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## Note

# DOES NORMATIVITY CONTRIBUTE TO THE EFFECTIVE PROTECTION OF RIGHTS? REFLECTIONS ON THE CONCEPT OF NORMATIVITY IN THE MODERN UKRAINIAN DOCTRINE OF LAW

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**Summary:** 1. Introduction: The Concept of Social Norms and Their Role in Modern Society. – 2. Normativity and Due Diligence of the Law: How a Subject Should Act and Why Coercion Is Not Effective. – 3. The Concept of Normativity in Modern Philosophical Writing and Its Significance for the Development of Modern Law and the Effective Protection of Individual Rights. – 4. Conclusions and Reflections on the Further Study of the Essence of Law in Modern Society.

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# DOES NORMATIVITY CONTRIBUTE TO THE EFFECTIVE PROTECTION OF RIGHTS? REFLECTIONS ON THE CONCEPT OF NORMATIVITY IN THE MODERN UKRAINIAN DOCTRINE OF LAW

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**A**bstract Normativity is considered the basis for the implementation of social regulation. However, this regulation of social relations must be organised and have a positive impact on the development of society. Normativity is considered to be the primary, original property of social reality due to the natural demand for establishing order and its integral ability for self-organisation. The integration of elements into a balanced system is carried out through their coordinated interactions, resulting in something new, which has a unique integrative quality, provided that this quality was absent before their integration into the system.

At the same time, nowadays, the phenomenon of normativity is studied mostly from traditional positions. A number of well-known works that raise the issue of normativity were written in the middle of the last century under conditions of an ideological monopoly and are unlikely to enrich the modern understanding of the normative nature of law.

Today, in the Ukrainian scholarly literature, because of Soviet remnants, only the formal (positive-empirical) side of normativity is being assessed, which leads to it being replaced by the concept of state coercion. In general, this leads to the spread and dominance of extremely negative phenomena in Ukrainian society, among which the total non-enforcement of court decisions is worth mentioning. The solution to this problem cannot simply be improving coercive measures of the state alone – there must be changes to understanding the rule of law and, in particular, the nature of normativity. The analysis of the method of objectification (formation) of the due diligence of law will significantly contribute to targeting this problem because the latter is not solely derived from the dictates of the state (or the empirical phenomena). However, the key focus is finding the answer to one of the most important questions of jurisprudence and the philosophy of law, namely: 'Why should a person obey the law?'. Thus, we are highly motivated to initiate a philosophical and legal rethinking of approaches to the normativity of law and the legitimation of state and legal processes. This article is an attempt to target a discussion in this sphere.

**Keywords:** law, human rights, normativity, due diligence of law, effective measures of protection of law, Ukraine

# 1 INTRODUCTION: THE CONCEPT OF SOCIAL NORMS AND THEIR ROLE IN MODERN SOCIETY

Modern legal theory represents diverse approaches to understanding the problem of social norms. However, each of these views is somewhat one-sided and insufficient and therefore does not provide a full answer to the main question of social, let alone legal, normativity: *why* and *how* is a social norm mandatory? Or, in other words, what are the normative force of social norms, and why must a person comply with the norm?

In recent decades, research has been carried out primarily on issues of the normativity of law, especially in works related to the nature and content of normative systems in society<sup>1</sup> or devoted to the philosophical analysis of normativity in general. Other authors focus on the value of law and law-making in modern legal worldview,<sup>2</sup> defining it as a phenomenon that determines the socio-value dimension of law, which is formed to specifically regulate social relations.<sup>3</sup>

It is not true that the problem of normativity of law has bypassed the legal doctrine of Western countries.<sup>4</sup> They have indeed tackled the problem, formulating the definition of pseudo-problems of the normativity of law (Leslie Green) and declaring an unbridgeable gap between is and ought (Sylvie Delacroix).<sup>5</sup> Roger A. Shiner, in particular, devotes his research to externalist, internalist, and descriptivist theories, as well conceiving the reductionism of 'jurisprudence'.<sup>6</sup>

At the same time, in recent years, the issue of the normativity of law and its value and role in the legitimation of state functions has become much more acute in Ukraine. In particular, this is has been significantly facilitated by conflicts between certain branches of government (executive and judicial branches, the President of Ukraine and the Constitutional Court of Ukraine, etc.). At the initial level, even the problem of non-enforcement of court decisions shows that outdated traditional approaches to legal understanding for the totalitarian state hinder the development of Ukrainian society and have become insurmountable obstacles to ensuring real access to justice and effective legal protection.

- 1 R Kabalskyi, Normativity of law as a subject of philosophical analysis (2008) Manuscript <<http://www.disslib.org/normatvynist-prava-jak-predmet-filosofskoho-analizy.html>> (accessed 10 May 2021); R Kabalskyi, 'History of philosophical understanding of normativity as a socio-cultural phenomenon' (2013) 79 (37) Collection of Scientific Works 'Gileya: Scientific Bulletin'; A Babiuk, 'The concept of normative law' (2014) 4 (52) University Scientific Notes 19 <[http://www.irbis-nbuv.gov.ua/cgi-bin/irbis\\_nbuv/cgiirbis\\_64.exe?I21DBN=LINK&P21DBN=UJRN&Z21ID=&S21REF=1&S21CNR=20&S21STN=1&S21FMT=ASP\\_meta&C21COM=S&2\\_S21P03=FILE=&2\\_S21STR=Unzap\\_2014\\_4\\_4](http://www.irbis-nbuv.gov.ua/cgi-bin/irbis_nbuv/cgiirbis_64.exe?I21DBN=LINK&P21DBN=UJRN&Z21ID=&S21REF=1&S21CNR=20&S21STN=1&S21FMT=ASP_meta&C21COM=S&2_S21P03=FILE=&2_S21STR=Unzap_2014_4_4)> (accessed 10 May 2021); L Zamorska, 'Normativity of law as a social value' (2012) 45 Current Policy Issues 28-37 <<http://dspace.onua.edu.ua/handle/11300/1259>> (accessed 10 May 2021).
- 2 T Didych, 'Value dimension of law-making in the modern legal worldview' (2014) 5 Pravovyy svitohlyad: lyudyna i pravo 165 <[http://almanahprava.org.ua/files/almanah-prava.-vipusk-5-\\_2014\\_.pdf](http://almanahprava.org.ua/files/almanah-prava.-vipusk-5-_2014_.pdf)> (accessed 10 May 2021).
- 3 Particular attention was paid to these issues in connection with sustainability, announced in UN goals. See Sustainability and Law. General and specific aspects, Volker Mauerhofer, Daniela Rupo, Lara Tarquinio (eds) (Springer 2020); I Izarova, 'Sustainable civil justice through open enforcement – The Ukrainian experience studying' (2020) 9 (5) Academic Journal of Interdisciplinary Research 206-216 and others.
- 4 L Green L, 'The normativity of law: What is the problem' <[https://www.uvic.ca/victoria-colloquium/assets/docs/Green\\_Normativity.pdf](https://www.uvic.ca/victoria-colloquium/assets/docs/Green_Normativity.pdf)> (accessed 10 May 2021).
- 5 S Delacroix, 'Understanding normativity. The impact of culturally-loaded explanatory ambitions' (2019) 37 REVUS. Journal for Constitutional Theory and Philosophy of Law 17-28 <<https://doi.org/10.4000/revus.4773>> (accessed 17 April 2021).
- 6 R Shiner, *Law and Its Normativity. A Companion to Philosophy of Law and Legal Theory: Second edition* (Blackwell Companion, 2009) <<https://doi.org/10.1002/9781444320114.ch28>> (accessed 10 May 2021).

In the Soviet era, the idea of social norms as objective phenomena prevailed, and the concept of objective social norms was formulated, the core idea of which was 'stable social ties that recur and arise in the process of social activities of people in exchange for material and spiritual goods, expressing the need of social systems for self-regulation'<sup>7</sup> or 'a form of the external manifestation of social relations that constitute the content of these norms.'<sup>8</sup> However, in this approach, the norm as an expression of the due diligence of law was mixed with social laws, i.e., with the existing essence, creating the illusion of the existence of a social norm outside the subject and of its autonomy. This, according to the authors of the present article, became the basis for a limited understanding of the essence of law and its normativity.

The process of describing social facts, revealing patterns, and trying to deduce the norm awards jurisprudence with the role of empirical science. Of course, the connection between norms and due diligence has been noted by many scholars, but the justification of the binding force (element of belonging) of social norms on the basis of their repetition 1) mixes the recurrence of behaviour with the universality of norms, 2) unreasonably removes due diligence from the existing reality, and 3) results in a certain pattern of behaviour becoming the norm because of its constant recurrence, even when it remains unclear why this behaviour was constantly repeated before acquiring the status of the norm.

A striking example of the mechanism during which a socially determined rule acquires the status of normative is modern judicial practice. For instance, for several years now in Ukrainian society, there has been a lively discussion about the usage or futility of compulsory vaccination. The tendency to refuse to vaccinate children has become quite widespread and dangerous. In its decision of 17 April 2019 in case No. 682/1692/17, the Civil Court of Cassation of the Supreme Court questioned this objectively-formed social attitude by prohibiting an unvaccinated child from attending kindergarten. The court emphasised that:

The requirement of compulsory vaccination of the population against particularly dangerous diseases, based on the need to protect public health, as well as the health of those concerned, is justified. In this case, the principle of the importance of public interests prevails over personal ones.<sup>9</sup>

In accordance with Part 5 of Art. 14 of the Law of Ukraine 'On the Judiciary and the Status of Judges', the conclusions of the Supreme Court are binding when applying the norm of law, which they supplement and develop.<sup>10</sup> However, in this situation, the normative nature of the injunction embodied in the decision of the Supreme Court raises difficulties in terms of its recurrence and universality, as the legal nature of a judicial act does not have such scope as an act of the Parliament.

Ukrainian philosopher A. Yermolenko drew attention to the fact that the norm has both prescriptive and descriptive content: it reflects not only what should be, but also what is, that is – the norm carries both counterfactual (transcendental) and factual (ontological) meaning.<sup>11</sup> Other scholars have noted that 'norms can also be defined as ideal general patterns of human behavior under certain typical circumstances'.<sup>12</sup>

7 E Lukasheva, 'General theory of law and multidimensional analysis of legal phenomena' (1975) 4 *Soviet State and Law* 15-22.

8 I Sabo, *Foundations of the theory of law* (Progress 1974) 272.

9 Resolution of the Supreme Court composed of the Joint Chamber of the Administrative Court of Cassation of 11 February 2020 in administrative proceedings No 816/502/16 <<https://reyestr.court.gov.ua/Review/81652333>> accessed 9 April 2021.

10 Law of Ukraine on Judiciary and Status of Judges, No 1402-VIII, adopted on 2 June 2016. Official website of the Parliament of Ukraine <<http://zakon0.rada.gov.ua/laws/show/1402-19>>

11 A Yermolenko, *Communicative practical philosophy* (Libra, 1999) 488.

12 *ibid.*

Not all researchers of social norms agree with their characterisation of a norm as a fixation or an expression of due diligence, typical for research of the Soviet period. In particular, it was noted that ‘The norm... is a characteristic of the actual state of affairs: not only what should be, but also what already exists, not only the proper but also the existing’.<sup>13</sup>

One more specific opinion on this issue is following

The norm... only ascribes what should be, but the norm itself is what is being, what is present, what exists as reality. Because if the norms were appropriate and not existing, then there would be no signs of the due diligence at all, it would be unknown what is appropriate and what is undesirable.<sup>14</sup>

This approach of the scholars results from their understanding of due diligence as generated by the existence and denial of the reality of due diligence. In other words, what is not existing is non-existence. As it is quite rightly emphasised in the modern Ukrainian doctrine of law that ‘the understanding of law as a system of norms emphasises its state, and denies its social nature’.<sup>15</sup>

Undoubtedly, the social norm always contains an element of that which exists, as there is a certain ‘corporeality’ with due diligence in the way it addresses social subjects. However, in our opinion, the essence of the norm is a derivative of due diligence and is instrumental. In the next part of our article, we will try to prove that normativity depends on values and due diligence, which are the essential core characteristics of law.

## 2 **NORMATIVITY AND DUE DILIGENCE OF THE LAW: HOW A SUBJECT SHOULD ACT AND WHY COERCION IS NOT EFFECTIVE**

Obviously, the answers to these questions should be considered in connection with such categories as ‘due diligence’, ‘norm’, and ‘normative’. In this regard, the position of some scholars, who considered social norms as logical judgments, seems interesting and contains significant heuristic potential. The Ukrainian theorist of law E. Burlay singled out a separate direction in the study of normative systems,<sup>16</sup> within which the norm is considered as an ‘authoritative prescription of the due diligence’ and ‘identify it with a judgment of a normative nature, i.e. with a judgment that contains a formulated rule of conduct’.

The vision of moral and logical judgments as single-order phenomena that equally claim universality and generality was initiated by I. Kant. This thesis was shared by well-known Ukrainian theorist of law P.M. Rabinovich.<sup>17</sup> The connection of norms and values was also described by another Ukrainian philosopher of law, S. Maximov. Considering the phenomenological structure of legal norms, he singled out such elements as ‘the subject (the one to whom the norm is addressed), the essence of value (what the value protects) and the object of due diligence (what should be done - rights and responsibilities)’.<sup>18</sup>

13 V Kudryavtsev, ‘Legal norms and actual behavior’ (1980) 2 *Soviet State and Law* 12-16.

14 R Lukich, *Methodology of law* (Progress 1981) 304.

15 A Babiuk, ‘The concept of normative law’ (n 1).

16 E Burlay, *Norms of law and legal relations in a socialist society* (Naukova Dumka 1987) 91.

17 P Rabinovich, ‘Law as a phenomenon of public consciousness’ (1972) 2 *News, Jurisprudence* 106-116. The latest work is ‘Basics of theory and philosophy of law’ <[https://law.lnu.edu.ua/wp-content/uploads/2021/04/Posibnyk\\_maket\\_2021\\_2.pdf](https://law.lnu.edu.ua/wp-content/uploads/2021/04/Posibnyk_maket_2021_2.pdf)> (accessed 10 May 2021).

18 S Maksimov, *Legal reality: the experience of philosophical understanding* (Pravo 2002) 328.

In our opinion, the norm is inextricably linked with due diligence. However, when considering a norm as a judgment, the question arises as to how the judgment is related to due diligence. As already noted, deontic judgment expresses a certain value, on the basis of which a conclusion is made about the need for a certain behaviour. That is, the norm (as a deontological judgment) is precisely connected with the realm of due diligence by the value.

The overriding task of norms is maintaining invariance by creating boundaries of variability. Invariance in a norm is a reference to the value that stands behind it and is expressed in it because only the latter can obtain the status of absoluteness in culture. But value, so to speak, inverts this absoluteness in the norm, reinforcing it with its authority. The norm, in turn, is a certain symbolic reflection of a value, a way of its manifestation.

In scholarly literature, the similarity of the categories 'due diligence' and 'normativity' was noted. This thesis was most vividly expressed by N. Nenovsky,<sup>19</sup> who declared that 'the due diligence presupposes and even absorbs the norm or, more generally, the normativity. When we say 'due diligence', we generally understand 'normativity'. The norm is a way of expressing the form of due diligence. The deontological objectifies through the normative and acquires the status of objectification independent of the individual consciousness. Because of the norms, due diligence becomes a reality. Or, in other words, norms are the reality of what is right, as scholars have noted. That is, in the process of the externalisation of due diligence (sense of value, an idea of how it should be), the value, as a kind of clot, institutionalised and objectified in social reality, became an integral element of the social norm. The value is the range of meanings of normative judgments (social norms).

Due diligence is a specific phenomenon of the social world. It does not exist in nature, outside of human society. Due diligence exists in a normative form; usually, it is the behaviour that is addressed to the subject and must be performed. It has an intellectual and emotional value composition. Due diligence is always a positive value that can be perceived by the subject as an autonomous (freely recognised) or heteronomous (externally binding) rule. In the latter case, due diligence exists in the mind of the subject as an objective reality. But even in this case, due diligence (social norms) arises only as a result of the activities of social actors, who interpret them as socially significant norms objectivated in social rules. Therefore, in its true meaning, the norm is not a specific object that exists independently of the subject but is a subjective correlation that expresses due diligence. Thus, we can declare the interdependence of the norms and the values. Thus, on the one hand, the value is manifested through the norm (deontological judgment) and, being integrated into the latter, is internalised and realised by the subject. On the other hand, it is the value, carrying in itself the element of due diligence, that endues social norms with the qualities of universality and universality and creates the essence of normativity. In this case, 'the content of the normative legal act that is being drafted and approved should be aimed at resolving the main problem or issue'.<sup>20</sup>

One of the best examples of a value that has gained the status of a norm through international recognition and legislative legitimacy is the concept of the rule of law. As the Venice Commission noted

Consensus exists on the core elements of the Rule of Law, which are: (1) Legality, including a transparent, accountable and democratic process for enacting law; (2) Legal certainty; (3) Prohibition of arbitrariness; (4) Access to justice before independent and impartial courts, including judicial review of administrative acts;

<sup>19</sup> N Nenovsky, *Law and values* (Progress 1987) 248.

<sup>20</sup> A Babiuk, 'The concept of normative law' (n 1).

(5) Respect for human rights; and (6) Non-discrimination and equality before the law (p.18).<sup>21</sup>

The idea of the rule of law is implemented at the constitutional and statutory level in most European states and is enshrined in the acts of substantive and procedural legislation,<sup>22</sup> as well as embodied in the jurisprudence at supranational and national levels. For example, in *Shchokin v. Ukraine* (Application Nos. 23759/03 and 37943/06), the European Court of Human Rights, emphasising the illegality of the tax charge on the applicant, which occurred due to defects in tax law, referred to the rule of law as '... One of the fundamental principles of a democratic society, inherent in all articles of the Convention'. The Court emphasised that

The question whether a fair balance has been struck between the general interests of society and the requirements for the protection of the fundamental rights of the individual arises only when it is established that the impugned interference complied with the law and it was not arbitrary (§ 50).<sup>23</sup>

The Constitutional Court of Ukraine embodies universal values in its decisions, which are mandatory for all law enforcement entities and ordinary citizens at the national level. One of the best interpretations of the concept of the rule of law in the case-law of this Court is its Judgment in the case of the imposition of a milder sentence by the Court of 2 November 2004 No. 15-rp / 2004, which states that

The rule of law requires from the state implementation of its values in law-making and law-enforcement activities, in particular in laws, which in their content should be permeated primarily by the ideas of social justice, freedom, equality and so on. One of the manifestations of the rule of law is that law is not limited to legislation as one of its forms, but also includes other social regulators, such as morals, traditions, customs, etc., which are legitimized by society and historically achieved in the national culture. All these elements of law are united by a set of rules that corresponds to the ideology of justice, the idea of law, which are largely displayed in the Constitution of Ukraine (§ 2, item 4.1, item 4 of the motivating part).<sup>24</sup>

Not only the law itself but the goals which are pursued by its norms are important, as noted in the doctrine

Law is defined as a manifestation of its value in the ability to regulate social relations, to act as a means of regulating of social relations, to ensure the corresponding social good in the form of law and order in society. In order to be valuable, law is endowed with those properties that reveal it as an important social force of society, the bearer of social energy... any legal phenomena, including the phenomenon of lawmaking, are not accidental, because they are generated to achieve a certain goal.<sup>25</sup>

- 21 Rule of Law Checklist, Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016) <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e)> (accessed 10 May 2021).
- 22 On procedural legislation harmonisation, see Fernando Gascon Inchausti and Burkhard Hess, *The future of the European Law of civil procedure* (Intersentia 2020) and I Izarova, *Theory of the EU civil procedure* (VD Dakor 2015). For the EU and third states harmonisation, see I Izarova, 'Enhancing judicial cooperation in civil matters between the EU and Ukraine: First steps ahead' in *EU civil procedure law and third countries: Which way forward?* A Trunk, N, Hatzimihail (eds) (Hart Publishing 2021) 191-212.
- 23 Case of *Shchokin v Ukraine* (Application Nos 23759/03 and 37943/06) <[https://zakon.rada.gov.ua/laws/show/974\\_858#Text](https://zakon.rada.gov.ua/laws/show/974_858#Text)> (accessed 10 May 2021).
- 24 Decision of Constitutional Court of Ukraine, 2 November 2004, No 15-pp/2004 <<https://zakon.rada.gov.ua/laws/show/v015p710-04#Text>> (accessed 10 May 2021).
- 25 T Didych, 'Value dimension of law-making in the modern legal worldview' (n 2).

The norm itself does not exist in its pure form: it is always the norm for some pattern (for example, the norm of behaviour, the norm of language, the norm of exploitation, etc.). The norm is fixed as far as its material, 'objectified' carrier exists.

Due diligence (and the social norm in general) in its phenomenological perspective is the result of social objectification, one of the means that support the functioning of the social system. Having attempted a preliminary definition of normativity on the basis of the data above, we can declare that normativity is a defining feature of a normative space, which, based on human reflexive ability, is a method of objectification (form) of due diligence (value) and is focused on the emergence of the relationships of due diligence in social subjects. That is, social normativity is characterised as an integral objective quality of social reality. Any set of social phenomena, despite their chaotic state, inevitably self-organises in one form or another. This process has the character of binding law, an inevitable condition of any social development. Objective social norms that form a system of value-normative regulation are a manifestation of social normativity as an objective law of social reality. Normativity is, first of all, an objective characteristic of social matters.

Social norms (including legal) as a manifestation of social rules must reflect all the characteristics of the latter. However, the analysis of normativity distinguishes two sides of the problem: the objective requirements of social life and awareness (recognition) of the need for normativity. In the course of social practice, people begin to realise the social significance of values and the need for normativity. Its need passes through consciousness, ideology, and the subjects of society begin to form traditions, customs, commandments, norms of religion, morality, and law. In addition, the norms may be characterised by derivative features, in particular, recurrence, typicality, and normality.

Public relations and social institutions, social and individual consciousness, social norms – all these phenomena are manifestations (forms of objectification) of social norms. Speaking of the relationship between norm and normativity, we can say that the norm is the quintessence of social normativity. Social norms express normativity in a concentrated form; it is the most definite, laconic manifestation of it. Describing norms as a particularly significant manifestation of normativity, it should be emphasised that the very isolation and separation of normativity in the form of norms allows the latter to be both a means of reflecting the real needs of society and of establishing order.

Thus, based on the above, it can be stated that normativity is a reflexive combination of generally binding and significant rules, which are defined by the due element of the norm (or another medium) through its integrated value. Normativity as an integral property of law is achieved both through national or international recognition of a certain value or norm and through giving the norm imperative status by state institutions, such as parliament, government, courts, etc.

### **3 THE CONCEPT OF NORMATIVITY IN MODERN PHILOSOPHICAL WRITING AND ITS SIGNIFICANCE FOR THE DEVELOPMENT OF MODERN LAW AND THE EFFECTIVE PROTECTION OF INDIVIDUAL RIGHTS**

In the world of philosophical writing, normativity as an independent philosophical category has hardly been singled out. At the same time, the question of the fundamental laws of construction and existence of the universe, the laws of natural processes and social regularities, has always existed. With the development of natural sciences and the emergence of social sciences, this problem has acquired new meanings, increasingly shifting into the realm of social reality. With the development of the world by means of natural sciences, social

reality, normative principles, and laws of its functioning received the status of a separate problem, which led to the allocation of a separate group of philosophers, who studied it in contrast to natural reality.<sup>26</sup>

G. Rickert's<sup>27</sup> values are very close in their meanings to Kant's *a priori* forms or norms that have a transcendental character and are timeless, non-historical, and universal principles that guide and thus distinguish human activity from processes occurring in nature. Values do not exist as any independent objects and do not arise in their understanding but in the interpretation of their meaning, so they 'mean'. Subjectively, they are perceived as an unconditional belonging (duty), experienced with apodictic obviousness. According to Rickert, values are not objects of pure contemplation for us at all. Values act as norms. The world of values is a world of what is proper, and because we act, we must strive to realise them; otherwise, our actions will not go beyond subjectivism and arbitrariness.<sup>28</sup> Thus, the general significance and universality of judgments and phenomena in the socio-cultural aspect, the categories of due diligence and normativity, are ensured through the world of values.

The concept of the French philosopher and sociologist of Russian law, G. Gurvych (called 'hyperemic realism'), also deserves special attention.<sup>29</sup> For him, realism meant abandoning attempts to find the absolute in philosophical reflection: all phenomena available to human knowledge are rooted in a being that has different dimensions – biological, social, ideal, mystical, etc. – which, of course, does not include a materialist understanding of the environment. Here, Gurvych tries to rethink and supplement Fichte's ideas about absolute reality, which does not depend on the subject and finds its manifestation in universal norms and in the subordination of man to these norms, the command of duty, and due diligence. These universal norms in the theoretical aspect form a perfect layer of social reality and are included in the structure of social life as an independent of the empirical sphere of the superstructure. But this irrational gap is bridged by the transitional sphere, which includes collective consciousness, social creativity, and normative facts.

Social integration is explained as an attempt to implement at the empirical level of absolute (transpersonal) values. Each of the spheres of social reality as an organisational unity is structured and functions on the basis of the existing 'ensemble' of normative facts, which in turn are formed from a system of values, united by a connection with a certain common absolute value. This dialectical perspective allowed Gurvych to create a model of society, where the unity of many different components becomes possible without denying their multiplicity as such.

It should be noted that these doctrinal concepts are carried out in practice, in particular, during the implementation of the ideal of the rule of law and the right of a person to a fair trial and access to justice. Absolute (transpersonal) values are the most important source in which judicial practice finds answers to questions that are not disclosed in the regulatory acts of the state, and this allows to formulate new interpretations of legislation, to 'enclose' in the content of positive rules of law general, universally recognised ideas, and concepts such as protection of law, human-centeredness, prohibition of arbitrariness and discrimination, inviolability of property rights, etc. In this way, normativity is legitimised as a property of law, and the judiciary stands as a guard over democracy, protecting the law from arbitrary encroachments and unwarranted interferences. This thesis is unequivocally confirmed by numerous modern research in the field of judicial protection

26 R Kabalskyi, 'History of philosophical understanding of normativity' (n 1).

27 G Rickert, *Philosophy of life* (Nika-Center 1998) 512.

28 *ibid.*

29 G Gurvych, *Philosophy and sociology of law: Selected works* (Publishing House of St-P. State Un-ty, Publishing House of the Faculty of Law of St-P. State Un-ty 2004) 848.

of law (in particular, the work of domestic law professors as V. Borisova, O. Ovcharenko, B. Karnaukh, and others).<sup>30</sup>

In its decisions, the Constitutional Court of Ukraine has repeatedly emphasised that the rule of law is the dominance of law in society.<sup>31</sup> The requirements of certainty, clarity, and unambiguity for the legal norm derive from the constitutional principles of equality and justice, as otherwise, their uniform application cannot be ensured. Yet, the absence of these requirements does not preclude the infinity of interpretations in law enforcement practice and inevitably leads to arbitrariness.<sup>32</sup> Thus, the law itself, due to its social significance and value and not the legal act, must play a role of a regulator of social relations and have primary significance. Accordingly, the defining element of the rule of law is the principle of legal certainty, which, according to the experts of the Venice Commission, means that

not only that the law must, where possible, be proclaimed in advance of implementation and be foreseeable as to its effects: it must also be formulated with sufficient precision and clarity to enable legal subjects to regulate their conduct in conformity with it (par. 58).<sup>33</sup>

A similar position has been repeatedly expressed by the European Court of Human Rights, which considers that

A norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (Olsson v. Sweden (no. 1), par. 61 a).<sup>34</sup>

In fact, the idea of legal certainty is borrowed from the doctrinal works of famous philosophers. Thus, the eminent German philosopher R. Zippelius emphasised that

if the rules governing the coexistence of people should provide clear guidelines for the legitimacy of behavior, they should not contradict each other, should be mutually consistent.<sup>35</sup>

The scholar thus defined the interconnectedness of norms as a system of law.

For its part, the European Court of Human Rights, having borrowed this idea, developed it by applying it to specific circumstances of cases, i.e., the facts of reality. For example, regarding the institution of legal, in particular, disciplinary, liability, the Court considers that its basis must be clear and predictable in order to avoid ambiguous interpretations and too broad

30 V Borysova, I Iurevych, K Ivanova, O Ovcharenko, 'Judicial protection of civil rights in Ukraine: National experience through the prism of European standards' (2019) 1 (39) *Journal of Advanced Research in Law and Economics* 66-84. DOI: <[https://doi.org/10.14505//jarle.v10.1\(39\).09](https://doi.org/10.14505//jarle.v10.1(39).09)> (accessed 10 May 2021); B Karnaukh, 'Standards of proof: A comparative overview from the Ukrainian perspective' (2021) 2 *Access to Justice in Eastern Europe*. DOI: <<https://doi.org/10.33327/AJEE-18-4.2-a000058>> (accessed 10 May 2021); I Izarova, *Theory of the EU civil procedure* (VD Dakor 2015).

31 Decision of Constitutional Court of Ukraine, 2 November 2004, No 15-пн/2004 <<https://zakon.rada.gov.ua/laws/show/v015p710-04#Text>> (accessed 10 May 2021).

32 Decision of Constitutional Court of Ukraine, 22 September 2005, No 5-пн/2005, para. 5, item 5.4 <<https://zakon.rada.gov.ua/laws/show/v005p710-05>> (accessed 10 May 2021).

33 Rule of Law Checklist, Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016) <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e)> (accessed 10 May 2021).

34 Case of *Olsson v Sweden* (Application No 21722/11) <<https://www.globalhealthrights.org/wp-content/uploads/2013/10/Olsson-Sweden-1988.pdf>> (accessed 10 May 2021).

35 R Tsyppelius, *Yurydychna metodolohiya* (Ruta 2003) 143.



V. Horodovenko notes that the condition for the full functioning of the judiciary is its institutional independence. He believes that

Support for the institutional independence of the judiciary is a necessary precondition for the implementation of the principles of separation of powers, the rule of law and the right for fair trial, which indicates its universality in the constitutional and legal dimension.<sup>42</sup>

Developing this thesis, we must note that the judiciary becomes a full-fledged branch of government in a democratic society only if it acquires the ability to apply generally accepted concepts of the rule of law, justice, and the priority of human rights. The actual application by the court in a particular case of a universal value to replace or develop a rule of law that is vague, ambiguous, contains gaps or internal conflicts, is aimed at effective restoration of violated personal rights, and testifies to the institutional independence of the judiciary and its functional ability to maintain regulations, adopted by the state.

It is quite reasonable to say that legal certainty is a principle and requirement of the rule of law, based on the traditional European approaches to this concept. Even though the fact that legal certainty does not belong to the constitutional principles directly stated in the Basic Law, this does not prevent its active application in Ukraine, in particular, in the practice of the Constitutional Court of Ukraine,<sup>43</sup> as well as courts of general jurisdiction. Accordingly, the normative nature of consolidation of the generally accepted principles does not affect the peculiarities of its application in practice. These approaches provide an opportunity to further argue the conclusions that are important for understanding the provisions proposed in the first part of this article.

## 4 CONCLUSIONS AND REFLECTIONS ON THE FURTHER STUDY OF THE ESSENCE OF LAW IN MODERN SOCIETY

S. Alekseev, a theorist of law who played a decisive role in the development of modern private law after the collapse of the Soviet Union, noted that

Law is not only norms; without norms, without *normativity* as a feature of law, there is no law ... normativity, no matter how widely this defining feature of law is interpreted, in principle can not be expressed in anything other than norms, general formalized written rules of conduct.<sup>44</sup>

Accordingly, for Soviet society, law is not just a system of norms but a system of norms established or sanctioned by the state.<sup>45</sup>

Such an understanding of normativity and law demands a focus on the formal (positive-empirical) side, neglecting its essential qualities. As a result, the essence of normativity (due diligence of law) is replaced by state coercion, not to mention an impoverished legal

42 Horodovenko V, 'Institutional independence of judiciary in Ukraine: constitutional aspects' (2021) 1 *Visnyk Konstytutsiynoho Sudu Ukrayiny* 85 <[https://ccu.gov.ua/sites/default/files/gorodovenko\\_v\\_instituciynna\\_nezalezhnist\\_sudovoyi\\_gilky\\_vlady\\_v\\_ukrayini\\_konstytuciyno-pravovyy\\_aspekt.pdf](https://ccu.gov.ua/sites/default/files/gorodovenko_v_instituciynna_nezalezhnist_sudovoyi_gilky_vlady_v_ukrayini_konstytuciyno-pravovyy_aspekt.pdf)> (accessed 10 May 2021).

43 G Ognevuik, 'Legal certainty principle in the decisions of constitutional courts of Ukraine and other countries' (2019) 23 *Visnyk Natsionalnoho universytetu 'Lvivska politekhnika'*. Serie: Yurydychni nauky 30. <<http://ena.lp.edu.ua:8080/handle/ntb/47744>> (accessed 10 May 2021).

44 S Alekseev, *Theory of law* (BEK 1995) 320.

45 M Marchenko, *Theory of law and state* (Velbi 2004) 640.

understanding. In addition, an important feature of normativity is not taken into account as a method of objectification (form) of the due diligence of law because the due diligence of law is not derived from the dictates of the state (empirical phenomenon). Accordingly, the vast array of legislation that becomes mandatory does not improve legal mechanisms or ensure the rule of law and access to justice but only complicates the structure of the legal system, which is saturated with cross-cutting rules that often contradict each other or established approaches.

Interpreting the normativity of law as being universally binding, different researchers have seen the source of such universality differently, i.e., who should be the subject of law-making. The prevailing approach in the Soviet era was the 'general expression in the form of state will, in the form of law' – the source of universal will and its expression is the state will

In the normativity of law, as in other qualities, it is manifested that the content of law is formed by the state will. This allows to make the will contained in the law, universal, generally binding, authoritative.<sup>46</sup>

A more modern vision of normativity, proposed by the Ukrainian theorist of law M.V. Tsvik,<sup>47</sup> who believes that

the normativity of law is that it contains universally binding rights and responsibilities for an indefinite number of subjects, long and repeatedly applied to the life situations provided by it... The main manifestations of law – legal relations, norms, principles and legal awareness – have a recurring nature in the establishment and implementation of law and in this sense are also normative.

According to Tsvik, it results from the fact that 'the repetition of certain actions, which eventually become a pattern of behavior, leads to their internal perception by people as obligatory'.

In our opinion, Soviet jurisprudence, in the conditions of the methodological monopoly of materialist dialectics, failed to overcome the dualism of the due diligence of law and the existing legal regulations and only made an attempt to eclectically justify the derivation of the due diligence of law from the existing legal reality. The generality of legal regulations, on the other hand, continues to rely on state security (albeit with reference to the possibility rather than the obligation to use coercion on offenders). The law applies to all because, in the case of an offence, compliance is guaranteed by the state. Thus, the normativity of law again can not get rid of state guardianship. In addition, this approach presupposes that the law can not be violated, which confirms the *a priori* negative (criminal) nature of a man.

Norms of law, being rooted in human existence, also cannot be fictions, depend on external (state) coercion, and be part of a symbolic reality. The norms of law reflect the due diligence of law in relations between people as beings with moral autonomy. Law is an adequate expression of human existence – the social dimension of objective reality. Therefore, the norms of law cannot be subjective, as they are rooted in human existence. Nor can the norms of law be called objective because such 'objectivity' disappears when a person leaves the social dimension. The norms of law are characterised by objectivity, as a synthesis of reality and effectiveness, only in the social dimension of objective reality as a space of human relations. Thus, law is intersubjective. Social beings, being immersed in the life world, directly feel for themselves (at the level of consciousness) the due diligence of law, caused by the influence of the normative force of law. Therefore, the consequence of an incorrect understanding of the essence of law and regulations is the public perception of judicial decisions and their

46 S Alekseev, *General theory of law in 2 volumes*, Volume 1 (Yuridicheskaya Literatura 1981) 361

47 O Petrishyn, S Shevchuck, *Problems of theory of law in manuscripts of M. V. Tsvik* (Pravo 2010) 272.

non-implementation, which leads to the search for possible options for appeal, cancellation, or change to avoid the end result. The enforcement of decisions or state coercion in general as an element of law-making cannot be effective in the modern paradigm of sustainable development of the world because the cost of its maintenance far exceeds the expectations and results achieved.

Our proposed understanding of normativity as a socio-cultural phenomenon distinguishes the latter as a function of the legal system, which is intended to streamline (settle) its structural elements, including social (legal) relations. The normativity of law is a defining feature of law, which, based on the reflexive ability of a man, is a method of objectification (formation) of due diligence of law (legal values) and focused on the relationship of proper patterns of behaviour in social subjects, in particular, good faith and a proper attitude to legal norms and the objectified reality, which reflects the value for each subject and for society as a whole. At the same time, normativity is characterised by a reflexive combination of generally binding and significant nature of law for an unlimited number of subjects, which are defined by the due diligence of the norm (or another medium) through its integrated value.

The judiciary in a democratic state, governed by the rule of law, plays an exclusive role in the protection of the rule of law by means of interpreting provisions of law and restoring violations in individual cases. The effectiveness of the judiciary is ensured, among other means, by the ability to effectively fill gaps in legal regulation and apply instruments of restoring subjective rights, taking into account the content of universal values, which serve as a criterion for internal assessment of the content of legal acts in correlation with the rule of law requirements.

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