches without good reason;

4) if the legislator did not define the meaning of the term, it should be understood in the meaning, in which it is used in the legal science and practice;

5) identical formulations of one and the same law cannot be given different meaning, if it does not follow from the law itself;

6) different terms should not be given identical meaning without good reason;

7) such interpretation, when separate words in the law are considered unnecessary, is inadmissible.[43]

Syntactical interpretation is an interpretation, based on the rules of combination of words in the sentence. Special attention in this method of interpretation is given to the use of copulative and disjunctive conjunctions, various verbal forms and participles. It is well-known, that the position of a comma in the sentence "Execute not pardon" determines its meaning. Philological method of interpretation is the basic one; it starts any process of interpretation of legal texts.

Logical method of interpretation presupposes the use of logical procedures and laws of logic for apprehending the meaning of the rule

[43] *Cherdantsev A.F.* Tolkovaniye prava. P. 328–329.

of law. The following logical procedures are usually used: logical conversion, comparison, analysis and syntheses, abstraction and generalization, induction and deduction, analogy; and the following laws of formal logic: law of identity, law of non-contradiction, law of excluded middle, law of sufficient reason.

***Systematic** method of interpretation* is based on structural character of legal texts. The meaning of an article of a legal text can sometimes be found and substantiated only after referring to the other articles, which, for example, contain the sought-for definitions of the legal terms. Reference and blanket articles also cannot be understood without referring to the articles they make reference to.

Systematic method of interpretation is used for comparison of general and specific rules. There is a principle in jurisprudence, according to which special rules limit the jurisdiction of the general norm. For example, Article 80 of the Family Code of the Russian Federation binds parents to provide financial support for their minor children. Article 120 of the same Code provides an exception from this article and states that in case of emancipation of minors (obtaining full legal capacity by minors until they attain the age of majority), parents do not bear such responsibility any more.

Historical method of interpretation helps to define the meaning of a rule of law, judging by the conditions of its creation. In this case the interpreter uses the knowledge about specific historical conditions, reasons and grounds of creating the interpreted act in order to clarify and understand its meaning. The most essential conditions are connected with the law-making process: drafts of normative acts, explanatory notes and the debates in the legislative bodies and in the press.

Functional (sociological) method of interpretation is based on the knowledge about the conditions, in which the interpreted rule of law functions (is applied, is in effect). At functional interpretation in order to understand the rules of law the interpreter uses characteristics and evaluations of various aspects of particular historical reality, knowledge about the social conditions (political, moral, living conditions, etc.) of functioning of the original legal texts, i.e. at this one can observe referring to the sources of information and criteria of evaluating the rules of law, which are external to the system of rules of law.[44]

At functional interpretation one uses the evaluation criteria and facts, referring to the sphere of politics, legal consciousness and morality. It is primarily true in regard to interpretation of evaluative terms, such as “valid reasons”, “ good faith actions”, “material harm”, “mercenary motives”, “equal opportunities”,

[44] *Cherdantsev A.F.* Tolkovaniye prava i dogovora. M., 2003. P. 131–132.

"reasonableness", "justice", etc.[45] It is impossible to formalize these terms, make them monosemantic and irrespective of the social context. But it is just as impossible not to use them, as law is not a totally formalized system and to a great extend it is based on the universum of social values, "living" in the natural language.

The language, which is spoken both by citizens and by lawyers, the language, in which the laws are written and which is spoken in court, — this language exists under its own laws. The knowledge of these laws and their efficient use is a necessary condition of effective legal activity.

Translated by N. Silinskaya

[45] In the literature other methods of interpretation are sometimes used, for example, *special legal* and *teleological*. Though their existence as independent methods is debatable. (See e.g. *Cherdantsev A. F.* Voprosy tolkovaniya sovetskogo prava. Sverdlovsk, 1972. P. 77–83).