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FRIEDRICH HAYEK'S EPISTEMIC APPROACH TO LAW

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This study aims to fill the lacuna in the legal views of a famous economist and philosopher, Economics Nobel Prize winner Friedrich Hayek. Although Hayek's economic and political ideas have eclipsed many other attempts to understand and overcome the social cataclysms of the 20th century, his legal views have never been explored in detail. Despite a considerable volume of secondary literature, the essence of Friedrich Hayek's concept of law is yet to be pinned down by scholars. In order to shed light on the topic, we will resort to the *reconstruction method*, a classic in Hayek studies. *For the main hypothesis*, we assume that Hayek's conception of law is based not on his liberal political philosophy but rather on his theory of knowledge or, in other words, his epistemology. This idea has not been tested systematically in earlier Hayek studies. *The main conclusion* is that the epistemological perspective on the topic allows us to observe some of the specific features of Hayek's legal views in greater depth than the traditional "liberal" approach. Unlike these interpretations, the "epistemic concept of law" approach can help explain the radical changes in Hayek's late works and organize his often-disparate legal ideas into a logical system. Therefore, we claim to have achieved a clearer understanding of the essence of Hayek's legal views and further clarified his contribution to the theory of law.

Keywords: epistemology, social theory, the concept of law, theory of complex phenomena, spontaneous order, English common law, liberalism, theory of distributed knowledge, Friedrich Hayek.

Introduction

Friedrich Hayek's scientific path was not an ordinary one. On the one hand, he was the prophet of modern cryptocurrencies, and on the other, the one whom Pope John Paul II nearly quoted in his encyclical *Centesimus Annus*.[1] He was one of the harbingers of the cognitive turn in the social sciences, the Economics Nobel Prize winner, and, perhaps, one of the first systematic biographers of Ludwig Wittgenstein.[2] In short, he was not an ordinary scientist but constituted an entire epoch of science. Assuming

[1] *Уэрта де Сото Х.* Австрийская экономическая школа: рынок и предпринимательское творчество. Челябинск: Социум, 2009. С. 115.

[2] *Erbacher Ch.* (ed.) Friedrich August von Hayek's Draft Biography of Ludwig Wittgenstein. The Text and its History. Paderborn: mentis, 2019. P. 7.

we live in a progressively "Hayekian" world – the world of spontaneous orders and decentralized network structures – the growth of interest in his scientific heritage observed today seems quite natural.

Besides, it would be unwise to state that this interest is equally allocated. As a rule, most scholarly attention is aimed at Hayek's economic and political views. It is not difficult to understand why that is so. Rostislav Kapelyushnikov, a corresponding member of the Russian Academy of Sciences, noted in one of his speeches that a significant part of modern trends in economics develop the ideas that Hayek formulated. The same can be said about the political views of the great scientist. Though modern libertarians, liberals, and republicans often tend to distance themselves from Hayek's ideas[3], his influence on modern political discourse, both theoretical and practical, is difficult to overestimate.[4] Legal research appears to be the only area where Hayek's ideas have not been acknowledged yet. It is precisely what we will focus on in this article.

For Hayek's legal ideas, one can refer to several of his works and insights. And yet, given the current state of affairs in this area, it seems reasonable to pay central attention to the question of Hayek's concept of law. This question is key for the analysis of Hayek's philosophy of law. We can hardly assess his contribution to the philosophy of law if we do not establish his thoughts about the essence of law. Accordingly, this article aims to answer the question of the representation of the essence of law in Hayek's social theory.

Main provisions

The main thesis of our research concerns the ultimate foundations of his concept of law. They determine what social institutions can be attributed to the sphere of "law" and what cannot. According to our research hypothesis, the theoretical foundation determining Hayek's concept of law is *his theory of cognition or, in other words, his epistemology*.

The key theoretical idea of this epistemology is *the distinction between "epistemically simple" and "epistemically complex" phenomena*. Such phenomena can include both physical and social phenomena. Therefore, with respect to Hayek's *social* theory, we can say that this socio-epistemological distinction of this theory is the distinction between "epistemically simple" and "epistemically complex" social contexts (or, equivalently, situations of social action). As the study has shown, it is *precisely the divergence between these two types of social context that serves as the ultimate "watershed" for distinguishing between "legal" and "non-legal" social institutions* in Hayek's conception of law.[5]

To be more precise, from the viewpoint of this distinction, the word *"law" refers only to such social institutions that are suited to guide the behavior of individuals in epistemically complex social contexts*. And vice versa: such rules of individual behavior that are suited to regulate it in epistemically simple social contexts and, at the

[3]It is hard to disagree with P.Yu. Rahshmir when he notes that in academic life Hayek was "a friend among foes, a foe among his own". For more detail see *Рахшмир П.Ю.* Свой среди чужих, чужой среди своих: Ф.А. Хайек и консерватизм // Вестник Пермского университета. Политология. 2012. № 3. С. 54.

[4]Many books have been written about the influence of Hayek's ideas on public and scientific life. See *Бёргин Э.* Великая революция идей: возрождение свободных рынков после Великой депрессии. М.: Мысль, 2017. С. 20.

[5]Among modern researchers of Hayek's ideas Cyril Holm is perhaps the closest to this position. See *Holm C.* Hayek's Critique of Legislation. PhD diss. Uppsala University, 2014. P. 403.

same time, *are not suitable for guiding it in social contexts of an epistemically "complex" type* cannot be referred to as "law" in the narrow, "Hayekian" sense of the word.

This is the main conclusion that we can derive from this research. If deemed convincing, this new perspective on Hayek's legal thinking can help recognize his original contribution to theoretical jurisprudence. Then his contribution *cannot* be hastily reduced to the legal ideas that Hayek developed on the basis of liberal ideology.[6] This rediscovery of Hayek as not only a liberal philosopher of law but also a jurist who formulated the original "epistemological" concept of law will even up economists and social theorists with jurists and allow the latter to acquire a better understanding of law that fits most to our "decentralized" epoch.

Materials and methods

The article studies the works of Friedrich Hayek throughout the years, reflecting the gradual evolution of his legal ideas, as well as secondary literature analyzing his philosophical, legal, and socio-economic views. The main method of research is the method of reconstruction. This method has already become a classic[7] in the field of research on Hayek's political and legal heritage and is suitable for achieving our goals.

Results of the study

1. From ideology to epistemology: Hayek's intellectual transformation

While considering how Hayek's legal ideas developed in his epistemological, legal, and socio-economic texts, it is impossible to omit a dramatic transformation of these ideas over time. "Late" Hayek viewed law so differently from "early" Hayek that they literally contradict each other.[8] For one of the most illustrative examples, we can take Hayek's views on the problem of the "prospectivity" of legal rules.

In his early works, Hayek repeatedly emphasizes that strict prospectivity and exactness of rules are, maybe, the main attributes of true law.[9] At the same time, prospectivity of law is understood as a state of affairs in which everyone affected by a certain legal rule is explicitly notified of its content in advance with a legal text. The well-known absence of *this* kind of prospectivity in the common law system, notorious for the fact that English courts, as Bentham sarcastically noted, inform citizens about existing legal norms by punishing them for actions that had not been previously declared illegal in a

[6] *Козлихин И.Ю*. Правопонимание Ф.А. Хайека // Правоведение. 1992. № 5. С.67.

[7] The first reconstructions of Hayek's theory (by the way, based on his epistemology) began during the scientist's lifetime. See *O'Driscoll G.* Economics as a Coordination Problem. Kansas City: Sheed Andrews and McMeel, 1977. P. xi. In modern times this method is even more relevant. For example, see *Postema G.* Nature as First Custom: Hayek on the Evolution of Social Rules. In: Research Handbook on Austrian Law and Economics / eds T. Zywicki, P. Boettke. Cheltenham: Edward Elgar, 2017. P.77.

[8] This point of view is supported, in particular, by one of the leading researchers of Hayek's work, Jeremy Shearmur. See *Shearmur J.* Hayek and the After. Hayekian Liberalism as a Research Programme. London: Routledge, 1996. P. 92.

[9] *Hayek F.A.* The Road to Serfdom. Chicago: The University of Chicago Press, 2007. P. 112.

written act[10], made Hayek one of the critics of precedent-based legal systems.[11] In his early works, he treated the common law system with quite a degree of skepticism.

This skepticism almost vanished in the later works of Hayek. To be more precise, his attitude changed *to the exact opposite*. Not only did he begin to praise the common law system, which allowed some researchers to even equalize Hayek's concept of law with this system of judge-made law,[12] but also radically changed his ideas about the prospectivity of legal rules. In the works of the late period, Hayek notes that prospectivity of law can be understood not only as a beforehand explanation of legal norms in official texts but also as a state of public opinion in which, *even in the absence of a legal text*, the illegal nature of certain actions seems obvious to any citizen.[13] Needless to say, this view contradicts the ideas that Hayek developed at the dawn of his legal theorizing. From harsh criticism of the English common law as non-consistent with the idea of prospectivity of legal rules, he came to total praise of this legal tradition as totally consistent with this crucial legal principle.

This polar transformation of Hayek's legal ideas can be observed not only in the question of prospectivity of law but also in a number of other questions. One could list them for quite a long time.

2. The epistemological argument and its significance for Hayek's social and legal thought

To understand the nature of this transformation, it is useful to refer to the broader context of Hayek's intellectual development. Notably, Hayek underwent a similar transformation not only in legal but also in his economic views. According to one of the main experts on Hayek's life and work, Bruce Caldwell, Hayek's late economic views do not just diverge from his early ideas in technical economics but, in a sense, even "challenge" them.[14] Later, reflecting on the "dramatic" changes that characterize Hayek's departure from his early works of the 1930s in the field of technical economics in favor of completely new ideas, Caldwell calls this turn a kind of Hayek's intellectual "transformation". As the source of this intellectual transformation, he points to Hayek's famous article "Economics and Knowledge".[15] In it, Hayek demonstrated *how much a social analysis depends on our understanding of the problems of epistemology*.

Similar judgments about Hayek's intellectual transformations can be found in a number of other works devoted to his intellectual biography. The core thesis of these

[10]For this feature, Bentham called the English common law system "dog's law", likening it to how dogs are trained through punishment.

[11]*Hayek F.A.* The Political Ideal of the Rule of Law. In: Hayek F.A. The Market and Other Orders. Chicago: The University of Chicago Press, 2014. P. 147.

[12]Somewhat hasty opinion that Hayek equated the English common law with his concept of law enjoys a certain popularity. For example, see *Covell Ch.* The Defense of Natural Law. A Study of the Ideas of Law and Justice in the Writings of Lon L. Fuller, Michael Oakeshott, F.A. Hayek, Ronald Dworkin and John Finnis. London: The Macmillan Press, 1992. P. 229.

[13]*Hayek F.A.* Law, Legislation and Liberty. Vol. 1. Rules and Order. London: Routledge, 1982. P. 116-118.

[14]*Caldwell B.* Hayek's Challenge: An Intellectual Biography of F.A. Hayek. Chicago: The University of Chicago Press, 2004. P. 177.

[15]Ibid. P. 231.

works can be boiled down to a statement that *Hayek's theory of knowledge became the starting point of his later intellectual transformation*.

It is reasonable to think that Hayek's epistemological inquiry in the field of economics, based on the analysis of the dispersed distribution of human knowledge in society, became the starting point not only for a "diametrical" change in Hayek's economic views *but also radical transformations of his concept of law in the late period of his work*. To unfold this hypothesis, Hayek's legal and epistemological views must be studied in detail. It would be consistent to start with the epistemology.

The article "Economics and Knowledge", noted by Bruce Caldwell as the starting point for the later transformation of Hayek's views, is, albeit important, but constitutes only the first step in the field of Hayekian social epistemology. Of greatest significance are Hayek's previous works devoted to the theory of cognition and methodology of science, as well as later articles concretizing these epistemological ideas of social coordination and communication. A scrupulous study is due of both Hayek's cognitive-psychological treatise *The Sensory Order*, a brief theoretical extract from the basic concepts of the current cognitive psychology (partly, at least), and his articles on "the use of knowledge in society" and "competition as a discovery procedure".

What exactly do these materials tell us? If we summarize briefly the essential socio-epistemological ideas contained in these works, we can formulate three basic theses of Hayekian social epistemology: 1) the thesis about radical limitations of human knowledge with respect to numerous facts of a complex social order; 2) the thesis about "dispersed" dissemination of knowledge in a complex society; 3) the thesis about the "implicit" (intuitive) nature of a significant bulk of human knowledge, which a person is unable to communicate effectively to others, and which he can use only being interactively and directly engaged into specific social contexts and situations. We will generalize these theses as components of the "epistemological argument" in social sciences, as defining the basic strategies of the "Hayekian" explanation of social order.[16] This, in short, is the essence of Hayek's social epistemology.

Obviously, first of all, this epistemological argument influenced Hayek's economic views. The thesis about radical limitations of human knowledge in relation to complex social orders has become the main argument against socialism and other governmental interference in the economy. The thesis about the "dispersed" nature of human knowledge in society gave rise to the theory of price mechanism as a "mechanism for transmitting information" between individuals as owners of their subjective "particles" of distributed knowledge.[17] The thesis about the implicit nature of a significant bulk of human knowledge made it possible to clarify the limits of its transmission by the method of explicit communication in the process of economic coordination. And this is only a small part of those economic ideas that had been formulated on the basis of the epistemological argument.

Similarly, on the basis of the epistemological argument, Hayek formulated a number of ideas in the field of legal theory.

[16]Hayek's epistemological argument in social sciences is discussed in detail in the monograph of the author of this article. See *Рааб Р.С*. Эпистемическая юриспруденция Фридриха Хайека: философско-правовое исследование. М.: Проспект, 2023. С. 14-40.

[17]*Капелюшников Р.И*. Философия рынка Ф.А. фон Хайека // Мировая экономика и международные отношения. 1989. № 12. С. 16.

The limited knowledge thesis, which served as the main argument against economic interventionism, had been transformed into Hayek's idea about the importance of understanding the limits of governmental legislative intervention in the processes of spontaneous evolution of law.

According to Hayek, legislation as a way of correcting a "spontaneously evolved" law should be used only in some rare cases and within clearly defined limits. Human knowledge of the legal system as a part of a more complicated social order is very limited, and in many cases the unintended consequences of governmental interference in law can be much more harmful than what a human mind is able to foresee. Human mind is capable of small gradual innovations of law in relation to specific cases, implemented mainly within the framework of the activities of judges based on precedents and customs.[18] This was Hayek's conclusion about how a legal system can effectively evolve. He came to this conclusion by extrapolation of his social epistemology to his legal thought. Without this epistemology, *there would not have been that unexpected "reversal" toward common law we wrote about earlier*. The criticism of continental "codified" legal thinking in the works of the late Hayek, as well as the praise of the English common law jurisprudence, is a direct consequence of the first thesis of Hayek's epistemological argument, namely the thesis about essential limitations of human knowledge in relation to specific facts of complex social order that makes it difficult to modify legal system by means of intentional legislative acts. "Legal interventionism" is as dangerous as economic interventionism in the light of Hayek's epistemology.

The second thesis of the epistemological argument, connected with the recognition of significant dispersion of knowledge available in society, is no less important. If in economic theory it led Hayek to the concept of price mechanism as a mechanism of market communication, in the field of legal theory this theory of dispersed knowledge led Hayek to the idea of effectiveness of heterogeneous and spontaneously evolved legal systems.

The special conditions of formation and functioning of these decentralized normative systems allow them to take into account the distributed "local knowledge" that cannot be collected by a centralized law-making body. Competition between normative systems proliferates "natural selection" of the most effective normative structures and contexts. It cannot be said that the market model is "literally" transferred to the sphere of law here, but there is a certain similarity. In this sense, Hayek's epistemological theory influenced both his economic theory and his legal theory. Again, Hayek's previously mentioned reversal to the common law as such a legal system in which common law in the narrow sense of the word and equity law, "the law of justice", historically coexist and to some extent compete, seems quite logical in the light of the second thesis of Hayek's epistemological argument about the extremely dispersed distribution of knowledge in society. It is the dispersed knowledge thesis that explains the effectiveness of such not fully unified and a bit "spontaneous" legal systems as the common law.

The influence of the third thesis of the epistemological argument on Hayek's legal theory is even more evident. We talk about the thesis of the implicit nature of a significant bulk of human knowledge. Before this epistemological thesis had influenced Hayek's legal theory, the scientist held rather positivist views on the mechanism of law. Probably, Hayek inherited this "initial positivism" from his mentor, Ludwig von

[18] *Hayek F.A.* Law, Legislation and Liberty. Vol. 1. Rules and Order. London: Routledge, 1982. P. 122-123.

Mises. Hayek himself mentioned Mises' near-positivist views on jurisprudence.[19] In his early political and legal works we can see this approach. However, in Hayek's later works, the approach changes significantly.

Positivist ideas turn out to be the object of criticism, and as one of the key theses Hayek puts forward is the thesis about the importance of half-intuitive implicit structures of legal thinking in jurisprudence. Hayek writes a lot about the importance of not fully conscious "sense of law",[20] unconscious "meta-legal"[21] structures of legal thinking, etc. It is noted that it is in the system of case law that these implicit aspects of legal thinking play a more important role. The desire of continental "codified" jurisprudence to codify and explicate everything textually is criticized by Hayek. The source of this criticism, as we see it, is the theory of "implicit knowledge". It began to influence not only Hayek's economic theory, but also his concept of law. It is not surprising that a well-known scholar Gerald Postema even called Hayek's jurisprudence a theory of "implicit law".[22] This "implicit" tradition, once again, prioritizing the common law system, had been significantly influenced by the third thesis of Hayek's epistemological argument, namely the thesis about the implicit nature of a significant bulk of important social information. Before this thesis had been applied by Hayek in the area of legal studies, the scientist was way more sympathetic to the continental positivist ideas in law.

Reflection of how the three main theses of Hayek's epistemological argument, as well as the other theses of this argument, influenced his legal theory, could be continued. At the same time, the above arguments already allow us to justify this kind of hypothesis. Moreover, the study of Hayek's legal ideas shows that they not only experienced strong influence of his epistemology, but in a sense became completely determined by his theory of knowledge. In Hayek's later texts, the epistemological theory does not just influence certain legal ideas, but completely determines the very essence of all the legal ideas of Hayek. *The very concept of law in the writings of the "late" Hayek is determined by his theory of cognition.*

3. Hayek's epistemic approach to law

To figure it out, we need to go beyond the previously indicated epistemological argument and focus on the socio-epistemic theory that is a byproduct of this epistemology. *The main idea of this socio-epistemic theory is the idea of a distinction between "epistemically complex" and "epistemically simple" social orders*. Given the fact that, as it seems to us, the late Hayek's concept of law is dependent on this epistemological distinction, it is necessary to consider it in a more detailed way.[23]

[19] *Hayek F.A.* Nobel Prize-Winning Economist Friedrich A. von Hayek. Interviewed by E. Craver, A. Leijonhufvud, L. Rosten, J. High, J. Buchanan, R. Bork, T. Hazlett, A. Alchian, R. Chitester / The Oral History Program and the Pacific Academy of Advanced Studies. Los Angeles: University of California, 1983. P. 242.

[20] *Hayek F.A.* The Primacy of the Abstract. In: Hayek F.A. New Studies in Philosophy, Politics, Economics and the History of Ideas. London: Routledge, 1990. P. 46.

[21] *Hayek F.A.* Rules, Perception and Intelligibility. In: Hayek F.A. The Market and Other Orders. Chicago: The University of Chicago Press, 2014. P. 251.

[22] *Postema G.* Legal Philosophy in the Twentieth Century: The Common Law World. Vol.11. New York: Springer, 2011. P. 141.

[23] A brief but succinct description of the theory of "complex phenomena" can be found in Hayek's short lecture "Economists and Philosophers". See *Hayek F.A.* Economists and Philosophers. In: Hayek

What is the meaning of that distinction? To figure it out, it is necessary to understand what, in principle, differentiates an "epistemically complex" phenomena from an "epistemically simple". In some sense, we can say that "simple" phenomena are such phenomena in respect of which a scientist can make a prediction of a "specific nature". For example, a prediction of how far one billiard ball will roll back if another billiard ball with a certain mass and speed hits it. The system of two billiard balls on a flat surface is an "epistemically simple phenomena".

An epistemically complex phenomenon is exactly the opposite. This is a system of elements in respect of which it is impossible to make any predictions of a specific strictly quantitative nature. It is impossible to predict how a word spoken out loud by someone in a crowded square will affect the crowd of people gathered there. Each person is a "complex" phenomenon in itself. A society consisting of these "complex phenomena" is even more complicated. Therefore, no predictions of a specific nature about the interactions of its elements are possible. This, in short, is the difference between "epistemically simple" and "epistemically complex" phenomena from the point of view of Hayek's epistemology.

The most important consequence of this epistemological difference is *the sociological difference between epistemically simple and epistemically complex social orders*. Of course, this difference is a bit arbitrary. Any complex social order, such as, for example, the system of global market economy, consists not only of individuals, but also of their organizations as a kind of "simple" social orders. Simple social orders, such as commercial companies, military units or government agencies, interact with each other and combine into a complex order. There is no doubt about that.

And yet, Hayek makes a distinction between rationally organized, let's say, "epistemically simple" orders and "epistemically complex" social contexts, within which these simple orders interact and form a more global decentralized system of spontaneous coordination.

At a glance, this distinction seems to be purely socio-epistemological, but a closer examination makes it clear that, apparently, *this distinction lies at the basis of Hayek's concept of law*. A concept of law that attributes the very name "law" not to all the social rules that are important from the point of view of liberal political theory, but mainly to those rules that determine human behavior *in epistemically complex social contexts*. And vice versa: those rules of behavior that regulate human behavior in epistemically simple social contexts *are not* defined as "law" by "late" Hayek (even in cases when these norms are extremely important from the point of view of his liberal political philosophy).

One of the best examples of such an "epistemic" logic in Hayek's legal theory is his opinion about the nature of procedural law. This branch of law is extremely important as a liberal institution. It would be more than reasonable for Hayek as an advocate of the liberal concept of law to call these rules "true law". But, surprisingly, Hayek *does not* (!) define the rules of procedural law as "law".[24] It is not "law" in his theory. Why is that so? The liberal interpretation cannot give an answer. But the epistemic can.

F.A. The Market and Other Orders. Chicago: The University of Chicago Press, 2014. P. 438-441.

[24] *Hayek F.A.* Law, Legislation and Liberty. Vol. 2. The Mirage of Social Justice. London: Routledge, 1982. P. 125.

According to the epistemic interpretation, the rules of procedural law regulate individual behavior in such a strict way that is more reminiscent of predictable collisions of billiard balls with clear parameters than spontaneous behavior of undetermined market actors. In a sense, the *social context* of procedural law is an *"epistemically simple" social context*. Provided that only the rules of *epistemically complex* social contexts are defined as "law" in Hayek's theory, the exclusion of the rules of procedural law from the field of Hayek's concept of law seems logical, even though the enormous importance of procedural institutions from the point of view of liberalism. There is no other way to logically explain this exclusion of procedural law from Hayek's "liberal" concept of law but to recognize the idea that separation of "law" and "non-law" in Hayek's legal theory is based not on the ideology of liberalism, but on the epistemological theory of "simple" and "complex" social contexts.

To support this hypothesis, let's consider another example – rules of the road. Undoubtedly, they generate a certain kind of "spontaneous order". It was spontaneous orders that Hayek considered the most "liberal" and economically productive. Isn't it logical to include the "spontaneous" rules of the road in the liberal concept of "law"? On the one hand, of course yes. Hayek does so in his early writings.[25] On the other hand, in his later works Hayek changes his mind and no longer attributes the term "law" in the "narrow sense of the word" to the rules of the road. He defines them as "rules of organization",[26] not "law". Again, the liberal interpretation cannot explain such a decision. Only the epistemic one can.

The "epistemic" reason for exclusion of the spontaneous-order generating rules of the road from the very concept of law implies that though traffic order is "spontaneous", nevertheless, *it is not epistemically complex*. In fact, it is relatively simple, and its elements operate within a limited set of pre-established parameters. Given the hypothesis that Hayek recognizes as "law" only such rules that are oriented to *epistemically complex* social contexts, Hayek's decision not to use the term "law" in relation to the rules of the road start to seem justified, even though the scientist highly appreciates spontaneous orders as effective and liberal.

Is there any other reason, besides epistemology, that could compel Hayek, a theorist of liberalism and spontaneous orders, to deny the very name "law" to the liberal institutions of procedural law and the rules of "spontaneous" traffic? Hardly any. The only possible reason why these rules had been excluded from the field of Hayek's rather specific concept of law is: the ultimate basis of Hayek's concept of law is not liberal ideology or spontaneous order theory, as it is often claimed in the secondary literature, but Hayek's epistemology. Hayek's idea of distinguishing epistemically simple and epistemically complex social contexts. The idea that produces a specific "epistemic" approach to law, found in Hayek's works instead of a rather more expected liberal legal philosophy (which, as it turned out, cannot explain why "liberal" Hayek excluded from the very concept of "law" such an important legal institution as the law of due process). And though in this article we are barely able to explicate all the aspects of this

[25]"The distinction we have just used between formal law of justice and substantive rules is very important and at the same time most difficult to draw precisely in practice. Yet the general principle involved is simple enough. The difference between the two kinds of rules is the same as that between laying down a Rule of the Road, as in the Highway Code, and ordering people where to go". See *Hayek F.A.* The Road to Serfdom. Chicago: The University of Chicago Press, 2007. P. 113.

[26]*Hayek F.A.* Law, Legislation and Liberty. Vol. 1. Rules and Order. London: Routledge, 1982. P. 138.

"epistemic" concept of law, there is a hope that we have managed to attract attention to Hayek's "epistemic" way of legal thinking. A lot of new insights into the nature of law and social order can be expected from such an epistemic approach.

Discussion

Within the framework of our analysis, it is useful to discuss a viewpoint of one of the main researchers of Hayek's legal theory – Gerald Postema. It should be noted that Professor Postema, being a supporter of the liberal-ideological interpretation of Hayek's legal theory, nevertheless points to the significant role of epistemology. He notes that liberal institutions of law contribute to decentralized coordination of "distributed knowledge", which is why they are an important institutional element of a complex spontaneous order. It is something we can agree with.

The only thing that seems objectionable is Professor Postema's too limited interpretation of the epistemic function of these liberal institutions of law. The scientist is inclined to reduce this epistemic function to the coordination of expectations of social actors and comes to the conclusion that it is impossible to draw a clear borderline between the rules of justice as "law" in the narrow sense of the word and the rules of organization (as "non-law") using the instrumental "epistemological argument" that describes the role of these rules in complex spontaneous orders.[27]

As a result, Professor Postema states that Hayek's epistemological argument regarding the role of the rules of justice in complex orders seems to be even less well-founded[28] than the already "controversial" normative thesis about individual liberty. It is not surprising that for Professor Postema it is the normative thesis of liberal jurisprudence that turns out to be more important[29] than the epistemological thesis about the meaning of the rules of justice as coordinating distributed knowledge in epistemically complex social contexts.

So far as we reduce the epistemological function of the rules of justice to an abstract idea of "coordination of distributed knowledge", Professor Postema's position is acceptable. On the other hand, if Hayek's epistemological thesis is not being reduced to the idea of coordination of distributed knowledge, the central role of his epistemological argument starts to seem more convincing.

It will be found out that coordination of distributed knowledge in a complex order does not exhaust the epistemological function of legal institutions as institutions of a complex social context. There are other aspects. These aspects include, for example, issues of *perception of "abstract" behavioral elements* in complex orders[30] and *the negative nature of "pattern recognition" in a complex context*, correlating with *"abstractness" and "negativity" of true law in Hayek's philosophy*. In Hayek's theory law is defined as a system of abstract and "negative" rules, mostly because *only such rules can successfully guide the behavior of individuals not in any, but precisely*

[27] *Postema G.* Legal Philosophy in the Twentieth Century: The Common Law World. Vol. 11. New York: Springer, 2011. P. 179-180.

[28] Ibid. P. 180.

[29] Ibid. P. 172.

[30] Practically no one pays due attention to this problem, while Hayek considered it almost the key to social theory. See *Hayek F.A.* Economists and Philosophers. In: Hayek F.A. The Market and Other Orders. Chicago: The University of Chicago Press, 2014. P. 442-443.

in an epistemically complex social context. Epistemic complexity of these contexts and situations is *the ultimate reason* for such necessary features of true law in Hayek's theory as "abstractness" and "negativity".

Not only "abstractness" and "negativity" as necessary attributes of true law are determined by epistemic considerations. Many other necessary attributes of "hayekian" law can be derived from the fact that Hayek's concept of law defines law as an institution of an epistemically complex social order. The necessary "evolutionary" genesis of law and the "piecemeal" pattern of its transformation by judges are the most exemplary ones. Both of them, as many others, are best explained not by liberal theory, but by the complex-epistemic nature of true law in Hayek's "late" theory. It is difficult to omit that in Hayek's theory the borderline separating law from rules of a different kind strictly follows the line separating institutions of an epistemically complex social context from institutions of an epistemically simple social context. The epistemological principle of distinguishing these social contexts quite exhaustively explains all the unique features of true law as essentially different from other kinds of simple-order oriented rules. Given the failure of the liberal interpretation of Hayek's legal theory to explain all these unique features of the "hayekian" concept of law as persuasive as it is obtained in the "epistemic" interpretation, the epistemological approach seems to be more productive.

Conclusion

Summing up, we can conclude that the hypothesis regarding the epistemic essence of Hayek's concept of law seems quite reliable. As it was shown in the study, Hayek's conception of law not only is not always coherent with a rather "popular" interpretation of his ideas as purely "liberal", but also underwent quite a radical evolution in the works of "late" Hayek. From a skeptical estimation of the common law type of jurisprudence, "late" Hayek came to a positive view of the common law system. It is very difficult to explain such a radical transformation until we rely on liberal reading of Hayek's conception of law. To explain this radical transformation, we need a different theoretical basis. According to our hypothesis, this proper theoretical basis is Hayek's epistemological theory. Having reconstructed Hayek's conception of law in the light of his epistemology, we can estimate how much this epistemology determines his concept of law. How epistemology, not liberal ideology, provides a basis for distinguishing "law" and "non-law" in Hayek's social theory. Such an epistemological view of Hayek's concept of law makes it possible not only to better understand the essence and evolution of his legal ideas, but also to evaluate Hayek's original contribution to theoretical jurisprudence.

Р.С. Рааб, заң магистрі, тәуелсіз зерттеуші (Бішкек, Қырғызстан): Фридрих Хайектің заң тұжырымдамасы: гносеологиялық тәсіл.

Мақалада әйгілі экономист және философ, экономика саласындағы Нобель сыйлығының лауреаты Фридрих Хайектің құқықтық көзқарастарын жаңа түсіндіруге тырысады. Егер Хайектің экономикалық және саяси идеялары XX ғасырдың көптеген әлеуметтік катаклизмдерін түсінуде маңызды рөл атқарса, онда ғалымның құқықтық идеялары, олардың маңыздылығымен, әлі толық түсіну мен қолдануға тап болған жоқ. Хайек шығармашылығының көптеген зерттеушілері оның құқықтық түсінігінің мәні туралы ешқашан жалпы қорытындыға келген жоқ. Бұл мәселені нақтылау үшін Хайек шығармашылығын зерттеуде классикалық болған

қайта құру әдісіне жүгіну қажет деп санаймыз. Зерттеудің негізгі гипотезасы – Хайек заңының тұжырымдамасы оның либералды саяси философиясына негізделмеген, өйткені ол жиі айтылады, бірақ оның таным теориясына немесе сол сияқты оның гносеологиясына негізделген деген болжам. Хайектің шығармашылығына бағытталған алдыңғы зерттеулерде бұл гипотеза әлі жүйелі түрде тексерілмеген. Осы гипотезаны тексеру нәтижесінде жасалуы мүмкін қорытынды – Хайектің құқықтық түсінігінің мәніне гносеологиялық көзқарас дәстүрлі "либералды" тәсілге қарағанда оның құқықтық тұжырымдамасының бірқатар ерекшеліктерін әлдеқайда жақсы түсіндіруге мүмкіндік береді. Либералды интерпретациялардан айырмашылығы, Хайектің құқықтық түсінігін "Заңның гносеологиялық тұжырымдамасы" ретінде түсіндіру "кеш" Хайектің құқықтық көзқарастарының түбегейлі өзгеруін түсіндіріп қана қоймай, сонымен қатар оның кейде әр түрлі құқықтық идеяларын логикалық дәйекті жүйеге айналдыруы мүмкін. Осы тәсілдің арқасында Хайектің құқықтық тұжырымдамасын неғұрлым нақты түсінуге ғана емес, сонымен қатар оның теориялық құқықтануға қосқан өзіндік үлесіне қол жеткізіледі.

Тірек сөздер: гносеология; әлеуметтік теория; құқықтық түсінік; күрделі құбылыстар теориясы; стихиялық тәртіп; ұйымдастыру; ағылшынның жалпы құқығы; либерализм; бөлінген білім теориясы; Фридрих Хайек.

Р.С. Рааб, магистр юриспруденции, независимый исследователь (Бишкек, Кыргызстан): **Концепция права Фридриха Хайека: эпистемологический подход.**

В статье предпринимается попытка новой интерпретации правовых взглядов известного экономиста и философа, лауреата Нобелевской премии по экономике Фридриха Хайека. Если экономические и политические идеи Хайека уже сыграли свою важную роль в осмыслении многих социальных катаклизмов XX века, то правовые идеи ученого, при всей их значимости, пока еще не встретили полного понимания и применения. Многочисленные исследователи творчества Хайека так и не пришли к общему выводу о сущности его правопонимания. Дабы прояснить этот вопрос, мы считаем необходимым прибегнуть к методу реконструкции, ставшему уже классическим в исследованиях творчества Хайека. Основной гипотезой исследования является предположение о том, что концепция права Хайека основана не на его либеральной политической философии, как это часто утверждается, а на его теории познания, или, что то же самое, его эпистемологии. В предыдущих исследованиях, посвященных творчеству Хайека, эта гипотеза еще не подвергалась систематической проверке. Вывод, который можно сделать по итогу проверки данной гипотезы, заключается в том, что эпистемологический взгляд на сущность правопонимания Хайека позволяет гораздо лучше объяснить целый ряд специфических черт его юридической концепции, нежели традиционный "либеральный" подход. В отличие от либеральных интерпретаций, трактовка правопонимания Хайека как своеобразной "эпистемической концепции права" может не только объяснить радикальную трансформацию правовых воззрений "позднего" Хайека, но и упорядочить его подчас довольно разрозненные юридические идеи в логически последовательную систему. Благодаря такому подходу достигается не только более ясное понимание юридической концепции Хайека, но и его оригинального вклада в теоретическое правоведение.

Ключевые слова: эпистемология; социальная теория; правопонимание; теория сложных феноменов; спонтанный порядок; организация; английское общее право; либерализм; теория распределенного знания; Фридрих Хайек.

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