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## Hierarchical Linkages of System of Law Primary Elements

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*The subject of research is the general universal law of system objects with reference to law - intersystem hierarchy. The emphasis is put on research of linkages among primary elements of system of law norms, principles, purposes etc. The conclusion on existence of hierarchical linkages among elements of the internal form of law is validated.*

*Keywords: system; law; hierarchy; the internal form, primary elements.*

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Ideas of systemacy of subjects and phenomena have been formed gradually throughout long time.

In the XX century with the beginning of wide application of the system approach in science, systemacy concepts (tectology by A.A. Bogdanova, general theory of systems by L. Bertalanfi) were developed<sup>1</sup>.

Understanding universality of dialectic nature of a category of the system has led to necessity of a system method application to the state-legal phenomena. So, in 1986 A.B. Vengerov wrote about possibility of the system approach use with reference to legal phenomena<sup>2</sup>. Now the system approach is recognised a universal method and is widely used in theoretic-applied research of law.

The most general definition of the system is given by philosophy. The system is understood as an ordered set of interconnected elements possessing a structure and organisation<sup>3</sup>. Essence

of the linkage system among elements of the integral is that, it is impossible to understand parts without knowledge of the integral. After all, the system object itself, and all linkages among its elements are subordinated to especial laws for the given object. Steady ways of linkages of elements of this or that complicated integral are understood as laws here.

Apart from «own» laws of linkage of elements, general universal laws also belong to system objects. They are stipulated by a dialectic nature of such linkages, are inherent in any system object, including law. The law of system hierarchy is the fundamental law of law as a system phenomenon. First of all, before defining it let us try understanding what hierarchy is.

In philosophy hierarchy is defined as a principle of a structural organisation of complicated multilevel systems, consisting in streamlining of interactions between levels from

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the highest to the lowest. Each of two or more levels acts as a managing one towards all which are under and as manageable, subordinate towards those which are above<sup>4</sup>.

In Sociology hierarchy is a system of consistently subordinated elements, located from the lower to the higher characterising various multilevel systems (social, political, linguistic etc.)<sup>5</sup>. The concept of hierarchy is usually connected with the system approach: «... hierarchy is conceived only within the limits of certain multilevel at least two-level systems that stipulate methodologically the necessity of hierarchy *of the system approach* ...»<sup>6</sup> issues use in study.

As the basic characteristic of hierarchy in the scientific literature the concept «level» that is a measure of a qualitative generality or subsystems variety of the given system in a «vertical» section is proposed<sup>7</sup>.

Thus, in general terms hierarchy can be defined as a special linkage, the relation of inequality, submission between elements being on different levels of the system. For system objects such a linkage has a steady character, is repeated and extends over all elements of their structure.

With regard to law the system hierarchy law includes subsystems which are ordered in a hierarchical way, thus laws of systems are executed at all levels of system hierarchy.

Hierarchy is, first of all, typical to the objective (positive) law as to the complete organised system of normative- regulatory means expressed in formal sources.

Researchers pay special attention to the study of hierarchical linkages with regard to the external form of law (formal legal sources)<sup>8</sup>.

So, for example hierarchy among formal sources of law of one kind is recognized (among regulatory legal acts the highest force belongs to the constitution and other laws, and by-laws

are passed for the sake of execution of laws and cannot contradict them).

This principle is formulated and has been bound in many legal acts, including Russia. Article 15 of the Russian Federation Constitution says: «the Constitution of Russian Federation has the highest legal force, direct action and is applied throughout the Russian Federation territory. Laws and other legal acts passed in Russian Federation, should not contradict the Russian Federation Constitution». Article 90 of the Russian Federation Constitution states: «Decrees and orders of the President of Russian Federation should not contradict the Constitution of the Russian Federation and federal laws». Article 115 of the Russian Federation Constitution states: «On the basis and to execute the Constitution of the Russian Federation, federal laws, normative decrees of the President of Russian Federation the Government of Russian Federation publishes decisions and orders, provides their execution». Other manifestations of hierarchical beginning in law (besides the external form) are studied in much smaller degree.

It is deemed, that hierarchical linkages are also typical to elements of the internal form of law, for normative-regulatory means. The latter is accepted to be referred to norms of law and normative generalisations<sup>9</sup>.

And the matter is not of hierarchy of the normative means containing in sources of different legal force. Hierarchical linkages, in our opinion, are inherent in means containing in sources of equal force, and, even, in the same legal source as well.

Today both in theory and in practice the leading role in the course of legal regulation is given to a legal norm. In theory the vision of law as a system of formally certain and generally obligatory norms is proposed. In practice a person applying law tries to use a norm, being

afraid of applying regulatory means of a more abstract character.

Hierarchical linkages among behavioral rules have been considered by G. Kelzen. In his opinion, that norm prescribing creation of any other norm, occupies a higher position, and the norm creating on the basis of the given instructions, – lower. Altogether they form «hierarchical structure higher - and lower» establishments<sup>10</sup>.

In modern theory of law separation of several types of hierarchical linkages among rules of law is proposed.

Firstly, these are relations between primary and derivative rules of law (linkages of concretization, addition, replacement, exception)<sup>11</sup>;

Secondly, the relations aimed at resolving legal collisions (between conflict norms and conflicting norms). In this case a hierarchical moment is revealed in the fact, that conflicting norms are subordinated to conflict ones as to the norms possessing ability to block action of some regulatory and (or) guarding norms and legitimate action of the others<sup>12</sup>;

Thirdly, relations between basic norms and formed on their basis specialized norms of law. So, I.A. Farshatov states: «... specialised norms do not act as a normative basis of certain legal relations occurrence. They are dependent on regulatory and guarding norms ... the specialised norm only in combination with the basic (defining) one is capable of having regulating loading. Thus, an indispensable condition of its effectiveness is a direct instruction in the text: what norm and what general (basic) article it concretizes, naturally, within functional features of the latter»<sup>13</sup>. Thus, among rules of law multilateral hierarchical linkages are traced. However, the norm is not a unique regulatory means in law.

Principles of law, purposes, tasks, definition etc. together with norms are also fairly referred

to elements of the internal form of law (primary elements of system of law).

Thus, principles of law purposes, tasks of law are extremely seldom used by lawyers. It occurs, as a rule, in the presence of gaps in law (thus, the term analogy of law is used).

So, for example, article 1 of CPC of Russian Federation establishes, that «in case of absence of a procedural law norm regulating the relations, arisen during civil proceedings, federal courts of the general jurisdiction and justices of the piece (further also - court) apply the norm regulating similar relations (analogy of the law), and in the absence of such a norm act proceeding from principles of administration of justice in Russian Federation (analogy of law)». But is it correct? Is it possible to give such an insignificant role to normative- regulatory means? The answer is deemed negative.

In legal theory it is suggested that principles of law should be understood as basic ideas, the beginnings run through all legal matter. Principles of law define the content of norms, act as the construction base for a regulatory system in this or that sphere of life activity. Besides, principles of law carry out a regulatory function of law. They can directly influence on public relations, assume coverage of a bigger numbers of subjects and a bigger circle of public relations (i.e. they are more normative). Thus, the understanding of principles of law as fundamental legal beginnings stipulates their priority before rules of law. Attention has already been paid to it in branch researches<sup>14</sup>.

Hierarchical collateral subordination of rules of law and principles is explained by the fact that the latter run through legal matter, express the natural, general, universal, characteristic for the system of law or its separate large subsystems. They «do not only cement variety of norms of law into a uniform harmonious, intercoordinated system, but give law an integral character either»<sup>15</sup>.

R. Paund asserted, that «legal principles are used by lawyers to interpret and co-ordinate available legal rules with each other, defining spheres of their application, and also to get rules which have not existed before where there is a need for them»<sup>6</sup>.

We believe that principles of law should be applied not only for lack of rules of law, but together with them constantly. Thus, in case of contradiction detection between a principle of law and a norm, priority should be given namely to principles. Principles of law as the most concentrated expression of its content can be presented as a hierarchical system. We see hierarchical linkages to be between general legal and branch principles of law. Thus, prior ones are general legal principles. A.F. Cherdantsev considers, that branch principles «are concretisation of general principles of law as a whole and, hence are that channel along which directing force of the general principles» flows<sup>17</sup>.

The opinion on possibility of chain of commands of one-serial principles was expressed by the researchers of principles of law hierarchy problematics<sup>18</sup>.

It is hardly possible to agree to such a point of view. We believe the hierarchy problem here is transferred to the plane of reference of this or that legal principle to a category of general-legal, interbranch or branch ones. The problem, in our opinion, can be solved by more accurate definition of a place of a concrete legal principle by its reference to one of the listed groups.

In practice, for example in separate law enforcement acts, hierarchy of one-serial legal principles can be defined by legal ideologies hierarchy of a certain historical society.

The purposes and tasks of law are even more capacious regulatory means as compared to principles of law. Legal regulation is a purposeful activity. The purposes and tasks of law urged

to define ideal result from the lawmaker's point of view. Only achievement of the goal set at the beginning of legal regulation allows to speak about efficiency of the entire mechanism of a legal regulation. Another opinion is that without achieving the set objectives, it is impossible to speak about a legal regulation either.

Thus, creation and implementation of rules of law should always correlate with the purposes put in the course of legal regulation and tasks. It is logical, that in a statutory act the legislator first defines purposes, problems, legal principles consistently, and only then norms. So, article 1 of Employment Code of Russian Federation states: «Purposes of employment legislation are establishment of the state guarantees of employment rights and freedoms of citizens, creation favorable working conditions, protection of workers' and employers' rights and interests.

The primary goals of employment legislation are creation of necessary legal conditions to achieve the optimum coordination of interests of the parties of labour relations, interests of the state, and legal regulation of labour relations and other relations as well directly connected with them on:

- organisations and management of work;
- employment by the given employer;
- in-office vocational training, retraining and advanced training ... «.

It should be noted, that if the rule of law contradicts the established purposes and tasks, it should not be applied. After all, in case of such a norm implementation, the effect opposite to the planned can be achieved. A failure in the mechanism of legal regulation operation arises. The purposes will not be achieved. In practice such examples frequently lead to infringement of rights and freedoms of the person.

We consider another hierarchical linkage with reference to the internal form of law among legal presumptions.

We support the idea about presence of central fundamental presumptions and subordinated to them, according to O.A.Kuznetsova: «there are presumptions with the widest content on the top level, there is their detailed elaboration and concretisation on the lowest ones. Central presumptions are primary, have a fundamental character, at lower levels they get into all sub-branches and civil law institutions both with the help of those subordinated to them and directly»<sup>19</sup>. Moreover, separation of hierarchical linkage of presumptions is possible on the other basis - generality degree: «Presumptions containing in the general part are general civil-law presumptions.

Presumptions containing in sub-branches are possible to name fundamental presumptions, they affect all institutions of a corresponding sub-branch. Special presumptions of civil law institution complete the hierarchy»<sup>20</sup>.

Summing up, we will highlight, that intersystem hierarchy is inherent in law. It exists not only among the elements of the external form of law, but connects the elements of the internal form - primary elements of the system of law. Understanding intersystem hierarchical linkages of law will allow to achieve a more effective legal regulation avoid errors in the course of law application.

- <sup>1</sup> see, for example, Bertalanffy, «General System Theory-A Critical Review» (vol. VII, 1962), 1-20.; Bogdanov «Tektology: the General organizational science» (Moscow: «Economics», 1989).
- <sup>2</sup> Vengerov, «Synergetics, jurisprudence, law», *The Soviet state and law*, 10 (1986), 36-45.
- <sup>3</sup> Frolov, «Introduction to philosophy» (Moscow, 1989), 124.
- <sup>4</sup> The philosophical encyclopedic dictionary (Moscow: Soviet encyclopedia , 1983),202.
- <sup>5</sup> Sociological encyclopedic dictionary Ed. by G.V. Osipov (Moscow, 1998), 254.
- <sup>6</sup> Petrov, «Hierarchical collision in law» The dissertation a scientific degree of the candidate of legal sciences (Krasnoyarsk, 2009), 14.
- <sup>7</sup> Khakimov, «Modelling of hierarchical systems: Theoretical and methodological aspects» (Kazan, 1986), 31.
- <sup>8</sup> See for example, Mitsajkov «Hierarchy in law», *Digest of Moscow University Is. 11. Law* 6 (1999), 53 – 71; Tolstik «Hierarchy of Russian law source» (N. Novgorod: Intelservice Society, 2002).
- <sup>9</sup> Shafirov, «Natural-positive law: Introduction to theory» (Krasnoyarsk, 2004), 149-163.
- <sup>10</sup> Cited. ac.: Drobishevsky «History of political and legal doctrines: basic classical ideas» (Moscow: Norma, 2007), 565.
- <sup>11</sup> Belkin, «On correlation of the Constitution and state-legal acts. Derived lawmaking» *Jurisprudence* 5 (1985),3 – 10.
- <sup>12</sup> See :Petrov , Ref. work, 84
- <sup>13</sup> Farshatov «Specialised and special norms of law» *State and law* 6 (2003), 22-23.
- <sup>14</sup> See for example Tiunov, «On the ground of the validity of the treaty» *State, law, legality: Scientific notes* 284 (1973), Issue. 4, 182; Kuznetsova, «Specialised norms of the Russian civil law: theoretical problems» (Ekaterinburg, 2007), 7, 18;
- <sup>15</sup> Cherdantsev «Interpretation of law and contract: teach. aid for higher schools» (Moscow: JUNITI-DANA, 2003), 33.
- <sup>16</sup> Cited accord.: Drobishevsky, «History of political and legal doctrines: basic classical ideas» (Moscow: Norma, 2007), 434.
- <sup>17</sup> Cherdantsev, *ibid*
- <sup>18</sup> So V.D. Filimonov sings out fairness princiole as basic among other criminal law principles. Other criminal law principles according to V.D. Filimonov occupy a place subordinate to fairness principle in hierarchy. Filimonov, «Principles of criminal law» (Moscow: «Centre YurInfoR» Inc., 2002), 51-55.
- <sup>19</sup> Kuznetsova, «Specialised norms of the Russian civil law: theoretical problems» Author's thesis ... Dr.of leg. sciences (Ekaterinburg, 2007), 20.
- <sup>20</sup> *ibid*

## References

- A.A. Belkin, «On correlation of the Constitution and state-legal acts. Derived lawmaking» *Jurisprudence* 5 (1985), 3-10), in Russian.
- L. von Bertalanffy, «General System Theory-A Critical Review» (vol. VII, 1962).
- A.A. Bogdanov «Tektology: the General organizational science» (Moscow: «Economics», 1989), in Russian.
- A.F. Cherdantsev «Interpretation of law and contract: teach. aid for higher schools» (Moscow: JUNITI-DANA, 2003), 33, in Russian.

S.A. Drobishevsky, «History of political and legal doctrines: basic classical ideas» (Moscow: Norma, 2007), in Russian.

V.D. Filimonov, «Principles of criminal law» (Moscow: «Centre YurInfoR» Inc., 2002), in Russian.

I.A. Farshatov «Specialised and special norms of law» *State and law* 6 (2003), 22-23, in Russian.

I.T. Frolov, «Introduction to philosophy» (Moscow, 1989), in Russian.

E.M. Khakimov, «Modelling of hierarchical systems: Theoretical and methodological aspects» (Kazan, 1986), in Russian.

O.A. Kuznetsova, «Specialised norms of the Russian civil law: theoretical problems» Author's thesis ... Dr.of leg. sciences (Ekaterinburg, 2007), in Russian.

M. Mitsajkov «Hierarchy in law», *Digest of Moscow University Is. II. Law* 6 (1999), in Russian.

A.A. Petrov, «Hierarchical collision in law» The dissertation a scientific degree of the candidate of legal sciences (Krasnoyarsk, 2009), in Russian.

Philosophical encyclopedic dictionary (Moscow: Soviet encyclopedia , 1983), in Russian.

V.M. Shafirov, «Natural-positive law: Introduction to theory» (Krasnoyarsk, 2004), in Russian.

Sociological encyclopedic dictionary Ed. by G.V. Osipov (Moscow, 1998), in Russian.

O.I. Tiunov, «On the ground of the validity of the treaty» *State, law, legality: Scientific notes* 284 (1973), Issue. 4, in Russian.

V.A. Tolstik «Hierarchy of Russian law source» (N. Novgorod: Intelservice Society, 2002), in Russian.

A.B. Vengerov, «Synergetics, jurisprudence, law», *The Soviet state and law*, 10 (1986), in Russian.

## **Иерархические связи первичных элементов системы права**

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*Исследуется всеобщий универсальный закон системных объектов применительно к праву – внутрисистемная иерархия. Делается акцент на исследование связей между первичными элементами системы права: нормами, принципами, целями и т.д. Обосновывается вывод о существовании иерархических связей между элементами внутренней формы права.*

*Ключевые слова: система, право, иерархия, внутренняя форма, первичные элементы.*

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