The Social Sciences 11 (Special Issue 1): 6012-6015, 2016
ISSN: 1818-5800

Philosophical and Legal Concept of Justice in the Civil Law Institute of Russia

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Abstract: The study is devoted to the idea of a just social order which has already been exciting the minds of philosophers and lawyers for many centuries. Justice serves as the ethical standard to which we relate the existing socio-economic and political structures and relationships. At the same time it is an ideal which makes us aspire to the horizon to achieve it. The value of justice makes an active philosophical and legal dispute, aimed at establishing its identity.

Key words: Justice, civil law, anti-social transactions, void transactions, philosophy, social equality, moral and ethical standards, common good

INTRODUCTION

The maximum degree of public danger is represented by the void transactions stipulated by Art. 169 of the Civil Code of the Russian Federation the transactions made for the purpose which opposes the principles of public order and morality. It seems appropriate to begin the analysis of some concepts in the modern ethical philosophy with the concept of Martha Nussbaum. This author notes that the modern deontological (Kantian) and utilitarian ethics is not able to work out an adequate concept of morality in the legal aspect. In order to overcome the ethical crisis she offers to formulate an adequate conception of the good human life and successful functioning as a human. Thus, Martha Nussbaum returns us in the ethical theory and the functional concept of the human being from the point of view of the law (Nussbaum, 2003).

MATERIALS AND METHODS

From a legal point of view, the concept of justice is reflected in the commission of antisocial transactions that is in the consequences of their invalidation.

The research methodology is an ethical concept of Martha Nussbaum which is aimed at achieving the goals of social justice, since the task of the society is to lift each person up to a certain threshold level in relation to each of the "essential functional capacities" in order to ensure the full-fledged human being. We are talking about an achievement of certain equality in the results as a way of expression of the equal dignity of every human person.

Thus, this concept of justice is egalitarian and is aimed at ensuring the fundamental ethical equality. Special attention is given to the fact that the theory of law considers the morality as an objectively existing group of social norms, the specific features of which is to evaluate the behavior of people in the light of such categories as "good-evil", "worthy-unworthy", "duty", "honor", "conscience" and provision with the force of social coercion. A vivid example of the relationship between the law and morality in the frameworks of civil law institute of Russia is the conclusion of anti-social transactions where the morality contradiction of the transaction is treated as the commission of acts that do not meet the established social concepts of good and evil, just and proper. The requirements of morality in contrast to the law are not fixed in the system of written rules.

RESULTS AND DISCUSSION

For the civil law the concept of M. Nussbaum is of great interest due to the fact that, for example, from the standpoint of Aristotelian thought" the property has no independent value, its value is determined solely by the social purposes, for which it serves. Therefore, the most definitive form is not a private or public but a mixed form of property ownership, eliminating the extremes of one or another".

A similar position is occupied by Peter Corning, treating the justice as a biological imperative and the society as an enterprise for the purpose of general survival. Regarding the Soviet and modern Russian civil

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doctrine, the well-known distribution to designate the transactions, violating the norms of morality and ethics, has been called "anti-social transactions". It should also be taken into account that the analogues of this transaction composition with the violation of generally accepted norms of justice are present both in a foreign and private law in the German Civil Code of 1896 (Paragraph 138), the French Civil Code, as well as in the Italian Civil Code (Articles 1343, 1418).

The modern Russian civil legislation defines in para. 1 of Article 169 of the Civil Code of the Russian Federation that the transaction made with a purpose which admittedly opposes the principles of public order or morality, is void. Unfortunately, the interpretation and application of this article presents some difficulties due to the lack of legislative definition of such category as the "morality foundation". Therefore, in order to deal properly with the concepts of justice and morality, applying them in the interpretation of the Russian civil law, it is necessary to examine these concepts in more detail in terms of philosophy and ancient law.

The modern ethical and philosophical discourse does not enable to resolve the conceptual dispute. This is an indication of the fact that the language of morality is in total disarray as a manifestation of a moral catastrophe marked by Alasdair MacIntyre (Schaefer, 2007). The Nozick's theory closes on the "justice" of property ownership (title of ownership). It is interested in the issues of original purchase of ownership (principle of just acquisition) as well as the transition of property rights (principle of just transition). In accordance with his historical theory, the distribution is true, if the subject legally owns the property ownership (title of ownership). However, what if the property has been acquired in the past by committing illegal (unjustified) actions? R. Nozick believes that the existence of injustice in the past makes to appeal to the principle of correcting injustice in the property ownership. At the same time, the author acknowledges himself that he is unable to answer the question, how far should we analyze the past in order to correct the historical injustice. R. Nozick says that all distributive conceptions of justice, aimed to achieve not formal, but material equality in the results, are out of history and insolvent. According to the author, the taxation of income earned by labor is equivalent to the forced labor and the use of calibration (calibrated by the pattern, for example, by the needs or merits) principles of distributive justice establishes a partial ownership to the people.

The justice concept of D. Rawls is of contractualist nature that is it is another variation on the theme of "natural (social) contract" and however, the contract is an abstract, hypothetical structure according to the understanding of this author.

Thus, the messages of these justice concepts are competing and opposing each other, therefore, in the absence of an external objective ethical criterion the dispute becomes insoluble. The modern liberal ethical and philosophical discourse does not enable to resolve the conceptual dispute between the ideologist of radical selfish individualism R. Nozick and the left liberal philosopher D. Rawls. Therefore, the following question is of interest: how to apply, for example, an overimperative principle of good faith in the judicial practice (P. 3 of Art. 1 of the Civil Code of the Russian Federation), if the modern ethical philosophy does not answer to the question of what is good and what is evil?

As noted by A. McIntyre, the emotivism rests on the assertion that all attempts in the past or present to provide a rational justification of moral objectivity have ended in failure.

And directly to the civil law, the following characteristics of Aristotelian ethics formulated by A.V. Prokofyev, are of some interest: it surpasses the modern exclusively normative ethics by the fact that the latter overlooks the difference between two ways of damage to the society (by the nature deficiency and by the breach of specified law) accented by the ethics of virtue. The ethics of virtue describes well the mechanisms that allow the individual to act in accordance with the moral considerations in particular, unique cases where it is unclear how to apply the rules and laws.

In practice, the legislator has a very negative attitude to inclusion of the term "morality" and "justice" in the rule of law which has been detected even in the pre-revolutionary literature. However, it has been used a slightly different idiomatic expression at that time "good morals" which in fact, does not much differ from the currently used-"morality". Regarding the void transactions in particular, I.A. Pokrovskiy said that "the rule that the contract which is contrary to good morals, is void, is a universal axiom, furthermore consecrated by a high authority of the Roman law: the very term "good morals" has its origin from the Roman "boni mores". Meanwhile, in spite of two thousand years of existence of the concept of "good morals", we have before us not something precise and definite but some solid puzzle which the lawyers are still not able to solve". In the Soviet civil law literature, it is also discussed the issue of whether it is possible to consider the transactions null and void, if they are contrary to the "socialist morality" and the "rules of socialist community".

The fact is that the original regulations should initially consolidate and specify certain aspects of the

moral and ethical principles. Thus, the universal values (life, freedom, etc.) are also the moral principles and are specified in the international and national legal instruments as the human rights. That is, it can be argued that these values are also constitutive and moral for the legal system. But all the moral norms, to which the law enforcer further refers, should be fixed in a certain kind the federal law and should be provided by the government through the coercive power that acts as a guarantor for their fixing. The question arises whether the "morality" is meant as such in all its diversity or only the "morality foundation" is meant.

Aristotle singled out the general and private justice in the "Nicomachean Ethics". The private justice in the civil law literature is usually divided into corrective justice and distributing that is distributive justice.

The individual civil lawyers such as Richard Wright, consider the concept of general justice as questionable. However, many civil lawyers do not consider the issues of general justice in their papers, hinging on the analysis of civil law problems from the standpoint of corrective or distributive justice. For example, James Gordli notes: there are distinguished two fundamental concepts of justice, on which the law is directly based: distributive and commutative. The objective of distributive justice is to ensure each subject with the necessary resources and the objective of commutative justice-to provide the opportunities for their receipt without creating the unfair restrictions to other subjects (Gordley, 2006).

As noted by a prominent legal theorist John Finnis, in the teachings of F. Akvinsky the justice is based on the unity of rights and obligations in relations and the equality is considered in the sense of right proportion (Finnis, 2011). As a result, the legal justice (an analogue of the Aristotelian general justice) is the force, ability and freedom in the definition of the common good and therefore, a correct establishment of rights and obligations in the intersubjective relations in accordance with the principle of moral necessity (Solari and Corrado, 2009). Thus, the "universal virtue" of the Aristotle's general justice is presented as the general social benefit and the basis of private justice, foundation and correctness of all obligations in the intersubjective social relations.

It is noteworthy a remarkable statement of A.A. Guseynov: the general justice can be defined as "the latest moral and appeal instance in the public affairs. The justice gives legitimacy to the social actions and forms of life. The general justice answers to the question about the purpose and meaning of the joint, united, social and orderly existence in the society and the state". The private justice, according to A.A. Guseynov is the system based on the purpose of "distribution of benefits and harms (advantages and disadvantages, gains and losses) of living together in a single social, state-organized space". As a result, the said author concludes: "the ethical-philosophical category and the ethical-legal category of justice are linked so organically that neither is possible without the other. They form two aspects of the theory of justice".

With this socialized understanding of the general justice as the goal of civil law, the law enforcers get a concrete opportunity to assess whether the use of a separate rule, the implementation of subjective right in a particular situation complies with the objective of achieving the social justice (Schaefer, 2007).

According to the eminent civil lawyer and member of the Working Group Martin Hesselink, there is a tendency of the civil law socialization. The author points out that: during the 20th century, the problems of social justice have strongly transformed the private law, the classic one has been replaced by the modern private law in which the formal concept of contract freedom and autonomy has given way to recognition of the fact that a lot of individuals are not free and autonomous in most situations in reality. In the contract law, this means that contract freedom and its binding force are limited by the obligations to provide information, implement care and co-operation, etc. in order to avoid injustice and protect the weaker party. In the property law, the absolute nature of the right of ownership is limited and its social function is established in order to prevent abuse in this area. In the tort law, the fault-based liability is replaced by the no-fault liability in many cases. The socialization is carried out both by law and by applying the general clauses by the courts, such as good faith, especially in the Anglo-Saxon countries.

At the end of considering the issue on features of the Aristotelian interpretation of justice, it should be indicated that: in the modern civil law literature it is allocated another manifestation of the private justice the retributive justice. Aristotle has not directly allocated this form of private justice but some researchers find the undeveloped intuitions of the retributive justice in the original texts of Aristotle. Thus, the civil lawyer Jeremy Waldron (2000) argues that: the retributive justice is recognized in the Nicomachean Ethics as a separate form of justice. The domestic philosophers also specify this form of private justice. For example, B.N. Kashkin points out that: the retributive justice contains the idea of social promotion and social punishment.

CONCLUSION

Thus, the justice as a category of civil law (in particular, on the example of void transactions in the Russian civil law) shall mean the historically formed representations in the society on the relevance of social ideals (parameters) of the distribution of rights and obligations between the parties, powers of the subjects

and the limits of their implementation, private autonomy and responsibility for collaboration and social cooperation, benefits, damages, losses and other adverse consequences for the non-performance of contract or damage, unscrupulous behavior, etc., as well as the necessary application of the adverse effects in order to adjust the behavior of the subjects.

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