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INTEGRITY IN INTELLECTUAL PROPERTY: THE LINGUISTIC PROBLEMS OF LEGAL TERMINOLOGY

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Abstract

The article deals with the issues of common and professional legalistic perception of commonly used words of the Russian language which take place in the theory of law and in normative acts as narrowly-specialized terms. The article is devoted to the analysis of the influence of the conventional understanding of a legal term on the extension and narrowing of the subjects of legal regulation. The author attempts to put a clear distinction among the legal terms of “integrity”, “honesty” and “good faith”. The author also makes an effort to point out the impossibility of blending these categories in search of a unified term at fair practices. On the example of creating a legal construction of good faith in any relations about results of intellectual activities, the author makes a conclusion about first and foremost tasks of legal linguistics to distinguish traditional meanings of commonly used words in legal contexts and the meanings of the same words as specific legal terms.

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1. Introduction

Linguistic component has always been very strong in jurisprudence, but it possesses a specific nature. Russel (2017) even combined jurisprudence and theology, because they both “take their original principles not from an impeachable text, but from a code of laws and from sacred scriptures” (p. 254). No doubt that hermeneutics of law distinguishes not only a grammatical way of comprehending the law, but other ways too: logical, systematic and historical. Among all of these ways the grammatical way is considered to be primary and original. A lawyer would appeal to other ways of comprehension quite rarely, and only in case when using the grammatical way of comprehending the law does not provide with a result. Alekseyev (2019) noted: “Grammatical comprehension is based on the material of grammar, lexis, philological sciences. Its point is in the elaborate grammatical and syntactic, “literal” investigation of the law, in the analysis of words, sentences, wordings of legal norms. Along textual and grammatical analysis everything is essentially important – commonly accepted meanings of words, their morphological characteristics, syntactical structures and grammatical connections between words” (pp. 135-136). It’s possible to understand this special attention which is paid to the issues of terminology both in the theory of law and in practical jurisprudence.

By now legal studies have expanded through the level of literal grammatical comprehension of texts. The need of deeper linguistic disquisitions for legal sciences has been increasing. A special educational subject called “Legal linguistics” has come into being (Tarlanov, 2018). “Jurilinguistics” is being formed as a new field of science, and it deals with the interaction between language and law. There appear theories, discussing main characteristics of legal linguistics, primary requirements for the language of law are being figured out (Pyzh, 2010), traditional questions of interpretation of legal text and legal techniques are being focused on from the point of view of legal linguistics (Romashov, 2010). Term formation in law is being closely investigated (Bushev, 2010).

The issues of stylistic peculiarities of foreign languages of law are being elaborated because of the increasing influence of theory and practice of foreign law on perfecting Russian legislation (Kosonogova & Malaschenko, 2014). Both general questions of techniques for translating legal texts (Meshkova, 2011) and practical difficulties of translating legal terms into the Russian language are being investigated (Soldatov, 2014).

But as it seems, not enough attention is being paid to the issues of transforming commonly used words of everyday language when they are introduced in the texts of normative acts as legal terms with narrowly-specialized meaning.

2. Problem Statement

The relevance of this research is based on the modern tendencies of commonly humane evaluative moral categories being introduced into the texts of normative acts.

3. Research Questions

For the research the author sets up the following objectives:

- to define the influence of common meaning of the words used as terms in the theory (law, justice) on legal consciousness in general;
- to define the influence of the translation of the universal legal term “bona fides” on the contents of the meaning of a particular legal term “fidelity”;
- to define the influence of different interpretations of legal categories (“intellectual”, “immaterial”, “creative”) in various legal systems on the extension and narrowing of the subjects of legal regulation;
- to define the influence of the tendency to unify commonly used words which serve as terms in jurisprudence (“integrity”) on appropriate constructions of legal statements.

4. Purpose of the Study

The main aim of the research is to study the perception of commonly used words which may serve as legal terms in the Russian legislation and law-enforcement practice on the examples of the use of such categories as “honesty” and “good faith” in relations with the field of intellectual property.

5. Research Methods

The methods used in this research are universal scientific research methods (generalization, abstraction, formalization, analysis, synthesis) as well as specific legal and linguistic research methods (technical, comparative-historical, contrastive-comparative, psycholinguistic, etc.).

6. Findings

6.1. Law and justice

Russian jurisprudence has considered German legal science (a representative of the continental family, “civil law”) to be an example to follow for a long time. Although, recently the influence of the Anglo-Saxon law (“common law”) has been strengthening, and that is a global tendency.

In the Russian and German languages the same roots can be found for the words “law” and “justice” (“*pravo*” and “*spravedlivost*” in Russian; “*Recht*” and “*Gerechtigkeit*” in German). In the English language those terms are separated: “*pravo*” is equivalent for “law”, “*spravedlivost*” is “justice” (cf. “judicial”). If needed, it’s possible to explain this occurrence by the peculiarities of the common law (case law, judge-made law), when legal norms which set up the rights and duties of citizens appear as a result of a judicial decision, and not by a normative act of the legislative authority. At any rate there is no breach between the notions of “law” and “justice”, which can seriously confuse the representatives of Russian and German legal cultures. It is no wonder that it was Russian and German philosophers who noted that “law in the context of order contradicts justice” (Radbruch, 2004, p. 115) and that “justice is a protest against law” (Muromtsev, 2015, p. 243).

Common notion of justice differs from a narrowly-specialized legal term, where “justice” is usually understood as “*aequitas*” - the Latin term of Roman private law, or equality in the sense of equivalence or parity. Law is the core of the structure of a western society. That is why in Russian society it’s not uncommon to see a person who faced “the soulless burrs of law” in shock. It’s difficult to ignore

the idea that the expectations that legal system cannot meet were only formulated because the notions of “law” and “justice” are synonymic in the Russian language. What legal profession members see as “the law” is not the same what other citizens imagine to be “the justice”.

6.2. Intellectual and creative activities

During the Soviet times chapters about laws of copyright and invention law in the civil rights textbooks were often referred as “Creative relations”. At the same time creative work was recognized as the highest form of intellectual work, but only the result of such creative work was protected. In foreign law, on the contrary, protectability of the result of intellectual work was never connected with the predicate of “creativity”; in the cliché “intellectual creation” the word “creation” only indicates that the object appears to be a result of a person’s intellectual effort (Bentley & Sherman, 2004, p. 87).

According to the VII section of the Russian Civil Code, which came into force on the 1st of January 2008, the protected intellectual creations are called the results of intellectual activity, after the terminology of western law. However, Russian theory and court practice don’t cease to equate “creative” and “intellectual” results. But in fact, it encloses a significant concept, aimed at picking out only the genuine results of intellectual activity worthy of being protected by law. The result of it is the breach between Russian and foreign law-enforcement practices. For instance, “creativity” for Russian language speakers is almost like “genius”, so more and more results of intellectual activity are being left out of “creative results”. In western law even the works with “low level of creativity” have already been protected by law for a long time, and it’s true not only for objects like TV programmes or railway timetables, but also for the results of modern scientific activity.

From this point of view, as it was noted by Makovsky (2017), even the term “intellectual rights” as the name for a sub-branch of civil law must be recognized as formality: “Prerogative, or exclusive right, a clearly legal construction, is the indigenous basis, on which a whole independent branch of civil law has originated, exists and develops. So “prerogative right” ought to be its name” (p. 285).

6.3. Honesty and good faith

The category which has been known from the very times of Roman private law as “bona fides” (literally “good faith”) plays a significant role in modern civil law all around the world, and in Russian it is traditionally called “dobrosovestnost” (literally “good conscience”).

In its conventional meaning “good faith” belongs to moral categories, and often that casts a shadow on its sense. According to Dahl’s (2017) explanatory dictionary “dobrosovestnost” – good conscience or integrity – is goodness of consciousness and of soul, honesty, trueness, strict fear of God (thus, the adjectives of the same root would mean true, faithful and honest). Conscience is moral consciousness, ethic intuitiveness or sense of a person; inner comprehension of good and evil; a hideout in a person’s soul which calls for encouragement or disapproval at every action; a feeling which craves for truth and good, and resents lies and evil; involuntary love for the true and the good; innate truth in various degrees of development. Those definitions really somehow remind of bona fides, and often scholars suffice with all those impressive moral characteristics. However, the article of “conscience” in Dahl’s (2017) explanatory dictionary has a continuation, and these phrases are applicable for law: “it’s down to my conscience” – *I regard myself as a promisor, obliged to do something*. And there is even

more. It's impossible to deny a legalistic nature of the following statements: 1) conscientious action – *something up for a moral judgement, not civil laws*. 2) Court of conscience – an institution, where selected cases are considered *according to judges' conscience*. That is how processual aspect influences Russian understanding of “bona fides” translation. Ancient Romans were able to construct a new flexible legal system using “bona fides”. Latin “bona fides” is not only a non-legal category, but even a category originally opposed to law: Roman “bona fides” initially was opposed to strict material rights, and so the process, serving these rights (Novitsky, 1916). “Court of conscience” is also opposed to “the law”. Therefore, conscience is applicable not to the parties of a case, but for the judge, who is guided by it while regarding the cases of “good faith”. That's why, oddly enough, in the Russian language “dobrosovestnost” – good conscience – is the category which can be exclusively legalistic, and even processual. Obviously, later this specific meaning of “good conscience” was totally suppressed by its conventional everyday meaning.

The inaccurate translation of “good faith” into Russian as “good conscience” could be dealt with, but historically in Russian civil law one term of “dobrosovestnost” (integrity) was used to denote two different concepts, thus it's commonly accepted to distinguish objective “dobrosovestnost” (honesty) and subjective “dobrosovesntnost” – good faith. Honesty is “an outer measure of behavior” and “it means none other than integrity in relations between people. Good faith, in its turn, is “particular consciousness of a person, unknowing of some circumstances, which can be connected with some legal consequences according to the law” or even “a person's unknowing of some circumstances preventing from acquiring some rights” (Agarkov, 1946, pp. 374-376; Novitsky, 1916, pp. 57-58). Therefore, if “honesty” still maintains some connection with common “conscience” from the point of view of morality, then “good faith” must be regarded separately from “a soul's hideout”. It's interesting to know that good faith has always been present in all Civil Codes of Russia, while honesty was first introduced into the text only in 2012.

Approximate equality between legalistic “integrity” in the languages of various law families is as follows: “objective integrity” in Russian is “honesty” in English, “Treu und Glauben” in German; “subjective integrity” in Russian is “bona fide” in Latin, “good faith” in English and “gutter Glaube” in German.

Objective and subjective integrity perform different functions in law. Objective integrity or honesty is a normal state of the subject, while subjective integrity (dishonesty) is abuse of right (ch. 1, 10 of the Russian Civil Code). If behavior is formally valid (the subject has their right), court refuses to protect this right. Thus, dishonesty turns a lawful state into unlawful. Good faith is applied in other legal formulatings: its function is often to turn an unlawful state into a lawful state, while an unlawful state is recognized as originating consequences of giving rights (Radbruch, 2004). So, an illegal owner of an object may turn into legal owner under the condition of good faith and a number of other details according to ch. 302 of the Russian Civil Code.

It's not unimportant that for objective and subjective integrity there are different assumptions: the assumption of honesty on the one hand, and the assumption of subjective dishonesty on the other.

However, nowadays the scholars are searching for a unified category of integrity and conclusions about existence of the unified assumption of integrity are being elaborated. Such researches are being

implemented without taking different functional targets of objective integrity and subjective integrity into account. Since “integrity” was introduced into ch. 1 of the Russian Civil Code as one of the primary bases of civil rights, the tendency to mix up honesty and good faith has strengthened, but now the balance has shifted for the side of honesty or objective integrity. Court practice (and partially the theory of civil rights) reflects a position, according to which one term of law must denote one concept. And that is clearly a consequence of grammatical way of comprehending the law. At contemporary stages of development such an approach looks too simplistic.

7. Conclusion

Modern law-enforcement practice has faced a very important legal task – it has become necessary to introduce the category of “subjective integrity” in relations to the results of intellectual activity, and especially in relations to the results of scientific activity. But this task might be impossible to complete without the linguistic issue of distinction between objective and subjective integrity. The opinion of Gongalo (2002) in this regard seems rightful: there’s a danger of abusing the problems of nomenclature, which consecutively turns civil-legal science into the science of terms, and sometimes it can happen because it’s much easier to analyze a word, than to deal with what this word denotes. In this regard, the primary task of legal linguistics should be to distinguish common everyday words appearing in legal contexts and the same words as terms with narrowly-specified meanings.

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