THE SPREAD OF SHADOW NORMS BEYOND STATE LEGAL SYSTEM: CHALLENGES OF A GLOBALIZED SOCIETY

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Abstract

The article analyzes the functioning and distribution of shadow norms in the globalized world. Shadow rules are classified according to their scope and degree of danger. Legal and social mechanisms of counteraction to shadow norms are considered. It is concluded that the mechanisms of combating shadow norms in a globalized society of different degrees of danger differ diametrically. Thus, in order to combat shadow norms that exist before or in parallel with legal norms, it is advisable to use social mechanisms. But, measures of legal responsibility should be strengthened with regard to illegal shadow norms.

Key words: *shadow norms, shadow law-making, underground activities, globalization, globalized society*

INTRODUCTION

Shadow norms are an integral part of the regulatory array, as much as we do not want to deny it. Sometimes they are society's response to unprofessional actions of state bodies, and in this sense, signal problems of state regulation; sometimes they

are clearly illegal and require a legal overreaction. But, regardless of how they will be considered: in the legal or non-legal sphere, – their functioning in society generates persistent negative patterns and stereotypes of behavior. It is worth recognizing the fact that shadow norms have been at all times and within all social systems, that is, so they have been a problem of every state. But modernity poses new challenges to legal systems. As a result of globalization, economic and cultural mutual penetration, such a phenomenon as convergence in law leads to the manifestation of the features of one legal system in another. This often enriches the legal system and stimulates its development. But, unfortunately, not only positive phenomena tend to borrow. Directly in this context, it is necessary to consider informal rules of conduct as "migrating" from one state to another, and sometimes rising to the supranational level. Thus, shadow rules cease to be a problem of certain legal system and just domestic legislation, but become a common challenge. This makes the issue of shadow law-making promising and necessary for research.

1. LITERATURE REVIEW, DEBATABLE TERMS AND MAIN CATEGORIES

The sphere of shadow law and shadow lawmaking can be defined as extremely controversial, which is also reflected in the terminology used.

It should be noted that shadow phenomena are often considered in other social and economic sciences, but not in legal ones. In particular, numerous publications are devoted to the phenomena of the shadow economy [Schneider 2013; Schneider & Williams 2013; Pickhardt & Pons 2006; Birks 2010; Mosiej 2004; https://ungc.org.pl 2018; Mosiej 2016; Masiukiewicz 2012; Alińska 2016], sometimes they are explored in the context of management [Russell 2010], labor [Bigaj 2013] and corporate law [Hobson 1998; Effron 2012]. But in the general theory of law, the analysis of shadow social manifestations is an infrequent phenomenon, although in recent years scientific interest in the mentioned problem is increasing significantly, as the influence of shadow regulators is increasing too. This diversity of sectoral approaches, as well as research within different legal systems, has given rise to a significant variety of terminology used.

Thus, in the sphere of legal research, the terms "shadow law", "shadow norms", "shadow rules", "shadow law-making", "informal norms" (rules, law-making), "unlawful rules" (behavior) [Ovchinnikov, Mamychev & Litvinova 2015], "shadow politics", "shadow authorities", "shadow government" [Axelrod 1992], "grey zone", "illegal rules" (behavior) are often used. Sometimes they are referred by authors as synonyms, and researchers emphasize this; sometimes they are used in the same or diametrically opposite context by default, without additional justification; and sometimes these categories are correlated in a certain way, based on a particular study (most often as part and whole or as cause and effect).

Let's look carefully at the specifics of the above categories and determine which terms in which cases will be the most appropriate.

Undoubtedly, shadow law-making deserves consideration in the context of social norms, which has been repeatedly demonstrated in the scientific literature, by E. A. Posner, for instance [Posner 2000]. At the same time, it remains an open question what nature these social norms are.

Quite often in special scientific papers, informal law-making is understood as the creation of norms that do not belong to the sphere of legislation, but generally belong

to the sphere of law (for example, rules formulated in court decisions, administrative bodies, as well as local legal and corporate norms) [Eisner 2002], also, there may be no variations of the formal law-making [Chalmers & Leverick 2017].
The distinction between formal and informal institutions has been conceptualized in several ways [Helmke & Levitsky 2003: 8]. One common distinction is state-societal. According to this approach, “formal institution” refers to state bodies (courts, legislatures, bureaucracies) and stateenforced rules (constitutions, laws, regulations), while “informal institution” encompasses civic, religious, kinship, and other “societal” rules and organizations [Eckstein & Wickham-Crowley 2003]. A problem with the state-societal distinction is that it fails to account for a variety of informal institutions, including the informal rules that govern behavior within state institutions and what Ellickson calls “organization rules,” or the official rules that govern non-state organizations such as religious orders, political parties, and interest groups [Ellickson 1991: 31].
In spite of the absolutely fair statement, that ″indeed, law is a complex structure, and its perceived legitimacy varies widely, over cultures, times, and domains of its everyday instantiation″ [McAdams & Nadler 2008: 866; Sarat & Kearns 1993: 9; Suchman 1997: 486–90; Calavita 2001], it will not be about alternative legal mechanisms and procedures in this scientific paper [Tyler 2013; Hutchison 2006]. On the contrary, in this case, shadow norms (rules) will be understood as rules of conduct that are not legitimized in any way. Not those contained in any sources of law. But those that have an informal, unwritten character, extend their effect to a wide range of social relations and actors, exist before the law or in parallel with it.
On this basis, for the purposes of this study categories ″shadow law″, ″shadow norms″, ″shadow rules″, ″informal norms″ (rules) will be treated as synonyms. Phenomena such as the ″shadow economy″, ″shadow politics″, ″shadow authorities″, ″shadow government″ and others will be used as an external expression of shadow norms in various spheres of social life.
Nevertheless, terms ″unlawful rules″ (norms, behavior), ″illegal rules″ (norms, behavior) will be referred to as part of the shadow norms that exist in society not just in parallel with official law, but in clear contradiction to it. That is, it can be qualified as an offense and even a crime.
There is no doubt, that shadow law clearly refers to the negative type of formation of the law [Калинин 2011: 19], but the categories ″shadow law-making″ and ″informal law-making″ can be used only with a certain degree of conditionality, since law-making is initially understood as an official procedure for the legalization of norms and a certain state subject of such legalization. However, although shadow norms are not officially fixed, but widely used, for social research it is possible to use this category by analogy.

2. METHODOLOGICAL BASIS OF THE STUDY

There are many problems in assessing the scope of shadow regulation, its nature and the degree of danger of specific regulators. In relation to the shadow economy, many direct and indirect methods have been developed, while such diversity is not observed for the shadow law. In addition, the representativeness of the data can always be questioned, since the entire field of study is "in the shadows". But this does not mean that the study claims to be inaccurate, because sometimes indirect methods,

complementing each other and confirming the data, provide reliability and complexity of the result.

Thus, the work can definitely be used dialectical method, since the shadow norms are in the plane of different social subsystems. Accordingly, only interdisciplinary research "on the border" of law, economics, sociology, psychology, political science, information technology in their interaction can clearly demonstrate these negative manifestations. This, in turn, leads us to use the integrative method, which in a globalized world makes it possible to realize the integrity of phenomena.

Also in the work the general method of comparison, as well as the method of legal comparativistics are admissible. They are absolutely necessary, since shadow norms due to globalization do not stay long within the same social and legal system. That is, at a minimum, they must be detected in advance to effectively counteract them in the future. And the analysis of other legal systems for this purpose is an excellent prerequisite.

One of the basic methods of scientific research is content analysis, carried out according to the semantic and quantification indicators of structural components of information in real life and virtual space. This will make it possible to identify the most "painful points" for society in the field of shadow norms, and in addition, will present a visualization of possible and most typical solutions to such situations in the world practice.

Also, the study will not be complete if we do not use the formal legal method, which will help to analyze the individual legal mechanisms that are provided in the legislation and other sources of law of different countries to combat shadow norms. In this context, it is useful to analyze their effectiveness or, conversely, inefficiency, along with the reasons for this.

The logical continuation should be the use of the legal modeling method, which will provide an opportunity to predict certain consequences of appropriate legal actions in the field of shadow norms. Such a methodology will allow to formulate the most effective mechanisms of fight against different types of shadow rules, and considering their national or supranational level.

3. THE STATE LAW-MAKING AND THE SHADOW RULES MECHANISM FORMATION: ASPECTS OF THE RATIO

In order to reveal in detail the mechanism of shadow norms occurrence, it is impossible not to turn first to the analysis of law-making in its classical sense. Namely, as the activity of the state represented by its public authorities and officials to create legal norms.

As is well known in the theory of law, a legal norm does not appear "from scratch", and state authorities and officials in democratic states should not create legal norms simply at will. The complex process of law formation begins long before its official registration, still in society. And law-making is only the final stage of the formation of law. The formation of law begins even when some new relations appear in society, which become quite common and consequently require certain regulation. But it is not a fact that this regulation will be legal in the beginning. Rather, on the contrary, people themselves will respond to the need and create rules of behavior that fit some common situation. When the above-mentioned rules of conduct become quite common in society and known to a wide range of people, from this point on it makes

possible to talk about the formation of so-called actual rules. They are not legal, but such norms regulate the vast majority of relations in society. And only some of them subsequently move to the level of law through the procedure of law-making. That is, the role of a competent, rational subject of law-making activity should be an opportunity to "discern" those relations that most require settlement, as well as those behaviors that are already used by society to regulate behavior (actual norms). To reliably reveal these relationships and common rules of behavior, a large number of methods are used (or should be used), including content analysis, various variations of opinion polls, the method of expert assessments, and so on. However, most of the actual norms remain at the level of society, not rising to the level of the state.

Thus, as stated earlier, in the process of law creation can be nothing insignificant, every detail plays an important role. It is necessary to distinguish the category "formation of law" (law creation) and "law-making" ("legislating"). The first of them refers to all the stages of the emergence of legal norms, considering their emergence in society. Meanwhile law-making represents the final stage of the formation of law, its official recognition and approval of state authorities. The formation of law is constantly and continuously simply because social life and social relations also are continuous. Specifically in this plane should be sought social conditionality of the legal norms. Legal regulation may have a high degree of efficiency only in the case when it comes from the actual rules of conduct, which in one form or another are formed in society before institutionalize them. This does not mean that they exist in structuralizing and formalised form, but in essence they are clear, reasonable, fairly common and recognized by many members of society [Mikhaylina & Palaščáková 2018: 350].

Now let's look at where the shadow norms come from. The point is that the actual norms are heterogeneous in nature. Some of them are positive, create the right behaviors and act as prerequisites for the creation of legal norms. But even in the absence of institutionalization, they operate in parallel with the legal norms and (or) complement them. Others create negative models of behavior and act in conflict with the law to varying degrees. This correlation could not have gone unnoticed in previous legal studies. So, some authors [Voigt & Engerer 2001] ″define four kinds of relationships between ... rules: neutral; complementary; substitutive (non-compliance is sanctioned either by the state or by private individuals); and conflicting″ [Chavance 2008: 61]. Accordingly, shadow norms are understood as those actual rules that relate to the law on the basis of the third or fourth method of the listed. Also it may be added that informal norms may not contradict "explicitly" the letter of the law, but it is necessary to contradict its spirit. That is, the commitment to shadow regulation in any case indicates a low level of legal awareness of a certain subject.

The causes of shadow law can vary significantly. Starting with absolutely illegal norms of interaction in criminal communities and ending with such the rules of behavior, which are formed as a "response" to the low social conditionality of legal norms. Due to various reasons and types, opposition to shadow norms should also be carried out taking into account these features, which will be discussed further.

4. MANIFESTATIONS OF SHADOW NORMS IN DIFFERENT LEGAL SYSTEMS AND CONSEQUENCES OF GLOBALIZATION

External manifestations of shadow norms are striking in their diversity. Starting with the ones that seem harmless enough. So, in Ukraine for decades drivers warn each other that police officers are on duty ahead, using a short activation of dipped-beam headlamps. This seeming innocuousness is quite deceptive, since in fact such behavior of drivers characterizes the general attitude to state bodies in Ukraine, where public authorities are not at all popular; they are feared rather than respected. Therefore, people consider it quite normal to warn each other about the "danger". That is, this behavior should be an important signal to the state that its mechanism is functioning incorrectly. And the most correct actions of the state in this case, obviously, should not be repressive actions, but adequate motivation to reform state bodies, that is, to remove the prerequisites and causes of the above-mentioned behavior.

This gives us the opportunity to come close to one of the most debated problems in the theory of law and branch of jurisprudence. It is "a pervasive concern in legal studies is the role of a coercion" [Goetz 2006: 2]. And in the field of shadow regulation research, the issues of state coercion and its limits are indeed characterized by ambiguity. As the scientists rightly believe: "during the past ten years we have seen the emergence of a number of "reforms" which have sought to resolve this multifaceted problem by imposing greater control on the rulemaking arena" [Cooley 1984: 894]. Although these words were written in the 80-ies of the last century, they have fully retained their relevance now. Unfortunately, rulemaking and legal practice follow the path when certain social prerequisites are ignored for a long time, but after reaching an invisible limit in perception, the legal reaction is carried out in the form of legal responsibility (including criminal) and sometimes in the form of violation of even basic human rights and freedoms.

Such shadow norms directly concern, in particular, the issues of migrants and refugees (phenomena that have arisen as a result of local problems and globalization at the same time). Thus, the majority of EU Member States have been demonstrated comprehensive tolerance and till certain time have been implemented an "open door" policy, not taking into account the fact that migrants and refugees often create compact human settlements (which complicate assimilation). Within such locations, it is often the social rules and moral stereotypes of the host country not dominate, as a stable group of people tries to live by "their own laws" in another country. These rules of conduct are frequently occupied a competing position not only with the social standards of the host country, but also with its legislation. And tellingly, most often, they win in this opposition. This is hardly a surprise to scientists who are investigating the issues of shadow rules creation, because "the relevant community may be a village, a nation, an ethnic or religious group, or an organization such as a political party, legislature, or state bureaucracy" [Helmke & Levitsky 2003: 26]. But this argument has long been unpopular in the policy of "open doors", although on its basis it was possible to prevent enormous number of problems, using a greater extent promoting of assimilation; replacing in time the informal rules of a certain community by their own rules of behavior; suppressing behaviors that are in clear contradict to national legislation. And finally, using more balanced approach to the criteria of migration policy.

But now, when it becomes obvious that shadow norms among migrants have become so all-encompassing, and public policy oftentimes becomes powerless against them, the fight not rarely begins to be carried out completely anti-legal methods, including an infringement of the basic human rights (such as the right to security and even to life, which is observed when states in the face of their bodies deliberately refuse to save drowning refugees). But this could have been avoided if shadow norms in the global context had been investigated in advance, rather than post-factum! Whereas "in order to draw "general lessons" from the transformation processes so far, the challenge of diversity has to be faced, and more inductive analysis has to be done of the variety of experiences that have surfaced" [Chavance 2008: 58-59].

One of the greatest amounts of shadow norms are concentrated, probably, in economy, and find external expression in shadow economy which in the modern world is in the public eye. The issue is truly transnational and one that requires effective action. So, "the vast majority of UK taxpayers pay what they owe, but a small minority seek to evade or avoid paying their fair share" [www.gov.uk 2016]. what does that say about developing countries, where the shadow economy is almost a sad norm of life, covering government officials, business at all levels and ordinary citizens. In particular, according to various estimates from 60 to 80% of the economy of Ukraine are in the shadows. This state of the economic system threatens the stability of society, its development, undermines the material component, without which it is impossible to implement any state programs and social initiatives.

Moreover, shadow norms in the economic sphere have reached their apogee, representing a fairly formalized and structured instructions. Firms offering illegal cash-out services (essentially tax evasion) have a so-called "financial discipline" that public authorities might envy. With stunning detail, it is indicated in what terms customers must provide documentation for cashing in, in what order and form. These rules are well-known and widely used, that is, it can be recognized as a classic shadow law.

However, in fairness it should be noted that the motivation in minimizing taxation differs from one entity to another. In a completely fair statement, "one way of identifying informal institutions is to look for instances in which the similar formal rules produce different outcomes and then attribute that difference to informal institutions" [Helmke & Levitsky 2003: 26]. Thus, it is easy to see that small and medium-sized businesses minimize their taxes banal in order to survive, since the tax legislation of Ukraine provides for a sufficiently high burden on enterprises (up to 80% of income [www.ubc.ua/Links/tax.html 2019]) in combination with the most complicated procedure of their administration and minimum of social guarantees for the country population. In addition, if we take into account that lending for business in Ukraine is available only at a rate of at least 20% per annum, tax evasion becomes, though illegal, but understandable and to some extent logical phenomenon. It is a product of the low economic and social conditionality of law. Big business is completely different. Tax evasion in this sector of the economy occurs more out of inertia, as well as to maximize profits. Accordingly, the fight against these shadow norms cannot occur in the same way, using the same means.

It is necessary to separate outwardly identical manifestations occurring for different reasons, and approach to their decision with different mechanisms. Thus, in most cases it is quite sufficient to eliminate the prerequisites for the existence of these phenomena. While legal liability should be treated as a last resort and be engaged or

in the case when the elimination of the reasons did not help, or in the case of absolutely unacceptable activities for the state. There is no doubt that this criterion is quite subjective and will vary significantly depending on the specific state, but in a globalized society in the near future, states need to be ready to develop at least partially unified criteria. Such as, in economy, as an example, can be cited actions aimed at to hide or disguise the origin of funds derived from illegal activity.

It should be mentioned that sometimes the state itself plays not last role in the formation of shadow norms. Periodically shadow methods (to a certain extent by passing the law) are used by state bodies, which in general creates a negative practice, as it forms the illusion that the state can do what ordinary subjects of law cannot do according to the strict legislation of this country [Nienaber 09.09.2019]. However, with regard to the cited resource, at the same time, it should be noted that it is possible to argue about the methods, but globally this mechanism was used for the benefit of the investment climate and the financial well-being of the state. But not all shadow norms emanating from the state are as harmless as in this particular example. Therefore, the use of shadow regulation by the state blurs the line between what is allowed and what is not allowed, which ultimately makes informal norms even more dangerous.

In modern society, the focus of shadow rules is politics, including international. And researchers not in vain argued, that "in some cases, the relevant community [for creation informal norms] is a political elite, the boundaries of which may be difficult to define" [Helmke & Levitsky 2003: 26]. "In electoral democracy, participation based on any of these types of preferences is valued. Voters are asked for outcomes, not reasons. ... In rulemaking, the formal legal requirements of data-driven analysis, reason-giving, and consideration of alternatives reduce the risk of outcomes that are “wrong” because of low-information, low-thought decision-making" [Farina, Newhart & Heidt 2012: 135-136]. And politicians are happy to achieve the results, without taking into account the reasons and the means used. This is what allows us to discover in politics perhaps the most fundamental and ingrained layer of shadow norms.

Moreover, political shadow rules can be defined as the most "viral" and prone to the greatest spread. In addition, they easily penetrate to the supranational level. So, J. Greenwood and C. Roederer-Rynning more recently conducted a representative and revealing analysis of shadow norms in the EU legislative process [Greenwood & Roederer-Rynning 2019]. Attempts to minimize shadow influence and shadow agreements are also actively discussed [Laloux & Delreux 2018; Kohler-Koch & Quittkat 2013].

Consequently, "transformation processes occur within the social and power relations at the global level as part of the struggle and the endeavour to establish a new structural order" [Akşit 2006: 20], and shadow regulation is actively involved in this process. As has been demonstrated in this scientific work, as a result of globalization, there is practically no sphere of public life that would not be "affected" by shadow norms. And, it is argued, the fight against informal rules should be carried out, taking into account the social sphere of their distribution, the national or international aspect (manifestation in another legal system or even at the supranational level), as well as the degree of public danger. Moreover, preventive measures (ideally not by legal methods) should prevail over combat measures of a legal nature, including criminal liability.

CONCLUSIONS

The conducted scientific research raises questions that are relevant at the moment for the absolute majority of countries in the world, because, as practice clearly demonstrates, shadow norms are a problem not only for developing countries, but also for recognized world leaders. In addition to the "internal" shadow regulation, which is "a product of one social and legal system, it is supplemented by new informal norms from the outside, which occurs as a result of globalization and convergence of law. Borrowed norms are always more difficult to deal with because they are "alien" to a particular system. This means that the tools of counteraction "grow" not together with the shadow rules of behavior, but must be formed quickly, spontaneously or also borrowed from another social and(or) legal system. Of course, for these purposes, legal comparative studies should rise to a fundamentally different level. But the theory of legal and social systems should not stand still either. In particular, the development of the essence, types and levels of shadow norms, depending on the criterion of their public danger, will be aimed at structuring methods of countering and "playing ahead" in the process of globalization.

In particular, it should be noted that informal norms may not contradict "explicitly" the letter of the law, but it is necessary to contradict its spirit. That is, the commitment to shadow regulation in any case indicates a low level of legal awareness of a certain subject.

Shadow norms have different degrees of danger, although in general all of them can be characterized as a negative phenomenon in the legal system. But on truly dangerous can be recognize only "illegal", although even they in certain conditions can fulfill positive role (function) and to point to shortcomings of legislator.

The fight against shadow norms should be carried out in stages. First of all, the causes of their occurrence should be scanned and leveled. As a rule, it helps to get rid of a significant part of the" household" shadow norms. And most often these reasons are visualized in a non-legal plane. Although legal and non-legal mechanisms work most effectively in a complex. A firm legal response is appropriate if the causes are neutralized, and the negative model remains (either because of its extreme profitability, or as a negative stereotype). In this case, legal liability may be the right decision.

Shadow norms are a dangerous phenomenon even within one legal system, but the globalized world presents us with new challenges, since shadow manifestations, as well as other cultural and anti-cultural phenomena, tend to spread and reveal themselves in other states and even at the supranational level.

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