Law in the context of justice

El derecho en el contexto de la justicia

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ABSTRACT

The article analyzes the nature of justice reflected in the law. According to the authors, the source of justice is quite "earthly", knowable and rooted in the real or imaginary interests of people. However, the notion of interest-based perceptions of justice, while methodologically significant, does not explain any particular situation itself. It is still necessary to know what interests are embodied in the relevant legal provisions. Representations of individual subjects about justice with greater or lesser adequacy reflect, first of all, their own interests. And much less they are able to assess adequately the actions of others, social movements, government authority. However, any private interests inevitably go back to more general interests, which are not monolithic in their structure, internally contradictory and sooner or later, but inevitably "return" to private interests. Justice is a reflection of diverse interests, so perceptions of justice are as volatile as perceptions of interests.

Keywords: the idea of law, the idea of justice, volitional law theory, interests and justice in law, legal axioms.

RESUMEN

El artículo analiza la naturaleza de la justicia reflejada en la ley. Según los autores, la fuente de justicia es bastante «terrenal», conocible y arraigada en los intereses reales o imaginarios de las personas. Sin embargo, la noción de percepciones de justicia basadas en intereses, aunque metodológicamente significativa, no explica ninguna situación particular en sí misma. Todavía es necesario saber qué intereses están incorporados en las disposiciones legales pertinentes. Las representaciones de sujetos individuales sobre la justicia con mayor o menor adecuación reflejan, en primer lugar, sus propios intereses. Y mucho menos son capaces de evaluar adecuadamente las acciones de otros, movimientos sociales, autoridad gubernamental. Sin embargo, cualquier interés privado inevitablemente vuelve a intereses más generales, que no son monolíticos en su estructura, internamente contradictorios y tarde o temprano, sino que inevitablemente «regresan» a intereses privados. La justicia es un reflejo de diversos intereses, por lo que las percepciones de justicia son tan volátiles como las percepciones de intereses.

Palabras clave: idea del derecho, idea de la justicia, teoría del derecho volitivo, intereses y justicia en el derecho, axiomas legales.

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INTRODUCTION

In recent years, it has become common in Russia to hear that law by its nature can only be just, and that what is unjust cannot claim its role. This interpretation of law, which has its origin in natural law concepts, certainly elevates it among the world of other social norms. But we fear that it is as unreal as other social utopias. Meanwhile, as Professor Otfried Heffe of the University of Tübingen (Germany) rightly emphasizes, justice is a fundamental concept of moral criticism of the state and law. All institutions of state and law, all activities of state and public entities should be evaluated from its position. Only with the help of justice "lawful, legitimate public and legal forms are distinguished from illegal, illegitimate" (Höffe, 2015).

People in all times knew what is injust to them. We must not forget that justice is usually invoked only in conflict situations or when social change is required, when an individual, a social group or the whole of society comes to the conclusion that "it is impossible to live like this" and "there is no other way". However, if the first of these formulas meets with universal understanding in society, an "enlightenment" comes soon enough with respect to the second one. Different people understand this "other" in different ways, and after a while society must again go through the stage of "you cannot live like this". Each time it turned out that the postulate or image of justice, which inspired people yesterday, today shamed itself only so that another postulate or image of justice became a new inspiring factor. Those researchers who focus on the conditionality of law by the idea of justice, which is unknown how it was formed, unable to answer the question of why the requirements of justice have changed. Science must either recognize its complete impotence in the solution of this question, or offer a different conceptual scheme than simply the recognition of some eternal justice that determines the content of law (Mazanaev, 2018; Gamulinskaya, 2018; Vysotskaya et al., 2018; Dermikanova, 2019; Ismailov & Mikogazieva, 2019).

Private interests inevitably go back to the more general interests — group, corporate, public, which is not monolithic in its structure, internally contradictory. The relations between these interests are relations of interpenetration. Some of them exist through others, inevitably "returning" to private interests. In addition, private interests themselves are internally contradictory. The presence of many different interests at particular individual at the same time leads to a conflict between them, to the need to identify priorities to the detriment of others, to errors in choice. Group and public interests are also contradictory. At the same time, of course, it is important to bear in mind the other side of the interaction of interests, which is expressed in their coincidence, so that social cooperation becomes possible.

Sooner or later, values always "land" on interests. Consequently, what is recognized as just now will not necessarily be so tomorrow. Therefore, legal norms are not indisputable either at the time of their establishment or at the time of their implementation. Only to the extent that there is solidarity, coherence of interests and values of different individuals, groups, it is possible to solve the problem, which is recognized by all as fair one (Ilyin, 2011).

MATERIALS AND METHODS

From the point of view of history and modernity, theory and practice, the methodological basis of the study is the general scientific dialectical method of cognition of social phenomena in the process of their historical development, in which other special methods of studying social and legal phenomena were used: historical and comparative, complex, sociological, statistical, method of legal modeling.

RESULTS

The problems of justice and law are of particular importance in the context of globalization, which, as we know, is carried out on the basis of Western civilizational standards. Russia did not take part in their formation, so it is not surprising that they are not always recognized in our country unconditionally. For example, the issue of non-application of the death penalty was difficult to resolve. From time to time, the voices of those demanding the reinstatement of the death penalty against terrorists or murderers have become very loud in society. And then the government (perhaps, the most influential "European" in our country) becomes difficult to resist such calls. Or there is another example. The Orthodox Church, considering equality between men and women to be just, nevertheless objects to the right of women to be bishops. In its own way it applies to private property, not considering it the highest ideal. The main thing for the Orthodox Church is not who owns the property, but how it is disposed of. According to the Orthodox Church, God is the owner of everything. Partly for this reason, from time to time in our country, discussions unfold around the question of the limits of the admission of private property.

Not least from the very beginning of reforms under the influence of national features of perception of justice in Russia there was a caricature image of capitalism. The lies about the inevitability of bandit capitalism, spread by some media, penetrated the consciousness of various groups of the population. And now mass consciousness can hardly unconditionally trust the idea of the state as the "night watchman" of the market economy.

In Russia, there has long been a tradition to consider law as a kind of will. And this despite the fact that the volitional law theory was subjected to fierce attacks from its opponents. Probably, in historical terms, the criticism of the outstanding German jurist R. Iering was the loudest. The scientist believed that volitional theory explains nothing, because it ignores the fact that the main engine of law is the goal. This problem was devoted to one of the most famous legal monographs of the XIX century — "Goal in law" (Jhering, 1877). Subsequently, R. Iering said his arguments. From goal he moved to interest, which became in his theory the main factor of the emergence and "movement" of law.

Meanwhile, the real secret of the volitional law theory was revealed long after the R. Iering's leaving science. It turned out, that volitional theory significantly deeper in character, than it was seen to its author's contemporaries. This became apparent when the attention of researchers was drawn to the structuring of the concept of will.

Every goal, as many scholars believe, is any pre-conceived result of activity, and a legal goal is a pre-conceived result of activity carried out by legal means. The question arises: can any goals be set, can goals be arbitrary? The answer to this question is to clarify the source and nature of the goals, or rather – their objective source and subjective nature. Goals are always objective in their source, because they are aimed at satisfying real interests and needs. If the goals were arbitrary in their source, humanity would simply die.

R. Iering has a methodologically important conclusion that it is wrong to study the problem of will and goals in law as some independent substances. Trying to study the "motive power" of goals, he came to the conclusion that the only motive power of human behavior are interests. And he was not quite right. Interests do play that role, but not just interests. The goal, as already mentioned, has an objective source and a subjective nature. To the extent that legal objectives are determined by an objective source, they are determined solely by interests. And to the extent that they are characterized by a subjective nature, they are determined by the interests and demands of justice.

DISCUSSION

There is no single view of interests in science. For some, interest is the orientation of consciousness on any object of the material or spiritual world, the desire of the individual to master it. For others, interest is an object that satisfies a need. Some believe that interest lies entirely in the plane of individual awareness of needs, i.e. subjective in its content. Others argue that interests in general can be independent of consciousness, i.e. objective in content. The German philosophical dictionary defines interests as "the value and significance of the things we give them, which accordingly occupy our thoughts and feelings" (Tishkoff, 2003). And one of the most famous modern philosophers in France, Andre Comte-Sponville believes that interest can be subjective and objective. Subjective interest is "a form of desire or curiosity, often as a combination of them both", and objective interest is "not what we desire, but what we should desire if we know exactly what is good for us and how to achieve it" (Comte-Sponville & Terré, 2003). The analysis of these approaches shows that it is impossible to limit the interpretation of the interests of one of the parties — because in this case the scientific picture of social relations changes radically. If, for example, we consider the interests only objective, it turns out that a demiurge behind the backs of people determines their actions, and the people themselves are only the executors of someone else's will. On the contrary, the subjectivation of interests would turn history, including the history of law, into a chain of blind accidents.

In Soviet literature, the reduction of the essence of law to the protection of the material interests of the class, of course, narrowed sharply the possibilities of law. It had to be considered and was considered as a result of development of mainly property relations. This idea, formulated by the prominent Soviet jurist E.B. Pashukanis, eventually transformed into the concept of total control over the behavior of the individual, who was allowed to act in the economic sphere only within the so-called socialist property (Pashukanis, 1980).

In addition to material interests political and spiritual ones are distinguished. In the U.S.S.R. they were declared to be derived from economic interests and were invariably reduced to them. Therefore, their analysis was intended to show that every law is a reflection of the interests of the exclusively economically dominant classes. A rare researcher tried to go beyond this thought. For example, M.S. Strogovich singled out in the law the general social moment connected with service of interests of all population. It was only at the end of Soviet power that the general social characteristics of law began to be studied relatively widely by the Soviet theory of law.

But let us return to the premise that it is not enough to study law only from the standpoint of interests. Domestic philosopher A.A. Ivin linked the need for research interests with values. He emphasized that the value should be understood as the subject of any interest, desire, aspiration (Ivin, 2011). In other words, values should be revealed through the characteristics of the surrounding world. But there are other views on values, for example as on ideas about the desired behavior of the system, which regulate the process of adoption by the constituent entities of the action of certain liabilities or as beliefs regarding the objectives and means i.e. in these cases the values are revealed through their belonging to the inner world of man (Parsons, 1971; Smelser, 1995).

L.S. Mamut, having considered these approaches to values, came to the conclusion that for use in state studies, and apparently, in law, the optimal interpretation of values as phenomena of special reality arising from the "coupling" of certain properties of objects, and directed to them the needs and interests of subjects (Mamut, 1998; Nersesyants, 2002). In this interpretation, we are talking about subject-object relations, i.e. two points are taken into account: the intentions of the subject (subjective intentions) and the properties of objects (objects of objective reality). In the case of law, this means that the intentions of classes, elites, rulers, the possibilities of law and the direction of these intentions are taken into account. A.V. Polyakov, having analyzed different approaches to the study of values, notes that "human activity is impossible outside the value context" (Polyakov, 2004).

The question of whether values are always absolute or always relative has been repeatedly raised and widely debated in science. According to the point of view coming from A. Toynbee, value is always relative (Toynbee, 1987). But this position (and here we cannot agree with L.S. Mamut) leads to the recognition of the correct statement that there are no criteria for distinguishing good from evil, just from unjust (Likhachev, 1990). Apparently, it makes sense to talk

about two types of values: relative, changeable from one historical era to another, and absolute, which retain their value at all stages of history. Justice also belongs to the category of such absolute legal values.

Justice, as O. Heffe pointed out, does not cover all spheres of morality of course, and does not draw them into itself. Therefore, it should be borne in mind that the state and law are responsible only for justice, but not for other virtues (Höffe, 2015). The factor of time is also important, in which representations and assessments of justice unfold. Originating in one time cycle, they may not coincide with their counterparts existing in another time cycle. The main point here is that the measure of justice seems always to be determined by interest. In turn, the choice of interest as paramount is dictated by the corresponding representations, estimates of justice. In other words, there are no interests taken apart from the notions of justice. But there are no notions of justice that are not related to interests, do not leave their mark on them. It is because the law reflects all sorts of interests and ideas about justice, it is multifaceted and multidimensional. As a result, the law is not covered in its entirety by any of its definitions. Apparently, the words of I. Kant will remain correct for all times: "Lawyers are still looking for a definition of law".

Special attention should be paid to the fairness of legal norms. This problem almost did not attract the attention of domestic lawyers for a long time, although there were many reasons for this. Let us turn in this connection, for example, to the question of the correlation of interests in the individual with the interests of society and the state. In the Soviet era, people spoke mainly about the priority of society and the state in relation to the individual. In modern Russia, however, they prefer to talk about the priority of the individual in relation to society. But this and that point of view with positions of justice are highly dubious. If they stand for the unconditional priority of the interests of the individual, then, whether they want it or not, they attach paramount importance to individual freedoms, which can undermine the integrity of society or the state. We must not forget that interests can be selfish, and the rights of an individual can be used to protect such interests. This is how the Russian legal scholar-emigrant I.A. Ilyin argued (Ilyin, 2011). But it is also unacceptable to strive for the unconditional priority of the interests of society and the state. In this case, the individual would simply become a means to society and the state. The idea of totalitarianism stems from the idea of the primacy of the interests of the state.

We cannot agree with the L.S. Mamut's point of view on this issue. In his opinion, the socio-political development of societies and states, which is at least accompanied by crises, conflicts, upheavals, takes place when parity of rights, freedoms and duties of the individual citizen and the "collective citizen" is achieved (Mamut, 1998). In essence, the author proposes to recognize the interests of the citizen and the state, the individual and society as equal. It seems to us that such parity is impossible in principle. In the one case, the interests and rights of the individual and the citizen should prevail, and in the other, the interests of society and the state. It can only be a question of establishing a harmonious combination between them. Such harmony, however, can be achieved only through the observance by all parties of universally recognized notions of justice. In this case, justice becomes an objective criterion for determining the priority of certain interests, to determine which interests should be primarily reflected in the legal norm. Without solving this problem, it is impossible to develop a structure of law acceptable to the state and citizens.

It should be borne in mind that private interests inevitably go back to the more general ones — group, corporate, class and social, which are not monolithic in their structure, internally contradictory. Hence there is their mobility, ability to new transformations. The relations between these interests are relations of interpenetration. Some exist through others, and eventually, figuratively speaking, "return" to private interests. In addition, private interests themselves are internally contradictory. The presence of many different interests at a particular individual at the same time leads to clashes between them, to the need to identify priorities at the expense of others, to errors in choice. Group and public interests are also contradictory, because, as O. Heffe wrote, "a group or a community is not homogeneous entities, where the good of some is harmoniously combined with the good of other" (Hoffe, 1987). Of course, it is important to keep in mind the other side of the interaction of interests, which is expressed not in conflicts of interests, but in their coincidence, as a result of which, in the words of the outstanding researcher of the problem of justice J. Rawls, "social cooperation" becomes possible (Rawls, 2009).

It is necessary to pay attention to one more problem: how interests and ideas of justice are reflected in the will of the subject? This awareness takes place in the form of feelings, moods, emotions and ideas fixed in the form of goals. It is sometimes suggested that emotions and feelings are secondary to the law, as they form only the primary motivational system of a person — in comparison with the deeply intellectualized sphere of legal ideology.

It is legitimate, of course, to raise the question: to what extent do the very notions of justice reflect specific interests? It may be that these representations are only a more or less adequate reflection of interests. However, another situation is also likely, where notions of justice are so detached from interests that they appear to stand above them. And then they are spoken of as a "place of meeting with God", because in them the subject rises above everyday life, goes into the world of ideals, "free" from egoistic preferences. The motives of ideas about the justice of values become elusive if they are not correlated with interests. Drawing attention to this, the outstanding French sociologist E. Durkheim stressed that the boundary between the just and the unjust, determined by the world of human values, is unstable and can be moved by the individual almost arbitrarily (Durkheim, 2007). And in the name of justice, people can even act against their immediate interests. However, sooner or later ideas of justice "land" on interests. Consequently, what is recognized as just now will not necessarily be so tomorrow. The scientific vision of law advocated by jurisprudence cannot ignore this fact. Based on the interests and ideas of justice, the jurist constructs typical patterns of behavior or course of action that should take place.

Speaking about the forms of expression of justice in law, it should be said about the so-called legal axioms. They can be defined as generally accepted requirements of justice, which from the point of view of morality must necessarily become part of the law in force. They are formed as a result of long-term observations and generalizations, as a result of human legal activity. For the first time they crystallized as requirements of legally significant behavior, probably, at the stage of emergence of the law. In their content axioms is nothing but simple rules of justice. They reflect the minimum conditions necessary for people to live together. They have become the supporting structures of law in modern civilized societies. They are time-tested, approved by many generations of people in different countries. From this point of view, their totality can be considered as a kind of natural right, i.e. a right that is valid for all mankind. Therefore, the fullest consideration and the fullest implementation of the axioms is the way to a globalization of law that is in the interests of all countries and peoples. Deviation from legal axioms, their non-compliance can lead to the fact that the law... ceases to be a law, remaining exclusively measures of direct coercion, organized influence (Alekseev, 1978).

Thus, in addition to the interests and ideas of justice, no law and no legal ideology and, accordingly, legal science exists and, in principle, can exist. Who expressed a particular legal idea, thus consciously or not, but recognized the presence of some specific interests and ideas about justice. When one of the legal scholars says, "I am far from politics", it does not mean that this is actually the case. It is impossible to ignore the fact that the conclusions of the scientist reflect a kind of amalgam of more or less adequately aware of his interests and ideas of justice, which are more or less shared by the relevant groups of the population, society. As the Western philosopher W. Dray rightly emphasizes, rational motives are at the heart of any explanation, although this does not mean that a person pre-weighs and sorts out a number of arguments in his mind. It is enough that there is a rational connection between actions and motives and ideas that are attributed to the person concerned (Dray, 1971).

This fully applies to legal norms and largely explains why, in the words of E. Levy, "in a certain sense, legal norms are never indisputable; if the norms were required to be such even before their establishment, human society would not be able to exist at all" (Levi, 1948). The norms reflect specific interests and perceptions of fairness at the time of their adoption. Faced with new challenges, people can take steps that previously could not be taken into account in the adoption of the norm. Therefore, the content of the norm is in constant development, adapting to the changed situation. New ideas of people about the phenomena covered by the law, to such an extent reflected in its content, that it eventually changes almost to the opposite. At the same time, its verbal framing can remain the same. Concepts in law are as fluid as life itself.

CONCLUSION

In the case of a conflict of interests and ideas of justice, it usually ends in favor of the interest. Therefore, we admire the actions of people who were able to sacrifice their interests in the name of justice. Citing such an example, academician D.S. Likhachev wrote: "What else can we oppose the Decembrist uprising, in which the leaders of the uprising acted against their property, estate and class interests, but in the name of social and political justice" (Likhachev, 1990).

Thus, it is impossible to deny the role of interests and notions of justice in the development of law. They ultimately determine the content of any law. The visible side of the law is claims, demands, rules, etc. And the hidden side is interests and ideas of justice, which only can explain why the law is that, and not another. They define the "official role" of law, its constantly changing nature, show why the law as a whole can be beneficial to all, but not beneficial to someone individually.

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