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ANTROPOLOGICAL APPROACHES IN LEGAL CERTAINTY RESEARCH

Purpose. The study is aimed at highlighting in the historical-comparative context the influence of anthropological teachings on the development and formation of such a legal phenomenon as "legal certainty", proving that the category of legal certainty appeared as a consequence of anthropocentric philosophical approach in law. **Theoretical basis.** In the article, using the system approach, the content of the term "legal certainty" was analyzed. The axiological approach allowed generalizing various manifestations of legal certainty within the limits of one va-lue concept and generalizing it by formulating and emphasizing the importance of the anthropophilosophical approach in the study of legal phenomena. The method of comparison, analysis, synthesis, generalization of philosophical concepts was used, in which the principle of legal certainty was expressed in different periods of historical development. **Originality**. This article supports a wide approach to understanding the principle of legal certainty, and the latter one relates to general theoretical legal principles. It is alleged that legal certainty consists of a number of requirements for lawmaking and law enforcement. In conducting a historical analysis for these requirements of legal certainty, it was established that they were historically originated and developed as a part of anthropological philosophical doctrine and subsequently embodied in law. The connection with anthropological teaching in jurisprudence is transformed into a relationship between the realization of the principle of legal certainty and human rights. **Conclusions**. Anthropological approaches in the study of legal phenomena allow providing value humanistic orientation to law. Human rights and freedoms as the most important social value require observance of them even when the legislation is imperfect, uncoordinated, contains gaps and uncertainties. The principle of legal certainty enables to overcome these difficulties, due to it the requirements of lawfulness and observance of human rights and freedoms are agreed upon. This principle is generally legal, and its content is revealed through a set of components – requirements.

Keywords: legal certainty; antropology of law; legal principle; res judicata; antropocentrism; principle of justice

Introduction

The gradually retreat from the positivist legal consciousness poses a set of questions both to the philosophy of law and to the branch sciences, in particular: 1) the clarity, precision and accessibility of the legal instruction for a person, the absence of contradictory and mutually exclusive provisions; 2) stability and predictability of legal positions arising in law enforcement; 3) compliance with the procedure for adoption of regulatory acts and their implementation; 4) the boundaries of discretionary powers of state bodies, in particular when applying to a person with legal responsibility. These requirements are included as components in the multi-element notion of "legal certainty". Legal certainty appears as a principle in various legal areas, in particular in European countries. The application of this principle is associated with "deregulation, greater flexibility and effectiveness of law" (Vaate, 2017, p. 5).

In the sphere of legal regulation, there is always a person for whom legal norms are embodied in acts of individual action, acquire a specific meaning. The perception by him/her of legal instructions, the ability to coordinate their actions with them, guided by making decisions and forging their future, affects the possibility of realizing by him/her the rights and freedoms of a man and a citizen, which are the highest social and legal values. Legal certainty, which is considered as a legal principle, embodies the elements that take into account not only direct subordination of a person to the state authority, but also the feedback – perception, respect and ob-

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servance of the legal instructions that a person demonstrates in response. At the present stage, the principle of legal certainty becomes the object of reference in court decisions, but it has not received its established definition in philosophical and theoretical legal studies.

Purpose

In view of the foregoing, the purpose of the article is to reveal the content of legal certainty by applying the anthropological approach, conducting the anthropo-historical analysis and studying how the theory of legal certainty emerged and developed and what significance this concept has acquired in modern law. Therefore, the study of the content of this principle with the use of anthropological approaches will reveal its significance for the legal system, for approval of humanistic principles in law.

Statement of basic materials

The term "legal certainty" brought to Ukraine, along with the decisions of the European Court of Human Rights, is becoming more widespread both in scientific papers and in judicial practice. In spite of this, there is no established meaning of this word in the theory and philosophy of law.

Since the appearance of the term "legal certainty" on the territory of Ukraine, there are two main approaches to understanding its content: narrow and broad. Representatives of the general theoretical schools adhere to a broad understanding of this term, considering it to be multielemental one and pointing to connection to the rule of law. S. Pogrebnyak and M. Kozyubra paid attention to the relevance of this approach in their papers. A broad approach to understanding of legal certainty is an individual manifestation of a general broad approach to the understanding of law that had been formed from the end of the nineteenth century, in contrast to a gradual change in legal concepts one after the other. The narrow approach focuses on the individual manifestations of legal certainty within a particular branch of law.

In foreign practice, the principle of legal certainty is interpreted as a general law phenomenon. In particular, Louise Marinoni (2012) argues that "legal certainty is a fundamental right and an indispensable principle of the state of law" (p. 255). Unlike representatives of the procedural law who are inclined to consider legal certainty as an interdisciplinary procedural principle and to identify it only with the requirement of res judicata – the requirement of the final judgment, – in sectoral studies of substantive law the approach prevails, according to which legal certainty is a general principle of law inherent in all branches of law. Investigating the principles of land law, B. Totskyi argues that the modern concept of legal certainty is embodied in Art. 22 of the Constitution of Ukraine, according to which human rights and freedoms are not exhaustive, and the restriction of their content or scope is not allowed (Totskyi, 2014, p. 206).

The study by Finnish scholar Juha Raitio argues that the principle of legal certainty, "despite the lack of a clear definition in Finnish law and other legal sources, is a general legal principle that personifies predictability in law" (Raitio, 2012, p. 11).

The ambiguity and simultaneously the versatility in the interpretation of this concept is caused by a number of factors – 1) the phrase "legal certainty" consists of words of general use, so its content can be established through a comparison of their meaning; 2) the concept is used in various fields of legal science, as a result of which the content of the concept is not fully covered, but only certain situations, its aspects are applied; 3) there are no doctrinal theoretical papers devoted to the study of legal certainty in Ukraine; 4) there is an unidentified connection of "legal certainty" with other legal principles.

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The experience of foreign countries, where the principle of legal certainty is widely used and is a part of legal reality, suggests that the content of legal certainty should be revealed not through a dogmatic approach, a literal interpretation, but through an analysis of its substantive elements, their manifestations, through the prism of human rights and freedoms.

Investigating the philosophical and linguistic features of legal terms in the papers of G. Hart, K. Doliwa states that:

> When it comes to legal concepts, traditional descriptive definitions do not reflect their content, which results from the abnormal ambiguity of legal terms and distinguishes them from the words of ordinary language, commonly used in everyday life. Legal terms are characterized by the fact that, although most people know about them, they do not understand their meaning. (Doliwa, 2016, p. 240)

Therefore, to study the concept one should based on scientific approaches, use the methodology of the philosophy of law, legal anthropology, the general theory of the state and law. This statement is fully applicable to legal certainty.

A study of legal certainty through the anthropological approach will allow us to deviate from the literal interpretation of the term, to go deeper into its nature, to analyze the links with other legal principles. "It could be argued that legal anthropology can best combine ethnographic studies and legal practice and provide the most accurate explanation concerning the nature of the relationship between a man and law" (Barceló, 2015, p. 204). In the context of the anthropological doctrines of the past and the present, the questions of the place of a person in law are considered, the backlash, demonstrated by a person, receiving the legal instruction from the state is also considered.

> One can speak about the presence of law in the society only in the case when every member of the society is recognized by the state as a rational being capable of deciding what is best for him/her. In the relationship between law and the person, law as a system of mandatory rules allows you to regulate the practice of the state in relation to the individual. The most acceptable position in the understanding of law factored in the orientation towards the person is the position where law is a social

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guarantee of the freedom of a socially recognized autonomous person.

(Kravchenko, 2008, p. 172)

It should be said that man-centrist approach to understanding of law has been defended by philosophers since ancient times, so the emergence of "legal certainty" as a concept that embodies anthropological approach in law is a phenomenon historically conditioned, not accidental.

The components of legal certainty, referred to above, became objects of anthropological philosophical and legal research from ancient times. The first known for us written sources of law aimed at least two purposes – to systematize and publicize the legal norms, to present them for everybody. Philosophers of antiquity emphasized the importance of law in order to determine the correct and unlawful behavior of the man (Aristotle, 2000, p. 84). They defined that officials can evaluate the human behavior with a view to identifying the subject of wrongfulness only when the laws are not in a position to give an exact answer to this question. It is this doctrine that today finds itself in a position supported by contemporaries that a person should know and understand the content of the legal instruction, on the basis of this to determine his/her behavior, to be able to distinguish the legitimate from the illegal subjects.

O. O. Fast notes about the connection between the ideas of medieval thinkers and the modern principle of the rule of law. The famous medieval philosopher-theologian F. Akvinskyi "had put forward a number of requirements that determine the nature of law: rationality, focus on public welfare (private good can be considered as a component of the welfare of the society); official adoption and publication" (Fast, 2017, p. 46). According to the author, the relevant requirements are consistent with modern criteria for a normative act in assessing the compliance of the rule of law principle. One can agree with the author that the basis for the development of later liberal legal concepts, among which is the concept of legal certainty, were laid long before their appearance, in particular in the papers of medieval scholars.

One of the requirements of legal certainty is the clarity, precision in the wording of the legal instructions, the lack of ambiguity in the interpretation. The origins of these provisions can be found in the papers of William Okkam, who believed that the explanation about the differences of matter would be better represented in the form of one thesis than several. Thus, simplicity, when it is applied to law, is directly related to the certainty and accessibility of legal norms.

From the selectively presented position of these medieval philosophers, it is seen that in matters of law they pointed to the need for its accessibility for citizens, but they did not limit themselves only with certainty of formulations. If the norm, even it is perfectly formulated, does not fulfill its purpose, it is incorrectly applied, it is applied differently for various categories of citizens, there is an abuse of the legal norm and distortion of its meaning. It loses its universality for the society. Drawing a parallel with today's approaches to the understanding of legal certainty, we can argue that the stylistic and philological perfection in the formulation, set forth in the legal norm cannot be the single content for legal certainty. Legal certainty should lead to unanimous legal regulation of social relations in law enforcement practice, to the absence of abuses based on legal norms, allowed by state authorities.

In the philosophy of the late middle ages and the new time, more attention was paid to the organization of public administration, the rules of interaction between the people and government representatives – the issue of certainty of legal insructions was considered in this context. So in the papers of T. Hobbes, an important element of the society/state relationship was:

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> Laws – these are the rules for every citizen that the state orally or in writing forms provided to him/her to use them to distinguish between right and wrong. The aim of laws is to give the right direction to people's actions, leaving to their discretion everything that is not forbidden and not determined by law. (Hobbes, 2000, p. 255)

John Locke did not spare the issues of certainty of law, he named the lack of a natural state that he lacked an established, definite law as a norm of justice and measure in disputes (Locke, 1988, p. 335).

In the nineteenth century, in contrast to the idea of natural law, political and legal ideas of positivism appeared, which were much more specific and exacting for the formulation of legal norms and their certainty. Applying a rational approach to the formation of a liberal conception of law I. Bentham noted that the content of natural law is not defined and interpreted in different ways by all, and therefore can not be perceived as a legal model (Krestovskaya, 2002, p. 258). In analyzing the law of common law countries, Bentham noted that in these countries law exists in the form of a "judicial law", the meaning of which can not be explained without resorting to judicial practice. Thinking about this problem, the author proceeded from the necessity for law to be clear, simple and accessible in understanding for the ordinary person. The consideration of the anthropological approach here means that the person, without resorting to a special body through familiarization with legal instructions, has to understand the difference between lawful and unlawful behavior and to be guided by these ideas in his/her actions.

The overcoming of incomprehensibility in law through codification was supported by Hegel. He criticized the uncertainty and incomprehensibility of the legal instruction, regardless of the reasons for such incomprehensibility, calling such a situation unfair in relation to a person.

> To hang the laws so high that no single citizen could read them, like the tyrant Dionysius did it, or bury them in expanded and numerous scholarly books, collections of decisions, numerous judgments, thoughts and customs that often contradict each other, and in books written in a foreign language, so knowledge of the law in force becomes accessible only to those who are engaged in research by scientists. All this is equally unfair… The law concerns freedom – the most valuable and most worthy in a person, and the person himself should know this law, since it is binding for him/her. (Hegel, 1990, p. 252)

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Consequently, the connection between the execution and understanding of the the legal norm is connected by Hegel with the requirement of obligation. Since the legal norm is binding and applies to citizens, they must know its content. The given examples from the history of law-making were analyzed by Hegel are extremely revealing. By combining various types of circumstances in violation of legal certainty, thereby Hegel emphasized the unimportance of the reasons why the rules are inaccessible for citizens to understand, in all cases, this situation must be overcome.

Despite the absence of a specific name, issues of legal certainty were not new ones for the legal science and are inherent even in the pre-revolutionary period. "Without using the term "legal certainty"of judicial decisions (legal certainty) in the pre-revolutionary period the scientists noted the importance of the sustainability of sentences and other judicial decisions that came into force" (Alekseeva, 2015, p. 9). Thus, in his paper "The General Theory of Law" G. V. Shershenevich points out that, unlike social norms, legal norms:

> Are characterized by a certainty of suffering, which are threatened by the rules of law, which are unusual for the norms of conscience or morality… a person who has agreed to violate the legal norm in advance knows about the volume and quality of the expected suffering. The second and more important difference… there is a certainty of organs that cause suffering for the violator of this norm. (Shershenevich, 1910, p. 289)

Reflecting on the issue of justice, including the justice of legal regulation, a well-known American philosopher who relied on liberal values, John Rawls noted that:

> The principles of justice are chosen in conditions of ignorance. This means that nobody will win or lose when choosing principles as a result of natural or accidental social circumstances. Since everyone is in the same position and nobody is able to invent the principles for improving their specific conditions. (Rawls, 1999, p. 11)

The statement about justice, which must be ahead according to the situation, that is, to regulate relations that will arise in the future, and not those that have already occurred (in a retrospective way) corresponds to a number of requirements of legal certainty that establish the inadmissibility of the retroactive effect of law in space and time, the inadmissibility of changes to the worst, the requirement to promulgate legal norms, so that citizens have the opportunity to orient themselves towards them in shaping their behavior.

In the context of the anthropological approach to the study of legal certainty, the paper of O. Holmes "The Path of the Law" deserves attention. In analyzing his rich experience of judging, the author shares his thoughts on what is law in the vision of ordinary citizens.

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> If you want to know the law… you have to look at him as a angry person who cares only about the material consequences that will enable him/her to analyze such knowledge, and not as a kind person who sees the reasons for his behavior – whether within the law, or beyond its limits – in certain sanctions of conscience. (Holmes, 1897, p. 3)

In such approach to the understanding of law, the importance of foresight is manifested. It is important for the citizen, to what final conclusion the court will reach when awarding judgement upon his/her case, no matter what methods and comparisons it applies. It can be underpinned by the search for the connection of law with the basics of morality, or to refer to the established judicial practice in similar cases, or analyze the rules of law for their erroneousness and inconsistencies with the basic principles of law, but for an ordinary citizen, this justification, which usually forms the basis of the motivational part of the decision is not important. For the individual, according to the author, the final result is important – the answer which should be given by the law – whether he/she lawfully acted or not (Holmes, 1897, p. 4). Without calling the principle of legal certainty, the author points to the need for a person to have a clear idea of the lawfulness of his/her behavior and its consequences.

> Even if every resolution required an emperor's sanction with despotic power and capricious mind, we should equally be interested in being able to predict – in clarifying the order, in rational explanation and in determining the principle of development of the norms that he affirms. (Holmes, 1897, p. 7)

Thus, the author points out the importance of certainty, regardless of the quality of law – no matter what the law is – good or bad – it must be definite and understandable for the "user".

In the first half of the twentieth century, the discussion between the adherents of natural and positive law was rather heated. This discussion attracted the attention of the researchers of both schools to the fundamental problems of law, forcing them to look for confirmation of their own theories and convictions on scattered examples. Among issues raised by such scholars as Dvorkin, Hart, and Fuler were issues related to the principle of legal certainty. The allegorical story about the imaginary King Rex, who wished to put an end to all legal problems, covers a number of violations of this principle. There were some measures which the imaginary king used: an attempt to introduce a case law that created the problem of unpredictability of a judge's decision; an attempt to codify legislation, which led to the ambiguity of statutory concepts for the population and contradiction of norms to each other. Elimination of these shortcomings and creation of the best legal act – the code – lasted so long that at the time of enactment, the code was outdated and could not properly regulate legal relations (Fuller, 1969, p. 33). This instruc-

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tive history consistently points to the problems associated with the process of lawmaking and lists a number of requirements of legal certainty, which, in the event of non-compliance, may distort legal regulation.

The improvement of legislative wording is perhaps the most common way to perfect the legal norm that applies in our country. It does not take into account the fact that modern legal problems often lie in the plane of interaction in the paradigm: society-state-man. Therefore, the traditional approach to improve the wording of the legal norm, although it remains relevant, is not capable of solving all situations. Changing the statutes one should always keep in mind the value that such a provision protects. Applying an anthropological approach to the study of legal phenomena will allow you to look at solving legal problems from the point of view of how one person 1) professes the values embodied in law (the requirement to respect the rights and fundamental freedoms of a man); 2) understands the content of the legal instruction (whether it is possible to distinguish between lawful and unlawful); 3) is aware of the norm of law (observance of the principle of legality and the requirements of legal certainty regarding the procedure for the adoption and promulgation of legal norms, the requirement of inadmissibility of changes to the worst).

As it was proved above, the requirements of legal certainty had been formulated historically in the context of the development of anthropological teaching and today are general legal. Although the emergence of the requirements of legal certainty occured separately and gradually, in the modern period they appear as a single doctrine of legal certainty, which is not reduced to one of the listed requirement, but embodies them as a system.

Originality

The content of legal certainty is considered from the standpoint of anthropology, the origin and formation of this phenomenon are investigated. It has been established that, much earlier than the appearance of the concept itself, ideas originated and evolved, embodied as elements of legal certainty. It is proved that legal certainty is a historically determined legal phenomenon the significance of which can be revealed through an anthropo-philosophical approach. The application of legal certainty will allow to focus on the value legal guidelines in the implementation of reforms in the state and legal sphere.

Conclusions

Legal certainty is a fundamental legal principle inherent in a state governed by the rule of law. The content of this principle is revealed through a set of component requirements, each of which has a historical basis of its origin. Requirements for the formulation of legal norms in a generally accessible way of familiarization, the inadmissibility of limiting or eliminating fundamental human rights, the lack of retrospective effect of law, clarity and precision of legal prescriptions, their mutual complement and consistency – these ideas were put forward by philosophers in the context of anthropological research and invariably associated with them requirements of justice to the person. Legal certainty is a legal concept, a general legal principle that embodies these philosophical views and transforms them into a legal field. Therefore, the study of this principle should be carried out taking into account the anthropological approach.

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АНТРОПОЛОГІЧНІ ПІДХОДИ У ДОСЛІДЖЕННІ ПРАВОВОЇ ВИЗНАЧЕНОСТІ

Мета. Дослідження спрямовано на висвітлення в історично-порівняльному контексті впливу антропологічних вчень на розвиток і формування такого правового явища як "правова визначеність", доведення того, що категорія правової визначеності з'явилась як наслідок антропоцентричного філософського підходу у праві. **Теоретичний базис.** У статті із застосуванням системного підходу було проаналізовано змістовне наповнення терміну "правова визначеність". Аксіологічний підхід дав змогу узагальнити різні прояви правової визначеності в межах одного ціннісного поняття й узагальнити його, сформулювавши та відзначивши важливість антропофілософського підходу в дослідженні правових явищ. Використано метод порівняння, аналізу, синтезу, узагальнення філософських концепцій, в яких знаходив свій вияв принцип правової визначеності в різні періоди історичного розвитку. **Наукова новизна.** У даній статті підтримується широкий підхід до розуміння принципу правової визначеності, а останній відноситься до загальнотеоретичних правових принципів. Стверджується, що правова визначеність складається з ряду вимог до правотворчості та правозастосування. При проведенні історичного аналізу цих вимог правової визначеності встановлено, що вони історично зароджувались і розвивались як частина антропологічного філософського вчення та згодом були втілені у праві. Зв'язок з антропологічним вченням у юриспруденції трансформується у залежність між реалізацією принципу правової визначеності та правами людини. **Висновки.** Антропологічні підходи до дослідження правових явищ дають змогу надати праву ціннісної гуманістичної орієнтації. Права і свободи людини як найважливіша соціальна цінність вимагають дотримання їх навіть тоді, коли законодавство є недосконалим, неузгодженим, містить прогалини і невизначеності. Принцип правової визначеності дає змогу подолати ці труднощі, завдяки йому узгоджуються вимоги законності та дотримання прав і свобод людини. Цей принци є загальноправовим, а його зміст розкривається через сукупність складових – вимог.

Ключові слова: правова визначеність; антропологія права; принцип права; res judicata; антропоцентризм; принцип справедливості

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АНТРОПОЛОГИЧЕСКИЕ ПОДХОДЫ В ИЗУЧЕНИИ ПРАВОВОЙ ОПРЕДЕЛЁННОСТИ

Целью статьи является исследование влияния антропологических учений на развитие и формирование правовой определенности как правового явления в сравнительном историческом контексте. Доказывается, что категория "правовая определенность" появилась вследствие развития антропоцентрического философского подхода в праве. **Теоретический базис.** В статье с использованием системного подхода было проанализировано содержательное наполнение термина "правовая определенность". Аксиологический подход был использован для объединения разных проявлений правовой определенности в рамках одного ценностно-ориентированного понятия, удалось обобщить эти проявления, сформулировав и определив важность антропофилософского подхода в исследовании правовых явлений. Использован также метод анализа, синтеза, обобщения философских концепций, в которых находил свое проявление принцип правовой определенности в различные периоды исторического развития. **Научная новизна.** В данной статье поддерживается широкий подход к пониманию принципа правовой определенности, а последний отнесен к общетеоретическим правовым принципам. Утверждается, что правовая определенность состоит из ряда требований к правотворчеству и правоприменению. При проведении исторического анализа этих требований правовой определенности установлено, что они исторически зарождались и развивались как часть антропологического философского учения и после были применены в праве. Связь с антропологическим учением в праве трансформируется в зависимость между реализацией принципа правовой определенности и правами человека. **Выводы.** Антропологические подходы в исследовании правовых явлений дают возможность придать праву гуманистическую целенаправленность. Права и свободы человека требуют соблюдения даже в тех ситуациях, когда законодательство не является безупречным, согласованным, имеет изьяны и неопределенности. Принцип правовой определенности дает возможность справиться с этими трудностями, благодаря чему принципы законности и соблюдения прав и свобод человека взаимно согласовываются. Этот принцип является общеправовым, а его содержание раскрывается через совокупность требований.

Ключевые слова: правовая определенность; антропология права; принцип права; res judicata; антропоцентризм; принцип справедливости

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