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The Essence of the Principles of Law

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The article analyses the viewpoints of the leading Soviet, Russian and international researchers specializing in general theory of law and the essence of the principles of law. The author come to conclusions that judicial positivism that had been predominating in the Soviet and Post-Soviet period did not allow researchers to recognize the principles of law as an independent means of legal regulation of social relations with a higher legal force than that of the norms of law, for example, in national regulatory legal acts; the theoretical conclusions of H.L.A. Hart, R. Dworkin and G. Brabant about combination in the principles of law legal reality and moral value are primarily based on scientifically debatable and diverse concepts of integrative legal consciousness, which artificially synthesizes ontologically diverse social regulators, law and non-law, including law and justice in a single system of forms of national and international law. In practice, such legal consciousness leads to endless and unlimited "erosion" of law by non-law, results in unstable, unexpected, diverse and directly contradictory precedents. In the end it leads to the violation of the rights and legal interests of the subjects of legal relations. In accordance with the scientifically based concept of integrative legal consciousness, law is expressed not only in the norms of law, but above all in the principles of law contained in a single, multi-level and developing system of forms of national and international law implemented in the state. Consequently, the principles of law are legal regulators of social relations, and not "ideas", "origins", "provisions", etc. The conclusions were made on the essence of the principles of law: the principles of law are objective legal regulators of public opinions, they are primary ones expressing basic regularities of legal regulation of public relations, the most abstract elements of a unified, developing and multi-level system of forms of national and international law. In the process of their specification the authorized rule-making bodies develop mainly specific legal norms in the forms of both national and international law and also the legal norms in national regulatory legal acts.

Keywords: essence, essence of the principles of law, legal regulators of public relations; unified developing multi-level system of forms of national and international law; specification of law, legal norms, national regulatory legal acts.

Research area: law.

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A.M. Vasilyev and other scholars in the field of general theory of law are quite convincing in studying the theory of legal categories (Vasilyev, 1976). On the other hand, researchers and practical lawyers have not been paying due attention to such an important legal category as “legal principles” from the position of scientifically justified conception of integrative legal consciousness. In connection with the above, it is quite hard to disagree with the viewpoint of T.G. Gordienko who wrote, “Notwithstanding its theoretical and practical value, the issues of the principles of law in modern legal science and study materials on the general theory of law and state are not very popular” (Gordienko, 2000). For example, researchers do not pay much attention to the study of the most important theoretical issues of the essence of the principles of law. The ambiguous title of the article by T.G. Gordienko herself is quite typical: “*Principles of law: the basis of law and legal systems*” (emphasis mine).

The term ‘principle’ was borrowed from the French and German languages in the 18th century. It goes back to the Latin ‘principium’ meaning ‘basis’, ‘origin’, ‘basic position’, ‘guiding idea’, ‘basic rule of behaviour’ (Etimologicheskii slovar’..., 1994). In ancient times, they emphasized that “the principle is the most important part of everything” (principium est potissima pars cujunque rei).

It is noteworthy that most pre-revolutionary specialist had not used the term ‘principle of law’ in their works, though they mainly analysed the principles of rule. For example, N.N. Polyanskii applied the concept of ‘origin’: “*The origin of participation of the people in administration of justice*” (emphasis mine) (Polyanskii, 1911). Following N.N. Polyanskii I.Ya. Foinitskii wrote, “...Two specific *origins of the criminal process* are the public origin and the personal origin” (emphasis mine) (Foinitskii, 1912). N.N. Rozin in 1916 developed a list of “basic origins and conditions for judicial activity” (Rozin, 1916). Among the “basic origins” N.N. Rozin quite ambiguously outlined the following leaving it open for discussion: “1) investigative and competitive origin; 2) origin of material truth (proof of criminal charges); 3) origin of spontaneity; 4) origin of oral nature; 5) origin of publicity; 6) judicial language” (Rozin, 1916).

V.L. Tomin studied the issue quite in detail and found only one work containing the word “principle”: “The basic principles of organizing the criminal court procedure” by I.V. Mikhailovskii published in 1905. Though it should be noted that I.V. Mikhailovskii studied “*the principles of organizing the criminal court*” (emphasis mine) and not the principles of law!

If prerevolutionary researchers mentioned the ‘principles of law’, they studied only statutory legal principles from the standpoint of judicial positivism. However,

most often the principles of law were criticized. For example, the generally accepted pre-revolutionary classic of the theory of law, G.F. Shershenevich understood the principles of law as the general idea, the direction the legislator puts, consciously or unconsciously, into a whole series of legal norms (Shershenevich, 1995). One of the most common was the point of view of E.V. Vas'kovskii. He had developed it without any necessary theoretical arguments, "... the principles of general law and natural law, in particular, are controversial ... it will result in the complete and uncontrolled judicial discretion, which can soon lead to the abuse of power" (Vas'kovskii, 1997).

With such a prevailing position of the majority of leading pre-revolutionary scientists, the conclusions of L.A. Tikhomirov and Ya.P. Kozel'skii seem especially striking. Thus, L.A. Tikhomirov wrote, "The legislators themselves should be guided by something, giving or not giving the person rights or defining any actions as their duty" (Tikhomirov, 1998). In the distant 1767, Ya.P. Kozelskii was even more theoretically accurate saying that the principles of law are "...something unchangeable and universal, so that the laws issued in the state always correspond to them" (Zolotukhina, 2018).

At the same time, judicial positivism that had been predominating in the Soviet and Post-Soviet period did not allow researchers to recognize the principles of law as an independent means of legal regulation of social relations with a higher legal force than that of the norms of law, for example, in national regulatory legal acts. For example, N.G. Aleksandrov, one of the Soviet classics of the theory of law in the middle of the 20th century, wrote quite uncertainly, "the basic principles of socialist law are *the statements expressing the general idea and the most pronounced features of the socialist legal regulation of public relations*" (Aleksandrov, 1957) (emphasis mine).

N.G. Aleksandrov quite consistently outlined such 'principles' of the Soviet law as "securing the political power of the workers led by the working class", "democratic centralism" and "ensuring planned discipline" (Aleksandrov, 1957).

In 1970 E.A. Lukasheva was one of the first in the USSR to make a step forward, though it was not enough. She determined the principles of law as "... objectively determined *the origins which serve as the guide for the system of law*" (Lukasheva, 1970) (emphasis mine). In the same article E.A. Lukasheva theoretically outlines, "... *the origins and ideas are the principles of law*" (Lukasheva, 1970) (emphasis mine). E.A. Lukasheva singled out the following "principles of law", which seem quite strange from the position of judicial positivism, and the position of the research discussion conception of integrative law consciousness as well (Ershov, 2018): 'justice', 'legality',

‘continuous connection of rights and obligations’, ‘combination of persuasion and coercion’ (Lukasheva, 1970).

Unfortunately, many researchers did not differentiate between “the principle of law” and “legal principle”. Some researchers of the 21st century do not provide necessary differentiation neither (Konovalov, 2018)¹. Back in 1970, E.A. Lukasheva believed (which is arguable in my opinion): legal principles are identical to the principles of law, and the distinction between them can be made only conditionally, while being embodied in the legal system, legal principles remain the principles of legal consciousness and affect the functioning of the entire legal regulation system (Lukasheva, 1970). At the same time, the ‘principles of law’ and ‘legal principles’, in my opinion, are different legal categories. Thus, D.A. Kerimov convincingly wrote that ‘legal principles’ are the well-established foundations of legal consciousness and the main directions of legal policy (Kerimov, 2001). Consequently, in my opinion, they are not law. At the same time, it seems that the principles of law are the fundamental (general) means of legal regulation of social relations, i.e. they are the law (Ershov, 2018).

S.S. Alekseev, who was a leading Soviet scholar in the field of the general theory of law in 80s-90s of the 20th century, in 1972 repeated the conclusion of E.A. Lukasheva to some extent. However, S.S. Alekseev developed his own rather uncertain point of view, later repeated many times by his followers: the principles of law are “... *the regulatory and guiding origins expressed in law that characterize its content, its foundations, the regularities of social life recorded therein. Principles permeate the law, reveal its content in the form of original, cross-cutting ‘ideas’, the basic origins of regulatory guidelines*” (emphasis mine) (Alekseev, 1972).

In this concept, S.S. Alekseev, unfortunately, first of all, defined the essence of the principles of law in the most general form. Secondly, his definition is contradictory including such phrases as “initial regulatory origins”, “initial, cross-cutting ideas”, “main principles of regulatory guidelines”. Thus, S.S. Alekseev left the main question unanswered: are the principles of law “the origins”, the “ideas”, the “regulations” or the independent and primary legal regulators of public relations?

However, in 1981 S.S. Alekseev repeated his own definition of the principles of law in a modified form. He wrote that the principles of law are “*the initial regulatory and guiding origins that are expressed in law, which characterize its content, its*

¹ See, for example: A.V. Konovalov names his article “Functioning of the principles of law and their role in the formation of legal order”, but in the article itself he writes about “legal principles”.

fundamentals ... the principles are a special element of the structure of law...” (emphasis mine) (Aleskseev, 1981).

The definition of the principles of law as “a special element of the structure of law” is especially surprising. Unfortunately, S.S. Alekseev did not dwell on the peculiarities of this “special element”. In his subsequent works S.S. Alekseev continued writing that “the principles of law... are the ideas... contained in the norms” (Aleskseev, 1989). Finally, in 2002 S.S. Alekseev repeated his conclusion (Aleskseev, 2002).

L.S. Yavich in 1976, following S.S. Alekseev also quite vaguely stated that “the principles of law are the leading origins of its formation, development and functioning” (Yavich, 1976). At the same time, 2 years later in 1978, he clarified his conclusion, “the principles of law are ... the beginning, the starting ideas of its being ... *they are universal, supremely imperative and generally valid*” (emphasis mine) (Yavich, 1978). At the same time, from the position of legal positivism, like most other scholars, L.S. Yavich analysed “norms-principles” rather than principles and norms of law as various legal regulators of social relations (Yavich L.S., 1978). However, it is noteworthy that back in 1978, L.S. Yavich theoretically convincingly emphasized, “from an epistemological point of view, it is important that the category “principle” is closely related to the categories of “legitimacy” and “**essence**” (emphasis mine)” (Yavich, 1978).

O.V. Smirnov made a significant step forward in the study of the principles of law in 1977. He came to the most important conclusion: *the principles of law reflect the features of the general, abstract, essential and systemic, the principles are deeper than the norm and the norm is richer than the principle* (emphasis mine) (Smirnov, 1977).

Unfortunately, in the second half of the 20th century another point of view was “established” in the general theory of law. According to it researchers and practical lawyers, as a rule, analysed “norms-principles”. Thus, S.S. Alekseev wrote, “the principles of law mainly appear in the form of norms (norms-principles)” (Alekseev, 2002). In the same 2002, O.E. Leist argued that “... norms-principles ... are the regulatory prescriptions of a high level of generalization, ... gaining validity and legal force only as a component of each of them” (Problemy teorii gosudarstva..., 2002).

With this state of the general theory of law in the second half of the 20th century, the standpoint of V.P. Griбанov, the Head of the Department of Civil Law at Lomonosov Moscow State University was surprising and incisive. In 1966 he outlined that “... the identification of the legal principle (in my opinion, it would be theoretically more precise to call it the principle of law) with the rule of law is almost equivalent to the denial of legal principles in general” (Griбанov, 1966). In the second half of the 20th century, the closest

to understanding the essence of the principles of law was, I believe, V.S. Nersesyants. Nevertheless, he wrote quite vaguely: the principles of law in the “legal system” play the role of “the vital force”, “self-regulation mechanism”, and “aspiration” ensuring the unity and consistency of all elements of the “legal system” (Nersesyants, 1983).

Considering the analysed standpoints of the leading Soviet experts in the field of theory of law made in the second half of the 20th century, let me summarize them as final conclusions from the position of legal positivism. First of all, scholars did not attribute the principles of law to independent legal regulators public relations. They were limited only to the analysis of the norms of law and only in the “legislation”, and more precisely in the national regulatory legal acts. Secondly, they did not differentiate between the principles of law and the norms of law, having developed a theoretically debatable concept of “norms-principles of law”. Thirdly, they did not establish the correlation between the principles of law and the norms of law.

In this regard, the principles of law in the second half of the 20th century, as a rule, were not analysed in textbooks on the theory of law and the state. They were only mentioned in separate textbooks for universities, and only from the position of legal positivism in the most traditional sense. For example, R.Z. Livshits, in the textbook on the theory of law, wrote, “the principle is always the initial guiding origin. With regard to law it is the idea” (Livshits, 1994).

At the beginning of the 21st century, many scientists essentially repeated the positions expressed in the second half of the 20th century. For example, G.T. Chernobel’ wrote, “the main essential feature of *legal principles* (emphasis mine) is that embodying a certain synthesized legal idea, a certain legal ideal ... they act as an ideological key to understanding and perception of the current legal system, ... *legal principles are nothing more than legal ideology born by justice*” (emphasis mine) (Normotvorcheskaia iuridicheskaja tekhnika, 2011).

However, at the beginning of the 21st century many experts in the field of the general theory of law began to define the principles of law not just vaguely, but, oddly enough, from contradictory positions of both legal positivism and the unscientific concept of integrative legal consciousness synthesizing not only the principles and norms of law contained in the unified, multilevel and developing system of forms of national and international law, but also non-law, for example, justice, judicial precedents and legal positions of the courts (Ershov, 2018).

The point of view of A.V. Konovalov is quite typical. He believes that social relations can be settled “*within a framework defined by the principle*”; “*the principles*

create a framework in which social relations arise and develop”; “the principles of law fulfill ... the role of general guidelines”; “one of the most important aspects of functioning of the principles of law is that they set the general direction, the main prevailing trends in law enforcement”; the principles of law should be “dissolved in positive legislation” (emphasis mine) (Konovalov, 2018).

At least, Konovalov’s extremely uncertain conclusion is surprising: “Thus, the principles of law operate in law and order in the following ways: 1) directly influencing social relations in the form of generalized rules of social communication; 2) being set as the basic principles of legislation in its positive norms; 3) being “dissolved” in all norms of the legislation; 4) determining the basic method of the field; 5) developing the key conceptual approaches, ensuring stability and consistency of law enforcement practice, including its most important aspect, legal precedents; 6) representing a semantic core of individual and collective legal consciousness, including the system of motivations of legal behaviour; 7) providing a transfer of the ideal model of settling public relations by law into actual public relations; 8) mediating the accumulation in the society of positive practices in law enforcement as the most important prerequisites for its successful development in the present and in the future; 9) being the conceptual ties tending to the disintegration of the civil law tools; 10) acting as factors that unite the elements of an atomized, horizontally integrated society, and a conceptual alternative to selfish irrational behaviour” (Konovalov, 2018).

With such a “theoretical” approach, it is not at all strange that in the legal encyclopedic dictionary, the principles of law are considered as “basic ideas, starting points or leading elements of the process of its formation” (*Iuridicheskii entsiklopedicheskii slovar’...*, 2008). Essentially, a similar conclusion was made in the textbook “The General Theory of State and Law”: the principles of law “... should be understood as the initial regulatory guiding origins (imperative requirements), which determine the general idea of legal regulation of social relations ... they also represent *certain fundamental ideas that are developed on the basis of scientific and practical experience; however, various legal ideas and ideals only become principles when they are directly (legally) represented in legal acts or other forms of law*” (emphasis mine) (*Obshchaia teoriia gosudarstva...*, 2007).

Taking into account the standpoints of the leading Soviet and Russian researchers in the field of general theory of law, I think one cannot but agree with the conclusion made by A.L. Kononov: “the concept of the principles of law in the Soviet legal doctrine exists mainly as ... extremely ideological. In fact, the principles of law were understood

more as political ideas than legal ones ... Exceptionally positivistic understanding of law did not provide the principles with the value of independent sources of law. It put them out of legislative norms and by virtue of this understanding they could not serve as a criterion for evaluating these norms. The assessment itself was not allowed as well” (Kononov, 2001).

Unfortunately, the practice of the Constitutional Court of the Russian Federation, in my opinion, is theoretically very inconsistent. On the one hand, the Constitutional Court of the Russian Federation from the standpoint of the scientifically based concept of integrative legal consciousness in its Resolution No. 9-P of November 30, 1992 theoretically convincingly differentiated various forms of national law: “general principles of law” and “current legislation” (Vedomosti s’ezda narodnykh..., 1993). In the other Resolution No. 1-P of January 27, 2004, the Constitutional Court of the Russian Federation seems to have developed a crucial position: “*The general principles of law, including those embodied in the Constitution of the Russian Federation, have the highest authority and are the criterion and measure of the validity of all regulatory acts*” (emphasis mine) (Svod zakonov RF, 2004).

On the other hand, in my opinion, the Constitutional Court of the Russian Federation adopted the Resolution No. 4-P of June 8, 2015 already from the standpoint of the scientifically debatable concept of integrative legal consciousness that synthesizes law and non-law, including the principles of law and justice. This Resolution states that “the need for the increased level of protection of the rights and freedoms of citizens in legal relations related to public liability *requires compliance of the legislative mechanisms* in force in this field and the law enforcement practice arising from the requirements of Articles 17, 19, 45, 46, 52, 53 and 55 of the Constitution of the Russian Federation and *the general principles of law to the criteria of justice, proportionality and legal security*, in order to guarantee effective protection of the rights and freedoms of man and citizen, including through the fairness of justice” (emphasis mine) (Postanovlenie Konstitutsionnogo Suda RF..., 2015).

The Plenum of the Supreme Court of the Russian Federation also uses the concept of “principles of law” in its Resolutions. It is noteworthy that it provides them with a higher power than the rule of law. For example, in accordance with paragraph 9 of the Resolution No. 21 of the Plenum of the Supreme Court of the Russian Federation of June 2, 2015 “On some issues that courts face when applying legislation governing the work of the head of the organization and members of the collegial executive body of the organization”, “if the court determines that the employer *decided to terminate the*

employment contract with the head of the organization under paragraph 2 of Article 278 of the Labour Code of the Russian Federation in violation of the principles of the inadmissibility of abuse of right (or) prohibition of discrimination in the sphere of labour (articles 1, 2 and 3 of the Labour Code of the Russian Federation), such a decision may be recognized as illegal” (emphasis mine) (Rossiiskaia gazeta, 2015).

There is another example. According to Paragraph 11 of the same Resolution, “if it is determined that the requirements of the legislation and other regulatory legal acts, including *the general legal principal of the inadmissibility of abuse of right* (emphasis mine), legal interests of the organization, other employees, other persons have been violated by the conditions of the employment contract, ... the court shall have the right to dismiss a claim for receiving a payment from the employer in connection with the termination of the employment contract or reduce its size” (Rossiiskaia gazeta, 2015).

Considering the established size of the article, let me limit myself to studying the views of only certain leading international experts in the field of the general theory of law. Many of them analyse the legal category of “the principles of law” from the standpoint of the unscientific concept of integrative legal consciousness that synthesizes law and non-law, for example, justice. Thus, G. Brabant wrote that “the equivalent of the general principles of law is ... the natural law of justice” (which is open for discussion, I believe) (Brabant, 1988).

H.L.A. Hart in 1961 published his work *The Concept of Law*, which many foreign and Russian researchers call the main work of legal philosophy in the 20th century. Hart identified two main approaches in criticism of legal positivism. The first one assumed that there are some *principles of human behaviour* (emphasis mine), which must comply with the laws in order for them to have legal force (Hart, 1961). R. Dworkin, the student and the most convinced and bright critic of H. Hart, was upholding the second approach. He wrote, “I call a principle such a standard that should be observed not because it contributes to changing or preserving some economic or political situation, but because it *expresses some moral requirements, which can be the requirements of justice, fairness, etc.*” (emphasis mine) (Dworkin, 2004). The second approach assumes a combination of legal reality and moral value (Hart, 1961).

In fact, the conclusions of H.L.A. Hart and R. Dworkin were very close. The proof of this, in particular, is the following phrase of H.L.A. Hart: “... the name of a valid right should be deprived of certain rules due to their extreme moral injustice” (Hart, 1961). In my opinion, the theoretical conclusions of H.L.A. Hart, R. Dworkin and G. Brabant are primarily based on scientifically debatable and diverse concepts

of integrative legal consciousness (Hunt, 1985; Meese, 1987; Waldron, 2008), which artificially synthesizes ontologically diverse social regulators, law and non-law, including law and justice in a single system of forms of national and international law. In practice, such legal consciousness leads to endless and unlimited “erosion” of law by non-law, results in unstable, unexpected, diverse and directly contradictory precedents. In the end it leads to the violation of the rights and legal interests of the subjects of legal relations.

The philosophical encyclopedic dictionary interprets the category “principle” in the subjective and the objective sense. In the subjective sense, as the main position, a prerequisite. In the objective one, as a starting point (*Filosofskii entsiklopedicheskii slovar*, 2012). For example, Aristotle understood the principle in the objective sense in the form of *the first value; the basis on which something exists or will exist* (emphasis mine) (*Logicheskii slovar'-spravochnik*, 1975). Hence, in the philosophical sense, the category “principle” is characterized by a generalization of the most typical, expressing the regularities underlying something.

It is characteristic that in logic the category “principle” is considered as the central concept, the basis of the system, representing the generalization and distribution of a position in relation to all the phenomena of the area from which this principle is abstracted. In this connection, I think, F. Bacon’s conclusion is characteristic: *“Principles are the primary and simplest elements from which everything else was formed”* (emphasis mine) (Bacon, 1937). In turn, I. Kant ingeniously remarked that “the principle is that which contains the basis of the universal connection of everything that represents the phenomenon” (Kant, 1963). Finally, Hegel wrote, remarkably subtly and deeply: “The principle is ... the unified one ...” (Hegel, 1970).

It seems that, in accordance with the scientifically based concept of integrative legal consciousness, law is expressed not only in the norms of law, but above all in the principles of law contained in a single, multi-level and developing system of forms of national and international law implemented in the state. Consequently, the principles of law are legal regulators of social relations, and not “ideas”, “origins”, “provisions”, etc.

With such a general scientific, theoretical and legal approach, the essence of the principles of law, in my opinion, is that the principles of law are objective legal regulators of social relations. They are primary, expressing the fundamental laws of legal regulation of social relations, the most abstract elements of a single, developing and multi-level system of forms of national and international law. In the process of their specification, authorized law-making bodies develop to a greater degree some

“real” norms of law in the forms of both national and international law, including the norms of law in national regulatory and legal acts.

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Сущность принципов права

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В статье анализируются точки зрения многих ведущих советских, российских и зарубежных научных работников, специализирующихся в области общей теории права, о сущности принципов права. Обоснованы выводы о том, что доминировавший в советский и постсоветский периоды юридический позитивизм не допускал признания исследователями принципов права в качестве самостоятельного средства правового регулирования общественных отношений, имеющего более высокую юридическую силу по сравнению с нормами права, содержащимися, например, в национальных нормативных правовых актах; теоретические выводы Г.Л. Харта, Р. Дворкина и Г. Брэбана о соединении в принципах права юридической действительности и моральной ценности, прежде всего, основаны на научно дискуссионных и разнообразных концепциях интегративного правопонимания, искусственно синтезирующих в единой системе форм национального и международного права онтологически разнородные социальные регуляторы, право и неправое, в том числе право и справедливость. Такое правопонимание на практике приводит к бесконечному и безграничному «размыванию» права неправом и к нестабильной, неожиданной, многообразной и прямо противоречивой

судебной практике. В конечном результате – к нарушению прав и правовых интересов субъектов правоотношений. В соответствии с научно обоснованной концепцией интегративного правопонимания право выражается не только в нормах права, но прежде всего и в принципах права, содержащихся в единой многоуровневой и развивающейся системе форм национального и международного права, реализуемых в государстве. Следовательно, принципы права – это правовые регуляторы общественных отношений, а не «идеи», «начала», «положения» и т.д. Сделан вывод о сущности принципов права: принципы права – объективные правовые регуляторы общественных отношений, являются первичными, выражающими основополагающие закономерности правового регулирования общественных отношений, наиболее абстрактными элементами единой развивающейся и многоуровневой системы форм национального и международного права, в процессе конкретизации которых управомоченными правотворческими органами вырабатываются в большей степени определенные нормы права в формах как национального, так и международного права, в том числе нормы права в национальных нормативных правовых актах.

Ключевые слова: сущность, сущность принципов права, правовые регуляторы общественных отношений; единая развивающаяся и многоуровневая система форм национального и международного права; конкретизация права, нормы права, национальные нормативные правовые акты.

Научная специальность: 12.00.00 – юридические науки.
