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ANTICIPATORY LAW REGULATIONS CONCEPT INFLUENCED BY RISKS AND THREATS OF DIGITALIZATION

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Abstract

The paper covers the issues of the concept of anticipatory legal regulations (development), the idea of which is more often come out within the current political and legal science because of the risks and threats of digital transformation of social relations. The latter refers to the increasing contribution and influence of digital technologies, computer-aided algorithms, artificial intelligence, etc., in various fields of human life (economy, politics, education, communication, law, etc.). In our opinion, the key issues of this concept include, first of all, poor philosophical and ideological validity, secondly, the lack of approved theoretical and methodological instruments of legal forecasting, thirdly, the indistinctive content of the material content of the concept, and, finally, fourthly, technical legal hindering factors of including the concept into the present legislative system, as well as the presentation of the substantive content of the concept. The first, second and fourth problems are general and do not depend on digitalization, since any advanced development concept faces them. The third, however, is directly concerned with digitalization and will therefore be mostly focused on. The author concludes that only a comprehensive solution to these problems will make it possible to define a concept of advanced legal regulations that can have an effective impact on social relations

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Keywords: Digitalization, law, law regulations, risks and threats

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1. Introduction

One of the key trends of the present is digitalization, the impact of which on public and personal life is becoming to be felt more effective. It should be noted at once that globally speaking (the most correct one in this paper), digitalization should be interpreted as "a set of economic, managerial and social procedures connected with the application and widespread acceptance of digital, computer, information, electronic and network (telecommunications) technologies and AI systems in nowadays" (Gaivoronskaya et al., 2019, p. 43).

It is digitalization that the present-day round of civilization development is connected with. It is called the Fourth Industrial Revolution (Industry 4.0) (Schwab, 2016). Its impact is involved in all key areas of human activity (law, education, economy, politics, etc.). The latter, in turn, is more mediated by the digital reality, how it interacts with it, makes a certain impact on social relations, introducing previously unknown norms and practices into them. The expanding share and amount of cyberspace are come across as progress and the inevitable development of human society. However, it does not exactly mean positive or negative, since this process can be interpreted negatively as a phenomenon that diminishes man and his nature, or positively as a solution to human problems in various fields.

The negative assessment is added by a pessimistic view of the advancing introduction of digital technology, computer-assisted algorithms, artificial intelligence, etc. The positive view is an optimistic one. According to it, the replacement of the analogue environment by a digital one is an unquestioned advantage. A moderate view, which does not consider digitalization as a purely negative or positive phenomenon, differs from these opinions. Specific to this view is a pragmatic attitude. It coincides with the notion that every phenomenon has negative and positive aspects. Each of them can be reflected in certain practices of application, inclusion and actualization. In other words, according to this approach, digitalization is more of a neutral phenomenon. The effects of it are still unclear.

As a highly complicated and compound process that transforms the socio-political and legal structure qualitatively, digitalization is attracting a great deal of scholarly attention, becoming one of the central areas of contemporary political and legal research. This is because law and politics, being very important fields of social life, are influenced by digitalization processes greatly.

This topic brings together both legal theorists (Baranov et al., 2020a, 2020b; Mamychev et al., 2018) and specialists in branch sciences (Efimova & Baldina, 2019; Gladysheva, 2019; Lebedev, 2019), being an example of a long-time unprecedented undivided opinion within the legal academic corporation on the relevance of the subject. Such interest is since digitalization already has a significant impact on the law, and in the future, as noted above, is seen as a phenomenon capable of changing not only the nature of a political and legal system of social relations but also the entire social pattern.

The research preferences and the gauge of consideration of the issue by branch scholars and theorists differ. Whereas the former consider the impact of digitalization on specific legal institutions, changes in legal activities, the branching nature of the relations arising, etc., the latter, quite logically, consider it by

focusing on more general issues; tend towards broad generalizations, fundamental doubts and not so practical conclusions. While belonging to the second group by our intradisciplinary nature, we believe that a theoretical, conceptual-legal examination of the digital transformation of the political-legal area is highly warranted and well-judged.

Moreover, a similar way of consideration seems justified by the nature of the challenges that digitalization brings to the legal sphere, as well as by the demands placed on law and policy affected by unrelenting digitalization. From this perspective, a theoretical consideration of the difficulties encountered is not seen as mere idle speculation but as an attempt to address the urgent problem by providing models, patterns and general recommendations for reconciling existing social relations, and perceptions of them, with the new formats of social, political and legal interaction that are emerging influenced by digitalization.

2. Problem Statement

This is where the research problem arises, which comes down to the fact that the uncontrolled and very active expansion of digital technologies, autonomous algorithms, robots, artificial intelligence replacing humans, etc., is more interpreted in the language as danger, i.e. in terms of 'risks', 'threats', 'challenges', 'problems', and so on (Gaivoronskaya, 2020; Khalin & Chernova, 2018; Ovchinnikov et al., 2020; Pluzhnikov, 2021). It contributes to securing from the harmful influence of digitalization. However, such a will generally develop within a moderate approach that admits both negative and positive aspects of digitalization, so the tendency towards security should not be seen as a wish to break off digitalization, but as an attempt to minimize its negative manifestations.

With this background, the impact of digitalization on the legal-political area is reformulated, through a change of emphasis, where law and legal policy are given a major part in the overall course of the digital transformation of social relations. This refers to the idea, actively discussed in political-legal research, of creating a concept of anticipatory legal regulations of digitalization procedures (Baranov et al., 2019; Liubashits et al., 2019; Mamychev & Miroshnichenko, 2019; Vasiliev et al., 2020).

The concept of anticipatory (developmental) legal regulations, which would record provisions to bring social relations into line with a certain pattern, thereby, acts as a project for the future. Such a view is in contrast to standard-setting which records only the current state to which the legal form is given. In the case of digitalization, the insufficiency of this action has been repeatedly emphasized.

It has been noted, for example, that "the adaptation of law, the application of the current norms to new relationships, is the first classical solution that comes to mind. It seems that concerning virtual objects, one cannot do without developing new, special norms" (Talapina, 2018, p. 10). Moreover, it is "the shift away from the instrumentalization of the law and the mechanism of 'similarity" (i.e., the provision of the current legal regulation with externally similar relations added by a digital element – author's note) requires the development of appropriate legal policy, the preparation of a special concept of advanced legal development of society and legal modelling of fundamentally new relations" (Mamychev &

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Miroshnichenko, 2019, p. 132). Therefore, one of the key theoretical and applied trends is “creating the concept of anticipatory reflection in the law of social relations in the fields referred to the use of digital technologies” (Khabrieva, 2018, p. 101).

Assume that the term 'concept of legal regulation' is used hereafter in two closely related meanings. First of all, it refers to the concept of legal regulation as a system of ideas and views on normative advancement (including a philosophical justification, a system of principles, etc.). And secondly, the concept can imply a certain legal act containing provisions regulating relations in the relevant area. We consider this duality of meaning to be extremely significant since the problem covers both the concept as a system of views and the concept as a legal act.

The most problematic area is the constitution of this concept, which is due to a number of reasons, the nature of which is in the internal logic of the legal coding of social relations and in the specific structure of law. In attempting to define the general outlines of the concept we encounter several objective difficulties. It seems to us, therefore, that the point of reference for the creation of an outline of the concept of anticipatory regulations of digitalization processes is verification of problems at present. The solution may allow us to define a legal action in the future which would have considerable regulatory potential. In other words, it is necessary to understand the difficulties that scholars and policymakers may encounter when attempting to create a workable concept of an anticipatory legal regulation of digitalization.

3. Research Questions

The subject of this study arises at the intersection of two processes - the development of the concept of advanced legal regulations and the digitalization of social relations. Being independent in their own right, these processes have their trajectories and patterns of development, which are not directly related to each other. However, according to the problem posed above, there is a common interest in these processes which generates the application space for research structure. In doing so, we are interested only in the most general, problematic points of intersection of the two phenomena. Each of them contributes its element to the overall system and affects its configuration. Thus, the subject of this study is the problem of constituting the concept of anticipatory regulation (development) of social relations. The necessity for it is proved by the risks and threats resulting from the uncontrolled digital transformation of social relations.

4. Purpose of the Study

The purpose of the research is to dwell on the problems of generating the concept of advanced legal regulation (development) of social relations emerging in regard to the digital transformation.

To achieve the goal, the following tasks are set and solved:

First of all, to identify and analyze possible philosophical and attitudinal approaches to anticipatory law-making;

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Secondly, to examine the theoretical and methodological tools of legal forecasting available in the present-day general theory of law, which can be used in creating the concept of anticipatory regulations of digitalization procedures;

Thirdly, to identify ideological, value and political points of tension that arise in the material content of the concept;

Fourth, to find out analytically and justify the concept's semantic structure, including the elements of the advanced regulations of social relations;

Fifth, to detect formal and legal difficulties in incorporating the concept of anticipatory regulation into the system of legislation, as well as difficulties in presenting its material content.

5. Research Methods

The special nature of the problem-focused, as well as the stated subject and defined goal, require the use of various methods and techniques of knowledge. The general boundary of them is set by general scientific methodology and logic. The theoretical trend of the research as a key method implies the analysis of texts containing relevant ideas and provisions.

Among the methods especially used, the reconstruction method and the technical-legal method should be mentioned. The reconstruction method is used to reconstruct some idea and provision in its internal logic and regularities (it uses separate components of historical-genetic and historical-systematic methods). Also, since the study is legal and is primarily aimed at acquiring theoretical and legal knowledge, it actively uses the provisions and conceptual and categorical framework of the general theory of law and state, which involves the use of the technical-legal method.

6. Findings

The study finds out four key issues in generating the concept of digitization anticipatory legal regulations. Three of these problems are common and relate to any concept of anticipatory regulations, but based on the general focus of the study they are closely linked to digitalization. The third issue relates directly to digitalization, so it will place greater focus on it. Thus, the distinguished problems include one of philosophical and attitudinal grounds, another one of theoretical and methodological tools of legal forecasting, the next one of material (substantive) content of the concept and, finally, the problem of the technical and legal properties of the concept.

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6.1. The problem of philosophical and attitudinal grounds of the concept of anticipatory legal regulations of development

By philosophical and attitudinal grounding is meant the position on the possibility of the existence of an anticipatory rule-making. Two models can be distinguished - catching up (formalizing, adjusting) and anticipatory (preventive) legal regulations. Each of them is based on a particular philosophical platform representing its view of the social function and capacity of law. The first one proceeds from the impossibility of rule-making ahead of time, treating the law as a means of registration those already established, historically selected and most useful models and patterns of social relations. The second, on the contrary, admits and insists on the possibility of anticipatory regulations, when the law acts as a mechanism that pulls up social relations to a certain state, thereby designing and creating new forms of social interaction.

For example, Mordovtsev (2020), pointing to the ‘formalizing’ (catching up, adjusting) nature of legal regulations, notes that “the principle of ‘anticipatory development’ cannot be applied in the legal branch (some fundamental ‘legal outline’ is created as a legal model before the appearance of the corresponding social relations). Otherwise, the possibility of building a subject area of ‘legal futurology’ should be recognized in legal science (p. 12). Accordingly, in this context, the task of law is to legalize (through nationalization) the independently emerging social relations associated with the circulation and use of robots, digital algorithms, augmented reality (AR) technologies, artificial intelligence, etc. In other words, the law only supports, protects and consolidates the relations that are most useful from the national point of view.

The logic of anticipatory development is very clearly illustrated by the following statement: “law is never just a tool in the hands of the state, it must carry a certain 'higher plan' of social development, a pre-ordained legal order, concerning which the state and its administration, in turn, act in an instrumental role, i.e. as a means of achieving it, constantly being adjusted by legal schemes” (Maltsev, 2007, p. 29). Here we are talking about the very ‘legal outline’ (Mordovtsev, 2020), which is a ‘pre-ordained legal order’, superimposed on the existing, incipient and potential social relations to transform them and give them a perspective corresponding to the stated model of the future. Then, therefore, we are talking about social construction using the law.

It cannot be said that this problem, which stems from the two opposing approaches within jurisprudence, has a theoretical solution. In fact, to move forward, it is necessary to distinguish between the second model, which allows for the creation of pre-emptive legal rules that do not only regulate future relations but also create them by restructuring already current relations. The philosophical and attitudinal component of this position is the notion that it is possible to construct the future through reason (in general, the dichotomy between created/artificial and established/natural is at the basis of the model distinction).

6.2. The problem of developing theoretical and methodological instruments for legal forecasting

If we allow the possibility of anticipatory legal regulations, then we are faced with the question of theoretical and methodological tools of legal forecasting. In other words, the question is how the regulatory effect and the logic of development of legislation containing provisions aimed at creating and regulating future relations can be determined.

In general, legal forecasting means "systematic research of prospects of development of legal phenomena and processes at certain levels of implementation: strategy of development of legislation and the legal system as a whole (first level), branches, institutes and norms (second level), functioning of legal institutions (third level), processes of law-formation and law-making (fourth level), legal behaviour (fifth level)" (Agamirov, 2020, p. 30). For the purposes of this study, we are interested in the first level, i.e. legal development strategies, which would be a possible concept of anticipatory regulations. The need to improve theoretical and methodological tools is directly related to the predictive potential of legal forecasts.

As a general matter, this topic has long been developed by different authors (Akopyan et al., 2014), so we will not decide on this point in detail and get to the next, most important and controversial issue.

6.3. The problem of the material (content) of the concept

Since the concept is not simply a concept of conservation, but a concept of advancement, the problem of the material content of the concept should be taken into account. In our view, this issue is the most polemical, because it is a collision of value, ideological, religious, political, etc. perceptions and beliefs. Each of them, through its specific representatives, 'is eager' to be reflected in the concept. In analyzing the whole content of the concept, it is possible to distinguish three semantic components that complete certain statements of the concept.

First, we are talking about the 'image of the future, that is, the version of events (state, situation) to which the law will draw social relations. It seems clear that any image of a desirable and positive future is not neutral but is value-based. Thus, the struggle over the future becomes a confrontation of different ideological platforms. Each of them claims to be the only true version of a possible future.

Next, and what is less obvious, the notion of risks and threats is not neutral either. The reference to risks and threats in the discourse of digitalization is of great importance. We have previously responded that it is by reference to them that the very need for an anticipatory legal concept is very often justified. Consequently, the content of the concept is proved not only by a drive for a desirable effect but also by the negative option from which the furthest away should be avoided. However, there is no phenomenon or process that can be objectively called 'a a threat', 'risk' or 'challenge'. However, we will refer to this semantic element of the concept, which means a set of risks, threats, challenges and potential negative consequences of digitalization, as the 'image of the enemy'.

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The third and final notional frame that underpins the concept is the 'image of the protected'. The latter refers to something to which threats and challenges can cause the most harm. At the same time, only that which has a value, which in turn is again conditioned by a certain set of external factors and beliefs, can be protected.

So, to summarize, when filling in the concept of anticipatory legal regulations, the critical elements are a) 'image of the future' (how things should become), b) 'image of the enemy' (risks and threats leading to the way things should not be and become) and c) 'image of the protected' (some phenomenon that should be preserved, such as peace, humanity, order, society, state, person, etc.). This division is analytical, since in specific research and possible conception each of these elements may probably not be reflexive in its own right.

The key issue is who will decide which value bases can be placed at the foundation of the concept. It is these that will be decisive when choosing from all three notional layers of the concept. Thus, in this aspect, the problem of the material content of the concept merges with the problem of representation and reflection in the legislation of the will of society, certain groups and individuals. Consequently, this point is highly politicized.

6.4. The problem of the formal-legal properties of the concept (legal validity and presentation)

Finally, there are formal-legal problems directly related to the applied significance of the concept. Positive law is characterized by a formal certainty that consists of at least two closely related components. First, the law is entered in a specific source that is legally valid. Accordingly, this aspect refers to the legal force of the act, i.e. its commitment and its place in the source system of Russian law. And secondly, the law is recited and entered in a particular linguistic form. Consequently, the formal-language aspect of the problem is the presentation of the ideas that form the basis of the concept. In other words, the substantive content to be formulated for the concept needs to be set out in some way and recorded in some source, thereby making it user-friendly, available and binding on the addressees.

7. Conclusion

Digitalization, which is included the subject field of theoretical jurisprudence, brings up to date many questions and problems on which jurisprudence seemed to have already developed and established a certain viewpoint. However, digitalization is precisely the challenge that tests the present-day legal knowledge system if it is solid and reliable. In the considered aspect, this is expressed in the fact that the question of creating the concept of anticipatory legal regulations of relations arising in connection with digitalization raises such purely legal issues as the philosophical and ideological justification of anticipatory rule-making, theoretical and methodological tools of legal prediction, the role and place of doctrinal acts in the legislative system, the proper linguistic narrative form of presenting standards. Nevertheless, there is

also the question of the material content of the concept, which is directly linked to the possible risks and threats of digitalization. To sum up, such an example of the involvement of a phenomenon in theoretical jurisprudence not only enlarges the latter but is also an important step in solving actual problems in practice, the most important of which have been dealt with in this article.

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