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I.G. Babich

SOCIAL JUSTICE AND THE PRINCIPLE OF JUSTICE IN LAW

When they say about historical and logical elements of civil community, it is determined that formal elements of such community are in total interaction of law and positive legislation, as well as inseparable rights of person.

Consideration of issue connected with studying of principle of justice and revelation of content of principle of justice and its use acquires a special meaning in the period that our state passes on the way to the law reform.

For domestic civil law the start of understanding of justice as law category is connected with appearance of category of "social justice". Appraising social utopias in Russia, V.I. Lenin determined that "utopian socialism was a symptom, spokesman, and forerunner of that class that being generated by capitalism grew now, at the beginning of XX century into a mass force capable to put end to capitalism" [1, p. 120].

The principle of social justice was the main principle of socialistic law.

Social justice is a complex phenomenon that comes forward as interaction of economics, law, politics and moral, as appraising notion of social events of public life. The object of appraisal from the point of view of social justice can be: 1) attitude of society to person; 2) attitude of person to society; 3) actions of person regarding another person.

Justice is a philosophical notion that determines objective economical, political, law and moral conditions of life of one or another community and tendencies of its development. The notion of social justice reflects not only a possible ideal status but also actual conditions of life in which it is necessary to reward and punish deservedly, to distribute restricted welfare, to appraise a relative meaning of social action.

Social justice can be determined as notion of social mind that characterizes the degree of gratitude and demand, rights and welfare of person or social community, the degree of exactingness of society to person, legality of appraisal of economical,

political, law events of reality and actions of people from the position of certain class or community [2, p. 135].

Socialistic social justice was reflected in main principle of socialism: "By abilities from everybody – by labor to everybody", which constitutes the essence of social justice of socialism, all the other principles of socialistic law ultimately are concretization and guarantee of main principle – the principle of justice. Close connection of all principles of law, its subjection to demands of socialistic social justice determines actually socialistic content of law.

Universally received principles of socialistic right together with principle of social justice were principles of sovereignty, democracy, internationalism, humanism, the principle of legal equality, inseparable connection of rights and obligations, legalism, the principle of responsibility for guilt [3, p. 130].

The principle of democracy in right was reflected in law guarantee of activity of state and other non-state organizations in the interest of people, for the purpose of guarantee of social justice, performance of power of people and through people that is the guarantee of revelation and realization of actual, vital people's interests.

The equality of rights of all soviet citizens irrespective of their social status, national belonging, gender, and other was the most important legal expression of principle of social justice, the idea about which in a great measure coincided with the idea about social and other forms of equality [4, p. 4].

The social justice of socialistic law finds also reflection in inseparable connection of rights and obligations. At the same time responsibility of members of social life, mutual dependence of interests and its realization that finds reflection in correspondence of rights and obligations constitute a structure of relations of social justice. Balance of law system of socialism, symmetry in relations between separate links of legal system has theoretical and practical meaning because legal system is built on symmetry of rights and obligations. When this balance is violated society is found in the face of undesired events [5, p. 255].

In general norms of law, being measure of possible and proper behavior of people, reflecting and consolidating social relations, corresponding to essence and concrete content of socialistic social justice serve as the most important way of confirmation and development of social justice [3, p. 131].

Inseparable feature of principle of social justice is humanism – each citizen has a right to acquire some minimum of social (material) welfare, which is impossible to live without.

Consequently, the principle of social justice consists of three main features: equality of citizens in possibilities; right to acquisition of material values in accordance with quantity and quality of labor spent by person for socially useful matters; humanism of socialistic society that provides invalids, elderly citizens who can not work by important reasons reception of minimum of social benefits necessary for existence [4, p. 4-5].

In spite of sufficient contribution made by soviet scientists in the development of notion "justice", it is necessary to mention that this category was built on subsurface of inviable ideology. The Constitution of URSR, accepted by the III general Ukrainian

meeting of unions consolidated the class organization of community. Social practice of 30-80 years of last century proved that at the time of socialism there was place for neither civil community nor legal state.

Already in 20-th years Soviet political and state leader L.Koganovich in the report to the Institute of soviet construction and law of Communist academy accused the idea of legal state as harmful and non-accepted for socialist state [6, p. 43]. The idea of legal state declared to be bourgeoisie and its theoreticians and bearers already in 30-th years underwent prosecutions and political repressions. Negative attitude to the theory of legal state indurated for decades in social thoughts and became stereotype [7, p. 3].

Therewith it is necessary to mention that political movement before independence of ex union republics was not based on any scientifically justified theory of transformation of community. Absence of necessary scientific justification of state policy of transformation of society became essentially one of the most important reasons of weak and long-suffering historical movement for peoples of post-soviet states. That is why during decades of establishment and confirmation of independence, including the Ukraine, the issue about conceptual principles of democratic transformation of Ukrainian society except its state and legal relations [8, p. 77] was and is left in the centre of attention of politicians, state and public figures except its state-and-legal relations.

It is necessary to agree with the point of view of O. Pidoprigory that there is neither private nor public law in actual social reality. These are scientific abstractions that reflect general essences of features of norms that regulate relations connected with interests of as state so private person. Such approach was observed at lawyers of Ancient Rome yet who understood law, particularly, as science about good and fair that is useful to all or many, and the term "law" – as derived one from the term " public justice" (justitia) [8, p. 78-79].

Therefore, it seems the use of categories "social justice" that was developed by soviet researchers, in terms of modern Ukrainian state becomes impossible.

Modern understanding of justice closely connected with morality stipulated by ideas about person formulated in new European culture. These are ideas about person as about independent individual which is vested with inseparable rights and capable to control and regulate independently its behavior in society on the basis of some norms generally determined. Ideas about inseparable rights of person today received general acknowledgement and is consolidated in series of international and legal documents, such as the Statute of United Nations, General declaration of rights of person, Final act of general European union of cooperation and safety in Europe and other, in the result of which the rights of person spread over all citizens of planet currently.

The idea of justice in its modern understanding is connected with the idea about necessity of social (moral) appraisal of existing regulations, laws, etc. As T.A. Alekseeva determines, "problems of justice appear in agenda when there is a necessity in social appraisal of activity of relative institutes to balance legitimate competitive interests and demands of members of society" [9, p. 10]. In this sense the

idea of justice corresponds to that separation of law and right that is performed in Ukrainian science of law by followers of "wide" understanding of law (D.A. Kerimov, E.U. Solovyov, V.S. Nersesyants, V.A. Tumanov and other). Ideas about rights and freedoms of person, not always fixed in texts of laws, are in moral understanding that often proposes corrections to texts of law or to its interpretation and use. The conception of "legal law" is based on it. First of all this conception comes from the fact that rights and freedoms of person belong to him from its nature, orientates for obligatory consolidation in legislation of moral values corresponding to its understanding and for estimation of legislation from these positions; at second, this conception orientates the practice of use and interpretation of law for maximum consideration of moral criteria; at third, equalizing in public world outlook moral values, not fixed by law, to those ones that already obtained legal force that gives all moral values the force of law aiding consolidation of its authority.

Law in a sense of moral- is a complex event to the structure of which the spirit of law itself comes and is at the first place. Law is justice, says Z.Romovskaya, when it is wise, just, confirms decency in relations between people. In the context of morality of law it is necessary obligatorily to pay attention to the Article 8 of the Constitution of the Ukraine that declares supreme role of law. Actually the supreme role of law, by formulation of the Article 8, is considered as supreme role of mind, as supreme role of justice. Thus, correspondingly a wise, just law can be related to the Article 8 of the Constitution of the Ukraine that confirms conscientiousness in relations between subjects of law relations [10, p. 2].

Admitting common origin of notions "justice" and "law", researchers solve issues about their correlation in a different way.

Some subordinate justice to law and consider it as exclusively law category, some defend point of view, corresponding to which justice creates law and only that one that is just can be called law. In this way, the problem of correlation of categories "law" and "justice" is left today as one of the most complicated and the most topical.

It seems such dissimilar approach to correlation of law and justice is connected with principally different approaches to understanding of law: positive and natural.

There are two kinds of law understanding: positive and neo-positive (moral-ethic one). In positive law understanding right and law are not differentiated between themselves, but on the contrary – are identified. Law is characterized as system of mandatory norms (rules of behavior), established and ratified by the state and provided by the force of state compulsion.

Law is a complex, multi-level structure. But there is a constant tendency to simplified ideas about this phenomenon. It is remarkable that different law schools substantiate in a different way the objective laws of appearance, development and functioning of law. First of all efforts of theoreticians are directed to discovery of source that provides law with its mandatory force. Thus, followers of natural and law school state that initial grounds of law come from human free will and determine law by this original source. Representatives of sociological school come

from standard based in relations of property which they connect the obligation of law norms with. Representatives of psychological school come from psychic, "imperative and attributive experiences", naturally native to person, which they connect the obligation of law norms (law norms reflect natural imperative and attributive standard of human experiences). For the followers of historical school law is a creation of history, time and soul of peoples. They connect the obligation of law instructions with these factors. It is essential that universality or ill timing of law at first stages of existence of this school were refuted. Obligation of law norms in juridical positivism is provided with its state ratification [11, p. 25].

Juridical positivism is based on acknowledgment in quality of values only norms of positive law and on turning any law to the norms active at present time and in the present state, without paying attention to the fact if this law is just or not. Then law becomes some autonomous discipline that is identified with will of the state, the reflection of which such law is. In such situation conflicts should not appear between law and state which becomes its only source, the evolution or transformation of which is reflected in corresponding changes in law as well. Law is reduced to the level of state attributes and often results in despotism of power or policy of force [12, p. 155].

First of all the fact attracts attention that modern western jurists are unanimous in critics of juridical positivism. The moment of power is insufficient for determination of law because the question appears inevitably: which the obligatory force of state decrees is based on? From now on it is not a question of law which is provided with legislator, but it is a question of compromise between this law and that one that is considered as just or wise [13, p. 38-44].

Natural law is over-positive. Positive law is estimated by legal idea and exactly coming from it as legitimate or non-legitimate. Predestination of natural law is to make free the way to over-positive critics of state and law. European legal thought through centuries was nourished by one source – from bringing together and opposing of natural law and positive law. Through centuries, natural law as special from of over-positive critics of state and law dominated in western European thinking. Natural law gravitates towards that over-positive state-and-law criticism that is principally unacceptable for all kids of juridical positivism. Only if justice is based in the model itself of law and state structure, it is possible to prevent from juridical positivism and at the same time to avoid that cynic conclusion that law is creation of state power. Positive law should be determined by itself coming from its auxiliary role towards justice… It is impossible to determine positive law with comprehensive manner without notion of justice [14, p. 294-295].

Natural positivism replaced classical theories of natural law which were born by revolution age of Enlightenment. Then V.A. Tumanov wrote about it: "Revolution transformations and existing social and political movements were always promoted with moving forward to the foreground of ideas, principles, demands of new social justice which is opposed to the old law and order; later on, due to the realization of these demands this opposition disappears and the idea of presentation of new, already built system is moved forward to the foreground" [15, p. 102].

Law positivism is searching for such definition of law, – O. Hoffe writes,- which would be free from the perspective of justice that does not exclude the critics of acting one which is carried out in the name of justice [16, p. 102].

Representatives of law positivism throw doubt upon the idea of justice itself, its role and meaning in social life, in political and legal activity of state and its institutes.

Since legal and political activity of power is provided with positive laws, the main source of such laws are decisions of legislative bodies of power and they are realized by means of state compulsion, i.e. value and natural and legal source of justice are lost here.

In terms of forming of new system of values such approach is unacceptable. Realization of demand of steady development foresees the use of profound determination of law. Normative interpretation of law as totality of norms can not be a regulator of steady and rational development of society. Any content can be determined by law and right which are just only because they come from the state. From the positions of pure legal positivism consideration of question about justice as criterion which is beyond law is impossible because law is that allows to measure, and justice beyond law – it is a notion that is impossible to determine and reflect in scientific terms. According to views of R. Iering: "law should not correspond to justice but on the contrary – the measure of justice are principles of legal law which consolidates equivalent relations formed between owners of goods. From the point of view of R. Iering, law does not require any criterion.

Determination of statements acquires many declarative statements which are not realized first of all due to economical reasons. Parallel disorientation of subjects of law is carried out and especially subjects of law employment who start to think over questions not characteristic to them: if these or those rules that are kept in laws correspond to natural law or common interest, and how they should act, if in their opinion, they do not correspond [17, p. 14].

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Н.Ю. Голубєва

КЛАСИФІКАЦІЙНІ КРИТЕРІЇ ДЛЯ ПОБУДОВИ СИСТЕМИ ПРИНЦИПІВ ЦИВІЛЬНОГО ПРАВА УКРАЇНИ

Проблема розробки теоретичних основ регулювання цивільних відносин завжди гостро стояла перед цивілістами. Особливої уваги в сучасних умовах, після прийняття ЦК України 2003 року, який визначив "загальні засади цивільного законодавства", набуває дослідження проблем сутності основних начал та принципів цивільно-правового регулювання, їх зв'язок з іншими правовими явищами.

До цієї теми звертались багато радянських, російських та українських вчених в різні періоди: Т. Бондар, В.П. Грибанов, Ю.Х. Калмиков, А.М. Колодій, Е.Г. Комісарова, О.А. Кузнєцова, А.В. Луць, В.П. Паліюк, Г.А. Свердлик, Ю.К. Толстой, Є.О. Харитонов, А.А. Чукрєєв та багато інших вчених.

Метою цієї статті є формування системи принципів цивільного права України, перехід від "простого" переліку принципів до логічно обґрунтованої структури, що дозволяла б визначити їх внутрішню пов'язаність один із іншим.

В юридичній літературі існують різні підходи до розуміння принципів права, зокрема принципів цивільного права, оскільки це один із основних елементів механізму впливу права на суспільні відносини.

Принципи права юридично закріплюють об'єктивні закономірності суспільного життя. Вони акумулюють у собі найхарактерніші риси права, визначають його юридичну природу [1, с. 215]. Принципи права – це такі відправні ідеї його буття, які виражають найважливіші закономірності й підвалини даного типу держави і права, є однопорядковими із сутністю права і складають його головні риси, відрізняються універсальністю, вищою імперативністю і загальнозначимістю, відповідають об'єктивній необхідності побудови і зміцнення певного суспільного ладу [2].

Проблема визначення сутності принципів права переходить і у сферу їх класифікації. Підсумовуючи різні токи зору на цю проблему, можна принципи права підрозділити на види залежно від того, на яку галузь правових норм вони