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NATURAL LAW DOCTRINE AND JURIDICAL POSITIVISM: COMPERATIVE ANALYSIS OF THE "OPPOSITE ANTONYMS"

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Демченко П.С. Природно-правова доктрина і юридичний позитивізм: порівняльний аналіз двох «протилежних антонімів»

Анотація. *Дана стаття присвячена порівнянню двох філософсько-правових теорій-природно-правової доктрини і юридичної позітівізма.Проаналізіровані основні теоретичні позиції кожної з теорій, визначені їх основні окремі концепції, вказані їх головні прінціпи.В статті наведені основні відмінності природно-правової доктрини і юридичного позитивізму. так само на прикладі Конституції України показано, що дані теорії в формі норм статей можуть одночасно існувати в одному нормативно-правовому акті.*

Ключові слова*: «право», «філософсько-правова теорія», «природно-правова доктрина права», «юридичний позитивізм».*

Annotation*.This article analyzes the legal doctrines of two legal philosophical theories-natural law doctrine and legal positivism.First of all the purpose of this article was to define the concept of law and legal consciousness as the main categories,which have different approaches to the definition,depending on the level of the state and society,which gives him a categorical assessment.*

Further on the basis of the conducted analysis it can be concluded that there is a great variety of legal theories,but only two of them play a major role-natural law theory and legal positivism.Revealing the essence of each of them were shown to the scientists who developed these concepts,the basic gist of ideas from each of the two concepts,the principles of the two theories.

In addition,on the basis of data analysis of natural law doctrine and legal positivism,outlined the main differences between these two legal philosophical theories.special attention is given in the proof of the fact that although these two theories are completely opposite,but they exist harmoniously in the modern legislation in the form of articles of a certain regulatory legal act.

This statement was made on the basis of the analysis of Chapter II "Rights, freedoms and obligations of person and citizen".In conclusion were obtained the main conclusions of the analysis on the continuing emergence and development of theories of law in connection with the development of humanity,the possible existence of different theories in a legislative plane,as well as the impossibility of deducing an absolutely perfect concept of law,taking into account all of the different theories.

Key words*:"law", "phylosoghical and legal theories","natural law concept","juridical positivism".*

Actual problems in the article: before starting the direct analysis of the concept we should answer to the such two questions: "what is law?" and "what is law understanding?". There is no single approach to the law understanding because the meaning of this term depends on such main peculiarities as historical epoch, development of the state, economics, society etc. According to this we can conclude that there are various meanings of the term "law". From all this quantity we can define the most common one that includes wide and narrow understanding of such term.

Scientist,who worked with this problem are :H.Grotius, Th.Hobbes, B.Spinoza,G-W Leibniz, Ch-Louis Montesquieu, Jean-Jacques Rousseau, Claude Adrien Helvetius (Natural law doctrine) and Jh. Austin, H. Kelsen,H.Hart, G. Shershenevich, K. Jaspers, A. Esman , N.M. Korkunov (Legal positivism)

Main content of the article: In the narrow understanding law – is a system of common-binding formally-defined norms that are established and secured by the power of the state and directed to regulate peoples' and collectives' behavior due to the adopted in such community standards of social, economical, political, cultural and moral life. [1,p 669]

Also law can be understood in the wide manner as legal sights and positions that express social interests enshrined in the system of general rules of conduct established and secured by the state that regulates relations in the society.[1,p.670]

In such understanding we can synthesize law understanding in the form of law ideology, law consciousness, law concepts and norms of the law that establishes the normative manner of conduct.

After understanding what "law" is we should give the explanayion to the term "law understanding" as outgoing from such term phenomenon.

From the position of A.V. Skorobogatov, law understanding – is a phylosophical and legal theory that includes as intellectual cognitive activity and its elements (perception, evaluation and representations) as also system of the interpreted legal phenomenons that were received in the result of cognitive legal activity.

According to his concept law understanding in the legal science is douply-represented. From one side it is scientific term that includes commonality of the theories, concepts, sights about essence, meaning and nature of law, representation of law on the specific manifestations, functions, place in the system of sciences and its connections with other branches of knowledge. Law understanding as scientific category – is a system of knowledge about the most common regularities of formation and organization of law that are recognized as logical and objectively true, and, thus, included to the compound of science of law in the specific society. From the other side, some authors determine law understanding as process and result of the humanitarian, cognitive, targeted activity of person that includes «cognition of the law, its perception (evaluation) and attitude to it as to the holistic social phenomenon».[2,p.8-12]

Due to the position of V.S.Nersesyants(1938-2005) law understanding should be considered from the two main legal cathegories – «law and legal act». As such cathegories are identified and distinquished we can speak about two concepts of law understanding – juridical (ius-law) and legitimate types (от lex-legal act).

Legitimate type of law understanding establishes the absence of law and indicates that the main role is given to the legislation. In the juridical type of law understanding the main rate is made on "law", that except legislation includes also the doctrine, concept and ideas. This is adducted to the various interpretations of the term "law".[3, p.32-36]

If we start to calculate the main classifications of the types of law understanding we should mention that it can lead to the huge amount of controversial questions.

However, we should define the two main concepts of law understanding, the rivairy of which is lead to the whole history of the philosophical and legal mind. There are natural law concept and juridical positivism. To define their main differences and contradictions we should detect the main characterizing moments and the main constituents of each.

Natural law concept is represented as main not only because of the historical aspect but also from the point of view the human-being and his essence is placed in the center and from this position all the system of law and legislation must be formulated.

The main ideas of such theory we can find in the works of H.Grotius,Th,Hobbes, B.Spinoza,G-W Leibniz, Ch-Louis Montesquieu,Jean-Jacques Rousseau, Claude Adrien Helvetius . Furthermore, from all of them we should define the works of Hugo Grotius (1583-1645) – dutch lawyer, politician. Up to him law has two meanings. Due to the first – it is nothing else than moral value, that gives a person right to have certain things and perform certain acts (law in the subjective meaning). The second meaning identifies the terms "law" and "legal act" (law in the objective manner). Hugo Grotius pointed out that the legal acts of the natural law have their beginning in the nature of intellect itself therefore they are as omnipotent as intellect. Due to his position even God can't violate the beginnings of the natural law. [4,p.76].

The essence of the natural law concept was quided to the search of the specific reality of law, no the reality of the state power settings. As unde the natural law we understand above-natural instance – the combination of all the obligations of the human's practice, thus, the peculiarity of the natural-law thinking is connected with the division and comparison of law and legal act from the position of principle of justice.[5,p.26]

Natural law theory established some of the principles in which its core is expressed. Furthermore, such principles sometimes are considered as foundation for the positivistic legislation.

While considering such principles we can establish that, firstly, the target of natural law – is to provide good and to avoid evil. In such principle the grounds of the natural legislation are established because such actions and inactivities are addicted to the natural law and directly comprehended by the human's intellect[6,p.178]; secondly, the human-being is seek for the specific goods as any living being Based on this the peculiarities of the natural law are such that take their beginning from nature: the couples' compound, the birth of the progeny etc;thirdly, the human-being is seeking for the good that is like the specific principle of the man as rational being. Therefore, to the natural law should be related such acts that take into account such idea. For example, people should avoid ignorance and mustn't harm to others. [6,p.179]

The main classification of the natural law concept, because of its different subkinds can be presented on basis of the typology of concepts.

From the first understanding lay the main categories of the natural-law mind: «nature», «intellect», «person's nature». Due to this we can define three kinds – kosmologycal, the main desire of which is to determine transendentual character of law, but the minus is the desire to withdraw natural law in the existence, out-of-mind to existing, rationalistic – that made the main reference to the power of intellect, the main minus of which is that while appeal to the power of intellect and don't take into consideration other factors, there is no opportunity to build the ideal system of law, antropologycal – in which the main role was given to the connection of law with the nature of person, but because of the different ways of of interpretation the sense of law's humanism is lost. [5,p.32]

Under the second typology of the concepts the main accent is given to the terms of «old» and «new» law. "Old" law is based on the traditions of the society and priveleges are given to gentry. "New" law firstly appeared in the theory ofnatural law in the eighteenth century, when the equality with citizens and state was achieved. [5,p.32-33]

The third typology of concepts provides that the ideas of "new natural law" can be divided to the naturalistic, deontologycal, logocentric, that differenciate up to the interpretation of the ontogonistic status of the natural law. The main researchers of such groups are Jh. Locke, I. Kant, G. Hegel[5,p.33]

The fourth typology of concepts offers to consider natural law as "classic" and "non-classic". We should take this classification into consideration because of the frequency of statements that natural law overcame itself. [5,p.33]

Turning to the legal positivism we should admit that there is a feature to identify law and legislation, in other words, law as a system of set norms, historically formulated institutes.

The main representatives of the theory of legal positivism are such scientists as Jh. Austin ,H.Kelsen ,H.Hart ,G.Shershenevich ,K.Jaspers ,A.Esman ,N.M.Korkunov.

However, we should admit that legal positivism takes its beginning from the general phylosophycal term "positivism". The founder of such phylosophycal stream is Aug.Comt(1798-1857), who was inspired by the scientific works of R.Descartes , F.Bacon , Th.Hobbes ,B.Spinoza. In the core of positivism is the statement that the source of positive knowledge can be only separate, specific (empirical) sciences and their synthetic unifications, philosophy as special science can't pretend on the independent studying of reality.

Classification of the main kinds of the juridical positivism can be represented from the three basic theoretical studies as classical Jh. Austin 's positivism,H.Kelsen's normativism and analytical jurisprudence of H.Hart.All these theories interpret positivism in different manner and also have their own attitude to the natural law concept.

Lets start from the classic Jh.Austin's(1790-1859) positivism. We should admit that his ideas were taken from the Bentam's works (he is considered as forefather of the juridical positivism). Nevertheless Austin gave life to the theory of legal positivism in the classical understanding. Under his point of view – law it is the rule is set for the ruling of one person who

is thinking above another. There are God's and human's laws. God's laws don't have any juridical power. Human's laws are divided into positive and positive moral. Positive laws are established by the political leaders for the political subservients or just citizens to realize the rights that were given to them. Austin looks at the law as a special command or order that obliged person always to act in a special manner or to refrain from the actions. "Law comes from the sovereign which means that every subordient should follow itoro права". [4,p.114-115]

H.Kelsen(1881-1973) offered to consider positivism not as a will of the political order but ruling of the norm of law. He named his concept "Clean theory of law" according to which there is strict hierarchy of norms that in the positive legislation forms the "pyramyd of norms". On the top of it – constitutional norms – basis – general source of all the norms by Kelsen, than from "the top to ground" are laws, governmental acts, acts of the below-standing authoritie. The ground of the pyramid are individual norms, issued by the court or administrative procedure.Kelsen also admits that besides creating and writing of the norm, significant role is given to the process of their realization.[5,p.91-93 /10]

The last and the most designed concept is the concept of H.Hart's(1907-1992) analytical jurisprudence. While studying the essence of his theory we can come to the conclusion that Hart considers law as something more than the system of commands issued by the state. He indicates that state compulsion has sense only for protective relations, at the same time, most of the regulative relations are based on the will of the participants. He also made a statement that immoral laws should be considered as law. Hart analyzes wide and narrow meanings of the law. Wide includes all norms (immoral also), narrow – only those that correspond to moral.[4,p.117-118/3,p.635-638]

The main principles of juridical positivism are the next:

Principle of etatysky paternalizm – that designates on the quardian-protective relations between the state and law and demands to determine and to mark the essense of law in the boarders of the state.

Principle of secularization – law has exclusively secular character and includes "music of the heavenly sphere and light of the highest absolutes". Human is thinking being without metaphysical soul.

Principle of the minimum of morality – morality is present in the positive law in those measure that secures necessity and completeness of the ethic law and doesn't permit it to become lawless.[7,p.134-136]

Considering such two philosophical and legal theories we can make a conclusion about their main difference:1)Natural law has its beginning from nature, at the same time, positive is created artificially by people to regulate their relations in the state.2)Natural law appears with the first civilizations, at the time when positive law only after the state development.3)Natural law concept includes respect to life, freedom, properly, human's dignity and gives them the highest value, positive law concept regards that all rights and freedoms are given by the state that obliged to conduct in a specific manner and can take away all these rights and freedoms.4)Norms and principles of natural law have religion's and morality's background, positive law is based on the will of state.5)Natural-law thinking demands philosophical intellect and metaphysical intuition, while positive law can't go beyond the limits of the theoretical stereotypes and installed rules.[7,p.132-133]

Nevertheless despite absolute difference in the essence of such two theories, natural law concept and positive law concept are used simultaneously in various legal acts, including Constitution of Ukraine. We must admit that such two theories not only complete themselves in the controversial questions of social-legal relations, but also create integrity contemporary system of legislation. Let's take, for example, Constitution of Ukraine, 1996, where in Chapter II "Rights, freedoms and obligations of person and citizen" most of the articles are the norms of natural character that quarantee rights, freedoms of every individual in the country. Articles 65(about the protection of the State), 66 (about the obligation of protection of environment), 67 (about the obligation to pay taxes), 68 (about the obligation to act according to the Constitution

and other laws of Ukraine) the state establishes rights and obligations of a person, Article 64 covers the provision about the restrictions of definite rights in special circumstances. Thus, we cam point out that such articles are the classical norms of juridical positivism. [8,p.21]

Thus we can come to the ***conclusion on the conducted analysis***:

1) Every philosophical and law stream appears and develops together with humanity and the main achievement of science and technic. Such two theories will be developing with "stagnations" and "declines".

2) As in general concept of philosophy – law doesn't have anything ideal. Thus we can make a statement that there is no legal system in a defined state which is based on the specific phylosophical and law schools. It will always have various law theories and streams.

3) An approach to the law understanding depends on which idea lies on the basis of this concept, which ideas are included in its sense, and how law corresponds to the reality. According to the diversity of theories, we can tell that the term "law" should be fixed in respect with all these theories.

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ЗАХИСТ КОМЕРЦІЙНОЇ ТАЄМНИЦІ ЗА ДОПОМОГОЮ ЗАКОНОДАВСТВА ПРО НЕДОБРОСОВІСНУ КОНКУРЕНЦІЮ

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Анотація. *В статті «Захист комерційної таємниці за допомогою законодавства про недобросовісну конкуренцію» розглядаються проблемні питання захисту комерційної таємниці за допомогою законодавства про недобросовісну конкуренцію. Також аналізуються положення міжнародних стандартів щодо захисту комерційної таємниці та ефективного захисту від недобросовісної конкуренції.*

Порушення комерційної таємниці розглядається міжнародним законодавством як факт недобросовісної конкуренції. При цьому закони про недобросовісну конкуренцію країн континентальної (пандектної) системи права засновані на теорії конфіденційності (фактичної монополії). Тому зарубіжний досвід саме країн континентальної (пандектної) системи права має особливе значення для формування українського законодавства про конфіденційну інформацію (комерційну таємницю і ноу-хау).

Ключові слова: *конфіденційна інформація, комерційна таємниця, секрети виробництва, ноу-хау, недобросовісна конкуренція, нерозкрита інформація.*

Аннотация. *В статье «Защита коммерческой тайны с помощью зконодательства о недобросовестной конкуренции» рассматриваются проблемные вопросы защиты коммерческой тайны с помощью законодательства о недобросовестной конкуренции. Также анализируются положения международных стандартов по защите коммерческой тайны и эффективной защиты от недобросовестной конкуренции.*