Л.Н. Гумилев атындағы Еуразия ұлттық университетінің ХАБАРШЫСЫ.
ISSN: 2616-6844. eISSN: 2663-1318

ҚҰҚЫҚ СЕРИЯСЫ/ LAW SERIES/ СЕРИЯ ПРАВО

IRST 10.07.27
Scientific article

https://doi.org/10.32523/2616-6844-2024-148-3-215-228

The category of legal certainty in the philosophical-legal conception H. Hart

E.V. Mitskaya[1]

[1] *M. Auezov South Kazakhstan University*

(E-mail: elenamits@mail.kz)

Abstract: This article is aimed at providing those interested in the problems of understanding legal certainty in the concept of the leading British philosopher of law Herbert Hart, whose works have been little explored in domestic legal thought. H. Hart, being a pioneer of analytical philosophy of law, devotes much attention to the language of legal norms, analysis of legal norms in the context of interpretation, judicial discretion and uniform law enforcement practice. The relevance of the study of his works is determined by the fact that the understanding of legal certainty and legal uncertainty as paired categories of law is one of the fundamental and strategic directions of the study of law as a social phenomenon. It is possible to achieve the sustainability of law only through a progressive process of transition from its uncertainty to certainty. This is of direct practical importance, as everyone should know the scope of his or her rights in order not to violate the boundaries of permissible behavior in society. The study of H. Hart's works will help to learn the Western traditions of legal understanding, to compare them with domestic ones, to better understand legal certainty as an ideal to which we should strive through the understanding of legal uncertainty, which is of scientific and theoretical importance for the modern understanding of the effectiveness of law and law enforcement.

Keywords: rule of law, legal certainty, formal certainty, judicial discretion, law enforcement practice.

Received: 01.08.2024. Accepted: 28.08.2024. Available online: 30.09.2024.

Introduction

Kazakhstan on its way to the rule of law consistently modernizes the judicial system, improves legislation, significantly changing the state institutions of governance and the legal system as a whole. The President of the Republic of Kazakhstan K.-J. Tokayev, promptly responding to the challenges of the time, initiates the vector of changes: "It is necessary to ensure the rule of law and the quality of administration of justice" [1], thus strengthening the reliable protection of rights and freedoms of both citizens and the state itself.

The rule of law cannot be ensured without precise formal definiteness of normative legal acts. Formal certainty of norms of law, being its property [2], in turn lays the foundation for certainty of the realization of law. The entire system of state bodies, including courts, in applying the law proceeds from the existing normative legal acts, the degree of certainty of which will directly affect the decision-making by these bodies. At the same time, as the President of the Republic of Kazakhstan draws attention to, frequent changes in legislation "destabilizes the law enforcement system as a whole and disorients those who work in this field. There is an increasing risk of mistakes, the price of which may be the fate of our citizens" [3]. We cannot but agree with A. Kaldybaev that the legal norms developed and adopted ideally should comply with the law, "but since the adoption of norms is influenced by the current political situation, global trends, the interests of various groups (lobbies), the level of professionalism of developers and adopters of norms, this ideal is not always achieved" [4]. There are no ideal states in the world with one hundred percent legal certainty of the legal system. There are legal systems with greater uncertainty, there are with less [5]. Specifying legal certainty proceeds from the understanding of legal uncertainty, the degree of determination of which depends on the real rule of law, accuracy of legislation [5], uniform practice of its interpretation and application. N. Tsagourias, referring to legal uncertainty, names two aspects of it, which are interrelated: first, uncertainty concerns the scope and content of legal norms in their application to specific life cases, and second, it is associated with the uncertainty of establishing certain facts in the qualification of a certain act, which, accordingly, makes the application of the law to the established facts uncertain [6]. In the first case, i.e. when the scope and content of legal norms are not sufficiently defined, H. Hart calls "the penumbra of uncertainty" [7]. It should be noted that Kazakhstani legislation does not enshrine legal certainty as a principle. The Law on Legal Acts [8], obviously, could not enshrine the enumeration of specific principles of legislation, since there are sectoral specifics. The understanding of legal certainty among scientists is quite debatable. Some recognize under legal certainty the presence of legal norms, ensured by uniform interpretation and their application [9], others consider it one of the aspects of the rule of law [10]. Others associate legal certainty with judicial activity, guaranteeing equality of all before the law on the basis of uniform understanding and application of legal norms, i.e. the indispensable basis of legitimate, fair and objective justice is clarity and clarity of legal norms [11; 12]. However, neither in the Universal Declaration of Human Rights, nor in the International Covenant on Civil and Political Rights, nor in the Convention for the Protection of Human Rights and Fundamental Freedoms there is no explanation of fair justice. To illustrate, the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6, enshrines the right of

all individuals to "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" [13]. However, the Convention does not elucidate the concept of fair justice. It must be acknowledged that there is no clarification of what is meant by the term 'fair justice' at the level of either international or national law. The Constitution of the Republic of Kazakhstan, "On the Judicial System and the Status of Judges," stipulates the right of all individuals to have their cases heard by a court in accordance with the principles of law and justice. This right to a fair trial in a court of law [14] is enshrined as a fundamental criterion for the implementation of justice, defining the quality of the judicial process. In the normative resolution of the Supreme Court of the Republic of Kazakhstan, it is explained that the uniformity of judicial practice is ensured by a uniform interpretation and uniform application of legal norms through the adoption by the Supreme Court of normative decisions, review of judicial acts in cassation procedure, aimed at ensuring their legality, validity and fairness [15]. However, the understanding of fairness is not presented. The concept of justice, as a category of morality [16; 17], is revealed through evaluative criteria such as honesty, objectivity, impartiality, rejection of injustice and correctness. These criteria are fundamental to the legal concept of justice, which is defined as the evaluative category of morality. The concepts of legal certainty and fair justice are interdependent, with each category characterised by the other. While legal certainty is dependent on fair justice, the inverse is also true. The absence of fair justice precludes the possibility of legal certainty, and conversely, the absence of legal certainty precludes the possibility of fair justice. Accordingly, legal certainty, as well as formal certainty of law, is directly related to the interpretation of formally defined norms of law, in which there are problems of subjective discretion on the part of the law enforcer. It is evident that the concept of legal certainty encompasses a multitude of criteria pertaining to the quality of normative acts and the practice of law enforcement. Consequently, it can be classified as an eclectic concept.

In this context, we wish to draw attention to the theoretical positions of Herbert Hart, a leading legal philosopher of the 20th century, on the essence of legal certainty. We believe that his insights will prove invaluable in elucidating the concept of legal certainty as a legal category.

Methodology

This study was conducted on the basis of an analysis of the works of scientists who have studied the understanding of legal certainty. In particular, it considers the contributions of H. Hart, one of the most authoritative researchers in modern Western philosophy of law. Hart is also one of the leading representatives of British legal philosophy and legal positivism. Furthermore, the present study draws upon the normative-legal instruments of the Republic of Kazakhstan's criminal and criminal procedural legislation, thus enabling a more precise delineation of the concept of legal certainty as postulated by H. Hart.

The method of contextual translation was employed when the expression was subjected to analysis in the context of its utilisation. The method of conceptual analysis was employed to facilitate the production, discussion and evaluation of the legal judgments of H. Hart in relation to the legal system of Kazakhstan. The method of legal analysis enabled the formal-logical interpretation of the legal norms of the current Kazakhstani criminal and criminal

procedural legislation to be undertaken, with this being used as an example of confirmation of the concept of understanding of legal certainty put forth by H. Hart. In order to gain insight into the understanding of legal concepts in the works of Western legal theorists, a comparative legal analysis was employed.

Results and discussion

1. Legal certainty from the perspective of participation and communication theory by H. Hart.

In his work, The Concept of Law, H. Hart [18] employs a variety of approaches to elucidate the comprehension of law and legal certainty. These include the conceptualisation of law as a mechanism for regulating the involvement of the legislator in public life, as a conduit for communication between the state (legislator) and society, and as a means of interpreting legal norms in accordance with specific life circumstances.

The function of law as a social regulator is to influence people's behaviour in order to form a socio-cultural community that unites individuals with diverse interests. In the view of H. Hart, each member of a social group is bound to adhere to the established rules of behaviour as set out in the social standards, which are expressed in terms such as "should", "must", "must", "should". Hart considers these to represent a limited moral structure embedded in the law, which he terms the "internal point of view" [18]. A similar opinion is also held by other scientists. In particular, G.D. Gurvich observed that any social group possesses the capacity to establish its own norms of integration and coordination [19]. These norms manifest not only as prohibitions but also as norms of cooperation and support. Notably, these norms are not personified but rather objective, enshrining common positive values [19]. However, if each individual applies the normative prescriptions of "must" and "should" to themselves based on their internal sense of alignment with the established standards of conduct, the situation is distinct in the context of a judge who renders a decision in a specific case. H. Hart posits that the law enforcer is bound by the wording of the normative act and that, regardless of their internal assessment of the act, they should act in accordance with it. However, he suggests that if the normative act is characterised by legal certainty, otherwise, when the normative act ceases to meet reasonable clarity, then the law enforcer should be guided by their internal point of view. It is not possible to concur with this assertion. In particular, prior to the most recent amendments to the Criminal Code of the Republic of Kazakhstan in 2014 regarding crimes against sexual inviolability, regardless of whether a judge may have internally disagreed with the classification of certain basic corpus delicti as medium gravity, which is contrary to reasonable clarity, a judge was not permitted to pass sentence based on their internal sense of such a provision. Similarly, in the case of other offences, if the prescribed punishment appears to be inconsistent with the criminal act in question, However, when considering the internal perspective of the judge in relation to the evaluation and resolution of a case, it is essential to recognise that this perspective is informed by the broader context of their professional practice. It is therefore imperative that the judge's interpretation of the law is based on a clear and consistent understanding of its principles, as any ambiguity or uncertainty in this regard could potentially lead to inconsistency in the application of the law.

H. Hart links the legal uncertainty of a normative act with the impossibility of foreseeing and regulating in advance all possible future situations of violation of legal norms with certain consequences. When an alternative, fixed circumstance arises within the framework of a legal norm, the prospect of the application of judicial discretion opens up. If people could predict everything for the future, all laws would be ideal in their legal certainty. H. Hart observes: "The uncertainty of law is therefore a consequence of the fundamental inability of people to predict the future, because of which there is ignorance of the facts that will arise and to which the law should be applied" [18].

According to H. Hart, in order to ensure law and order, it is necessary for a normative act to be fair, which is revealed by the law's comprehensibility for all, feasibility of its implementation by all, impartiality of its application to all similar cases [18]. He associates the interested observance of legal norms by all, and thus participation in the maintenance of law and order, with just laws, saying that "an unjust law is not a law" [18]. According to him, the law is a way of participation of the legislator, the subjects of the law and the executors of the law in the formation of the legal order developed in the society, and it must meet the requirements of formal intra-legal justice [20]. Accordingly, legal certainty is associated with legal justice. One cannot but agree that law and morality have a certain connection. As scholars note, "the law should have a minimum moral content" [21].

H. Hart suggests that if it were impossible to convey general standards of behaviour that an unlimited number of people could accept without any additional conditions, then such behaviour could not be recognised as a norm, what we now recognise as law [18]. Legal certainty provides social control over people's behaviour because it allows comparison of correct behaviour and deviation from it. The state, as H. Hart notes, entering into communication with the subjects of law, establishes relations through the interrelation of four elements of such communication:

1) the legislator, who ultimately formulates the legal norm and through whom it is formulated

2) the medium which communicates the normative act (official publication through which the essence of the adopted normative act is communicated to all subjects of law)

3) the normative act, the content of which constitutes the essence of the communication

4) the entire unspecified public to which the normative act is addressed.

At the same time, H. Hart believes that it would be wrong to consider the law, and in particular the law, only as a means of communication, when the legislator communicates to citizens the rules of their behaviour, since it is necessary to make a decision depending on the specific situation [18]. For example, the qualification of murder when exceeding the limits of necessary defence according to article 104 of the Criminal Code of the Republic of Kazakhstan [22] is based on the fact that there should be a defence and its limits should be exceeded, but the law cannot include in the regulation of the legal norm all possible circumstances of defence and exceeding its limits, the application of this criminal-legal norm depends entirely on the specific circumstances of the criminal case.

In addition, as noted above, H. Hart admits that a normative act may contain a "penumbra of uncertainty" because the meaning of the text of the normative act may be ambiguously understood, vague or unclear. Let us take an example from the current criminal procedural legislation on the initiation of pre-trial investigation, when, according to the Criminal Procedural

Code of the Republic of Kazakhstan of 2014, the basis is registration in the ERDR (Article 179 of the Criminal Procedural Code of the Republic of Kazakhstan [23]), and according to the Rules on receiving and registering a statement, message or report on criminal offences, as well as keeping the Unified Register of Pretrial Investigations - these are completely different grounds for initiating pre-trial investigation - a statement/report/reason [24]. Or another example, on the application of fines in case of violation of obligations by participants of criminal proceedings and holding them responsible for it, but here the question arises - under which legislation, under the norms of the Criminal Procedural Code of the Republic of Kazakhstan or administrative? However, H. Hart explains legal uncertainty by the open structure of the language of a normative act, since it is impossible to regulate absolutely all possible situations in life in a legal norm, but at the same time without denying the "core" of a normative act - the most precisely formulated correct behaviour of citizens or recognition of their rights, giving an understanding of the stability of their legal status in legal relations, without which the norm could not be a legal norm. Returning to the given examples from the criminal procedural legislation, it becomes clear that they cannot be characterised by the "penumbra of uncertainty", as they create incomprehensibility of their application due to the fact that these norms contain inconsistency with other norms of the current legislation, which creates legal uncertainty, a defect of legal regulation.

H. Hart is a follower of the positivist approach to the understanding of law [25], so he associates legal certainty first of all with a specific definition of the correct, required behaviour of people, which he understands as a basis for further formation of legal certainty. His understanding of the purpose of legal certainty is that it provides the subjects of law with the opportunity to accurately predict the result of their actions and how the court will rule on them. In other words, the predictability and legality of actions should be mutual, both on the part of citizens and on the part of the state, represented by officials of state bodies. Furthermore, it is necessary to consider what role, according to H. Hart, the judicial discretion, the interpretation of legal norms, the practice of court decisions play in the understanding of legal certainty.

2. Legal uncertainty in court decisions

Thus, H. Hart, speaking about the fact that the basis of a legal norm is based on certain concepts, phenomena that we are able to explain, at the same time argues that legal concepts have both their "core" - fully understandable, obvious signs of their applicability to the facts of life, and "penumbra" - unclear, non-obvious cases of their application [18]. He gives an example that is relevant in our time, reflecting on what is a means of transport: a car - obviously, and bicycles, aeroplanes, roller skates have certain signs of a means of transport, but they are not such in the direct sense of the law. Then, in his opinion, it is necessary to eliminate the uncertainty of legal concepts and to recognise or classify individual cases in the manifestation of signs of general concepts or phenomena due to the open structure of the language of law [18] directly through judicial law enforcement activity. The inability of the legislator to foresee the unlimited variability of all future life situations limits the ability of the law enforcer to solve these situations in advance [18]. H. Hart sees the way out in the application of discretion, which he, according to G. Shaw, "sought to distinguish from the raw choice and deterministic application of rules" [26].

H. Hart believes that it is wrong to equate discretion with the notion of choice. Discretion, he says, is "almost synonymous with practical wisdom, or judgment, or prudence" [27], i.e.

he does not associate discretion with personal preferences or sympathies, i.e. he does not associate discretion with personal preferences or sympathies, much less with naivety or situational caprice, but explains it as a professionally oriented choice to clarify the situation, an interpretation of a legal norm, justified by the rational outcome of the solution of the situation [27], based solely on the law [27]. Moreover, H. Hart connects judicial discretion with the rule of law, i.e. when applying judicial discretion, judges should start from the rule of law and not be guided by, for example, personal biases, political prejudices. He considers the precision of legislation, together with the rule of law in the legal system and even the number of judges deciding on the case in question, as criteria for determining the degree of legal uncertainty [5].

It should be said that the positivist premise of H. Hart is clearly manifested in the fact that the principle of the rule of law should be manifested in the law enforcement discretion and in no other way. According to him, prosecutorial discretion should be the result of good law enforcement practice in general, thus leading the prosecutor to generalise the positive practice of law enforcement. We cannot disagree with him on this point: legal certainty is expressed both in legal norms and in the practice of their application. Deformations both in the construction and expression of legal norms automatically complicate their interpretation, reduce the regulativity of these norms and prevent their effective implementation [28]. In fact, there are two ways to solve the problems of legal uncertainty: by improving legislation and by striving for its uniform application [29].

H. Hart links judicial discretion directly to the application of descriptive statements, in other words to the interpretation of a normative act, in which it is important for the judge to take into account moral principles such as impartiality and honesty. He presents interpretation as a process consisting of two elements: 1) relatively unproblematic application of descriptive terms to specific cases that correspond to the basic meaning of these terms, in other words, mechanical reproduction of precisely defined norms, and 2) realisation of creative choice in difficult or problematic situations when considering a case, when terms that are in the penumbra of doubt are applied to it, in other words, when there are no clear indications of the law on the situation and it is necessary to choose the norms of the law for each specific case [7]. The second element of interpretation in relation to modern legislation can be understood as the permissible or permissive uncertainty of a normative act, expressed in evaluative concepts that do not have exhaustive content and scope, criteria for their evaluation, due to which their interpretation is left to the discretion of the executor of the law. Judicial discretion thus manifests itself in the interpretation of evaluative constructions and their filling with content on the basis of the actual situation in each specific case. Of course, with regard to Kazakh legislation, it should be said that judicial discretion should be exercised by interpreting normative acts in each specific case, taking into account the current normative decisions of the Supreme Court of the Republic of Kazakhstan, which, inter alia, determine the logical and semantic limits of interpretation of evaluative concepts. Without entering into theoretical discussions that judicial discretion and judgement are not always identical concepts, but are interrelated, it should be said that the application of law is impossible without a normative judgement.

H. Hart, speaking about legal uncertainty, had a negative attitude towards it, because it disrupts the communication between the legislator and the citizens in terms of ensuring their

proper behaviour and coherence in society, which ultimately leads to the imperfection of legal regulation. Accordingly, the establishment of balanced relations between the subjects of law can be achieved through the interpretation of a normative act, which they consider to be necessary for the transition from legal uncertainty to legal certainty, but, we repeat, only that interpretation which is based on the rule of law, proceeds from the applicable legal norms and complies with the principle of legality, equality of all before the law and the court.

Conclusion

Thus, H. Hart attempted to distinguish between the effectiveness of normative acts as products of law-making and the effectiveness of the legal process itself - the practice of their interpretation and uniform application. His findings and conclusions, drawn in the twentieth century, are still relevant today. He showed that an important feature of law enforcement is the transition from legal uncertainty to legal certainty. Although his works do not pay much attention to such legal uncertainty as the absence of a legal norm, which can only be filled by legislation. When deciding on the merits of a case in the absence of a necessary norm, the judge uses the possibility of applying the analogy of either the law or the law (with the exception of criminal law relations). Just as the content of legal norms cannot be outside their normative fixing, so the judicial discretion cannot be outside the framework of existing legal norms. The stability of the legal regulation of relations in society is aimed at ensuring the formal certainty of the law, which is expressed in the uniform understanding, interpretation and application of legal norms, which characterises the material side of the implementation of legal certainty. The study of legal certainty in the works of H. Hart allows us to conclude that legal certainty is a multidimensional phenomenon and refers to complex phenomena of legal science and practice. The works of H. Hart help to better understand and evaluate the powerful potential of domestic legal thought.

Contribution of the author

When writing the article, developed the design of the study, processed and analyzed statistical data from law enforcement agencies and other organizations. Researched materials from scientific and educational literature, analyzed reports and materials from international organizations, defined the purpose and objectives of the study, formed proposals and conclusions to address the issues raised.

References

1. Послание Главы государства Касым-Жомарта Токаева народу Казахстана «Справедливое государство. Единая нация. Благополучное общество» (г. Нур-Султан, 1 сентября 2022 года). – URL: https://www.akorda.kz/ru/poslanie-glavy-gosudarstva-kasym-zhomarta-tokaeva-narodu-kazahstana-181130.

2. Булгакова Д.А. Теория государства и права. Учебное пособие. – Алматы: Нур-пресс, 2020. – 114 с.

3. Глава государства провел заседание Высшего совета по реформам. – URL: https://www.akorda.kz/ru/events/akorda_ news/meetings_and_sittings/glava-gosudarstva-provel-zasedanie-vysshego-soveta-po-reformam.

4. Калдыбаев А. Принципы права и их применение судами. – URL: https://online.zakon.kz/Document/?doc_id=33356505&pos=6;-107#pos=6;-107.

5. Weiss U. The Regressive Effect of Legal Uncertainty // Journal of Dispute Resolution. – 2019. – Vol. 2019. – Iss. 1. – P. 149-185. Available at: https://scholarship.law.missouri.edu/jdr/vol2019/iss1/13.

6. Tsagourias N. Digitalization and its Systemic Impact on the Use of Force Regime: Legal Uncertainty and the Replacement of International Law // German Law Journal. – 2023. – Vol. 24(3). - P. 494-507. DOI:10.1017/glj.2023.33.

7. Hart H.L.A., Raz J. and Bulloch P.A. The Concept of Law (3rd edn). – Oxford: Oxford University Press, 2012. – 400 p. https://doi.org/10.1093/he/9780199644704.001.0001.

8. Закон Республики Казахстан от 6 апреля 2016 года № 480-V «О правовых актах». –URL: https://online.zakon.kz/Document/?doc_id =37312788&pos=412;-45#pos=412;-45.

9. Назаренко Т.Н. Принцип «правовой определенности» и его применение судами общей юрисдикции Российской Федерации.– URL: http://usd. sml.sudrf.ru/modules. php?name=press_dep&op=4&did=9.

10. Ковтун Н.Н., Шунаев Д.М. Правовая определенность и Resjudicata в решениях Европейского Суда по права человека // Российский судья. – 2014. – № 9. – С.38-42.

11. Масаладжиу Р. Принцип правовой определенности в науке, практике ЕСПЧ и его влияние на доступность правосудия на стадии надзорного производства в гражданском и арбитражном процессе // Арбитражный и гражданский процесс. – 2009. – № 8. – С. 10-14.

12. Вильдхабер Л. Прецедент в Европейском Суде по правам человека // Государство и право. – 2001. – № 12. – С. 5-12.

13. Convention for the Protection of Human Rights and Fundamental Freedoms. Available at: https://www.coe.int/en/web/compass/the-european-convention-on-human-rights-and-its-protocols.

14. Закон Республики Казахстан от 25 декабря 2000 года №132 «О судебной системе и статусе судей». –URL: https://adilet.zan.kz/rus/docs/Z000000132_.

15. Нормативное постановление Верховного суда Республики Казахстан от 15 января 2016 года № 1 «О праве доступа к правосудию и правомочиях Верховного Суда Республики Казахстан по пересмотру судебных актов». – URL: https://adilet.zan.kz/rus/docs/P160000001S.

16. Hafer C.L. & Olson J.M. An analysis of empirical research on the scope of justice // Personality and Social Psychology Review. – 2003. – Vol. 7. – Iss. 4. – P. 311–323. DOI: 10.1207/S15327957PSPR0704_04.

17. Skitka L.J., Bauman C.W., Mullen E. Morality and Justice. In: Sabbagh, C., Schmitt, M. (eds) Handbook of Social Justice Theory and Research. - New York: Springer, 2016. – P. 407-423. DOI: 10.1007/978-1-4939-3216-0_22.

18. Hart H.L.A. Concept of Law. – New York: Oxford University Press, 1961. – 262 p. DOI: 10.2307/2217213.

19. Гурвич Г.Д. Философия и социология права: избр. соч. / пер. М.В. Антонова, Л.В. Ворониной. – СПб.: Издательский Дом С.-Петерб. гос. ун-та, Издательство юридического факультета С.-Петерб. гос. ун-та, 2004. – 848 с.

20. Popović P. Hart on the role of justice in the concept of law: some further remarks // Jurisprudence. – 2022. – Vol.13. – Iss. 4. – P. 489-515. DOI: 10.1080/20403313.2022.2077514.

21. Andrei M. and Sarch A. The Nature of Law // The Stanford Encyclopedia of Philosophy (Fall 2019 Edition), Edward N. Zalta (ed.). URL: https://plato.stanford.edu/archives/fall2019/ entries/lawphil-nature/.

22. Уголовный кодекс Республики Казахстан от 3 июля 2014 года № 226-V. –URL: https:// online.zakon.kz/Document/?doc_id=31575252

23. Уголовно-процессуальный кодекс Республики Казахстан от 4 июля 2014 г. №231-V.– URL: https://online.zakon.kz/Document/ ?doc_id=31575852

24. Приказ Генерального Прокурора Республики Казахстан от 19 сентября 2014 года № 89 «Об утверждении Правил приема и регистрации заявления, сообщения или рапорта об уголовных правонарушениях, а также ведения Единого реестра досудебных расследований». –URL: https:// adilet.zan.kz/rus/docs/V14W0009744

25. Patterson D. Theoretical Disagreement, Legal Positivism, and Interpretation // Ratio Juris. – 2018. – Vol. 31. – Issue 3. – P. 253-375. DOI: 10.1111/raju.12216.

26. Shaw G.C. H. L. A. Hart's lost essay: "Discretion" and the legal process school // Harvard Law Review. – 2013. – Vol. 127. – Iss. 2. – P. 666–727.

27. Hart H. Discretion // Harvard Law Review. – 2013. – Vol. 127. – Iss. 2. – P. 652–665.

28. Мицкая Е.В. Размышляя о достижении эффективности нормативных правовых актов // Юридическая мысль. – 2021. – №4(124). – С. 77-87.

29. Dari-Mattiacci G., Deffains B. Uncertainty of Law and the Legal Process // Amsterdam Center for Law & Economics Working Paper №o. 2005-10. – Amsterdam, 2005. – P.1-42. Available at SSRN: https:// ssrn.com/abstract=869368.

Е.В. Мицкая
М. Әуезов Оңтүстік Қазақстан университеті
(E-mail: elenamits@mail.kz)

Философиялық-құқықтық тұжырымдамадағы құқықтық сенімділік категориясы Г. Харта

Аңдатпа: Бұл зерттеу британдық жетекші құқық философы Герберт Харттың тұжырымдамасындағы құқықтық сенімділікті түсіну мәселелеріне қызығушылық танытқандардың барлығын таныстыру мақсатында жүргізілді, оның еңбектері отандық құқықтық ойда аз зерттелген. Г. Харт заңның аналитикалық философиясының негізін қалаушы бола отырып, құқықтық норманың тіліне, түсіндіру, сот шешімі және бірыңғай құқық қолдану практикасы тұрғысынан құқықтық нормаы талдауға көп көңіл бөледі. Оның еңбектерін зерттеудің өзектілігі құқықтық сенімділік пен құқықтық белгісіздікті құқықтың жұптасқан категориялары ретінде түсіну құқықты әлеуметтік құбылыс ретінде зерттеудің негізгі және стратегиялық бағыттарының бірі болып табылатындығына байланысты. Құқықтың тұрақтылығына қол жеткізу оның белгісіздігінен сенімділікке ауысудың прогрессивті процесі арқылы ғана мүмкін болады. Бұл тікелей практикалық мәнге ие, өйткені қоғамдағы рұқсат етілген мінез-құлық шекараларын бұзбау үшін әркім өз өкілеттіктерінің көлемін білуі керек. Г. Харта еңбектерін зерттеу батыстық құқықтық түсіністік дәстүрлерін білуге, оларды отандық дәстүрлермен

салыстыруға, құқықтық сенімділікті құқықтық белгісіздікті түсіну арқылы ұмтылуымыз керек идеал ретінде тереңірек түсінуге көмектеседі, бұл құқық пен құқық қолданудың тиімділігін қазіргі заманғы түсіну үшін ғылыми-теориялық маңызы бар.

Түйін сөздер: құқық үстемдігі, құқықтық сенімділік, ресми сенімділік, сот шешімі, құқық қолдану практикасы

Е.В. Мицкая
Южно-Казахстанский университет им. М. Ауэзова
(E-mail: elenamits@mail.kz)

Категория правовой определенности в философско-правовой концепции Г. Харта

Аннотация: Данное исследование предпринято с целью ознакомить всех интересующихся проблемами понимания правовой определенности в концепции ведущего британского философа права Герберта Харта, труды которого малоисследованы в отечественной правовой мысли. Г. Харт, являясь родоначальником аналитической философии права, уделяет большое внимание языку правовой нормы, анализу правовой нормы в контексте толкования, судебного усмотрения и единообразной правоприменительной практики. Актуальность исследования его трудов обусловлена тем, что понимание правовой определенности и правовой неопределенности как парных категорий права представляет собой одно из фундаментальных и стратегических направлений исследования права как социального феномена. Достижение устойчивости права возможно только через поступательный процесс перехода от его неопределенности к определенности. Это имеет непосредственное практическое значение, так как каждый должен знать объем своих правомочий, чтобы не нарушить границы дозволенного поведения в социуме. Исследование трудов Г. Харта поможет узнать западные традиции правопонимания, сравнить их с отечественными, глубже понять правовую определенность как идеал, к которому мы должны стремиться через понимание правовой неопределенности, что имеет научно-теоретическое значение для современного понимания эффективности права и правоприменения.

Ключевые слова: верховенство права, правовая определенность, формальная определенность, судебное усмотрение, правоприменительная практика

References

1. Poslaniye Glavy gosudarstva Kasym-Zhomarta Tokayeva narodu Kazakhstana «Spravedlivoye gosudarstvo. Yedinaya natsiya. Blagopoluchnoye obshchestvo» (g. Nur-Sultan, 1 sentyabrya 2022 goda) [Message of the Head of State Kasym-Jomart Tokayev to the people of Kazakhstan "Fair State. Unified nation. A prosperous society" (Nur-Sultan, September 1, 2022)]. Available at: https://www.akorda.kz/ru/poslanie-glavy-gosudarstva-kasym-zhomarta-tokaeva-narodu-kazahstana-181130 (accessed 02.07.2024)

2. Bulgakova D.A. Teoriya gosudarstva i prava [Theory of State and Law]. (Almaty, 2020, 114 p.) [in Russian].

3. Glava gosudarstva provel zasedaniye Vysshego soveta po reformam [The Head of State held a meeting of the Supreme Council for Reforms]. Available at: https://www.akorda.kz/ru/events/akorda_news/meetings_and_sittings/glava-gosudarstva-provel-zasedanie-vysshego-soveta-po-reformam (accessed 02.07.2024)

4. Kaldybaev A. Printsipy prava i ikh primeneniye sudami [Principles of law and their application by courts]. Available at: https://online.zakon.kz/Document/ ?doc_id=33356505&pos=6;-107#pos=6;-107 (accessed 04.07.2024)

5. Weiss U. The Regressive Effect of Legal Uncertainty // Journal of Dispute Resolution, 2019 (1), 149-185 (2019). Available at: https://scholarship.law.missouri.edu/jdr/vol2019/iss1/13

6. Tsagourias N. Digitalization and its Systemic Impact on the Use of Force Regime: Legal Uncertainty and the Replacement of International Law // German Law Journal, 24(3), 494-507 (2023), DOI:10.1017/glj.2023.33

7. Hart H.L.A., Raz J. and Bulloch P.A. The Concept of Law (3rd edn). (Oxford, 2012, 400 p.), DOI: 10.1093/he/9780199644704.001.0001.

8. Zakon Respubliki Kazakhstan ot 6 aprelya 2016 goda № 480-V «O pravovykh aktakh» [Law of the Republic of Kazakhstan No. 480-V of April 6, 2016 "On Legal Acts"]. Available at: https://online.zakon.kz/Document/?doc_id=37312788&pos= 412;-45#pos=412;-45 (accessed 04.07.2024)

9. Nazarenko T.N. Printsip «pravovoy opredelennosti» i yego primeneniye sudami obshchey yurisdiktsii Rossiyskoy Federatsii [The principle of "legal certainty" and its application by courts of general jurisdiction of the Russian Federation]. Available at: http://usd.sml.sudrf.ru/modules.php?name=press_dep&op =4&did=9 (accessed 04.07.2024)

10. Kovtun N.N., Shunaev D.M. Pravovaya opredelennost' i Resjudicata v resheniyakh Yevropeyskogo Suda po prava cheloveka [Legal Certainty and Resjudicata in the Decisions of the European Court of Human Rights] Rossiyskiy sud'ya [Russian judge], 9, 38-42 (2014) [in Russian].

11. Masaladjiu R. Printsip pravovoy opredelennosti v nauke, praktike YESPCH i yego vliyaniye na dostupnost' pravosudiya na stadii nadzornogo proizvodstva v grazhdanskom i arbitrazhnom protsesse [The principle of legal certainty in the science, practice of the ECtHR and its impact on the accessibility of justice at the stage of supervisory review proceedings in civil and arbitration proceedings] Arbitrazhnyy i grazhdanskiy protsess [Arbitration and civil procedure], 8, 10-14 (2009) [in Russian].

12. Wildhaber L. Pretsedent v Yevropeyskom Sude po pravam cheloveka [Precedent in the European Court of Human Rights] Gosudarstvo i pravo [State and law], 12, 5-12 (2001) [in Russian].

13. Convention for the Protection of Human Rights and Fundamental Freedoms. Available at: https://www.coe.int/en/web/compass/the-european-convention-on-human-rights-and-its-protocols (accessed 04.07.2024)

14. Zakon Respubliki Kazakhstan ot 25 dekabrya 2000 goda №132 «O sudebnoy sisteme i statuse sudey» [Law of the Republic of Kazakhstan dated December 25, 2000, No. 132 "On the Judicial System and Status of Judges"]. Available at: https://adilet.zan.kz/rus/docs/Z000000132_(accessed 04.07.2024) [in Russian].

15. Normativnoye postanovleniye Verkhovnogo suda Respubliki Kazakhstan ot 15 yanvarya 2016 goda № 1 «O prave dostupa k pravosudiyu i pravomochiyakh Verkhovnogo Suda Respubliki Kazakhstan po peresmotru sudebnykh aktov» [Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan of January 15, 2016, No. 1 "On the Right of Access to Justice and the Power of the Supreme

Court of the Republic of Kazakhstan to Review Judicial Acts"]. Available at: https://adilet.zan.kz/rus/docs/P160000001S (accessed 02.07.2024) [in Russian].

16. Hafer C.L. & Olson J.M. An analysis of empirical research on the scope of justice //Personality and Social Psychology Review, 7(4), 311–323 (2003), DOI: 10.1207/S15327957PSPR0704_04.

17. Skitka L.J., Bauman C.W., Mullen E. Morality and Justice. In: Sabbagh, C., Schmitt, M. (eds) Handbook of Social Justice Theory and Research. (New York, 2016. – pp. 407-423), DOI:10.1007/978-1-4939-3216-0_22

18. Hart H.L.A. Concept of Law. (New York, 1961, 262 p.), DOI: 10.2307/2217213

19. Gurvich G.D. Filosofiya i sotsiologiya prava: izbr. soch./ per. M.V. Antonova, L.V. Voroninoy [Gurvich G.D. Philosophy and Sociology of Law]. (St. Petersburg, 2004, 848 p.) [in Russian].

20. Popović P. Hart on the role of justice in the concept of law: some further remarks // Jurisprudence, 13(4), 489-515 (2022), DOI: 10.1080/20403313.2022.2077514

21. Andrei M. and Sarch A. The Nature of Law// The Stanford Encyclopedia of Philosophy (Fall 2019 Edition), Edward N. Zalta (ed.). Available at: https://plato.stanford.edu/archives/fall2019/ entries/lawphil-nature/ (accessed 04.07.2024)

22. Ugolovnyy kodeks Respubliki Kazakhstan ot 3 iyulya 2014 goda № 226-V [Criminal Code of the Republic of Kazakhstan from July 3, 2014 № 226-V]. Available at: https://online.zakon.kz/Document/?doc_id=31575252 (accessed 06.07.2024)

23. Ugolovno-protsessual'nyy kodeks Respubliki Kazakhstan ot 4 iyulya 2014 g. №231-V [Criminal Procedure Code of the Republic of Kazakhstan from July 4, 2014 № 231-V]. Available at: https://online.zakon.kz/Document/?doc_id=31575852 (accessed 06.07.2024)

24. Prikaz General'nogo Prokurora Respubliki Kazakhstan ot 19 sentyabrya 2014 goda № 89 «Ob utverzhdenii Pravil priyema i registratsii zayavleniya, soobshcheniya ili raporta ob ugolovnykh pravonarusheniyakh, a takzhe vedeniya Yedinogo reyestra dosudebnykh rassledovaniy» [Cutor General of the Republic of Kazakhstan dated September 19, 2014 № 89 "On Approval of the Rules for Receipt and Registration of Statement, Message or Report on Criminal Offenses, as well as Maintenance of the Unified Register of Pre-trial Investigations"]. Available at: https://adilet.zan.kz/rus/docs/V14W0009744 (accessed 06.07.2024)

25. Patterson D. Theoretical Disagreement, Legal Positivism, and Interpretation// Ratio Juris, 31(3), 253-375 (2018), DOI: 10.1111/raju.12216

26. Shaw G.C. H. L. A. Hart's lost essay: "Discretion" and the legal process school// Harvard Law Review, 127(2), 666–727 (2013).

27. Hart H. Discretion // Harvard Law Review, 127(2), 652–665 (2013).

28. Mitskaya E.V. Razmyshlyaya o dostizhenii effektivnosti normativnykh pravovykh aktov [Reflecting on Achieving the Effectiveness of Normative Legal Acts] Yuridicheskaya mysl' [Legal Thought], 4(124), 77-87, (2021) [in Russian].

29. Dari-Mattiacci G., Deffains B. Uncertainty of Law and the Legal Process. Amsterdam Center for Law & Economics Working Paper №o. 2005-10. (Amsterdam, 2005. – pp.1-42). Available at SSRN: https://ssrn.com/abstract=869368.

Information about the author:

Мицкая Е.В. **–** заң ғылымдарының докторы, М.Әуезов атындағы Оңтүстік Қазақстан университетінің қылмыстық құқық және қылмыстық процесс кафедрасының профессоры, Тәуке хан даңғылы, 5, 160018, Шымкент, Қазақстан

Мицкая Е.В. **–** доктор юридических наук, профессор кафедры уголовного права и уголовного процесса Южно-Казахстанского университета им. М. Ауэзова, проспект Тауке хана 5, 160018, Шымкент, Казахстан

Mitskaya E. **-** Doctor of law, Professor of the Department of Criminal Law and Criminal Procedure, M. Auezov South Kazakhstan University, Tauke khan avenue 5, 160018, Shymkent, Kazakhstan