ТЕОРІЯ ТА ІСТОРІЯ ДЕРЖАВИ І ПРАВА

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JUSTICE AS CATEGORY OF LAW

In the article some of the theories and principles of justice that exist in the legal and public management thought were considered. The paper deals with the legal doctrines of well-known law theorists such as O. Heffe and J. Rawls, in particular, the contract theory of law and justice, their common essential characteristics and their differences.

Key words: justice, ideas of distribution and retribution (equalization), social contract, concept of law in ethics, legitimization.

Problem statement. Today, Ukraine is going through a process of radical change in legal system and its adaptation to the new sociopolitical and economic realities. We need to seek out the principles and values of the new sociopolitical reality in Ukraine, which is based on European integration, globalized democracy, market and public society. The comparative law can play an important role in this process.

Analysis of researches and publications. O. Heffe and J. Rawls attained international reputation as they supported the idea of law on one hand and criticized legal positivism on the other hand. J. Rawls soil works of philosophy and jurisprudence folded views of Locke, Rousseau, and Kant. Rawls's works of philosophy and law are based on the ideas of Kant, Rousseau, Locke.

Paper purpose. Considering the abovementioned issues, the purpose of this article is to analyze the legal doctrine of justice of known theorists such as O. Heffe and J. Rawls.

Paper main body. The main idea of this study is to establish justice not only as categories of ethics, but also as category of law.

What is justice? Searching for answers leads us classical Roman and Greek law concept. Since the time of Aristotle (the 5th book of «Nicomachean Ethics») we distinguish two areas of application of justice: distributive and contributive (retributive).

In the first case we have a political society (the state), in the second — economic. In the economic society fair distribution provides that each gets his share according to his contribution. In such a way goes distribution of profits in a company so to say. In political society such benefits as power, posts, rewards, allowance and the like are distributed primarily. Therefore comparative or retributive justice regulates the existence of private (civil) society sector; distributive justice is intended to organize public (political) sphere. Both concepts are irreconcilable. And this irreconcilability turns out in the battle of ideologies and political movements. It should not go without mentioning the unsurpassed value of Roman theory of justice. Law and justice or the Romans are the same sort of thing. It is recognized that first law regulations arose from the recognition of private property rights, and that the laws of justice are the same objective and unamended as the laws of mathematics, as the main categories of private law are the property and contract, then obviously it becomes clear pursuance by Romans the contractual nature of law and justice. That's why, the essence of right and justice can be explained through the terms of contract best of all.

Contract unlike common promise has the legal power of agreement with three essential points. Firstly, the participants can choose whether they will join the agreement or not. The basis of the contract is the consensus of the parties, voluntary agreement, consensus. Secondly, in the case of consent the question is a mutual or reciprocal assignment of rights and obligations. Thirdly, after signing a contract, compliance with its conditions becomes legal obligation of each participant and noncompliance results in the application of appropriate penalties.

So, the essence of the contract is a mutual recognition of equality of services, i.e. the equivalence of which is given and adheres. The consequence of this fact is the recognition of equality of the parties who have entered into an agreement (act of purchase and sale, contract of lease, loan contract, etc.). Terms of the contract themselves are the law. Law arises out of the contract. Where a party breaches a contract, there maybe injustice, consequently the essence of justice forms the principle of equivalence. The equivalence formula sounds as «equal for equal» or «each according to his deeds.»

From classical Greek and Roman law comes up that justice can be better understood in terms of the contract. The concept of a contract is essential for understanding of justice. It can be argued that when we thoroughly describe the procedure of contract and all attendant phenomena, we can explain the essence of justice. Following the Greco-Roman tradition, the contract theory of law and justice is studied now by well-known law theorists such as O. Heffe and J. Rawls.

Firstly, they note that solution to problem of justice is impossible without a thorough critique of legal positivism.

In the terms of legal positivism the search for a concept or criterion of justice is meaningless. Legal positivism highlights only one side of the case, namely, that fairness of adopted decision is contradictive every time.

In the other areas we find the principles of conduct, the validity of which is hardly denied. Yes, undoubted, for example, is the principle of exchange. Here we deal with retributive or comparative justice. Principles, the validity of which almost no one has doubts exist in the field of behaviour; Think of the need to listen to the dispute to the opinion of the second party and to restrain from judgments about their own actions.

Principles of behaviour of this type are considered fair because they are subject to higher and undisputed principle of justice — fair play culture. The first minimum requirement of fairness is the prohibition of freewill. Both principles — fairness and the prohibition of freewill — are, by the way, the negative measures. Their content area is prohibition. You cannot summarize from this that the laws of justice in most cases are negative. Such norms of behaviour as a requirement to listen to the second party are the positive principles of justice and the same measure as demand of equal exchange [1, p. 246].

The abovementioned noncontradictory principles of justice in many cases give the opportunity to rebut ethic legal positivism. If the fundamental human problem concerns not distributional issues (as it is commonly believed), but exchange issues first, and secondly behavioural issues, then their decision could be found on the basis of uncompromising in this situation principles: the principle of equivalence of what is given and obtained, as well as fair play culture.

As for exchange, it is so important phenomenon of modern society, that this society can be called «exchangeable», as it does F. A. Hayek. Before that time K. LeviStrauss described contemporary culture as the culture of sharing — the results of labour, goods, services, genes, information.

Openness of society is determined by the intensity of the exchange. Where exchange takes place, there the violence as a method of obtaining the benefits recognized unjust, criminal. Those who enter into an exchange, by the very act of exchange recognizes as the second part equal. We can say that the exchange — this is the practical implementation of equality. Voluntariness and mutual consent — these are general signs of exchange.

Accordingly, the contract is a form of comparative, or commutative (commutativa change, exchange) justice. Contract is the unity of freedom and dependence on demands of another, and at the same time the other has the need in me. I embody my freedom thanks to another, and another embodies his freedom thanks to me. We're equal relative to the needs and freedom, and this equality claims the contract [1, p. 249].

O. Heffe considers that «only if in the legal and state system itself» is laid justice it can warn against legal positivism, and at the same time prevent the cynical conclusion that the law is a form of state power... Positive law itself should be determined on the basis of its role with respect to justice... Positive law can not be defined comprehensively without applying the concept of justice [1, p. 12–77].

The formula of the German law theorist of the priority of justice idea over positive law has been repeatedly used in the decisions of the Federal Court and

the Constitutional Court of Germany. These bodies in a number of its resolutions declared that the constitutional right is not limited to the text of the Basic Law, and also incorporates «some general principles that the legislator did not specify in a positive norm, that exists even «super positive» law that binds even a constituent power of the legislator.

Acceptance of the idea, according to which a constituent power can regulate all sphere in accordance with its wishes, would be return to the passed positivism; «extreme cases» are possible when the idea of the law must outweigh the positive and constitutional norms, and in accordance with these principles the Federal Constitutional Court is called upon to decide an issue of «constitutionality» [2, p. 148].

German legislator marks methodological significance of the social contract, the fact that the actual agreement is a fundamental concept of the theory of legitimation, and, consequently, the theory of justice. He notes that regardless of method of origin of a political community — through violence, through «organic development» or through agreement — theory of contract investigates the problem of the legitimacy of the state and legal forms of human cohabitation. Theory of legitimation focuses on the fundamental grounding of public enforcement policy.

Like the classic Roman theory of justice, according to O. Heffe, the contract has the legal force of the agreement, with three essential points. Firstly, the participants retain the right whether they will join the agreement or not. The basis of the contract is the consensus of the parties; the theory of agreement is essentially the theory of political legitimacy consensus. The word «agreement» suggests that one person «gets along», «peacefully coexists» with another, but is not opposed to him.

Secondly, in the case of consent this will concern transfer of certain rights and obligations, and, more often, this transfer is reciprocal (this may be the exchange of goods for services and vice versa, or exchange of both services and goods for money). Obviously, gift agreements are also possible, i.e. one-way transmission. Further, the contract is a legal figure, not only in private law but in public law as well. Speaking about the agreement, we can not, therefore, bring it all together to the economics. Agreements can be divided to intrastate and interstate, and such a special form of the contract as a delegation. Finally, the last. After signing the contract compliance with its terms becomes a legal obligation of each party, and noncompliance results in the application of appropriate penalties [1, p. 278–282].

Defending his theory of justice, J. Rawls noticed his theory is Kant's theory in essence because it admits the advantages of social contract theory of Locke, Rousseau, and Kant in spite of utilitarianism of Hume, Bentham and Mill. American scientist explores what free and fair society should be. «Justice, — he notes, — is the first necessity of social institutions, as truth — for the scientific system» [3, p. 28]. No matter how effective were not considered social institutions, if there was breach of justice, they need to be replaced.

Utilitarians aimed at the greatest prosperity for the greatest number of people. Eventually the result was the increasing dependence of the individual

from the society. J. Rawls strongly disagrees with such state of affairs when one person depends on another or social majority.

Following Kantian principles, J. Rawls refers to the principle of moral autonomy as he acknowledges members of this or that society not as concerned parties, but as free and intelligent creatures. «Parties reach social unity only as free, equal and intelligent creatures, because only they are aware of the circumstances that make the important principles of justice» [3, p. 42]. Provided that moral autonomy exists nobody wants privileges for themselves. The only possible choice — one that applies to all — is the principle of justice in the abstract.

According to J. Rawls, the grounding principle which forms the social structure is a contract. All morally autonomous individuals are parties who agree regardless of the circumstances, time and place. The subject of the contract is two moral principle of justice. The motive that determines the contract is associated with the need to face the difficulties and setbacks, the threat of which is well known to everyone.

The first principle of justice proclaims, «Everyone has an equal right to freedom, fundamentally compatible with the same freedom for others.» The second principle proclaims, «Economic and social inequality, such as wealth and power, which are fair only when they bring common benefit to everyone and compensate for losses of the most undefended members of society.»

The first principle justifies individual freedoms and requires equal codification of fundamental rights and obligations. The second principle focuses on the most benefit for the majority and excludes adjustment for sacrifice. This position resembles the position of utilitarianism, however J. Rawls is antiutilitarist. «The fact that some people are deprived, and others at the same time are full and happy, is probably useful, but unfair,» [3, p. 58] — he writes down. Social and economic inequality can be recognized only on condition when it improves state of ALL, not just some, or even majority of society.

The first principle of justice concerns individual freedoms — freedom of thought and conscience, freedom of speech and assembly, political freedoms. The constitution and laws should ensure effective use of these freedoms. It must be emphasized, not the absolute detachment and fundamental nature of freedoms of thought and conscience. «Individuals are not merely permitted or forbidden to do something; the government must be legally obliged not to interfere with the freedom of people to think for themselves.»

On the other hand, leaving free discontented people system dooms itself to self-destruction. It is possible to protect freedom by a system of rules that define the rules themselves. «In democracies, — writes J. Rawls — some political groups after gaining power, seek to strangle constitutional freedoms, there are also among those who teach in universities enemies of individual freedom» [3, p. 60]. The question arises: either you must be patient with dissatisfied? The answer of J. Rawls is as following: Justice should not require self-denial sacrifice, but when a constitution in force, there is no reason to refuse complaints of dissatisfied with freedom.

In «Theory of Justice» we find several formulations of the second principle of justice. According to the first, wealth, power, and second forms of inequalities are fair only if they contribute to the common benefit and for losses of the most undefended members of society.

According to the second formulation of the «social and economic inequalities should include : a) the maximum benefit for those who are in difficult circumstances, and b) open opportunities and equal conditions for all who are in similar circumstances.» In other words, inequalities have to be balanced in such a way that: a) they could be provided for benefit of everyone and b) prestigious posts became open and admissible to all».

The second principle of justice calls unjust forms of economic and social inequality, as long as they do not serve interests of the most undefended members of society. It thus corrects unbalance of favourable and unfavourable starting conditions. The existence of weak and sick people with lower profits is an obvious fact. The facts themselves are not good or evil. However, it becomes just or unjust, either of interpretation methods of these facts by different social institutions. And these institutions only then are right when considered what can be called the principle of distinction, according to which «the greatest expectations of those who occupy the highest positions to overlap with the expectations of those who occupy the lowest positions.»

In other words, if for the sake of a law to limit prospects of the most powerful members of society, and this restriction would be harmful for the weak members; the law according to J. Rawls would be unfair. However, the possible improvement of the position of the powerful members that will facilitate and improve the position of the weak members, must to be seen as fair. In the proposed limits of the principle of maximum minimorum, according to which not each inequality is possible, but only such inequality that maximizes the minimum. The true marker of maximization becomes, it should be noted, not the general social conditions, but, in a special way, the position of the weakest members of society.

Conclusions. In addition to above considerations, we consider that justice is usually associated with the term «distribution». «Each according to his deeds» — that's the classic formula of the idea of justice. It is universal, so the person when he wants to be fair should follow this formula in relation to others. Treat them according to their deserts. Justice has always been a problem. In a totalitarian state benefits and wealth are distributed. In a state of law — rights, freedoms and responsibilities are distributed. In today's civilized world justice means equal rights and freedoms for everybody. Public promotion is aimed at plenary confession of equal merits and freedom of each person. Many historical documents — political statement and memorandum — start with the postulate of equality. In the US Declaration of Independence it is stated that «all men are created equal.» In the Universal Declaration of Human Rights, which was adopted by the UN General Assembly in 1948, it is stated that «all men are born free and equal.» It is necessary to introduce the postulate of equality imperative: «treat others as you would treat yourself». This will be essence of the idea of justice, universal equality of people.

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СПРАВЕДЛИВІСТЬ ЯК КАТЕГОРІЯ ПРАВА

Резюме

У статті досліджено деякі теорії і принципи справедливості, що існують у правовій та державно-управлінській думці. Проаналізовано правові вчення відомих теоретиків права, таких як О. Хеффе і Дж. Ролз, зокрема договірну теорію права і справедливості, спільні сутнісні риси, які поєднують ці вчення, та їхні відмінності. Автор дійшов висновку, що справедливість у суспільстві пов'язана з поняттям розподілу.

Ключові слова: справедливість, ідеї розподілу і відплати (вирівнювання), суспільний договір, поняття права в етиці, легітимація.

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СПРАВЕДЛИВОСТЬ КАК КАТЕГОРИЯ ПРАВА

Резюме

В статье рассмотрены некоторые из теорий и принципов справедливости, которые существуют в правовой и государственно-управленческой мысли. Проанализированы правовые доктрины известных теоретиков права, таких как О. Хеффе и Дж. Ролз, в частности договорная теория права и справедливости, общие существенные характеристики, которые объединяют данные учения, и их различия. Автор пришел к выводу о том, что справедливость в обществе связана с понятием распределения.

Ключевые слова: справедливость, идеи распределения и возмездия (выравнивания), общественный договор, понятие права в этике, легитимация.