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Legality and reasonability in criminal process

Abstract: An issue of reasonability in law appears due to the fact that laws have a common nature, covered with it regulating in generalised, abstractive form a certain kind of generalised relationships, establish common rule of behaviour. Social value, sense of the law is namely concluded in this generalised rule.

Law and discretion at its application are the two sides of legal regulation of the social life, which needs in a certain combination, where the law has a leading role as the basis of legality and investigatory (court) discretion.

Therefore, legal norms, which regulate an activity of fight against crime, should be enough concrete and flexible.

Keywords: legality; reasonability; discretion; positive law; criminal process; legal regulation; procedural norm; proving; evidence.

In modern theory of the law the notion of legality is always accompanied by the categories of reasonability and justice. However, if notion of justice has more philosophical beginnings and ascent to the natural law, then a feature of reasonability is manifested in lawmaking and law enforcement and expresses the property of positive law.

Currently acting legislation does contain such notion like reasonability. Despite the fact that law enforcement activity should be designed with provision for idea of reasonability, an interpretation of this notion is not given in acting codes.

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Without dwelling specifically on the lexical, social and philosophical interpretation of the concept of 'reasonability', we note only the significant factor that practically all authors associate this concept with the purpose of this or that type of human activity деятельности [9, p. 870; 13, p. 730; 16, p. 31].

History of law testifies that from antique time, when, in opinion of Cicero, "Socrates justly cursed the one who had separated a benefit from law" [15, p. 79], the problem of reasonability in law had resolved, proceeding from commitment to the theory of positive or natural law.

Supporters of the theory of positive law used a simple formula: all that is legal, it is reasonable. None reasonability can be justified law's violation as if the laws, like a basis of legality, are reasonable, then their exact execution is a higher manifestation of reasonability [6; 5, p. 13]. According to their opinion, all socially legal experience of humanity testifies on usefulness just such approach to the norm of law, on priority of the letter of law over subjectively interpreted a spirit of law, on inadmissibility and replacement of legality with reasonability [3, p. 434].

However, by absolutising legality, we involuntarily approach to the more than doubtful slogan of ancient lawyers – pereat mundus, fiat justitia (let the world perish but justice triumphs)

It is historically confirmed that complete forgetfulness of reasonability leads to a formalism [8, p. 43]. Supporters of appropriation of reasonability as an independent category (properties) of law at the same time do not detract from the necessity of observing the law. Flexible approach to law's interpretation is manifested in their position. They more proceed from a spirit, than a letter of the law at its application in those or others circumstances. From point of view of this theory, reasonability should be applied in strict bounds that established by law [1, p. 45].

According to the views of modern scientists, a priority of reasonability should be given at the stage of lawmaking. Namely at creation of legal act it assessed from

position of reasonability. Adopted law should be executed, and reasonability of law enforcement appears at choice of the decision's way, if law allows the ways [2, p. 192-193].

In soviet period of Russian state the positive approach to the problem of reasonability predominated in law. The older and middle generations still remember the work of one of the founders of the Soviet Republic V.I. Lenin "On 'double' subordination and legality". In the work (dictated by V.I. Lenin on 20 May 1922 by telephone, and firstly published on 23 April 1925 in "Pravda" newspaper) was laid the concept of ensuring of legality in the state.

One of the signs of legality, in opinion of V.I. Lenin, is concluded in the fact that at assessment of legality of the decisions of the local authorities a prosecutor should proceed from the fact "that none of decisions… disagree with law…". Analyzing the previous thought: "Rabkrin judges not only from standpoint of legality, but also from point of view of reasonability" [7, p. 199], is unclear what V.I. Lenin kept in mind. Using comparative and logical methods, we may conclude that prosecutor's office had to be supervised in order the decisions of local authorities adopted in the bounds of their competence, and the decisions would based on law. An issue what had served as actual ground to adopt a decision and what this decision would be resulted (i.e. reasonability), are beyond prosecutor's supervision. The issue on correlation of 'legality' and 'reasonability' will not one time as subject of attention in theory of law, however all theories would have designed on the base of V.I. Lenin's position.

Eventually, soviet juridical science will be stopped to attribute the reasonability to legal category and will fill it with ideological content. The position of M.S. Strogovich will be prevailed, according to which the problem of reasonability in law enforcement will be viewed not as a category equal and pair category 'legality', but as one of its components [12, p. 11-14]. However such approach does not resolve the problem of law's application. A clear example of

this is the Code of Criminal Procedure of the RSFSR of 1923, in Part 2 of Article 2 of which the rule was fixed, forbidding the court 'to stop a resolution of the case on the pretext of an absence, incompleteness, ambiguity or contradiction of laws". Thus, a legislator allowed not only a possibility of the court to decide within the framework of the application of the valid law, but actually ordered of it to create a law itself to resolve a production on criminal case.

The problem of expediency in law arises from the fact that laws have a general nature, they cover by their regulation in a generalized, abstract form, a certain form of generalized relations, and they establish a general rule of behavior. In this generalized rule is concluded a social value, the meaning of the law. This value of the law was known already in antiquity. "The rights are not established proceeding from occasion" - claimed Celsus, the distinguished lawyer of Ancient Rome.

However, this generalized content of law is concluded also its lack, weakness. Life is always much more complicated, richer, more 'inventive' than the rule that a legislator sets for regulating certain social relationships. Therefore, applying a law (in a broad sense), a court often encounters a complex logical task. If the court does not find a legal norm for resolving of appropriate dispute, it faces a choice: to refuse considering the dispute or based on common principles of that or other legal system, to establish a new norm (rule) of behavior, or so to interpret a similar effective norm (rule) to extend it to a specific dispute, to base it on its decision [3, p. 416].

First, a court, and then executive authorities, within their competence, was given the right to create a law and resolve a legal dispute, relying on its own discretion.

Discretion became to be understood as a possibility of administrative and judicial power when applying the law to be guided in each case by special considerations of reasonability.

It is necessary to note that a collision of two fundamentally different theoretical schools in understanding of the law only as a 'letter' or its 'spirit', different approaches to its application (correct and formal, that is, impersonal or allowing the law-enforcer's will) arose not in the period following the French bourgeois revolution, and not as a thought-work of French lawyers, then brought to the theoretical perfection by German, Austrian, and later Russian jurists. For the first time at the level of various law schools, this dispute arose in the days of ancient Rome, but then the term 'lawfulness' did not enter into the lexicon of the legal language. In our opinion, the reason here is not the imperfection of scientific thought in the law of that time, but rather in imperfection of the language.

After the term 'legality' began to be used in the sphere of constitutional and state law, it becomes the property of other branches of law, including criminal procedure. In the theory of criminal process, like in the theory of state law are observed a difference in understanding of this term. So, J. Glaser, proceeding from § 152 of the German Criminal Procedure Code, points out that in German law the beginning of legality (Legalitsprincip) means a duty of prosecutor's office, at presence of sufficient factual grounds, to prosecute for every act subject to criminal prosecution and punishment, unless otherwise provided by law (by other words, the formal application of law). This legal institution has had a huge impact on the construction and application of the German criminal process. It opposes the right of a prosecutor's office to discretion in criminal prosecution, based on the appropriateness in each case. And the beginning of discretion (Opportunidtsprincip) were not directly or indirectly fixed in the legislation, but only derived from the history of its application and were known as the theoretical position of the legal science of that time [10, p. 180-181].

This provision may have been borrowed from the French criminal proceedings. In 1826, the French Court of Cassation, interpreting Article 47 of the Napoleonic Code of Criminal Investigation of 1808, noted that a prosecutor

deciding whether to initiate or not to initiate a public action has discretionary powers to leave the criminal act without consequences on the basis of the mere reasonability of criminal prosecution [4, p. 61-68].

S. Poznyshev's textbook, the correlation between the notions of legality (Legalitatsprincip) and reasonability, convenience (Opportunitatsprincip) is considered in a similar way. These two 'beginnings' are opposed, up to denying the possibility for prosecutor's office discretion in deciding whether to initiate criminal prosecution [17, p. 240-241].

Studying the ways and means of collecting evidence, V. Sluchevsky uses the concept of 'legality' as their criterion. In his opinion, observing the provisions of a law, "judicial and investigative authorities can take such actions, the production of which they do not meet with the direct permission of the law and which must be applied in accordance with the interests of expediency, provided that, on the other hand, these actions do not violate the rights of outsiders and did not impose on them duties, a law on them not assigned" [11, p. 332]. The author practically continues the discussion about possibility or denial of the beginning of discretion and reasonability in application of law; he only transfers it to particular questions of application of the criminal procedure law. At the same time V. Sluchevsky, in fact being an adherent of admissibility of discretion in the application of the criminal procedural legislation, stipulates the conditions for deviation from the beginnings of 'legality'.

Legality and reasonability of were considered by I. Ya. Foinitsky as follows. Reasonability is the beginning of practical convenience. The authorities were given the right to decide whether it was convenient and reasonable to 'clean' the criminal charge or abstain from it. The beginning of legality is a duty in the service, by virtue of which an official must carry out criminal prosecution. There is no room for considering the convenience and reasonability of such prosecution. The official prosecutor acts as the first, and under some laws and an exclusive authority,

assessing the sufficiency or inadequacy of evidence for the prosecution. If it is obvious that bringing the charges remains without any results for criminal justice, then the official prosecutor is powerful, and sometimes it is obliged to refrain from accusation [14, p. 74-75].

The problem of the freedom to choose a decision and action in criminal proceedings and correlation between a choice of a decision as a legal discretion of the law-enforcer and the difference from arbitrariness was an object of attention of lawyers at different times.

Awareness of impossibility to achieve the truth's clarification, only literally observing the law, the consciousness of the reasonability of such regulation in the activities of judges had led to the need to adopt the principle of freedom of judicial thought in this regard. The law is limited only by a few guidelines on the procedure for proving and the strength of evidence, providing the rest with the thoughts and conscience of the judge.

Today, it should be recognized that Law and discretion at its application are the two sides of legal regulation of the social life, which needs in a certain combination, where the law has a leading role as the basis of legality and investigatory (court) discretion.

Therefore, legal norms, which regulate an activity of fight against crime, should be enough concrete and flexible.

Excessive itemization of the procedural law, allegedly with the aim to strengthen the legality is also unacceptable as its abstractness. The law is obliged to ensure an optimal combination of the orders of each procedural norm and investigative, judicial discretion.

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