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# FREEDOM AND JUSTICE IN THE THEORY OF JURISPRUDENCE

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Historically, the concept of "positive law" was formed by the natural law school, under which law of each country, which is effective, alters based on legislative will due to changes in social life. Such changes often contradict natural law which is common to all peoples, permanent and fixed, and determined by the unique nature of man. The author considers the very term "positive law", which is used in the legal meaning, to characterize legal rules which tangibly (impartially) exist and find specific implementation (action) in the relevant legal relations. At the level of positive law, legal provisions having legal force differ from those standards which have been canceled or have lost their validity, as well as from concepts of standards which have not yet been adopted, but there is a need to take them into account in the future (bills, proposals, requests, legal ideas, etc.). The author concludes that the Latin term "delegelata" (subject to the law in force) is sometimes used in this sense to characterize positive law. If a specific issue is not settled by the current law, but its resolution is desired, the phrase "delegeferenda" (according to the subsequent adopted law) is used.

Therefore, the modern realities of the development of Ukraine as an independent state demand the clarification of the essence and peculiarities of the functioning of current law like never before, that is, written, positive law based on a correct understanding of the terms of freedom and justice as categories which render and elucidate the problematic components of the process of democratization of the state and society in the legislator's contemporary interpretation. At the same time, it should always be kept in mind that the desire to implement the mentioned fundamental principles of law cannot be deliberately hyperbolized and transformed into anarchy or totalitarianism, thereby endangering the existence of society.

***Key words:*** *freedom, justice, equality, humanism, positive law, absolute law.*

Луцький Р.П. СВОБОДА ТА СПРАВЕДЛИВІСТЬ В ТЕОРІЇ ПРАВА

*Дослідження понять свободи та справедливості як філософських категорій проводяться вже тривалий час. Категорія права є досить вивченою. Проте в теорії права мало приділяється уваги розкриттю сутності «позитивного права» як реальної форми права. Взаємозв'язок форми та матерії (відповідність права таким категоріям як справедливість, рівність, свобода, гуманізм) виступає тією складовою, яка характеризує сутнісну основу права щодо регулювання суспільних відносин.*

***Ключові слова:*** *свобода, справедливість, рівність, гуманізм, позитивне право, абсолютне право.*

**I. Introduction.** Development of knowledge on law assumes deep understanding of fundamental principles, on which legal regulation is based. In particular, the categories of law belong to them. The knowledge of their concepts, system and content provides a possibility to simplify the lawmaking process, since it helps to specify the landmarks of legislative activity more clearly and procure a unity of legal practice in its different sphere. In addition, the categories of law are closely related to the issue of legal ideology. That is why the research of content of legal concepts systems (in general, as well as of its separate elements) has not only academic, but also practical meaning. The abovementioned provisions constitute topicality of the raised issue.

**II. Analysis of the last researches and publications.** Methodological basis of the article is scientific works S.S. Alekseew, V.D. Babkin, V.A. Bachinin, O.V. Zaichuk, M.V. Kostitchogo, V.S. Nersesiansa, N.M. Onichtenko, M.I. Panova, O.L. Kopilenka, N.M. Parchomenko, S.S. Slivki, L.L. Fullera, R.O. Halfina and founder of Ukrainian jurisprudence Y.S. Chemchuchenko, that assist the comprehension of current processes in the theory of right and have an important value for their further research.

Going already out those fundamental bases, what of them pawned, deem it wise to carry out own researches of certain range of problems.

**III. Problem statement.** The purpose of writing this article is to specify the essence and performance features of positive law on the basis of correct understanding of those fundamental principles and categories (equality, freedom, justice and humanism), which are key factors in the process of lawmaking formation and development.

**IV. Results.** In order to consider freedom and justice as crucial theoretical and legal principles of the positive law (applicable legislation) formation and development, first of all, it is necessary to determine and ascertain the essence of the latter.

Historically the concept of 'positive law' formed due to the natural law school, under which the right of each country, which is effective, changes on the basis legislative will in conjunction with changes in the life of society. Such changes are often opposed to the natural law, which is common for all nations, permanent and unchangeable, and which is determined by the sole nature of a human being. The term 'positive law' itself is applied in legal meaning fir characterization of legal standards, which actually (impartially) exist and find specific implementation (action) in the respective legal relations. It is on the level of positive law that legal provisions, which have legal effect, are distinguished from those standards, which have been cancelled or actually become void, and

also from concepts of the standards, which have not yet been adopted, but are desirable in future (law projects, proposals, requests, legal ideas and etc.). Roman term 'de lege lata' (subject to the law, which is effective) is sometimes used in this sense for characteristics of positive law. If a specific issue has not been solved by the applicable law, but its solution is desirable – a phrase 'de lege ferenda' (under subsequent, assumed law) is used.

Paying attention to the fact that the structure of legal reality in ontological aspect is a contradictory unity or duality of the natural and positive law, we thereby underline that the real and actual law is the unity of justice, which constitutes its essence, and positivity, which constitutes its objective and institutional form. That is why both justice and positivity is the necessary condition for the law validity. At thee same time the law positivity means its display in legislation, that is, in objective and institutional forms. So, in the first approximation the law may be defined as the justice, expressed and fixed in objective and institutional forms of regulation of humans' external behavior. At the same time the legal justice, or natural law, is not a certain substance, absolute reality of law, but is rather a relational and conceptual phenomenon. It is the essence, which is revealed and maintained in relationships between different subjects and moments of legal reality. In such case the natural law should be construed as an equivalent of objectively valid law, a principle of human co-existence, without the action of which neither cultural, nor social development of the human being is possible.

The concept of freedom is one of the most complex and multiple-aspect concepts. It is related, first of all, to the fact that various aspects of freedom exist – economic, political, legal, moral and etc. In this respect ones can come across various concepts and definitions of freedom on scientific literature, which often depend on certain judgmental representations of one or another scientist, who seen what he wishes to see in liberty. At the same time this does not really mean the absence of good reasons or foundations of freedom, among which a necessity is number one concern.

In the course of considering the interrelation of law and freedom, it should be noted that the analysis of this problem will always bump up against the law on one side, and, certainly, against the moral on the other, since otherwise freedom turns into permissiveness, lawlessness and anarchy. That was how famous philosophers and thinkers of the past understood freedom: T. Hobbes, I. Kant, Ch. Montesquieu, J. Locke and others. They regarded an idea of law as the idea of freedom, and they always related freedom to the law (legislation), morals and self-restraint.

Freedom is the property, which identifies a person, distinguishes it among other living creatures; it is equally characteristic for all people. So, freedom is the universal and most important attribute of any person [1, p. 54].

Any society is interested in preserving the freedom of all, or at least most participants of social interaction. In this respect the society carries out regulation and formalization of freedom through the authorized state institutions in terms of general scale and equal behavior scale, which fact forms legal regulation. The specified regulation and formalization of freedom is expressed by the well-known formula, the essence of which can be particularly expressed in the following way: 'personal freedom of each person ends at the point, where freedom of the other begins' or 'the freedom of one person is limited by the freedom of the other'.

Freedom as certain social state of the society, as experienced and mastered necessity receives its largest concentrated expression in the law, in which it is really objectified, and materializes in specific legal forms, principles and institutes. By the character of law development, which is applicable in certain society, we can judge of the essence and scale of the freedom, which is legally acknowledged and allowed by governmental authority. The law serves as an official standard of effective freedom, its norm, index of the boundaries of the necessary and possible. At the same time it is a warranty of implementing that freedom, means of its security and protection. Acting as legitimate (legal) scale of freedom, the law objectively reflects the obtained level of social reality development [3, p. 41–42]. At the same time one should remember that ' a rule is only the minimum of human freedom' [2, p. 90].

Category 'justice' is close to the category 'freedom', which also, to any extent, penetrates the content of positive law, including in modern Ukraine.

The category 'justice' is inextricably intertwined with conscience, especially with such its form, as legal consciousness. Since the essence of justice is dialectical, i.e. dynamic, contradictory, integral and separable, it is hard to specify it definitely. A range of scientists try to define it: as supreme value, which is destined to be protected and cultivated by the entire law system, as general moral sanction of people's common life, which is considered mostly in terms of the clash of desires, interests, and obligations, as permanent and eternal will to give credit to everyone. The amount of definitions can be continued further. But a method of its descriptive definition seems to be more efficient – through characteristics of the features, in which the category of 'justice' is disclosed, and to which they relate.

Justice functions as one of the means of social evaluation: here it is closely related to the concept of equality, which is manifested in the fact that this relation gains quantitative characteristic. It takes pace in the simplified understanding of justice as of equalizing factor. That is, the bearers of such understanding believe that each member of society or parties to legal relationships have equal rights and possibilities within the boundaries, acknowledged by an agreement, tradition or law. Any deviation in distribution of benefits or rights is construed as injustice. It is natural for a human being to desire to limit others, make them equal, not to allow to rise, stand above, and to obtain more. The equalizing justice is displayed also in case, when the problem of establishing and expressing

a measure of justice arises. Although the concept of justice and the concept of measure are often mixed, an association of justice with some equivalents and measures still leads to its simplified understanding. Rationalization of justice can generate formalist approach to it. That is, it will take place only when certain and predetermined conditions, boundaries, and circumstances are available [4, p. 200–202].

Such 'arithmetic' formalization of justice kills its dialectic 'live' nature, or, as likely as not, brings the understanding of justice to an absurd, transforms it into the direct opposite – injustice.

On the other hand, a measure as the assembly of certain conditions and allowances should be present in justice, and such measure can not be completely formal. On the contrary, it is capable to become a unifying basis with at least minimum thoroughness. And the more clearly the thoroughness of justice is shown, the less substantial becomes the form, formality, encumbered in equality [5, p. 51].

Such justice is construed as distributional and it is often understood as a sum of benefits or rights, which should divided between people, and parties to legal relationships.

The recognition of general consensus or common interest as of the positive law essence distinguishes it among other regulatory instruments, provides it with the quality of general social regulator, instrument for achieving a consent and social peace in society, excludes consideration of law as a tool of violence, means of individual will oppression, serves as a methodological guidance for a legislator, which is obliged to define justice as obligatory basis for this process, and as universal worldview category, which is detailed within the framework of the theory and philosophy of law, serves as a catalyst for forming new state and law in Ukraine. Legal justice is real and proper measure of social relations, which is implemented in legal form of action. Justice is a sign of rationality of social life, pervasive social virtue, important criterion for evaluation of society, state and its institutions.

In this regard, the understanding of law as not of the method for implementing the justice ideas, but exclusively as of method for law enforcement by means of formally determined standards, sanctioned and procured by a state, does not correspond to modern stage of humanity development on the basis of democratic and liberal values. Justice, freedom, equality, and humanism are the categories, which the law should correspond to, since they are its essential properties. Academician of National Academy of Sciences of Ukraine Y.S. Shemshuchenko remarks on this point that the impact level of positive law on the nature of social development depends on the stage of implementing the ideas of justice and human rights in the law, its natural rights, conformity of law with social progress [6, p. 671].

**V. The Conclusions.** Therefore, modern realia of development of Ukraine as independent state more than ever demand determination of the essence and peculiarities of applicable law functioning, that is, written, positive law, on the basis of correct understanding of the terms 'freedom' and 'justice' as categories, which display and reveal problematic constituent elements of the process of the state and society democratization process in modern understanding of the legislator. At the same time it should be always remembered that a wish to implement the mentioned fundamental principles of law should not be consciously hyperbolized and transformed, with respect hereto, into anarchy or totalitarianism, thus putting the existence of society in jeopardy.

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