

## COMMENTS

### THE ESTABLISHMENT OF LEGAL RULES AS AN ELEMENT OF THE SYSTEM OF LEGAL INFLUENCE: AN INSTRUMENTAL APPROACH

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*The author considers the essence of the establishment of legal rules as the will of the State that forms the structure of social relations. Based on an instrumental approach, the author examines the establishment of legal rules and the rules of law in their interaction with social activity, which allows subjects to “find themselves” in the legal system. Thus, the structures of public authorities, establishments and enterprises are created, their goals and order of activities are determined, as well as the competence and powers of officials, and legal statuses are secured; consequently, the participants, objects, terms of starting, changing and terminating legal relations concerning society are determined, too. Hence, the law influences the content of social relations, which is activity. In general, the results of the activities of individual and collective subjects of law reflect social relations, and social relations need legal regulation. At the same time, social relations may appear not only as activity, they may also appear in a passive form as legal statuses, social institutions. They are also regulated through legal rules, and in that case legal influence is carried out through the establishment of legal rules. It is able to predict the legal forms of subject activities through the establishment of legal rules. The author puts forward a legal definition of the establishment of legal rules as a purposeful influence on public relations, which is to regulate by means of legal rules. Distinctions of legal regulation from legal influence are established. The legal means expressing external factors in reference to the subject’s will correspond to the establishment of legal rules. However, by analyzing a list of normative acts we can conclude that legal means should be established more logically. It*

*is necessary to consider the dialectics of relationships between purpose and means in the field of rulemaking processes, since dialectics is of a two-way determinative nature.*

*Keywords: legal impact; establishment of legal rules; legal means; legal behavior; legal activity; legal status; instrumental approach.*

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## Introduction

A new issue has arisen in the evolution of the present-day theory of state and law, and it needs to be analyzed. The present stage of development of civil society places demands on the theory of state and law. There should be a continuous flow of information about social processes and changes in the life of civil society for this purpose. We need to have not only scientific information about the functioning of one or another social “subsystem,” but also scientific recommendations to administer the processes and to influence them purposefully.

Legal research shows that the evolution of social “subsystems” resulted in important changes in the content, problematique, methods and structure of the theory of state and law. The scientific development of the methods and approaches to legal research constituted a necessity to look at the results attained by legal science from a new point of view. An acute issue relating to the methods of legal research arose. It became obvious that the transition from common legal conceptions to researching legal phenomena needed certain theoretical intermediates, such as “particular” and “special” summaries and distinct theories. This way, in the structure of the general theory of state and law, particular legal theories appeared (a theory of the interpretation of law, a theory of legal awareness, a theory of implementation of the law, a theory of legal influence).

The new issue that arose in the theory of state and law cannot be analyzed without considering a number of circumstances. The theory of state and law and its particular scientific theories also develop due to the continuous connection with other legal sciences and their research results.

There is the issue, difficult to comprehend and analyze, which concerns the structure of legal influence. Its difficulty lies in the fact that legal influence is a dynamic process, which changes through time and space. The process results in the appearance of arranged social links between the subjects of law through legal rules. The degree of order of social links and the direction of this order might be just the opposite to the existing order of the law.

## 1. The Instrumental Approach

The Italian philosopher and diplomat N. Machiavelli laid the basis for instrumentalism in his treatise "The Prince."<sup>1</sup> Machiavelli studied power and political conflict, and he viewed politics as a means (technology) of seizing and retaining power. That is why Machiavelli is usually called the father of the instrumental (technological) school of public administration.

Nevertheless, the founder of the instrumental scientific approach is the American philosopher J. Dewey, who singled out instrumentalism from pragmatism. He believed that the instrumental approach makes it possible to develop and rationalize the theoretical basis of concepts, judgments and conclusions in various forms by studying the functions, their role and place in the process of constructing conclusions based on experience.<sup>2</sup>

It is necessary to note that instrumentalism has become a methodological synthesis of the sociological understanding of the law by R. von Jhering and R. Pound, the utilitarianism of J. Bentham and American pragmatic philosophy.

R. Rorty, one of the followers of Dewey, developed an instrumental approach in his works. He singled out the peculiarities of the instrument. First, the instrument is part of human interaction with the environment; it must be applicable in the practical activities of people. Second, the instrument should help in solving a specific problem; it should be convenient for the researcher.<sup>3</sup>

In addition, Austrian philosopher and sociologist K. Popper rightly pointed to the advantage of the instrumental approach. According to him, instrumentalism allows viewing scientific theories as practical tools or means for anticipating future events.<sup>4</sup>

The instrumental approach has become widespread in the study of various phenomena of public life. So, for example, the instrumental approach became especially popular in economics in the twentieth century. Such well-known economists as M. Friedman, L. Hickman and J.F. Foster developed ideas of instrumentalism.

Moreover, legal science also accepts the instrumental approach. The methodological basis of this approach in jurisprudence is the combination of philosophical and sociological ideas with the dogma of law.

The instrumental approach in modern law, as S. Filippova has said, is a scientifically grounded method of cognitive activity.<sup>5</sup> This method involves the unification of diverse knowledge about legal objectives, rules of law and specific legal

<sup>1</sup> Niccolo Machiavelli, *The Prince* (Chicago: The University of Chicago Press, 1985).

<sup>2</sup> *The Later Works of John Dewey* 14 (J.A. Boydston (ed.), Carbondale: Southern Illinois University Press, 1984).

<sup>3</sup> Richard Rorty, *Consequences of Pragmatism* (Minneapolis: University of Minnesota Press, 1982).

<sup>4</sup> Karl R. Popper, *Conjectures and Refutations* 62 (New York: Harper Torchbooks, 1962).

<sup>5</sup> Филиппова С.Ю. Инструментальный подход в науке частного права [Sofia Yu. Filippova, *Instrumental Approach in the Science of Private Law*] (Moscow: Statut, 2013).

activities of subjects in the formation and application of legal means, and results in scientific knowledge that is suitable for achieving the aims of the subjects of law enforcement.

The author proposes to consider legal influence, a form of which is the establishment of legal rules, through the instrumental aspect. The three categories that are part of it are legal purpose, legal means and legal activity. A legal purpose is the initial point of choosing the legal means and their application in the legal activity. This signifies that the instrumental approach towards conception development is impossible without deep research into the essence of legal purpose.

We suggest that the instrumental approach may be considered to be the most promising approach within the framework of legal science.

The instrumental approach in the legal sciences supposes the denial of futile centuries-old discussions about the essence of particular legal concepts; rather, the instrumental approach is about setting goals. These are the ways in which one or another legal decision can be used, what problems one or another legal decision can solve, what means a subject of legal influence can use to reach its goals. The unconditional advantages of the instrumental approach are that particular legal decisions can be assessed in different ways in different historical periods and that what is considered to be a legal means of achieving legal purposes at the present-day stage in the development of the law might not be the same tomorrow. The reasons for this are the lack of urgency of a particular purpose or a loss of lawful character of conduct that was within the legal framework due to the establishment of certain legal rules.

The most important aspect of the instrumental approach in jurisprudence is the continuous analysis of a subject's behavior aimed at achieving a legal purpose.

The instrumental approach, according to our comprehension, implies researching legal phenomena from the perspective of their reasonability and functional suitability for their use in the process of the legal activity of people in achieving their legal purposes. The only criteria of the existent necessity of one or another legal phenomenon is its usefulness for people. In other words, laws exist for the benefit of people.

In researching this particular subject, we pay attention to the statement that the law primarily is of use for communication between subjects of law. So, legal activity is the activity of people in a social environment, whose interests and legal purposes collide, coincide, overlap and need to be organized. That is a purpose of law.

The instrumental approach makes it possible for the law to realize its utility, uniting its dogmatism and sociology. From the viewpoint of instrumentalism, it is impossible to research legal rules and reveal their connection in isolation from the activities of people.

The main cognitive possibilities of the instrumental approach are to comprehend the reasonability of the use of one or another legal phenomenon to satisfy a subject's

interests of lawmaking activity, his or her interests in the sphere of the application of the law according to the conditions of choosing the instruments and comparing them to other ones.

Any subject of law needs legal instruments every time they face legal purposes. The legal instruments are the set of legal means used by a subject of law.

The research on the instrumental approach makes it possible for the author to conclude that the system of legal influence demonstrates a dynamic aspect of the legal system. This aspect allows us to trace the process of transforming the law from an abstract possibility into reality through the successive and objective implementation of legal means in the framework of the legal reality.

The instrumental approach is applied in many branches of science – in economics, sociology, chemistry, physics, and in the law as well. For example, D. Enoch and T. Fisher, using an instrumental approach, try to prove the necessity and validity of the use of statistical data in conducting legal research. In their opinion, the instrumental approach makes it possible to understand the difference between statistical data and individual evidence.<sup>6</sup>

Moreover, Y. Listokin believes that the instrumental approach is the most suitable approach for investigating the dynamics of imprisonment. He estimates the elasticity of prison admissions with respect to crime, applying the instrumental approach in interrelation with mechanical theory.<sup>7</sup>

In addition, J. Morgan<sup>8</sup> and N. Liao<sup>9</sup> talk about the possibility of using an instrumental approach in commercial contract law and medical law.

## 2. Correlation of Legal Regulation and Legal Influence

Before a detailed analysis of the establishment of legal rules, we will consider the issue of the correlation of legal regulation and legal influence.

Different judgments are given in Russian national jurisprudence concerning the “quantity” and “names” relating to the content of the process of legal regulation. For instance, S. Alekseev identifies a number of stages: the establishment of legal rules and their validity, the appearance of rights and obligations, and the realization of

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<sup>6</sup> David Enoch & Talia Fisher, *Sense and “Sensitivity”: Epistemic and Instrumental Approaches to Statistical Evidence*, 67(3) *Stanford Law Review* 557, 575 (2015).

<sup>7</sup> Yair Listokin, *Does More Crime Mean More Prisoners? An Instrumental Variables Approach*, 46(1) *Journal of Law & Economics* 181, 181–182 (2003).

<sup>8</sup> Jonathan Morgan, *Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law* 19–42 (Cambridge: Cambridge University Press, 2013).

<sup>9</sup> Nina Liao, *Combining Instrumental and Contextual Approaches: Nanotechnology and Sustainable Development*, 37(4) *Journal of Law Medicine & Ethics* 781 (2009).

those rights and obligations.<sup>10</sup> Alekseev also notes a stage of the implementation of law as a facultative stage. He considers that the process of legal regulation does not include the lawmaking process. It is necessary to recall that this process

starts from the juridical concepts, requirements needed, hierarchy of the... laws, the need to follow proper steps through channels and committees within the National Congress, quorum required until its final approval with the presidential sanction, when a project of law becomes an enacted law.<sup>11</sup>

In 1976, L. Yavich said that in practice the process of making law is a prerequisite and a normative foundation for legal influence on any social relations.<sup>12</sup> A number of researchers were of the same opinion. Legal regulation is a process of making obligatory rules of conduct and establishing sanctions for their infringement. Therefore, legal regulation appears as a form of lawmaking. Regardless of the subject of law, properly, legal regulation should be considered to be a system of actions to create rules of conduct and establish sanctions for their infringement. The foundation of this opinion is a systemic approach of establishing the elements of a mechanism of any kind of social influence, in which the process of creating rules of conduct distinguishes between the process of people's activities, whose conduct the rules regulate.

V. Gavrikov, in his article "Theory of State Regulation: A Special Study," writes that there is another point of view represented by such legal scientists as V. Isakov, V. Babaev and V. Syrykh.<sup>13</sup> He notes that Isakov identifies the stages of legal regulation as follows: the regulation of social relations, the establishment of subjective rights and legal obligations, and their realization. Isakov considers the regulation of social relations to be the development of legal rules – a lawmaking process. Babaev, speaking of these stages of legal regulation (the regulation of social relations and the validity of legal rules), stated that legal regulation is making legal rules – a lawmaking activity. Syrykh determined a first stage of legal regulation as the lawmaking stage and identified a stage of the realization of legal rules and a stage of the responsibility of law-breakers.

<sup>10</sup> Алексеев С.С. Механизм правового регулирования в социалистическом государстве [Sergey S. Alekseev, *The Mechanism of Legal Regulation in a Socialist State*] 34 (Moscow: Yuridicheskaya literatura, 1966).

<sup>11</sup> Така Oguisso & Maria J. Schmidt, *Sobre a elaboração de normas jurídicas* [*The Process of Making Laws*], 33(2) Revista da Escola de Enfermagem da USP 175, 175–176 (1999).

<sup>12</sup> Явич Л.С. Общая теория права [Lev S. Yavich, *General Theory of Law*] 204 (Leningrad: Publishing House of the Leningrad University, 1976).

<sup>13</sup> Гавриков В.П. Теория государственно-правового регулирования: результаты специального исследования // Международный журнал экспериментального образования. 2015. № 9. С. 64 [Vyacheslav P. Gavrikov, *Theory of State Regulation: A Special Study*, 9 International Journal of Experimental Education 63, 64 (2015)].

Thus, the issue of the stages of the legal regulation process is an issue concerning the comprehension of the essence of legal regulation and legal influence, it is not an issue concerned with the number (“quantity”) and names of the stages.

Let us turn our attention to an analysis of the form of legal influence in the field of constitutional relations.

First of all, constitutional relations influence on the legal system occurs because they define the principles of the State, social values and dependence, and the independence of the law; but on the another hand, they influence modern law and all the branches of law. In this regard, M. Osipov noted that constitutional relations guarantee the identity of the legal system and the national-cultural traditions, the law values of the people.<sup>14</sup>

Moreover, Chairman of the Constitutional Court of the Sakha Republic (Yakutia) D. Mironov analyzed constitutional relations as a constitutional form of political and socio-economic relations.<sup>15</sup> He proposes that the actual forms of constitutional relations influence on the development of the legal system are rulemaking; scientific and expert examination of normative legal acts; legal proceedings; the realization of the law; the implementation of the law; judicial practice; the harmonization of the legislation of the subjects of the Russian Federation. The author notes the set of forms is rather conditional, since the forms interact with each other or exist simultaneously in a number of cases, as for example rulemaking, lawmaking, the making of the rules of law and the lawmaking process. In particular, he insists on precisely defining the forms of constitutional relations influence on the legal system since this will make the forms more substantial.

It is necessary to agree with Mironov, who also distinguishes between the terms “form of influence” and “means of influence,” since in his opinion

the means of constitutional relations influence act on [the] development of the legal system in different ways: some of them act automatically due to constitutional establishment, others [are] realize[d] through [the] use of... [the] status, powers and competence of a certain body of state authority and other authority bodies.<sup>16</sup>

In our opinion, constitutional relations have influence on the development of the legal system not to the same extent as they have influence on the development of social relations, and social relations form one or another element of the legal

<sup>14</sup> Осипов М.Ю. Теория конституционно-правовых процессов [Mikhail Yu. Osipov, *Theory of Constitutional and Legal Processes*] 46–47 (Moscow: Nota Bene, 2011).

<sup>15</sup> Миронов Д.Н. Конституционные правоотношения: воздействие на правовую систему // Журнал российского права. 2013. № 12. С. 36 [Dmitry N. Mironov, *Constitutional Legal Relations: Impact on the Legal System*, 12 *Journal of Russian Law* 33, 36 (2013)].

<sup>16</sup> *Id.*

system. The disadvantages of the means of constitutional relations influence reflect not only on the legal system as a whole. They also have influence on a person and a person's legal status. We have to note that the specific character of constitutional law influence lies in its universal nature relative to other branches of law. The result is that legal influence obtains a twofold nature: legal constitutional influence and dependence on a branch of law with a special set of means of legal influence.

In addition, T. Ashurbekov identifies the Procuracy as an effective means of influence on social relations. The reason is that the place of the Procuracy within the mechanism of national security is determined by its supervisory and compensatory influence on the bodies of national security. Furthermore, Ashurbekov determines the forms of the procurator's activity as the means of legal constitutional influence towards society: lawmaking and law implementation practice, legal proceedings, ensuring law and order, prevention and legal social control systems, a judicial system of protection of citizens' rights, legal ideology and legal culture.<sup>17</sup> All of these forms of activity have a social-oriented goal, which is positive influence on social relations. That is why the Procuracy may have an effect on the stability of the constitutional guarantees of a person's interests, society and the State.

From the foregoing, we can draw the following common theoretical conclusion. The forms of legal influence we have been speaking of are different, and they are the elements of the legal reality. The legal reality acts as the legal field in which other legal phenomena appear, for instance an informational and psychological form of legal influence.

### **3. Constitution and Constitutional Establishment of Legal Rules**

It is common knowledge that the word "constitution" comes from the Latin word *constitutio* and means "establishment," "system." In constitutional law, a constitution is a single normative legal act having particular legal features. A constitution establishes the general principles of society and state structure as well as the legal status of a person and a citizen. The specific character of the establishing of a constitution and the ensuring of its effect consists in the fact that a constitution does not need specific legal means to guarantee the established legal rules, i.e. punishment; they are merely of a statutory nature. The constitutional means of establishment show themselves both immediately (since having the feature of direct force) and through the concretization of normative provisions in special regulatory acts and subordinate regulatory acts.

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<sup>17</sup> Ашурбеков Т.А. Воздействие преобразований правовой системы на состояние законности и национальной безопасности // Право и политика. 2007. № 8. С. 24–27 [Tofik A. Ashurbekov, *The Impact of the Transformation of the Legal System on the State of Legality and National Security*, 8 Law and Policy 24 (2007)].

In particular, the legal structure of the establishment of constitutional rules of law does not imply certain (personalized) rights and obligations of certain subjects of law since the constitutional rules of law have a common, universal nature and influence all the subjects of law or some of them; they do not create certain legal relations and reflect in common constitutional relations (e.g. Article 10 of the Constitution of the Russian Federation). The common constitutional rules of law are in the form of the establishment of constitutional rules of law.

Constitutional law has much more common regulative norms than other branches of law do; constitutional law has no norms of a certain regulative nature, as eminent researchers have stated. The common regulative norms are norms-principles, norms-declarations, norms-programs, norms-interpretations, etc. Therefore, the norms-principles extend their application to all subjects of law regardless of the kind of relations which the subjects of law are participants to (e.g. civil law relations, administrative law relations, labor law relations, etc.). Often the norms-principles and the norms-declarations are fundamental provisions of constitutions.

In addition, it is necessary to mention some arguments in favor of the establishment of legal rules as a form of legal influence in the instrumental approach. Being the main law of the state and accordingly taking the main place within the national legal system, any constitution has particular legal features that distinguish it from other national and international legal acts. However, independently of the significance and universality of the provisions of constitutions as well as of their direct force, the highest legal effect, the particular procedure for adoption or alteration of a constitution and for protection of the constitutional norms, it is impossible not to notice that the provisions do not have prior influence on the ensuring of constitutional law and order that are the essential features of constitutional clauses.

In that sense, the value of a constitution generally consists in the fact that it establishes the most common and universal principles, rules and procedures that form the constitutional ideology of relations between a person, society and the State. It is generally assumed that the inalienable features of constitutional ideology are supremacy of law and the rule-of-law state, recognition and respect for the rights and freedoms of a person and a citizen, democracy and the people's representatives, private property and entrepreneurship, separation of powers, decentralization of the state apparatus, equality before the law and the courts, political and ideological diversity, multiplicity of political parties and freedom of activity of public association, independent courts and the adversarial character of judicial proceedings. All of them taken together make up the essence of a constitutional tradition that is to reach a balance between personal freedom and public authority.

L. Valentini is convinced that a constitution is a necessary constituent of a just society. She said that constitutions have instrumental value because they are

an instrument for the realization of freedom.<sup>18</sup> Moreover, V. Frick,<sup>19</sup> P. Nora<sup>20</sup> and A. Pizzorusso<sup>21</sup> also declare the value of a constitution.

To continue deliberating on the essence of the establishment of legal rules it is necessary to observe that the value paradigm of the constitution of a democratic legal state consists in the fact that a constitution defines the general strategy of the official legal ideology, its vectorial social parameters, and establishes fundamental principles of hierarchical state administration on the basis of recognition of the highest significance of the supremacy of the law. Moreover, a constitution establishes constructive functions of the state administration; those are quite different within the given competence. Furthermore, a constitution establishes the principle of the indisputability of general rights and obligations of citizens and guarantees the State will ensure them.

In addition, the constitutional norms secured in a constitution are fundamental for all of the branches of law of a state. Being of immediate action, the norms give impulse to the development of the legal system because of their lawmaking nature. A constitution is a legal normative basis of the present-day legislation system, the ignoring of which is impermissible in a democratic rule-of-law state. As L.A. de Saint-Just noted, a constitution is the beginning and the concentration of all the laws. Any rule of law coming from somewhere other than a constitution is tyranny.<sup>22</sup> J. Gutmann and S. Voigt determine the rule of law, as the subordination of all citizens and all representatives of the state to well-defined and established laws, to be a desirable trait for a country's legal system.<sup>23</sup>

We are about to consider the institution of property to differentiate the establishment of legal rules and legal regulation as different types of legal influence, which are considered by the author separately within the instrumental approach. F. Rossano, L. Fiedler and M. Tomasello define

<sup>18</sup> Laura Valentini, *On the Value of Constitutions and Judicial Review*, 11(4) Criminal Law and Philosophy 817 (2017).

<sup>19</sup> Verena Frick, *Rezension über Thomas Vesting/Stefan Koriath (Hg.), Der Eigenwert des Verfassungsrechts. Was bleibt von der Verfassung nach der Globalisierung?*, Tübingen: Mohr Siebeck 2011 [Review on T. Vesting & S. Koriath (eds.), *The Intrinsic Value of Constitutional Law. What Remains of the Constitution After Globalization?*, Tübingen: Mohr Siebeck, 2011], 54(2) Politische Vierteljahresschrift 363 (2013).

<sup>20</sup> Pierre Nora, *Valeur universelle de la Constitution des Etats-Unis: La France et l'expérience américaine [Universal Value of the United States Constitution: France and the American Experience]* in *Et la Constitution créa l'Amérique [And the Constitution Created America]* (M.-F. Toinet (ed.), Nancy: Presses Universitaires de Nancy, 1988).

<sup>21</sup> Alessandro Pizzorusso, *Il valore della Costituzione nell'Italia del 2005 [The Value of the Constitution in Italy in 2005]* (Sep. 2, 2018), available at [http://www.astrid-online.it/static/upload/protected/PIZZ/PIZZORUSSO\\_Valore-Costituzione-16\\_04.pdf](http://www.astrid-online.it/static/upload/protected/PIZZ/PIZZORUSSO_Valore-Costituzione-16_04.pdf).

<sup>22</sup> Нормотворческая юридическая техника [*Normative Legal Technology*] (Moscow: Institute of Legislation and Comparative Law under the Government of the Russian Federation, 2013).

<sup>23</sup> Jerg Gutmann & Stefan Voigt, *The Rule of Law: Measurement and Deep Roots* (Sep. 2, 2018), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2692771](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2692771).

property as a social “agreement” [that] comprises both a communicative component, in which someone makes a claim that she is entitled to some piece of property, and a cooperative component, in which others in the community respect that claim as legitimate.<sup>24</sup>

Economically speaking, property is the relations on the subject of supremacy over certain material and spiritual values. These relations are in the center of relations of production, consumption and distribution of welfare; they also define the main features and the essence of the economic system and the economic authority. As A. Rapaczynski writes,

[P]roperty rights is a precondition of a market economy, the development of market institutions is often a prerequisite for a viable private property regime.<sup>25</sup>

Within the framework of civil law, the institution of the right of property is a set of rules of law regulating the relations of the subjects of law on the subject of supremacy over material objects.

At the same time, the constitutional legal institution of property contains norms establishing the common constitutional status of the institution of property: recognition of different forms and levels of property (pt. 2 of Art. 8 of the Constitution of the Russian Federation (RF)); equal legal protection of these forms (pt. 2 of Art. 8 of the Constitution RF); establishment of legal regime features of the right of property on land and other natural resources as the basis of life and activity of the people living in the corresponding territories (pt. 1 of Art. 9 of the Constitution RF); restriction of the right of private property due to certain constitutional legal conditions, including emergencies (pt. 1 of Art. 56 of the Constitution RF).

The institution contains the norms establishing the particular status of private property (pt. 1 of Art. 35 of the Constitution RF – “the right of private property shall be protected by law”); the legal content of private property (pt. 2 of Art. 35 of the Constitution RF); the guarantees of protection of private property (pt. 3 of Art. 35 of the Constitution RF); recognition of the other legal elements of the right of property – recognition of the right of inheritance (pt. 4 of Art. 35 of the Constitution RF), recognition of intellectual property (pt. 2 of Art. 44 of the Constitution RF); recognition of the subjects of the right of private property (pt. 2 of Art. 35 of the Constitution RF – everyone shall have the right to have property both personally and jointly with other

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<sup>24</sup> Federico Rossano et al., *Preschoolers’ Understanding of the Role of Communication and Cooperation in Establishing Property Rights*, 51(2) *Developmental Psychology* 176, 176–177 (2015).

<sup>25</sup> Andrzej Rapaczynski, *The Roles of the State and the Market in Establishing Property Rights*, 10(2) *Journal of Economic Perspectives* 87, 102 (1996).

people; pt. 1 of Art. 36 of the Constitution RF – citizens and their associations shall have the right to possess land as private property); the certain legal regime of objects of the right of private property (pts. 2, 3 of Art. 36 of the Constitution RF – possession, utilization and disposal of land and other natural resources shall be exercised by the owners freely, if it is not detrimental to the environment and does not violate the rights and lawful interests of other people (pt. 2 of Art. 36 of the Constitution RF).

#### **4. The Concept and Particularities of the Establishment of Legal Rules**

The establishment of legal rules expresses laws governing the origin of the law, because before the law becomes valid, first it should be established. The establishment of legal rules per se is an intentional influence on social relations to regulate them through legal rules.

It should be noted that in the world of legal literature the concept of the establishment of legal rules has not received adequate coverage. Most often, the issues relating to the establishment of legal rules are considered from a practical aspect (F.M. Kay, J. Brockman,<sup>26</sup> J.-P. Gagnon,<sup>27</sup> E.F. Mooney,<sup>28</sup> Q.J. Wang,<sup>29</sup> etc.). Accordingly, there is a need to develop a theory of the establishment of legal rules because "Practice without a theory is blind."

Therefore, the author, defining the establishment of legal rules through the generic term of legal influence, takes into account that the legal influence within the instrumental approach contains such forms as legal regulation and legal protection, but the establishment of legal rules.

Hence, the diversity of the establishment of legal rules consists in the following:

- The establishment of legal rules has an intentional character that is expressed in the process aimed at achieving the comprehended purpose of the legal regulation of social relations through the legal rules; these relations are very important for the life of society and being volitional per se they aim at certain results. The relations are stable, regular and typical. In addition, they could be formalized and are controlled from the outside;

- Moreover, one should take into account that the purpose of regulation through the rules of law reflects in law the prior awareness of the legislator, and the legislator

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<sup>26</sup> Fiona M. Kay & Joan Brockman, *Barriers to Gender Equality in the Canadian Legal Establishment*, 8(2) *Feminist Legal Studies* 169 (2000).

<sup>27</sup> Jean-Paul Gagnon, *Post-Colonial Public Law: Are Current Legal Establishments Democratically Illegitimate?*, 5(1) *African Journal of Legal Studies* 21 (2012).

<sup>28</sup> E.F. Mooney, *Legal Services and Legal Establishment*, 70(3/4) *West Virginia Law Review* 363 (1968).

<sup>29</sup> Q.J. Wang, *Legal Establishment on Subject of Ecological Compensation*, 19(1) *Zhongguo Renkou Ziyuan Yu Huan Jing/China Population Resources and Environment* 139 (2009).

considers the purpose as a potential result of potential activity that is useful for a society to achieve;

– For, the legislator's goal is the regulation of social relations through the rules of law. Regulation is the transition of relations to a model of conduct or it is modelling of social relations that is useful and necessary for a society. Within the framework of modelling the subjective rights and legal obligations of relations participants are defined, and their realization aims at ensuring the realization of a model; moreover, legislatively established social relations are in fact the implementation of reality in the legal form. Here, N. Vitruk noticed that the procedure of normative evaluative reflection contains appraisal (i.e. the comparison of a typical situation with other situations and the revelation of its usefulness or harm for a subject of cognition), giving an evaluative judgment and at least transformation of the evaluative judgment into a perfect form. A process of comprehension increases a subjective part of the genesis of norms.<sup>30</sup>

D. Kerimov's words about the accent of the creative nature of the legislator is to be paid attention to since they highlight that the legislator should not only show the changes of the external environment, but should also ensure the influence on the changes by suspension or speeding up and protecting.<sup>31</sup> According to Kerimov, thus the legislative practice is of a creative nature since it does not simply reflect the changes of the external environment, rather it is a complex process of purposeful, focused and normative legal transformation of the external environment. Only because of that, the legal rules have effect on the environment, where they came from. In fact, the logic of the judgments proves Kerimov's thesis that social relations are regulated through legal rules and the modelling of wished-for social relations.

The author of the paper supposes the implementation of reality in the legal form is mediated by the mechanism of legal reflection. Taking into account that the issue concerns the establishment of legal rules, advance reflection should take place obviously, the plot of which is a fact that all the consequences should be foreseen before any actions.

One can give an example that the norms are an indication of the connection between them and the reflection. Any time the legislator formulates a norm he tries to foresee any negative consequences, and in case of their arrival the legislator foresees the formula for dealing with them. Lawmaking is a process of cognition, reflection and creation of the future. It is appropriate to consider lawmaking as a form of advance reflection of social consequences. At the same time, being a reflection of life, legal acts and the legal rules in them are like gates to past times. They also

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<sup>30</sup> Витрук Н.В. Правовой статус личности в СССР [Nikolay V. Vitruk, *The Legal Status of the Individual in the USSR*] (Moscow: Yuridicheskaya literatura, 1985).

<sup>31</sup> Керимов Д.А. Культура и техника законотворчества [Dzhangir A. Kerimov, *Culture and Technology of Lawmaking*] (Moscow: Yuridicheskaya literatura, 1991).

make it possible to “watch relations, manners, conflicts that existed [at] that time, i.e. to feel the past.”

In that sense, legal rules are of significance to the extent that they serve as a form of advance reflection and form the conduct of people. Even in the cases where the positive legal norms ensure social standards that existed before, it is appropriate to consider them as a form of advance reflection. This is possible due to the fact that the norms contain the information about the limits of freedom, the limits of legal conduct and the liability for their infringement. Any legal norm informs the participants of social interactions about the rules of conduct before the actions take place, and in that sense the norms of law are a form of advance reflection.

The author of the paper considers it important to pay attention to the static nature of the establishment of legal rules. Since social statics have the goal of finding and establishing social-oriented laws, the term “establishment of legal rules” defines the certain elements of legal statics (initial features of a legal system, initial connections between the elements of the system, forms of legal influence, etc.).

For instance, if one considers the static nature of the establishment of legal rules within constitutional law, we may state that the Constitution of the Russian Federation establishes the common legal construction, law and order, based on which the mechanism of state and municipal authority functions and the rights and freedoms of person are guaranteed. Constitutional “rights may change and develop, yet as the heritage of our political and legal culture, they possess a solid core meaning.”<sup>32</sup> The prospective nature of the Constitution is a particular form of social and scientific prognostication, of creative law influence on the arrival of new social relations. There is a conclusion which states that the exclusive significance of the new Constitution consists in the fact that it legally establishes the sovereignty of Russia as a united, multinational state, as a state of civilization, as a state of a united civil nation bound together by Russians, the Russian language and Russian culture, as a state holding a noteworthy place within the world community. The Constitution ensures the present-day model of the federalism of the Russian Federation.

When analyzing the establishment of legal rules as a variety of legal influence in criminal law, we find the reasoning that criminal law relations is a crime committed by a person since crime is a juridical fact causing criminal law relations between people who commit a crime and the State. These relations between people and the State at first remain static (until a person is found guilty of a crime) and then become dynamic (when punishment for a crime is imposed). Particularly, point 2 of Article 2 of the Criminal Code of the Russian Federation declares that for the accomplishing of the tasks of the Code, the Code establishes the grounds and principles of criminal responsibility, defines which deeds are recognized as offences dangerous to persons, society or the State, and establishes the types of punishment

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<sup>32</sup> Marijan Pavčnik, *Questioning the Moral Understanding of Law*, 8(2) *Danube* 111 (2017).

and other penal measures for the commission of offences. Therefore, we may state that the establishment of legal rules as a variety of legal influence is used in different branches of law. The range of the establishment of legal rules is different depending on the branch of law. For instance, legal influence will be exercised more in the fundamental and main branches of law through the establishment of legal rules.

At first sight, the establishment of legal rules reflects the ways the law arises whereas for the law to be in force it has to be established. The establishment of legal rules is a purposeful action aimed at having an impact on social relations for their legal regulation through legal rules.<sup>33</sup>

Legal certainty features the establishment of legal rules and reflects the practical function of introducing a subject to a system of values and norms of a social environment. We are to understand that the establishment of legal rules forms the basis for selective activity of a subject, and therefore the establishment of legal rules indicates the potential activities of a subject through legal rules.

It is possible to predict the legal forms of subject activities through the establishment of legal rules. Therefore, understanding "essence" as a philosophical category that means important, fundamental, key things, let us understand the essence of the establishment of legal rules as the will of the State. It forms the legal structure of social relations and subjects become capable of "finding themselves" in a legal system. Thus, structures of public authorities, establishments, enterprises are established, their goals and order of activities are determined, the competence and powers of officials are determined, legal statuses are secured, and therefore the participants, objects, terms of starting, changing and terminating legal relations concerning society are determined, too.

As a result, the law influences the content of social relations, which is activity. In general, the results of activities of individual and collective subjects of law reflect social relations. Social relations need legal regulation. At the same time, social relations may appear not only as activity, they may also appear in a passive form as legal statuses, social institutions. They are also regulated through legal rules, and, that case, legal influence is carried out through the establishment of legal rules.

### 5. Three Hierarchical Levels of Establishment

There are three hierarchical levels because the establishment of legal rules determines the selective activity of a subject: semantic, objective and operational.

The semantic level of establishment of legal rules has the most general nature and determines a person's relationship to objects having a personal meaning to the person. The objective level of establishment of legal rules has to do with a person's

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<sup>33</sup> Берг Л.Н. Инструментальные аспекты исследования правового установления // Вестник ЮУрГУ. Серия «Право». 2016. № 16(2). С. 21 [Lyudmila N. Berg, *Instrumental Aspects of the Study on Legal Establishment*, 16(2) Bulletin of the South Ural State University. Series Law 19, 21 (2016)].

certain actions and his or her wishes “to push the matter through.” They determine the relatively sustained nature of activity. If the actions stop, motivational excitement is the result. This provides the potential for the continuation of the actions.

At the operational level of establishment of legal rules, we can single out these sublevels: constitutional establishment of legal rules, civil establishment of legal rules, criminal establishment of legal rules and administrative establishment of legal rules.

As an example of constitutional establishment of legal rules, we can consider the establishment of legal status and relationships between the bodies of state authority of the subjects of the Russian Federation (Art. 77 of the Constitution RF). Under Article 77, subjects of the Russian Federation shall establish the system of bodies of state authority independently and according to the principles of the constitutional system of the Russian Federation and the general principles of the organization of representative and executive bodies of state authority established by federal law.

As an example of civil establishment of legal rules, we may consider Article 48 of the Civil Code of the Russian Federation where the status of legal entity is established. The features of legal entity reflected in the article are as follows:

- Organizational unity (a legal entity is an organization);
- Property independence (having one’s own property);
- Property liability (a company’s property is liable for its commitments);
- Company’s name;
- The capability to acquire and exercise civil rights and perform duties;
- The capability of suing and being sued in a court.

These features distinguish a legal entity from other legal forms. For instance, a unitary enterprise viewed as a subject of law (Arts. 113, 114 of the Civil Code) is distinguished from the enterprise as a property complex, used for the performance of business activities, i.e. an object of rights (Art. 132 of the Civil Code).<sup>34</sup>

Analyzing criminal establishment of legal rules, we may agree with N. Vitruk’s opinion that rights and duties from other branches of law complement the system of constitutional rights, freedoms and duties. In criminal law they are regulated by the criminal legal rules. A criminal legal rule establishing the legal status of a person in society determines the range of potential subjects of criminal legal relations and provides them with legal personality which is a part of the criminal legal status of a person (for instance, Arts. 19 and 20 of the Criminal Code of the Russian Federation).<sup>35</sup>

With regard to administrative establishment of legal rules, there is a possibility to consider administrative legal regimes to be an institution of administrative law,

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<sup>34</sup> Гражданский кодекс Российской Федерации. Постатейный комментарий к главам 1–5 [*Civil Code of the Russian Federation. Commentaries to Chapters 1–5*] (L.V. Sannikova (ed.), Moscow: Statut, 2015).

<sup>35</sup> Vitruk 1985.

for example. Their legal foundation is the Constitution of the Russian Federation, federal laws, the decrees of the President, the decisions of the Government, the acts of the federal executive bodies of state authority, the laws and other legal acts of the subjects of the Russian Federation. There are acts that are devoted to the administrative legal regime: on veterinary medicine, on the sanitary and epidemiological welfare of the population, on states of emergency, on the exclusive economic zone, on a closed administrative-territorial entity, on the state border of the Russian Federation, on health-improving areas and resorts. The major part of the issues are regulated by the relevant legislative acts, assigning the administrative regimes as a part of a basic elements of administrative law.

### **6. Types of Establishment of Legal Rules**

The establishment of legal rules occurs in public law and in private law, both of which involve interests. Public law is oriented towards the satisfaction of social and public interests; private law satisfies personal, private and corporative interests.

As legal scientists note, public law establishment of legal rules is traditionally oriented not only towards the strengthening and growth of liability in the field of executive power, but also towards the creation of new legal mechanisms for tackling the management challenges facing the state authorities as well as the local authorities.

Public law establishment of legal rules is exercised by the methods of normative orientation and imperative orders influencing the will and wishes of individuals and legal entities in the way of legal power to induce and force them to act so as to reach common goals and satisfy public interests. Public law establishment of legal rules is supposed to be viewed from the perspective of substantive administrative legal rules, establishing statute provisions (such as participants, rights, duties, liability, administrative legal regime of fulfilment).

In considering private law establishment of legal rules, we should analyze the term "servitude" as it relates to a parcel of land. The legal basis of the term as well as the criteria for its classification were developed in Roman law, but it retains its meaning as a model for understanding the essence of these rights in contemporary property law.

Servitude is established in the Civil Code of the Russian Federation. For the purposes of defining "servitude," we should look at point 1 of Article 274 of the Civil Code.<sup>36</sup>

The legislator has defined servitude as the right to the limited use of a neighboring parcel of land that shall be granted by claim of the owner of another neighboring parcel of land. The servitude may be established to guarantee passage across the neighboring parcel of land both on foot and by motor vehicle, to provide for the laying and operating of electric power and communication lines, as well as of pipelines, for water supply and amelioration, and also for other needs of the owner of the realty, which cannot be provided for without establishing the servitude.

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<sup>36</sup> *Civil Code of the Russian Federation*, *supra* note 34.

Depending on the establishment of the types of legal activities, there is the establishment of legal behavior and the establishment of illegal behavior.

In the area of the establishment of the types of legal activities, research should be undertaken concerning the legal activities of a person, since they are one of the basic categories expressing the dialectic interconnection between personal and social, private and public interests in the field of legal social relations.

The Constitution of the Russian Federation establishes the legal nature of the legal activities of a person. On the one hand, "Man, his rights and freedoms are the supreme value. The recognition, observance and protection of the rights and freedoms of man and citizen shall be the obligation of the State" (Art. 2 of the Constitution RF); on the other hand, "The exercise of the rights and freedoms of man and citizen shall not violate the rights and freedoms of other people" (pt. 3 of Art. 17 of the Constitution RF).

Under these provisions the State acts for the benefit of a person (man and citizen), and a person may not violate the rights and freedoms of other people nor the legislation of the Russian Federation when exercising his or her rights and freedoms.<sup>37</sup>

In the area of the establishment of the types of illegal activities, it must be noted that the constitutional (in the constitutional acts) and the constitutional-law liabilities (established by the Constitution and other sources of constitutional law) are an independent type of liability.

The foundation of this type of liability is constitutional delict. It is an act (action or omission) of a subject of "constitutional law relations" that is inappropriate for the due behavior established by the constitutional-law rules, and thus the subject becomes liable to constitutional-law proceedings.

The sanctions of constitutional-law liability include declaring an act illegal, suspension, dismissal and transition of the powers of local authorities to the bodies of state authorities (the introduction of temporary state administration), early termination of powers of local authorities on exercising separate powers of state authorities (withdrawal of the powers of state authorities), cancellation (or recognition as null and void) of legally meaningful results and the cancellation (suspension) of legal acts.<sup>38</sup>

## 7. Establishing Means and Constitutive Norms

It is important to note that the system of the legislatively established legal means, their quality and frequency of use is recognized as a basic feature of a society's legal

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<sup>37</sup> Воронин Д.В. Психолого-правовые аспекты правомерного поведения личности // Юридическая психология. 2014. № 4. С. 18–20 [Dmitry V. Voronin, *Psychological and Legal Aspects of Rightful Behavior of a Person*, 4 *Legal Psychology* 18 (2014)].

<sup>38</sup> Абдулгалимов Р.З., Сунцов А.П. Юридическая ответственность общественных объединений как субъекта управления делами государства // Административное и муниципальное право. 2014. № 8. С. 807–810 [Rustam Z. Abdulgalimov & Alexander P. Suntsov, *Legal Liability of Public Associations as a Subject of State Affairs Management*, 8 *Administrative and Municipal Law* 807, 807–810 (2014)].

culture. If the range of different legal means is not sufficient or people cannot use the means for resolving their issues, one can conclude that the legal culture of the society is not advanced.

For example, S. Alekseev noted that all legal means are subdivided into so-called “establishing means,” or methods of impact (external factors in reference to a subject’s will – permissions and prohibitions established in legal rules, subjective rights and legal duties).<sup>39</sup> In his opinion, legal means are of a synthetic nature since they are devoted to connecting a purpose and a result. Thus, legal means are a bridge between a subject and an object of activity, an ideal model and a materialistic result.

It follows then that legal means as a specific link include the ideal element (legal instruments, establishing means – subjective rights, duties, preferences, prohibitions, encouragement, punishment) and the materialistic element (technologies, means of using the instruments – acts of exercising rights and duties).

Based on this, it is possible to determinate the features of the establishing means (instruments). They are:

1. Substance existence characterizes a thing itself, substance, its materialistic feature as a real existing fact of reality (Alekseev).

2. Informational nature. This means the legal instruments are the information legislatively established and expressed in legal facts, subjective rights, duties, preferences, prohibitions, encouragement, punishment, etc.

3. Static nature. This means the legal instruments cannot be used automatically. They are prescriptions, not acts. One needs to “take them in hand” and then use them.

4. The establishing means are generally obligatory, since they are established in acts of law, where the due behavior is also established.

5. The establishing means can be viewed as models for reaching results.<sup>40</sup>

We can state that legal means in expressing external factors in reference to a subject’s will correspond to the establishment of legal rules as a type of legal impact. However, by analyzing a list of normative acts we can conclude that legal means should be established more logically since their system is an algorithm of resolving issues. It is necessary to consider the dialectics of relationships between purposes and the means in the field of rulemaking processes, since dialectics is of a two-way determinative nature. On the other hand, depending on the purpose there should be the selection of the legal means for reaching the purpose. Virtually, purposes need the relevant legal means that determine their nature and direction.

The establishment of legal rules is expressed in rulemaking. The author agrees with the statement that by using legal means with open content the State delegates authority to carry on the process at the level of exercising the rights (certainly, where

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<sup>39</sup> Алексеев С.С. Правовые средства: постановка проблемы, понятие, классификация // Советское государство и право. 1987. № 6. С. 12–19 [Sergey S. Alekseev, *Legal Means: Problem Posing, Concept, Classification*, 6 Soviet State and Law 12–19 (1987)].

<sup>40</sup> *Id.*

it is possible).<sup>41</sup> With the legislator and the source of rulemaking in its bodies of state authority, the State establishes such legal regimes corresponding to public interest most of all.

Since the issue of rulemaking has been touched upon, it is necessary to make note of the constitutive norms used in the process of rulemaking and objectifying the establishment of legal rules. For defining such norms one uses different names, for instance "initial," "starting," "constitutive." It seems that "constitutive" is the most appropriate because it shows the genetic nature of the norms – the law as a source of creating such norms. They have a number of features. First, they do not contain the rules of behavior in the form of permission, prohibition and duties. Not being of an obligatory nature, the constitutive norms carry out specific functions: declarative norms show the motivation of the legislator to issue normative acts; principle norms form the beginning of regulation depending on the branch of law; statement norms establish the order of things; definition norms define the vocabulary, etc. Second, the structure of the constitutive norm is not typical; because of that it is not easy to single out the common elements of the norm (hypothesis, disposition and sanction). Third, such norms have to do with the establishment of legal rules, not legal regulation – since legal regulation is conducted through regulative norms. Thus one can state that such legal means as legal declaration, principles of law and legal definitions, etc., correspond to the establishment of legal rules as a type of legal impact.

It is well known that the division of normative acts among branches of law and legal institutions needs to state the structured common part including principles of law, special terminology, etc. The role of constitutive norms in the process of forming such a differentiation is hardly possible. Constitutive norms strengthen the system of law and make it more complete, taking part in the establishment of legal rules, in creating large parts of the law (such as branches of law, sub-institutions), supporting logical and systematic interconnection between regulative and protective norms.

### Conclusion

It is necessary to note that the establishment of legal rules forms the structure of social relations. There are different types of establishment of legal rules, such as public law and private law establishment of legal rules, the establishment of legal behavior and the establishment of illegal behavior. Moreover, the establishment of legal rules determines the selective activity of a subject through semantic, objective and operational levels. Furthermore, constitutive norms objectify the establishment of legal rules. Finally, if we consider the establishment of legal rules as a type of legal impact, then we can come to the conclusion that it corresponds to legal means representing external factors to the subject's will.

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<sup>41</sup> *Вопленко Н.Н. Источники и формы права [Nikolay N. Voplenko, Sources and Forms of Law] 22 (Volgograd: Publishing House of the Volgograd State University, 2004).*

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