

UDC (УДК) 340.12  
DOI 10.32518/2617-4162-2018-1-11-16

**Стовба Олексій В'ячеславович,**  
доктор юридичних наук,  
адвокат Харківської обласної колегії адвокатів  
e-mail: Stovba34@mail.ru  
ORCID ID: 0000-0002-8154-8929

## **НОРМАТИВНІСТЬ ПРАВА: ФІЛОСОФСЬКО-ПРАВОВЕ ОСМИСЛЕННЯ**

**Анотація.** Осмислено феномен правової нормативності у світлі авторської концепції – темпоральної онтології права. Ця теорія є певним способом неklasичної правової думки, яка зосереджується на сутності юридичної особи (сутність права) та правовій сутності – відповідності між вчиненим діями та її правовими наслідками. Стверджується, що юридичний позитивізм чи школа природного права не можуть розкрити питання про природу правової нормативності в її найглибшому походженні. Тож прихильники класичного способу мислення мають можливість уточнити онтологічну основу нормативності, її спосіб буття: тобто під час розгляду правової нормативності автор наголошує на необхідності подолання межі чистого юридичного бачення права в контексті філософсько-правового дослідження. Наголошено на необхідності виходу за межі суто юридичного світогляду при розгляді нормативності та переходу до філософсько-правового дослідження зазначеної проблеми. В якості методологічного підґрунтя у статті використовується метод фундаментальної онтології, започаткований німецьким філософом Мартином Гайдеггером. Розглянутий таким способом феномен нормативності дає можливість виявити його приховану структуру, відповісти на найважливіше питання – чому люди повинні підпорядковуватися закону, як це справді видається – не в ідеальному вимірі норми і правила, а в реальності буття. На базі цієї філософії стає можливим обґрунтувати феномен нормативності не з волі законодавця (правовий позитивізм), не з ідеального змісту свідомості (класичний юснатуралізм), а зі співіснування людей у темпоральному розриві між вчиненим діями та його правовими наслідками. В підсумку наводиться висновок, що правова нормативність є темпорально-онтологічним феноменом, який первісно локалізовано не в ідеальному світі норм і правил, а в соціальній дійсності сумісного буття людей у правовій події, як тяжіння між вчинком та його правовими наслідками.

**Ключові слова:** право, нормативність, темпоральна онтологія, тяжіння, правова подія.

**Stovba Oleksiy,**  
Doctor of Legal Sciences,  
The attorney of the Kharkov regional council of attorneys  
e-mail: Stovba34@mail.ru  
ORCID ID: 0000-0002-8154-8929

## **THE NORMATIVITY OF LAW: LEGAL-PHILOSOPHICAL REASONING**

**Abstract.** The article is dedicated to the reasoning of the phenomenon of legal normativity in the light of the author's conception – the temporal ontology of law. The temporal ontology of law is the certain way of the non-classical legal thought, which concentrates itself on the Being of the legal entity (Being of law) and the legal Being – the attraction between the committed deed and its legal consequences. Author strikes, that the legal positivism or nature law school are not able to reveal the question about the roots of the legal normativity in its deepest origin. Thinking by this – classical way of thought the researchers have any possibility to clarify the ontological basis of the normativity, its mode of Being, e. t.c. During the contemplation of the legal normativity the author stresses on the necessity to overcome the border of pure juridical vision of law towards legal-philosophical research of the named issue. As the methodological ground in the following article author uses the method of the fundamental ontology, which was elaborated by the German philosopher Martin Heidegger, which is supplemented by the philosophical constructions of the famous French philosopher Emmanuel

Levinas, hermeneutical French researcher Paul Ricoeur, contemporary British legal philosopher Oren Ben-Dor. On the basis of such philosophy becomes possible to establish the phenomenon of the normativity nor from the legislator's will (legal positivism), nor from the ideal content of the consciousness (classical natural law), but from the common human Being with one another in the temporal gap between the committed deed and its legal consequences. To consider the phenomenon of the normativity by this way gives us a possibility to reveal the hidden structure of it, to answer on the most important question – why people have to obey the law, how it is really happened – not in the ideal dimension of the norms and rules but inside the everydayness, in the reality of our Being-with-one-another. So, in its deepest roots the normativity opens itself not as the quality of the certain entity – the norm of the law (legal positivism), or rules of moral and values (natural law) but in the structure of the human Being itself, when we encounters the other people in the legal event. Thus, author makes the conclusion, that the legal normativity is the temporal-ontological phenomenon, which primary is located not in the ideal dimension of the norms and rules, but in the social context of the common human Being in the legal event as the certain attraction between the committed deed and its legal consequences.

**Key words:** Law, normativity, temporal ontology, attraction, legal event.

### Introduction

The research of the legal normativity is very simple, when we try to unfold it in its juridical dimension only. To consider law as the couple of the positive norms and rules, which was issued by the legislator (or another sovereign), we can come to the conclusion, that the legal normativity is a certain quality of the norms, similar to the enforcement in the case of its breaking, its formal determination e t.c. The origin of such quality is derived in the state authority, in the will of the ruling class, or in the legislator's competence. From the point of view of the legal positivism, all similar factors are the sufficient ground to the normativity of this or that norm. Thus, the way of dogmatic thought simply presupposes the legal status of the norms, that are issued by the authoritative person or organization and normativity as the necessary attribute of the similar rules. The similar position is maintained by Bulygin (2016), Kelsen (2009), Hart (2007) [1; 2; 3].

The situation is much more interesting in the case, when we consider law not as the simple set of the official rules, which are established by the state, but in the much variety perspective. In accordance with the statement of the natural law school the phenomenon of law is not limited itself by the official norms of the legal normativism, but includes much more than this. By this way we are able to speak about the law of reason and nature (school of natural law), law as the set of the norms which is issued by the sacral origins (religious roots of law), law as the certain quality of the human nature (anthropological legal thought) etc. The different ways of the legal thought consider as the foundation of the legal normativity not the objective factors, which are rooted in the will of the state, but certain presuppositions, which are derived from the consciousness (the religious faith, the ideas, which are immanent by the consciousness of the subject) could be characterized as the “subjective way of the legal thought”. In the similar situation there are also any difficulties with

the normative status of the similar law, because the necessary condition of its normativity is the existence of the certain “higher” entity: “The Being of the God, of the Reason, of Nature gives us a possibility to obey the such law without any doubts”. In the contemporary legal philosophy this way of thought is transformed in the so-called “non-positivism” (Alexy, 2009; Fuller, 2007) [4; 5].

So, we can come to the conclusion, that the phenomenon of the normativity is understood as the quality of the certain entity – official norms and rules, moral values, human Being, reason, social relationships e t.c. Due to these facts to reach the origin of the legal normativity means firstly to answer the question: what really law is? The way of the such thought is necessarily connecting with the operation named “destruktion” [6, 19]. The similar operation helps us to clear the phenomenon of law and opens the way toward its normativity. Then firstly we have to consider the traditional way of legal thought and its consequences to our topics. After this task we'll pass to the phenomenon of law as such and, thirdly, try to explicate the results of our investigation towards normativity of law, which (as we will see) is not equal to legal normativity.

### 1. The classical (optic) approaches to the normativity of law

Traditional, classical legal philosophy intends to determine the law as *entity* (Seiende – germ.) through the other *entity* – freedom, equality, justice. But the similar attempts like an endless circle. In other words, to determine one entity through the another is the way to the infinity, to the necessity of the further determination (“what is law?” – “freedom”, “what is freedom?” etc.). The second negative feature of the determination of the law as entity through the other entity is so-called “legal nominalism”, when the phenomenon of law loses its own unique content and turns into empty general concept, which marks the simple totality

of the other entity (“Law is freedom, equality, justice....”). The third imperfection of the classical position is a dogmatic way of the certain entity’s identification as legal. The legal status of the certain entity (norms, legal decisions and other legal objects) is not the result of the researches, but the dogmatic presumption is.<sup>1</sup> The specific feature of the similar approach lies in the free choice of the researcher, when the last chooses this or that entity as “law”, as the object of researches, and doesn’t think about criterions of its legal relevance, its “legal status” (“Rechtlichkeit”). At the same time, as we can see, such “legal entity” as legal norm or court decision always has the possibility, to turn into the “Unlaw” (for example, in the case of the review of the court decision by the higher court). And, equally, the status of the “legal irrelevant entity” at any time could be transformed into the “legal”, for example, when one or another thing becomes “evidence”, “object of the offence” etc.<sup>2</sup>

Thus, we can come to the conclusion, that classical legal science is not able to justify its claims, borders and limits of the researches. The reason of the transformation of the entity into the “legal entity” has the will of the legal scientist as its only ground, when all another aspects of this entity (biological, chemical, esthetical, economical) are reduced randomly. The questions about the criterions of the “legal relevance” of the entity left without answers. The same destiny has the “classical view” on the legal normativity also.

In my opinion, the attempts to find the roots of the legal status of the certain entity in this entity, in the entity itself, are hopeless. There are two main reasons for that. Firstly, each entity (and legal so) is determined as entity by Being (Sein – germ.). As noted British legal researcher O. Ben-Dor, “Being thoughtful about law relates to being thoughtful about the Being of law. Thinking about law must first be attentive to that being and thinking that ontic for-the-most-part with law conditions. The relationship between law and its Being understands the relationship between the ontic manifestation of law and its Being” [11, 93]. So, it is reasonable to suppose, that legal status of the entity is determined by its specific modus of Being – legal Being. But here is the second (methodological) difficulty: as M. Heidegger said, the science understands as real only those things, which are reachable for it *objectively* (*i.e. entity – A. S.*) [12, 162]. Thus, to make the similar operation, to reach the Being of the entity is the task of the philosophy and the way of our thought leads us with necessity from the legal science

(legal theory) to the philosophy of law, to the region of legal ontology.<sup>3</sup>

## 2. The non-classical (ontological) approach to the normativity of law

The philosophical (ontological) way is to think law in the horizon of Being (Sein). The last gives entity “to be” and determines the entity (Seiende) “as such”. Then, the legal status of the entity is determined by the Being also. The legal Being, Being of the legal entity is not randomly constructed modus of the Being, but is determined by the involvement of the entity into the legal event.<sup>4</sup> The elaboration of the next researches will be based on the ontological difference (Being/entity) and on the post-ontological difference (Being as such/Being of the certain entity), which were founded by M. Heidegger [6; 16, 3–30]. From the difference between the legal entity and its Being we are able to explain, in what way the certain entity becomes legal. In its turn, legal Being – Being of the legal entity – is derived from the “pure Being of law”, *i.e.* law Being, which is the core of the law event. Then, the further path of our research is the ontology of law, which is found on the post-ontological legal difference – between the legal Being and law Being.

As we noted, the classical approaches to the law interpret law as entity (legal ideas, subjects of law, legal norms etc.) and consequently could be marked as *optical*. The proposed way of research tries to think law from the horizon of the Being and due to this *ontological* is. The horizon of the understanding of Being is *time* (M. Heidegger) [6, 1]. In accordance with M. Heidegger, the unity of the Being and time is the *event* [16, 24]. Then in order to integral reasoning of the phenomenon of the law we have to think law Being in its connection with time of the law. Due to this fact our ontology of law could be marked as the *temporal ontology*. So, further we have to reveal the specific of *legal time* in its connection with the legal Being and the Being of law. Namely this connection is the most problematic place in our investigations and is the very obstacle by the way of the new “non-classic” reasoning of the normativity of law.

The event is not the same phenomenon as the process is. The difference is rooted in their temporal aspects. The process exists *in* the time, which obviously is understood as the endless chain of “now”. Opposite, the event is not “*in*” time: time *belongs* to the certain event. But the specific time of the event is quite different from the linear time

<sup>1</sup> The further argumentation of such thesis [10].

<sup>2</sup> On the necessity of the “ontological turn” in the philosophy of law see, for example: [13, 105].

<sup>3</sup> The experience of the similar investigation in my works about legal event: [14, 127–159]; [15, 133–146]; [9, 483–487]. Event (Ereignis – germ.) is understood here in Heidegger’s sense, as unity of Being and time: [16, 24]

<sup>4</sup> Secondary literature and critic of W. Maihofer’s position (J. Thyssen, A. Baratta) see in: [18, 151, 332].

of the process. The event is realized not continual, but “pointwise”, at the “one moment”. The named moment is not simple “point” of time: not just one “now” in the line of another “now”. The “happening” of the event is the origin (and the end) of each process. So to speak, the event “creates” the linear time as the certain “place”, in which “takes place” every process. As we can see, the time of the legal process – trial for example – is continual. But the time of the law event is not continual – it is not possible to say “how long” last the moments of murder, theft, road accident etc. Further we will try to describe the time of the law event as an “ecstatical contemporality”.

### 3. The temporal-ontological roots of the legal normativity

The beginning of the law event is certain – legal – action, which is constituted as legal through its *direction* to the Other as *Anyone* (P. Ricoeur). In other words, in the legal sphere we meet one another not as *Me* or *You* – as unique and unsubstitutable individual, but as *Anyone*, who could be replaced at his place at any time by another person. The similar determination of the legal human on *ontic* level has its existential-ontological roots in Werner Maihofer’s legal thought. This German legal philosopher in his famous book “law and Being” (“Recht und Sein”, 1954) [17] comes to the conclusion, that we are not just to live with one another “as such”, but in our Being-with Others always exist “as” *someone*: as buyer and seller, doctor and patient, driver and passenger etc [17, 32]. This modus of the “social Being”, i.e. “Being-as” (“Alsein” – Germ.) is the basic modus of human Being with the Others.

So, in the legal world *Anyone* commits his deeds as “Being as someone” towards another – equally substitutable persons, whose modus of social Being is tied up correlatively with the actor’s modus of existence. The similar actions immanently contain in itself the horizon of all its possible consequences i.e. possible “re-actions” of the Other “as” *Anyone* on the similar deed. Here we have the deal with the mutual relationships between them, which both constitute one another in the described interplay of “actions and re-actions”. This situation is close to the Levinas’ thought about the presence of the Other, which is primary to the presence of Ourselves, when the Other constitutes our modus of existence just by the fact of his presence.

But the similar situation is possible only then, when me and the Other both have common temporality – in the opposite case we just couldn’t meet one another. In accordance with the described circumstances the possible legal consequences – the “future” of the law event are

“contemporal” to the “past” of the event – legal action. In other words, at the *moment* of the commitment of the legal relevant deed the similar deed “already” “calls” its legal consequences from the future. The last, which intends from the future to the past, encounters the committed deed in the “presence”, when the deed “factually” meets its legal consequences. Because of these facts, on the optical level of legal processes, which are produced by the law event, “future” as the legal consequences of the committed deeds (sanction, for example), are “earlier” than the “past”, because of each “presence” before “to be passed” and “to become past” *earlier* “exists” as the future.

So from the similar point of view the time of the law is presented as the special “temporal loop”, when the past (legal deed) and the future (legal consequences) contemporarily-ecstatically direct to one another, to “tie up the loop” in its “factual” meeting in the present.

The upper description of the legal time makes possible to disclose law Being. Following Heidegger, Being “exists” as event (Ereignis). Then, law Being is the certain “modus of exist” of Being itself, when the last “exists” as “law Being”. As Heidegger said, to the essence of the Being belongs “that, what were (past)” “that, what might to be (future)” and “that, what ought to be (presence)” [19, 149]. So due to this statement it is reasonable to think law Being as “inter-belonging” between the “has-beens”, “possible” and “ought”, as “attraction” which put these three phenomena “to-gather”. On the notice level of the legal processes law Being reveals itself as *attraction* between the committed deed and its legal consequences. All that entity which was “caught up” by the law event at the same moment received legal modus of Being, the Being of the similar entity becomes legal Being. But at that time, when legal deed encounters its legal consequences, the temporal loop is tied up, and law Being is disappeared; legal entity becomes “normal” again and reveals itself in its chemical, physical, economic and others modes of Being.

Then, the main thesis of the temporal ontology of law is the grounding of that fact, that law originally the law Being “is”, i.e. “attraction” between the committed deed and its legal consequences, which “exists” in the horizon of the time of the law, so legal modus of the Being of the legal entity (idea, norm, thing, human being) is derived from the involvement in the law event.

**Conclusions.** By using the results of our researches it’s possible to re-thinking the problem of the legal normativity. From the positions of the temporal ontology of law we have to speak rather about the normativity of *law* than *legal* normativity. Because

of under the law we understand not certain entity – legal norms, legal relations, legal persons etc., but the special modus of the Being of similar entity, there are no more reasons to speak about the normativity as the *quality* of the certain entity. Opposite, legal entity receives its normative quality due to legal Being only.

But normativity is not the simple attribute of the legal Being. As we noted, legal Being is rooted

in the law event and in the Being of law as the “attraction” between the committed deed and its legal consequences, which “exists” in the horizon of the time of the law. Thus the normativity of such law is not its attribute or quality, but its *essence*, which puts “to-gather” different entity, which is involved in the event of Law and by this way its legal status received.

### List of References

1. Булыгин Е. В. Избранные работы по теории и философии права : пер. с англ., нем., исп. / [ под науч. ред. М. В. Антонова, Е. Н. Лисанюк, С. И. Максимова]. Санкт-Петербург: Алеф-Пресс, 2016. 476 с.
2. Кельзен Г. Чистое учение о праве и аналитическая юриспруденция. *Российский ежегодник теории права*. 2009. № 2. С. 432–453.
3. Харт Г. Л. А. Понятие права / пер. с англ.; под общ. ред. Е. В. Афонасина и С. В. Моисеева. Санкт-Петербург: Изд-во С.-Петерб. ун-та, 2007. 302 с.
4. Алекси Р. Дуальная природа права. *Российский ежегодник теории права*. 2009. № 2. С. 19–33.
5. Фуллер Лон Л. Мораль права / пер. с англ. Т. Даниловой, под ред. А. Куряева. Москва: ИРИСЭН, 2007. 308 с.
6. Heidegger M. Sein und Zeit. Tuebingen: Niemeyer, 2001. 445 p.
7. Рабинович П. М. Філософія права: деякі «вічнозелені» наукознавчі сюжети. *Право України*. 2011. № 8. С. 13–20.
8. Толстик В. А. Борьба за содержание права – важнейшее научное направление. *Право України*. 2010. № 4. С. 29–35.
9. Stovba O. V. Phenomenon of “A law” as Core of an Authentic Process of Trial. *Проблеми філософії права*. 2010–2011. Т. VIII-IX. Р. 483–487.
10. Стовба А. В. О перемене сущности или «что есть» право в эпоху постметафизики. *Правоведение*. 2008. № 1. С. 157–164.
11. Ben-Dor O. Thinking about Law. In Silence with Heidegger. Oxford and Portland, Oregon: Hart Publishing, 2007. 406 p.
12. Heidegger M. Das Ding // Vortraege und Aufsaeetze. Stuttgart: Klett-Gotta, 2009. P. 157–180.
13. Kaufmann A. Preliminary Remarks on a Legal Logic and Ontology of Relations. *Law, Interpretation and Reality*. Dordrecht, 1990. P. 104–123.
14. Неклассическая философия права: вопросы и ответы [Ю. Е. Пермяков, С. И. Максимов, А. В. Поляков и др.]. Харьков: Библиотека международного журнала «Проблемы философии права», 2013. 272 с.
15. Стовба А. В. Право и событие. Экзистенциально-онтологический анализ. *Российский ежегодник теории права*. 2011. № 4. С. 133–146.
16. Heidegger M. Zeit und Sein // Zur Sache des Denkens. Frankfurt am Main: Vittorio Klostermann, 2007. P. 3–30.
17. Maihofer W. Recht und Sein. Prolegomena zu einer Rechtsontologie. Frankfurt am Main: Vittorio Klostermann, 1954. 125 p.
18. Die Ontologische Begrueudung des Rechts. Darmstadt: Wissenschaftliche Buchgesellschaft, 1965. 742 с.
19. Хайдеггер М. Что зовется мышлением? Москва: Территория будущего, 2006. 320 с.

### References

1. Bulygin E. V. (2016) Yzbrannnie raboty po teorii i filosofyi prava [The selected works in theory of law and legal philosophy]. SPb: Alef-press. 476 p. [in Russ.]
2. Kelzen G. (2009) Chistoe uchenie o prave i analiticheskaya jurisprudencia (The pure legal study and analytic jurisprudence). *Rossiyskiy ejegodnik teoryi prava* [The Russian Yearbook of legal theory]. 2, 432–453 [in Russ.]
3. Hart G. L. A. (2007) Ponyatie prava (The concept of law). SPb.: Izdatelstvo Sankt-Peterburgskogo Universiteta. 302 p. [in Russ.]
4. Alexy R. (2009) Dualnaya priroda prava (Dual nature of law). *Rossiyskiy ejegodnik teoryi prava* [The Russian Yearbook of legal theory]. 2, 19–33 [in Russ.]
5. Fuller Lon. L. (2007) Moral prava (The Morality of Law). Moskva: IRISEN. 308 p. [in Russ.]
6. Heidegger M. (2001) Sein und Zeit (Being And Time). Tuebingen: Niemeyer. 445 p.
7. Rabinovich P. (2011) Filosofiya prava: dejaki «vichnozeleni» naukoznavchy sjugety (Legal Philosophy: some «evergreen» scientific plots). *Pravo Ukrainy* [Law of Ukraine]. 8, 13–20 [in Ukr.]

8. Tolstyk V. (2010) Borjba za soderganie prava – vagneyshee nauchnoe napravlenie (The Struggle for the content of the law – the most important scientific direction). *Pravo Ukrainy [Law of Ukraine]*. 4, 29–35 [in Russ.]
9. Stovba O. (2010–2011) Phenomenon of «A law» as Core of an Authentic Process of Trial. *Problemy Filosofiyi prava [Problems of the philosophy of law]*. Vol. VIII-IX, 483–487.
10. Stovba O. (2008) O peremene suchnosty ili “chto est” pravo v epochu postmetaphisiky (About the changing of essence or “what is” law in the age of postmetaphysics). *Pravovedenie [Science of law]*. 1, 157–164 [in Russ.]
11. Ben-Dor O. (2007) Thinking about Law. In *Silence with Heidegger*. Oxford and Portland, Oregon: Hart Publishing. 406 p.
12. Heidegger M. (2009) Das Ding (The thing). *Vortraege und Aufsaeetze [Lectures and essays]*. Stuttgart: Klett-Gotta. 157–180 [in Germ.]
13. Kaufmann A. (1990) Preliminary Remarks on a Legal Logic and Ontology of Relations. *Law, Interpretation and Reality*. Dordrecht. 104–123.
14. Neklassicheskaya philosophia prava: voprosy i otvety (The non-classic legal philosophy: questions and answers). Kharkiv: Library of the International Journal «Philosophy of Law Issues» (2013). 127–159 [in Russ.]
15. Stovba O. (2011) Pravo i sobitiye. Ekzistencialno-ontologicheskii analiz (Law and Event. Existential-ontological analysis). *Rossiyskiy egzegovodnik teoriji prava [Russian Yearbook of Law]*. 4, 133–146 [in Russ.]
16. Heidegger M. (2007) Zeit und Sein (Time and being). *Zur Sache des Denkens [To the cause of thinking]*. Frankfurt am Main: Vittorio Klostermann. 3–30 [in Germ.]
17. Maihofer W. (1954) Recht und Sein. Prolegomena zu einer Rechtsontologie (Right and being. Prolegomena to a legal ontology). Frankfurt am Main: Vittorio Klostermann. 125. [in Germ.]
18. Die Ontologische Begruendung des Rechts (The ontological basis of law). Darmstadt: Wissenschaftliche Buchgesellschaft (1965). 742 [in Germ.]
19. Heidegger M. (2006) Chto zovjetsa michleniem? (What is called Thinking?) Moskva: Territoriya budushchego (Problem of the future). 31–248 [in Russ.]