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INTERSECTORAL AND INTEGRAL APPROACHES AS A RESPONSE OF THE THEORY OF LAW TO THE CONTEMPORARY ISSUES OF THE IMPLEMENTATION OF LAW

Viktorya Ohanyan[1]

Decisions that are good for individuals can sometimes be terrible for groups
«The Economist,» 7 September 2016[2]

The realities of the 21st century bring new challenges to the law: Kant's "search for a definition of the law" is more than relevant today. The concepts of law can be relatively true, comprehensive and justified only for a particular period within certain paradigms. The reason for this is not only the development of scientific thought but also and mainly the dynamics of the change of the society. The "pure" theory of law, attempts to understand the meaning of the law without the in-depth examination of its interconnection and correlation with the object of its influence - conduct, social relationship, social realities - is like a football, where the player is aware of the rules, follows them, applies the best tricks, but does not see the gate. The legal reality of Armenia is full of examples when the adopted legal regulation is "lawful" by its nature[3], conforms to all the rules of the legal technique, in other words, it is a legal rule by form and essence, but, nevertheless, does not lead to any positive

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[2]https://www.economist.com/blogs/economist-explains/2016/09/economist-explains-economics

[3] The entry is used in terms of legal conception (natural-legal doctrines, liberal-law legal conception).

change in public life. *Is it the role of the law to lead to such a change or the principal function of the law is to ensure that social relations are regulated?* The question is somewhat related to the contradictions between legal positivism, jusnaturalism, and legal realism approaches[1], but is not identical to that issue and is discussed from a different point of view in this article.

The traditional legal science values the law as a regulator. If we sum up the qualitative aspect of the "regulatory" function, the following features stand out: normativity, obligatory nature, enforceability (positive paradigm), compliance to natural laws, values and principles (natural-legal paradigm), formal equality, justice and liberty (liberal-legal paradigm), compliance with the applicable objective societal regularities (sociological paradigm), arrangement based on individual and collective psychological/emotional/ unconscious motivations (psychological paradigm). However, it should be noted that all these legal concepts mark the pre-classical and classical period[2] of the theory of law as a social science. In all these paradigms, the principal subject of the law, i.e., an individual plays a minimal role in the process of law formation, the law by its essence and content is eventually deemed to be predetermined, caused by numerous objective and subjective factors, but not dependent on the addressee of the law. A human, being a subject of right, is an object of the law by demonstrating certain conduct in social relations.

It is difficult to disagree to the idea that the traditional legal science with its pre-classic and classical paradigms lags far behind the processes that take place in natural sciences, as well as in certain social sciences, which suggests that the scientific context of the “law”

[1] See, for example, the issues of general theory of law and state. Textbook for higher educational establishments // Ed.gen. V.S.Nersesyants, Moscow: 2014, Page 135.

[2] For more details about the theory of law as periods of development of science: **Razuvaev N.V**. Contemporary theory of law in search for postclassical paradigm of awareness. Jurisprudence, 2014, N. 5 (316); Pages 137-151

phenomenon is not always compliant with the social-legal reality of the 21st century. In the center of contemporary science is relativity and a man as a creative creature, and not an object. Therefore, within the contemporary legal science, the theory of law should review the new qualities of the law, in particular,

- the regulatory potential, capable of leading to socially significant changes and creating conditions required for the full and effective implementation of human rights for everyone,

- a complex system and an element of a complex system regarding interrelation and interconnection with other elements (e.g., social norms);

- formation of law for a human, but also due to and through a human, and evaluation of necessary and incidental effects of multiple determinants influencing this process.

Scientific justification of this and other vital aspects/developments is impossible within the traditional legal science. Moreover, the efforts to "clean" the legal science from elements of other sciences at times result in complete detachment of the theory of law from life and exclusion of the possibility of practical application of its achievements. As Romashov distinctly points out, "We, the theorists, aspiring to the “pure law," eventually turn into the scholastics of legal science, which leads to the lack of interest in our scientific achievements both by the representatives of other legal sciences and practicing lawyers."[1] There is a profound gap between the science and practice, and we all face today the challenge of recognizing and overcoming this gap.

The developments of legal science over the recent decades have shown that the law is really viewed as a complex system and, therefore, cannot be thoroughly studied regarding its impact on social relations, unless it becomes a subject of interdisciplinary research. In

[1] **Romashov R.A**. Integral jurisprudence and encyclopedia of law: historical-methodological analysis, Jurisprudence, 2013, N.3 (308), Page 107.

the modern world, where everything is interconnected and all elements are in the synergy processes, the role, significance and potential of the law as a social regulator should be justified anew from the point of such approach and methodology, and finally, a new paradigm of the law theory, which is in tune with the theory of complex systems and the dictates of modern reality[1]. The search for the meaning and content of the law continues today with the use of the theory of probabilities, game theory and other mathematical/economic tools, within the social norms and social doctrines on social change, with the use of gestalt psychology and other scientific achievements. This approach has led to some developments within the theory of law. Some theorists have put forward new paradigms of the theory of law, such as the communication theory and concept[2] of law, in which the integral approach to the law takes a new meaning. The theory of law is also developing dynamically. In any case, even irrespective of prevailing paradigms, it is indisputable that theory of law can only benefit in a broad sense by using the theories, methodology, and tools for examining behavioral and social relations externally manifested in other branches of science.

Let us, for instance, refer to the game theory deemed as a branch of mathematics. Its application in economics, international relations, and sociology have already a decades' history. The game theory in social sciences serves as a tool for prediction. The object of law impact is the conduct; thus, from the perspective of implementation

[1] **Taron V. Simonyan, "Nash Equilibrium as a Mean for Determination of Rules of Law (for sovereign actors)"**, Journal of Scientific Articles dedicated to the 80th anniversary of the Faculty of Law (YSU), p. 19:

[2] **Polyakov A.V**. Communication conception of law (genesis and theoretical-legal substantiation), dissertation for candidate of degree of doctor of law science in the form of a scientific report. St. Petersburg, 2002, including **Arkhipov S.O**. Communicative theory of law A.V. Polyakov. Russian law Journal, 2016, N.4, Pages 20-27; **Kravits V**. Legal communication in modern law systems (theoretical-legal perspectives). Jurisprudence, 2011, N.5, etc.

of the law, it is essential to predict which of the possible options of behavior will be selected by the participants of the social relationship regarding predetermined legally acceptable standards of behavior. Interestingly, the application of the achievements of the game theory to social relations pursues the very goal of predicting, rather than the goal of verification of behavior options with mathematical accuracy[1]. In parallel with the development of law, the processes of prioritizing human rights, the victory of liberal-democratic values, the development of rule of law and civil society concepts, recognition of an individual as a legal being and member of self-managed, self-organized civil society expand the optionality and diversity in the law, under which the prediction of the regulatory effect of the law is becoming more critical.

There are some works on the use of the game theory in the law, where the use of the concept of the game theory is justified in all cases where the participants of the game (in our case, social relationship), i.e., independent decision-makers, presumably act reasonably and rationally[2]. The presumption of acting independently and reasonably (with the awareness of his/her rights and legitimate interests) is also based on lawful conduct, because the latter is linked to such "conscious" categories within the theory of law as legal consciousness (especially legal ideology) and legal culture. Therefore, when applying the game theory in law, the social relationship as a matter subject to legal regulation is viewed as a game that enables to forecast and analyze the conduct of legal beings.

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[1] **Jessie Bernard, "The Theory of Games"**, American Journal of Sociology 59 (1954), p.412, reference according to **Richard Swedberg, "Sociology and Game Theory: Contemporary and Historical Perspectives"**, Theory and Society, Vol. 30, N. 3 (June 2001), Page 305:

[2] **Morten Hviid, "Games Lawyers Play?"**, review of "Game Theory and the Law" by Douglas G. Baird, Robert H. Gertner and Randal C. Picker, Oxford Journal of Legal Studies, Vol. 17, No. 4 (Winter, 1997), Pages 707-708:

Within the game theory, the idea of the equilibrium[1] proposed by John Nash is perhaps of particular interest regarding the problem of implementation of the law. According to Nash, in a non-cooperative game, i.e. such games where players have no opportunity to reach an arrangement or there is no active mechanism of implementing any arrangements, there is always a combination of players' strategies in which the player cannot have a better strategy and better result without changing the other player's strategy. This condition is called "the Nash equilibrium" and it has a stable nature, since in terms of the game when everyone pursues his/her interests and acts independently, the Nash equilibrium is the most beneficial and safe condition for everyone where the risk of harm caused as a result of other players' actions is minimal. Everyone makes the most beneficial decision for himself/herself based on his or her predictions about the conduct of others. Admittedly, the Nash equilibrium is NOT the best thing for each player.

Moreover, for the whole group, it may also be negative. The point is that a better result is possible only if the participants in the game cooperate for the common and the better for each one. This is not possible in a non-cooperative relationship.

The concept of the Nash equilibrium applies to such social relations, the participants of which have the possibility of selecting specific options of conduct, subject to restrictions under the standards of law. In other words, the Nash equilibrium is applicable to social relations regulated under the dispositive legal rules. Moreover, in consideration of the assumption that the law is only one element of the socio-normative regulation system, and the people's behavior is directly or indirectly regulated or exposed to other elements of the system, in particular, the impact of social norms, the choice in the spectrum of legitimate and non-legitimate conduct, even in the case

[1] The theory of the Nash equilibrium is widely used in economics and sociology. Its author John Nash was awarded the Nobel Prize in 1994.

of imperative norms can also be explored through the lens of game theory.

This judgment can be discussed based on the examples below.

A judge holds a case where one of the parties is the judge's neighbor. The judge does not withdraw herself from the case. The other party files a motion for self-withdrawal.

Behavior options for the judge:

- accepting the motion and withdrawing from the case;
- rejecting the motion and continuing the examination of the case.

Behavior options for the party who files the motion:

- appealing the final judicial act with the Court of Appeal on the grounds of lack of impartiality;
- applying to the entity who has the authority to initiate disciplinary proceedings against a judge in the Supreme Judicial Council with a motion to initiate disciplinary proceedings against a judge by a violation of the Rules of Conduct by the judge.

Since the party at that stage of a relationship has made the only step that was available for him/her within the legal regulation – i.e., filed a motion for self-withdrawal of the judge, and no change in strategy can be made at this point, let's consider the most optimal options[1] from the judge's viewpoint:

a. high profile of the profession of a judge in the society makes her be perceived as not having a right to err: if the judge withdraws only following the respective motion by the party and not proactively, an impression will be created that the judge was trying to conceal her failure to be impartial or is not sufficiently aware of the

[1] In this or other examples the options of conduct are discussed not from the perspective of legality but from the standpoint of game theory which presumes that everyone in the game acts independently, in his/her own interests. In the given case, the judge's interest is that violation of the rules of conduct by the judge - failure to withdraw voluntarily when the grounds for withdrawal are in existence, does not lead to negative consequences for the judge.

law and the rules of the judge's conduct, which would have a negative impact on her reputation. In that light, the judge had already committed a violation by failing to withdraw when there were grounds of self-withdrawal. The probability of unfavorable consequences for the judge in these circumstances is 100%.

b. if the judge continues to try the case, the party may not appeal the judicial act with the Court of Appeal in case judicial act is passed in his/her favor. Even if appealed, the Court of Appeal may not find that there was a basis for self-withdrawal, or the entity is initiating disciplinary proceedings against the judge may fail to accept the application because it was not sufficiently justified, etc., etc. Thus, the probability that the judge will face unfavorable consequences is much smaller than 100%.

It is more than likely that the judge in a given situation will choose not to withdraw, and this strategy, taking into consideration the interests and capabilities of the parties, will create the state of the Nash equilibrium within the given relationship.

Does the state of the Nash equilibrium within legal frameworks contribute to the full implementation of the rule of law, that is, the social good that serves the norm? It is obvious that the choice of a judge is not a legitimate conduct, at which legal regulations ensuring the judge's impartiality are aimed; moreover, such situation is far from the real social benefits which were to be shaped as a result of regulation - the public's trust in the impartiality of the judicial system and the victory of the interests of justice. Under the Nash equilibrium, everyone operates in a "beneficial" way, but the interests of the group (in our case – the interest of society at large to enjoy the protection of the human right to fair trial) suffer.

So where is the problem? The existing legal regulations are clear on the grounds and procedure for self-withdrawal of the judge, rules of conduct for judges and mechanisms of implementation thereof. On the one hand, if we take into consideration the existing regulations

from "legality", those do not anyhow violate the general principles of law, do not contradict the Constitution and international standards. Legal regulations have been adopted in accordance with the established procedure, all the methods and tools (public hearings, professional discussions, legal assessment of regulatory influence, etc.) have been applied and maintained in the process of their formulation, aimed at ensuring that the content of legal order will be further implemented in social relations. However, the regulatory function of the law is not being implemented in practice. And a systematically non-implementable regulation is nothing but an illusion of law. It is also evident that such result occurred because of the legal regulation, the validity of which had not been assessed from the point of view of the determinants of social behavior of people, motives, and the promoting and impeding factors. The legal regulation did not consider the fact that Nash equilibrium is an objective regularity.

The new norms jurisprudes seem unanimous in accepting the basic economic premise that people act exclusively (or pretty much so) to maximize self-interest, which leads them to prescribe the arrangement of norms in ways that will best channel that type of behavior in order to maximize the common good[1]. A clear and quick solution to this issue is also of importance because people, as a rule, tend to apply again and again the behavioral patterns that once again yielded positive results regarding fulfillment of their interests[2]. Moreover, multiple users can form a social norm, the further overcoming of which will not be easy through legal rules.

If one approaches this problem with this logic, it could be concluded that examining possible predictive behavior options of potential parties of social relationships and the point of Nash

[1] **Lawrence E. Mitchell, "Understanding Norms"**, The University of Toronto Law Journal, Vol. 49, No. 2 (Spring, 1999), Page 189:

[2] **Robert Axelrod, "An Evolutionary Approach to Norms"**, The American Political Science Review, Vol. 80, No. 4 (Dec., 1986), Page 1096:

equilibrium of that relation would provide the policymakers/lawmakers with valuable information which could be used in the process of lawmaking. Based on this information one would be in a position to propose such legal regulation that would lead to the shift of the point of Nash equilibrium by outlining/motivating additional options of possible behaviour, or provide for a cooperative regulation, since the cooperation itself discards the Nash equilibrium state and leads to a better result and a greater good for each side. Back to our example, let us imagine that the legal regulation provides for another procedure of discussion and resolution of withdrawal motion. Besides the judge, the motion anonymously (through the IT system of the judicial system) is provided to two more judges at the same time for consideration thereof, each of whom ought to propose his/her own option for resolution of the motion, which is sent to the judge hearing the case and to the party who filed the motion. In the case at least one of them finds that there are grounds for withdrawal, the judge who is in charge of the case must withdraw. In case of such regulation, the list of behavioral options for the judge and the likelihood of adverse effects change. The judge is conscious of probable recognition of the existence of grounds for withdrawal by other judges, if she fails to recognize that there are grounds for withdrawal and rejects the motion, a question will immediately arise about her impartiality or professionalism, which may have a preventive effect and motivate the judge to voluntarily withdraw when there is a ground for that, without awaiting the motion of the party. Such a practice would help build confidence regarding the impartiality of the judicial system.

Within the scope of this article, our goal is not to propose a change in the procedural legislation or the rules of judicial conduct. On the contrary, the need for such a change should be seriously examined by studying the judicial practice, the psychological peculiarities and corporate culture of representatives of the judicial

corps, public trust and other issues. The example just illustrates that without preliminary evaluation of the psychological, informational, social, economic effect that the legal regulation would have upon the participants of the social relations by its form and content, it will not be possible to predict the success/failure of implementation of a legal rule. This can be demonstrated through many other examples which cannot be thoroughly analyzed in the scope of this article.

In conclusion: the traditional legal science does not give an answer to the question what the *quality* of legal regulation is, and by what criteria it is possible to measure it. Legal science studies the phenomena of "social relations regulator," "legitimate behaviors" and "social regulation system" in the context of the very legal characteristics. As already noted, such a linear, sectoral approach no longer gives an opportunity to study all aspects of the issue of implementation of the law as a complex system. Thus, the conditions for the creation of desirable public good through legal regulation of social relations should be the subject matter of research by the theory of law in the interconnected contexts of lawmaking and implementation. To do that successfully the theory of law should rest upon methodological and instrumental achievements of other sciences by adapting them to the peculiarities of legal reality.