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Contemporary Conceptions of Universalization in Constitutional Law

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Abstract: Traditionally, the problems of state-legal unification and universalization have been theoretically developed and practically solved on the basis of two opposite and rather antagonistic types of legal understanding: jus naturalism (natural-legal approach); and positivism (legalism). In contemporary international and intrastate legal acts, the external and pragmatic compromise of these two cardinally different approaches is expressed in the form of requirement that norms of the positive law would correspond to commonly accepted natural and inalienable human rights and freedoms. Libertarian juristic general theory of law and state can be used as the conceptual approach, retaining cognitive-valuable points of two other types and, at the same time, overcoming their serious drawbacks. Thus, we can say about three conceptions of law universalization, namely, antagonistic (jus naturalistic and positivistic) conceptions and libertarian juristic theory, synthetic in many respects. We will consider the essence of these approaches because, in our opinion, precisely these will help us to understand the basic principles of the contemporary universalism.

Key words: Jus naturalism (natural-legal approach) · Positivism (legalism) · Antagonistic · Libertarian juristic theory

INTRODUCTION

The history and theory of development of law and government and the processes of their universalization indicate that the basis of any form of official-power regulation and ordering of social relations and, e.g., relations global in character, constitutes a certain type of legal consciousness and appropriate conceptual-legal understanding and interpretation of the state. According to this principle, we can single out a few types of interpretation of legal universalization. Let us consider this in more detail.

Traditionally, problems of the state-legal unification and universalization have been theoretically developed and practically solved from viewpoints of two opposite and rather antagonistic types of legal consciousness:

- Jus naturalism (natural-legal approach);
- And positivism (legalism).

Struggle between these scientific directions had ultimately led to the fact that most of the contemporary international legal acts, as well as Constitutions of most foreign states, simultaneously contain regulations which can be referred to both approaches [1].

In contemporary international and intrastate legal acts, the external and pragmatic compromise between the two cardinally different approaches is expressed in the form of requirement that norms of the positive law would correspond to the commonly recognized natural and inalienable human rights and freedoms.

The libertarian juristic general theory of law and state can be used as the conceptual approach, retaining cognitive-valuable points of two other types of approaches and, at the same time, overcoming their serious drawbacks. This theory, developed by academician V.S. Nersesyants [2], permits successive interpretation of content, form and prospects of the processes of the legal universalization and unification, as

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well as the sense, directions and features of these processes under the conditions of contemporary general social globalization.

Thus, we can say about three conceptions of legal universalization, namely, antagonistic (jus naturalistic and positivistic) conceptions and libertarian juristic theory, synthetic in many respects. We will consider the essence of these approaches because, in our opinion, they will help us to understand the basic principles of the contemporary universalism.

Representatives of positivism (legalism) [3], denying the essence of the legality, reduce it to the law, i.e., to the "positive" phenomenon, by which they mean any (and, in particular, arbitrary) official power-holding, compulsory-obligatory establishment of the normative character. In fact, legists think that the essence of (both intrastate and international) law is power-holding obligation (order of the government) because it is just this feature that they use to distinguish between law and unlaw.

Credo of legalistic (positivistic) approach in New time was formulated by ideologist of the absolutist state T. Hobbes: "Legal force of law lies only in that it is just an order of the sovereign" [4].

In other words, everything what is ordered by authority is just the law. All legalists (positivists and neopositivists) of contemporary and past times adhere to this approach.

Moreover, compulsory character of the law (i.e., legal act, all official sources of intrastate and international positive law) is interpreted not as a consequence of some objective properties and requirements of the law, but rather as an initial legislative and law-determinative factor, as a power (forcing) original source of the law.

Principal Part: The power (an authority) in this case gives rise to forced, mandative law. Ideas of positivists about universalistic properties, directions and characteristics of official power-holding regulation of the intrastate and international relations just lie within the range of these power (forced-mandative) conceptions about law and order. They have no criterion to distinguish between law and lawlessness. Moreover, most consistent apologists recognize no distinctions at all.

For instance, H. Kelsen comments that "any arbitrary content can be the law. There is no human behavior which, as such, in virtue of its content, could not deliberately compose the content of the legal norm" [5].

The statement of positivists that the law (positive law), as an official power-holding phenomenon, bears obligatory character, is correct by itself and in no way doubtful. But, this is not sufficient for the definition of law. A core flaw of their approach is that they, denying an objective (irrespective of how the authority thinks) essence of law, simultaneously deny the distinction of law (and an official power establishing it) from lawlessness and violence.

Positivism is the name for social and intellectual movement, which tried to find out from mistakes of the project of Enlightenment, which was finished, firstly, in the Reign of Terror after French Revolution of 1789 and secondly, in irrationalism of Weimarer Republic after Germany defeat in the First World War. At time when this was generally accepted, in order to distinguish between quasi-political movement (named 'positivism' and created by Auguste Comte in 1830s) and more strictly philosophical movement, named 'logical positivism', connected with Viennese circle in 1930s, both shared common perceptibility, namely, in that uncontrollable realization of the cause could have pernicious practical consequences. Thus, both of them considered those demands of the cause as "funds", in order to structure its further development and in order not to become the victim of the suicidal skepticism. In this regard, positivism includes earlier missed dimension of the empiricist concerning the (disinclined to the risk) orientation toward peace, historically connected with the Studies of Platon [6].

We begin with the logical positivism in philosophy. Main ideas and problems of the logical positivism were developed as a part and long running struggle of empiricism against rationalism and anti-idealistic aim of ensuring the clarity concerning the questions of philosophy [7].

At the same time, it should be noted that legalists (positivists), in principle, correctly (though one-sidedly) criticized (and continue to do so) the fact that jus naturalists neglect the regulative role and importance of the law (positive law) as the widespread (universal) official power-holding established regulator of social relations.

Jus naturalists, in their turn, antagonistically oppose the natural law and the positive law and, thereby, consider the law (positive law) as something unauthentic (unauthentic in terms of essence, in terms of phenomenon), while the natural law (in some or another

version) is interpreted as the only authentic law (as an inseparable union of essence and phenomenon of the authentic law), which appears and acts according to the "nature of things", by itself, as opposed to the state and its legal acts (positive law) [8].

This explains the regulation, characteristic for jus naturalism, about legal dualism, i.e., the conception about two different, but simultaneously acting, types (varieties) of the law: natural law and positive law.

In fact, consistent jus naturalists deny positive law in favor of the natural law and a sovereign national state (i.e., the authority, which establishes a positive law) is replaced with non-state or supranational instances.

According to jus naturalism, common basics of law (intrastate and international) are developed and implemented in the course of the universal natural law and, primarily, in the form of inseparable natural human rights and freedoms.

At the same time, jus naturalists seriously underestimate and often disregard, the role of the law (positive law) as a necessary method and means for official power-holding (at intrastate and international levels) establishment of generally compulsory and formally definite norms of law, acting in one or another society.

In the context of contemporary integration processes, this is manifested in tendencies toward the establishment of the priority of natural human rights with respect to state and its positive-legal acts inside the country and toward strengthening of supranational basics (obligatory norms, power-holding institutions, military organizations, legal, controlling, executive-administrative, law-establishing, law enforcement and other institutions) in intergovernmental relations.

In the frameworks of libertarian juristic approach, there is a distinction between the essence of law (the principle of formal equality), i.e., what is objectively inherent in the law and does not depend on the will and lawlessness of the official law-establishing power and an external phenomenon, pretending (of course, not always lawfully) to have legal significance, i.e., commonly compulsory official power-holding normative establishments (different acts and sources of acting intrastate and international law, generally speaking, legal act).

The sought (in the course of libertarian study) union of essence and phenomenon in the sphere of law is a legal act, when commonly compulsory regulatory phenomenon (Constitution, law, norms of the acting positive law) corresponds to the essence of the law (to the principle of the formal equality), i.e., it represents precisely and solely the legal commonly compulsory phenomenon and not just any (moral, religious, or arbitrary) commonly compulsory phenomenon.

System planning is always based on the exchange between flexibility and juridical confidence. Each system shares a little of both. Systems such as English heavier emphasize on flexibility, while Americans and Frenchmen seem to appreciate higher the juridical confidence. Netherlands are the part of the same Napoleon juridical family, as France. However, in Netherlands, the planning practice seems to be more flexible than the general perception of the Holland system of planning. Many events deviate from the juristically obligatory plan of land use. Therefore, this plan does not provide high juridical confidence [9].

In the same cases (rather ubiquitous in past and at present), when generally obligatory phenomenon (law) contradicts the essence of law, we deal with unlawful (offending, anti-legal) law (with norms of the positive law, contradicting the principle of the formal equality) [10].

The principle of the formal equality is the union of three mutually-implying essential properties (characteristics) of the law, i.e., universal equal measure (and scale) of regulation, freedom and justice. This trinity of essential properties of the law (three components of the principle of the formal equality) can be characterized as three interconnected meanings of the same sense: one impossible without another (one property impossible without other properties). Universal equal measure, inherent in the law, is just an equal measure of freedom and justice, while freedom and justice are impossible outside and without equality (universal equal measure and single scale of regulation).

Legal type (form) of human interrelations are the relations, regulated according to common abstract-universal scale and equal measure (norm) of permissions, prohibitions, requitals, etc. This type (form) of interrelations includes:

- Formal equality of participants (subjects) of the given type (form) of interrelations (in fact, different subjects are equalized with a single measure and common form);
- Their formal freedom (their formal independence from one another and, at the same time, subordination to the common equal measure; action according to a single common form);
- Formal justice in their interrelations (abstract-universal (identical for all) measure and form of permissions, prohibitions and so on, envisaging no privileges).

Equality (universal equal measure) envisages and incorporates the freedom and justice; freedom implies equal measure and justice; and justice implies equal measure and freedom. At the same time, equality, freedom and justice as properties of the legal essence (points of the principle of the formal equality) have formal (formal-substantial and not virtually-substantial) character, serve as formally-legal qualities (and categories), are constituent parts of the concept of law and are possible and expressible only in universal-legal form.

Components of the principle of formal equality (equal measure, freedom and justice) refer to the sphere of law and not to the sphere of morality, religion, etc., since all these (and the other) illegal spheres (and intrinsic forms and norms of regulation) bear limited, partial character, have some definite factual content (by virtue of variety of different moral, religious forms, norms and conceptions about the proper things, absence of single and universal morality, religion and so on).

Also, these components are devoid of abstract-universal form (and universal formalization) inherent only in the law; in this form it is only possible to express universal (for the corresponding socio-historical stage of development of the law) abstract-universal, absolutely (universally) formalized sense of the equality and justice in the corresponding society.

This makes it possible to characterize the law as universal-common, necessary and the only form of being and expression of equality, freedom and justice in the social life of people in their intrastate and international relations [11].

Equality (equal measure), freedom and justice are the essential properties of the law as special form of factual relations and they, like the law as a whole and as defined, bear formal character. On the other hand, factual property does not have universality quality of universality itself (universal form): anything factual is always only partial, civil and not universal.

According to libertarian study, the history of law is the history of progressing universalization of law and legal form of regulation, development of the scale of measure of the formal (legal) equality, with the preservation of this principle itself in any system of law and the law as a whole.

Different stages of historical development of rights in human relations are characterized by their specific forms, possibilities and limits of universalization of law and state, their own scale and their measure of equality, freedom and justice, their range of subjects of legal (and state-legal) relations; in words, they are characterized by their own content of the principle of formal (legal) equality and its normative specification in the law.

Thus, the principle of the formal equality represents a universal principle, constantly inherent in the law, with historically changing sphere and measure of regulation.

On the whole, this historical evolution of the sphere, scale and measure of the formal equality does not contradict but, on the contrary, supports the universal importance of this principle (and the system of norms, specifying it) as a distinct feature of the law in its relation to and divergence from other (moral, religious, etc.) types of the social regulation. Owing to the law, many factual differences in external or internal relations turn into universal (for the corresponding society) legal order of equalities and inequalities, coordinated according to single scale and in equal amount.

World history of mankind is a progressing movement toward the universal freedom of a growing number of people (representatives of different ethnic groups and nations, at intrastate and international levels).

From the legal point of view, this process of juridical (state-legal) universalization means that growing number of people (representatives of new nations, layers, classes and so on) are recognized as formally equal subjects of the law. Historical development of right in human relations is, hence, the progress of equality of people as formally (legally) free individuals.

Through the universal mechanism of legal regulation, the originally not free crowd of people gradually (in the course of the socio-historical development) turns into free subjects of the law.

Legal equality makes freedom to be possible and real in universal normative-legal form, in terms of a certain legal (intrastate and international) order.

In socio-conditioned environment of universality of the law and its generality and validity, as a necessary form of social relations of free subjects, precisely the legal justice serves as a criterion of legality or illegality of all the other pretenses to play this role and to occupy the place of justice in this space.

Rule of general effect of the positive (intrastate and international) law is the consequence of its socio-historical validity as a universal regulator according to abstract-universal principle of the formal equality. According to this logics and taking into account these requirements, real process of “positivisation” of the essence of the law should flow, as an expression and

official power-holding fixation of generally valid requirements of the principle of formal equality in the corresponding acts in the form of specific norms of obligatory law (intrastate and international law).

During struggle against offending law, in the process of historical development of law and statehood, the state created and strengthened special institutions, procedures and rules in both law-making activity itself at intrastate and international levels and in authoritative intrastate and international control over the legal act correspondence to the law, state, quality and real compliance with the established law and order.

Essential union of the law and state (as a legal form of organization of the public power) predetermines the uniformity and common orientation of its universal regulatory-ordering properties, functions and characteristics.

In some or other form, these common universalistic basics appear in all historical types and forms of the state, in all aspects and directions of organization and functioning of the state power. The degree of universality of the state and, at the same time, the universality of the corresponding regional and worldwide unions and communities in different states, is ultimately determined by the development level of principle of the formal equality, implemented and realized in it (in the form of norms of the legal act, institutions of legal statehood, etc.)

The above-mentioned situation of contradiction between positivism and jus naturalism, according to libertarian juridical conception, for the purposes of preservation and further development of intrastate and international law and order, should be understood and interpreted not as capitulation of the state and positive law in favor of the natural law and not as restriction of the state sovereignty in favor of the supranational structures, but rather as a search for reasonable compromise between natural law and state (with its positive law) on the general legal basis of the principle of the formal equality under the conditions of the apparent transition from the former force conception of the state sovereignty to the contemporary legal conception of the state sovereignty.

In this sense, the voluntary transfer of a part of their legal powers to international associations and structures, performed by the states in accordance with international agreements (and in compliance with requirements of the principle of their formal equality as subjects of international law), is in no way should be considered as a restriction of their sovereignty, but just as one of an adequate and proper forms by which they would realize their legal powers in the frameworks of legal conception of the state sovereignty.

In contemporary international-legal acts and national constitutions, the corresponding natural-legal regulations about rights and freedoms of a human are fixed as independent (and, at the same time, priority-ranked with respect to all the other sources) source of positive (international, national, macro-regional) law. In particular, the regulations of the Constitution of the Russian Federation claim about supreme significance of rights and freedoms of a human (art. 2), about the need in correspondence (non-contradiction) with content of laws about rights and freedoms of a human (art. 18.55), etc.

But, besides all this, the Russian Constitution (part 3, art. 17) contains the following special preservation: “Realization of rights and freedoms of a human and a citizen should not disturb the rights and freedoms of other individuals”. Normative-legal and juridical-logical sense of this proviso (from viewpoints of its libertarian juridical interpretation) consists of the statement that natural rights and freedoms of a human, wrote in the Russian Constitution (and, by the way, like the rights of a citizen), possess their own juridical power, only (in that amount and in those cases) because they correspond to (and not contradict) the legal principle of the formal equality.

This proviso clearly demonstrates both the fundamental shortcomings of jus naturalism (by virtue of absence of the concept of legal act in it, etc.) as a basis for the proper positive law and the need in formalized essential-legal criterion (principle of the formal equality) for estimating the normative-legal significance of the natural-legal regulations about human rights and linking the natural and positive law (their rendering to the common essential-legal denominator at intrastate and international levels).

The specific features of human rights and freedoms as the source of law are caused by the fact that human rights and freedoms, even after their acceptance and fixing in national and international acts as the priority source of positive law and, hence, their endowment with the corresponding official power-holding juridical strength, continue to be simultaneously the natural rights which, according to their nature and essence, principally differ from formally specific and normative-concretized regulations of the positive law, even under the conditions of its pragmatic compromise and agreement, fixed in the Constitution.

These and other features of the natural law (mixing of the law with morality, etc., indistinguishing between normal-legal and factually substantial properties, unspecified regulations about natural rights in normative-legal form, etc.) should be taken into consideration in the process of the normative-legal concretization of the general regulations of the intrastate and international law about the priority of rights and freedoms of a human.

At the same time, firstly, we should keep in mind that the necessary (within the practical needs and principal capabilities of the positive legal regulation) normative-legal concretization of requirements of natural rights and freedoms of a human in different branches of legislation in the form of the proper regulations (norms) of the acting positive law it is a great and complicated juridical work of the scientific and practical character, which requires creative efforts and cannot be realized in mechanical way (such as through simple repetition of the common regulations about rights and freedoms of a human in specific areas of the legal regulation).

Secondly, from the already mentioned specific features of the natural law, it follows that complete juridically important content of rights and freedoms of a human, in principle, cannot be totally and ultimately (once and forever) normatively transformed and expressed in the form of the corresponding norms of the acting positive law.

Thirdly, from the material above, it is clearly seen that the part of juridically significant content of human rights and freedoms, which did not get its concretized expression in the form of specific norms of law in the acting positive law, should be properly (with the help of adequate juridical methods, procedures, forms, etc.) ensured and protected in human rights and law enforcement activity, in the process of consideration and solution of concrete situations and cases, concerning the rights and freedoms of a human.

On the whole, the libertarian juridical theory of law and state (and the corresponding conception of juridical universalization under the conditions of the contemporary globalization) makes it possible to preserve and advance the achievements of legalism (positivism) and jus naturalism in the frameworks of a new approach; however, at the same time, this theory is free of inner antagonism and one-sided interpretations of this subject matter.

By virtue of the successive formalization of its regulations about the principle and forms of the processes of juridical unification and universalization, the libertarian juridical approach, in our opinion, can be used as adequate and promising theoretical basis for development and implementation of conception of legal (state-legal), intrastate and international policy of Russia, in the contemporary global world.

CONCLUSION

Thus, we can maintain that universalization in the sphere of right and state is one of important aspects of the general globalization in the contemporary world. As is well known, contemporary processes of globalization influence substantially the transformation, changes and modernization of state-legal institutions, norms and relations at worldwide, macroregional and intra-national levels, stimulates, accelerates and renovates the processes of universalization in the sphere of law, organization and functioning of the state.

Contemporary globalization (including juridical globalization as its important constituent part), considering all peculiarities of its content, specific properties, characteristics and so on, is a certain new stage of further universalization of world history of humanity. This universalization involves, in particular, universalization of constitutional principles and norms. Based on the aforesaid, we can generally define the universalization in the constitutional law.

Universalization in constitutional law is the process of fixation of the certain universals in Main laws of the contemporary states, most of which are formulated taking into account the process of international fixation of rights and freedoms of a human and a citizen, but are not confined to them.

In its turn, universals in the constitutional law are definite norms, concepts áand ideas, distinctly showing versatility and integrity; they have general obligatory character and are formulated in accordance with specific features of a particular state.

CONCLUSION

In general philosophical meaning, universalization is universality, versatility and a sort of overall knowledge. Universalization is also meant to be a tendency toward integrity, a form of intellection, which considers universe as something integral and tries, using all overlying integral, to explain, understand and extract a single.

At the same time, universalization, as applied to the law, has its own specific features, which are gradually manifested in the contemporary law, in the set of norms that regulate the relations in the sphere of human rights. It is noteworthy that, already now, the international law contains norms generally recognized and, hence, obligatory for all states and determining the basic rights and freedoms of a human irrespective of nationality, gender and religious membership. In addition to these generally recognized norms, there are also a many agreements regarding special questions about human rights. According to the opinion of adherents of universalization of norms of the law, universality of norms of human rights and freedoms in the contemporary law carries unquestionable character and all rights and freedoms of a human are indivisible, interdependent and interrelated.

These specific features immediately stem from the essence of basic conceptions that have affected the formation of universal ideas in law.

Traditionally, problems regarding the state-legal unification and universalization were theoretically developed and practically solved on the basis of two opposite and rather antagonistic types of legal understanding:

- Jus naturalism (natural-legal approach); and
- Positivism (legalism).

Struggle between these two directions had ultimately led to the fact that most contemporary international legal acts, as well as the Constitutions of most foreign states, simultaneously provide for regulations which can be referred to both approaches.

For instance, Russia for a few centuries is known to form a type of legal culture, according to which rights in conjunction with charges and responsibility and not individualistic rights, were of the top importance. Therefore, since nineteenth century, familiarization of the Russian jurisdiction with western legal tradition evolved primarily into the perception of positivistic conceptions, which dominate in the Russian theory of law even at present.

At the same time, acting Constitution of the Russian Federation proclaims another type of legal understanding, i.e., ideology of natural and inalienable rights of a human. Article 2 considers a human, his rights and freedoms as those of supreme value. Acceptance, maintenance and protection of rights and freedoms of a human and a citizen are among the duties of the government.

We also note that libertarian juristic general theory of the law and state can be used as the conceptual approach, retaining the important points of these two types and, at the same time, overcoming their substantial drawbacks. This theory makes it possible to successively interpret the content, forms and prospects of the processes of juridical universalization and unification, as well as the sense, directions and specific features of these processes under the conditions of the contemporary general social globalization.

We can speak about three conceptions of universalization of the law, namely antagonistic (jus naturalistic and positivistic) conceptions and libertarian juridical theory, synthetic in many respects. An importance of the latter, at present time, is manifested in that, in contemporary legal norms of the universal character, we cannot already find purely “positivistic” or “jus naturalistic” roots, which are more likely to represent their synthesis.

From the legal point of view, the process of juridical universalization means that the growing number of people (representatives of new nationalities, layers, classes and so on) are recognized as formally equal subjects of the law. Through universal mechanism of the legal regulation, initially non-free group of people gradually, in the course of the socio-historical development, turns into free subjects of the law.

We can maintain that universalization in the sphere of the law and state is one of the most important aspects of the general globalization in the contemporary world. Contemporary processes of globalization are known to have a great affect on transformation, changes and modernization of the state-legal institutions, norms and relations at worldwide, macroregional and intra-national levels, stimulate, accelerate and renew the processes of universalization in the sphere of law, organization and functioning of the state.

Contemporary juridical universalization, given all pecularities of its content, specific features, characteristics and so on, constitutes a certain new stage in the process of development of law.

In its turn, universalization in the constitutional law is the process of fixation (in the Main laws of the contemporary states) of certain universals, most of which

are formulated in accordance with the process of the international fixation of rights and freedoms of a human and citizen, but are not confined to them.

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