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THE SIGNIFICANCE OF LEGAL PRAGMATISM AND ECONOMIC ANALYSIS OF THE LAW FOR THE THEORY OF ADJUDICATION IN THE CONDITIONS OF SOCIAL LIFE

The views and ideas of thinkers and actors representing the direction of legal pragmatism and economic analysis of law, whose ideas had the greatest influence on the world philosophical and legal thought and the formation of the philosophical and legal views of judges, are considered. The interaction between the directions of legal pragmatism, economic analysis of law and the formation of judicial philosophy is shown. The highlighted role and significance of legal pragmatism and economic analysis of law for the development of the philosophy of justice, which should be in constant contact with current events and problems, thanks to which it would ensure its leading role in the development of legal theory and practice, through the influence on modern legal thought, in conditions of modern society.

Keywords: *adjudication, legal pragmatism, economic analysis of law, contextualism, anti-fundamentalism, instrumentalism, perspectivism, descriptive theory.*

Problem setting. It is the philosophy of law component in adjudication decisions and justifications for decisions that is taken into account, interests and influences philosophy of law thought and modern society. Through highlighting the theoretical context of the directions of legal pragmatism and economic analysis of law, an attempt will be made to show their influence on the activities of judges, the formation of philosophical and law aspects of adjudication in the conditions of public life.

It is essential that legal pragmatism emphasizes that law is a practice specific to a specific context, that it does not have once and for all defined grounds, and therefore remains instrumental, that is, one that must constantly take into account the perspective of adjudication. A pragmatic position in jurisprudence raises many philosophical questions about traditional concepts of law.

It is important for us to understand the content of these concepts, taking into account all the necessary features, then through the content we will be able to determine the scope of these concepts. It is in discussions among scientists that new prospects for resolving contradictions arise [1]. Thus, the discussion of these issues should be conducted in the philosophical and philosophy of law area, and the answers should appear precisely in the realm of the philosophy of law.

Recent research and publications analysis. The results of the analysis of scientific sources and publications indicate that these conditions require a thorough and in-depth study of the influence of legal pragmatism and economic analysis of law on the formation of court decisions. In our country, a number of theoretical-legal, philosophical-political, philosophy of law works were devoted to the study and overcoming of these problems, taking into account world theoretical experience and Western legal concepts, which, in particular, is reflected in the writings of: Yu. Bytiak, O. Danylian, O. Dzoban, P. Yevhrafov, V. Kolisnyk, O. Lytvynov, S. Maksymov, S. Pohrebniak, V. Rechytskoh, V. Tytov, O. Uvarova, including justice as an object of philosophical and legal research by V. Bihun, N. Havrylova, N. Huralenko, S. Prylutskaa, S. Rabinovych and others.

Extensive foreign literature is devoted to legal pragmatism. According to B. Butler [2], the most authoritative sources here are the works of M. Brint and V. Weaver [3], T. Kotter [4], M. Dickstein [5], D. Farber [6], T. Gray [7], N. McCormick [8], R. Posner [9–13], M. Radin [14], R. Rorty [15], M. Rosenfeld [16], V. Shutkin [17], S. Smith [18], B. Tamanaga [19], C. Wells [20] B. Butler includes R. Dworkin among the supporters of pragmatism, referring to his «Empire of Law», although in this and his other books, R. Dworkin is clearly an opponent of pragmatism.

The results of research into these problems make it possible to note that, in general, the systematic scientific understanding of the problem of establishing the influence of the philosophy of law and legal directions of legal pragmatism and the economic analysis of law on the activity of the court, which is reproduced during the trial of the case, is only at the initial stage.

Paper objective. The purpose of this article is to show the influence on the formation of adjudications in the conditions of public life through highlighting the theoretical context of modern philosophical and legal directions of legal pragmatism and economic analysis of law as necessary components of the construction of the personal philosophy of law position of a judge.

Paper main body. B. Butler defines legal pragmatism as a theory that is critical of traditional concepts, especially the theory of adjudication. Classical theory pays special attention to the quality of legal facts, careful analysis of precedents, and argumentation by analogy. As noted, in legal pragmatism it is emphasized that law is a practice specific in a specific context, that it does not have once and for all

defined grounds, and therefore remains instrumental, that is, one that must constantly take into account the perspective of court decisions. A pragmatic position in jurisprudence raises many philosophical questions about traditional concepts of law.

First of all, this is a question about the *classic picture of passing* of adjudication. The classic model of legal argumentation in common law is based on the casebook method, the use of precedent and arguments by analogy. The casebook method assumes that the essential and comprehensive material for a legal decision is summarized in the published opinions that accompany the decisions on disputes in court. A judge, in order to make a proper sentence, examines a variety of situations analyzed in previous decisions in other cases that seem relevantly similar. Actually, a casebook (literally – a book of cases) is a collection of materials of typical cases, which contains certain data necessary for a decision. A specific verdict on the case considered by the court is «distilled» from precedents and written opinions of judges. Given a legal dispute, a practitioner (judge, lawyer, etc.) looks at previous cases for similar situations and then tries to distill the grounds that have been accepted as legally appropriate for his client's position. A legal conclusion must be drawn from these sources.

This classic picture of legal argumentation was first proposed by the former dean of Harvard Law School, K. K. Langdell (Christopher Columbus Langdell). C. C. Langdell created the first casebook as an educational tool, and associated this type of textbook with the Socratic style of teaching that is so prevalent in American legal education. Casebook and the Socratic method assume a somewhat closed and rationalistic view of legal institutions. Another influential and more modern source of the classical model is presented in E. Levi's book «Introduction to Legal Reasoning.» E. Levi describes legal reasoning as a «three-step process», where «initially similarity between cases; then the rule of law that was used in the first case is established; then this rule of law is applied to another case» [21, p. 2]. At the same time, it is implicitly assumed that, as soon as the similarity between the cases is recognized, legal reasoning is reduced to creating a logically correct deduction, taking the provisions of the law for a greater basis and the statement of facts for a smaller basis.

B. Butler believes that the most influential modern defender of the classical model is Ronald Dworkin. R. Dworkin's theory functions both as a normative and as a descriptive theory. In its descriptive aspect, this theory describes what judges actually do when reaching a legal conclusion.

According to B. Butler, despite the fact that R. Dworkin denies the purely deductive picture proposed by K. K. Langdell and calls for consideration of the moral dimension in addition to traditional legal materials and methods, he still remains a supporter of the classical view of the adoption of judicial decision.

The next question concerns the *pragmatic theory of adjudication*.

Legal pragmatists such as D. Farber, T. Gray, M. Radin and R. Posner believe that classical jurisprudence is highly distorted because it is excessively legalistic, naively rationalistic and based on a misunderstanding of legal institutions. In contrast to the limitations caused by the classical view of judicial decision, legal pragmatists emphasize the eclectic nature and variety of purposes of law. To a large extent, they all agree among themselves on four main aspects: (1) the importance of context; (2) absence of universal grounds; (3) the instrumental nature of law; and (4) the inevitable presence of alternative perspectives.

For a legal pragmatist, all legal disputes are essentially context dependent. The main requirement of contextual analysis is that each judicial decision, as well as any legal conflict, takes place in a certain unique context. Therefore, a judicial decision becomes distorted if it is carried out without taking into account the given context.

For example, R. Posner emphasizes that the inevitable presence of the context «separates the rattling machines of philosophical abstraction from the practical business of managing our lives and our communities» [13, c. 463]. He brings to the fore the slogan of contextualism about «returning from abstractions to concreteness», implying that C. K. Langdell and R. Dworkin are overly fond of abstractions. The contextualism of legal pragmatism is best illustrated in the strategy of Judge O. V. Holmes, who used historical analysis to show that even the most abstract legal concepts should be considered derived from situational-accidental and specific-contextual needs [19, p. 315]. While legal formalists try to explain the context based on the content of the concepts, the legal pragmatist considers the legal concepts themselves to be products of the context.

Legal pragmatists also insist on the rejection of universal grounds in of adjudication. Fundamentalists believe that there is always some basic principle or principles from which all legal decisions can be derived. Not everyone these days admits to such fundamentalism, but most legal theorists share a moderate version of it. This version emphasizes that the judge has a sufficient set of tools to make a adjudication (at least the case method mentioned above). In other words, the moderate version sees in the cases under consideration all the necessary and sufficient grounds for obtaining substantiated legal conclusions.

A legal pragmatist considers such a belief to be a descriptively erroneous position. First, it rejects «the idea that correct results can be derived from some comprehensive principle or set of principles» [4]. Instead of deductive certainty, a picture of induction and an emphasis on the creative act of solving the problem is proposed. Secondly, pragmatism rejects the metaphysical picture of knowledge as a basis. Knowledge and reason in law are extremely open concepts that require continuous testing and revision, and therefore the application of law is an activity that is broader than any currently conceivable grounds. Thus, if the precedents

provide the necessary grounds for legal decisions, then the legal pragmatist emphasizes that they will not be sufficient to answer the challenges in subsequent cases, and therefore the picture of the fundamentalists, if not completely false, is at least incomplete.

While the classical conception of adjudication emphasizes its consistent relation with past of adjudication (deference to precedent), the instrumentalist is interested in examining the effects that a adjudication might have and the effectiveness of the relevant legal institutions. The instrumentalist approach is less interested in precedent and is more guided by «future orientation» [16, p. 98]. Thus, instead of emphasizing consistency with past decisions, a pragmatist judge turns to the social implications of his decision. For example, in the case of a disputed contract, a judge guided by the classical model of legal reasoning would refer to the rights and obligations already established in previous precedents. A pragmatist judge, for his part, taking into account and evaluating the previous settlement of the problem as important, will also take into account the possible consequences for contesting the contract in the future. This approach involves curiosity about the effects of the decision of the case on third parties, as well as how this decision will affect everyday life, etc.

Orientation to the future empirical reality means that for the pragmatist judge there is an additional set of legally relevant grounds for adjudication. While the defender of the classical view may limit the reasons and facts to their permissible list in similar cases accepted as precedents, the pragmatist judge will take into account new kinds of data, for example, sociological or economic arguments, which in some way also relate to the given individual case. Instead of the priority of agreement with the precedent, the legal pragmatist emphasizes the «priority of consequences in interpretation» [13, p. 252].

Finally, the position of a legal pragmatist requires taking into account the prospects of making a court decision. Perspectivism often causes suspicion of overly broad generalizations and eclectic modes of description. In contrast to legal formalism, according to which «there are certain meanings in legal texts which can be discerned by reason, and objective and immutable principles both determine and transcend the practice of applying rules», perspectivism emphasizes that all possible solutions are open to revision in the light of another perspective or further information [17, p. 66]. Recognizing perspective means that an overly deferential stance toward precedents and analogies may falsely limit new and perhaps more meaningful accounts.

B. Butler reminds us of important problems with clarifying the theoretical and methodological status of legal pragmatism. First, is legal pragmatism a descriptive or a normative theory? Second, does such a position really offer any useful advantages that a more classical picture of law cannot? Does she suffer from even more severe handicaps?

An important achievement of legal pragmatism is its *ability to be a descriptive theory*. Actually, this is a theory about what actually happens in law. The legal pragmatist thinks that the classical picture of jurisprudence does not correspond to the real problems of applying the law, and the pragmatist's own picture offers a better alternative. Pragmatists of this type look to legal realists as their historical predecessors. Legal realists emphasized that law is a much more political and, at the same time, less rational institution than the one allowed by the model of C. K. Langdale. The grounds and data proposed by the classical model do not adequately explain the actions of legal institutions.

First, according to B. Butler, political actors do not consider the court system as neutral and functioning only on the basis of respect for precedent. Conflicts over judicial appointments show that political actors view judges as politically important persons. Second, empirical research challenges the assumption that precedent actually has the authority it is expected to have. B. Butler points to examples of studies that have shown that decisions are made more under the influence of a judge's political beliefs than under the influence of precedents, and that 85% of success in predicting future decisions is based on the «values» of judges. Thus, empirical evidence suggests that the classical model does not explain the way in which judges actually of adjudications.

On the other hand, the descriptive theory of pragmatists has its own difficulties. First, judges act and write in most cases as if they were following precedent and traditional legal reasoning. Secondly, judges who really stand on the positions of pragmatism should be more rigorous in researching the empirical implications of their decisions.

According to B. Butler, all this raises many questions. First of all, there is a fear of statistics and sociological data possessed by lawyers. Second, how exactly should the rule be applied according to the canons of exact pragmatic application? In addition, there remains the issue of institutional competence. Does the legal system really have enough resources to collect and summarize all the data needed to make an informed and pragmatic decision? Does the judge have the ability to generalize relevant material regarding a certain range of real-world development trajectories?

In addition to the descriptive dimension, researchers are also interested in the aspect of *legal pragmatism as a normative theory*. Since neither description accurately corresponds to what actually happens in practical jurisprudence, legal pragmatism can also be considered a normative theory. In its normative aspect, legal pragmatism considers law and the legal sphere as a tool useful for social purposes. A legal pragmatist opposes the a priori and rationalist style traditionally used in legal argumentation, arguing that such methods have no real force because they actually lack the tools necessary to justify their own use. The style of legal

thinking, which is more traditional for Anglo-American jurisprudence, concentrates attention on cases, excluding broader and more scientifically guaranteed data. Therefore, the user of the classical theory can offer no more than a spectacular, but hardly justified statement: «*it works*», when faced with the question of the empirical effectiveness of the solution.

All pragmatist thought contains a suspicion of unquestioned or untested mental pictures. Pragmatist theory offers the ideal of a system based on experience and the experimental method. In contrast to the overly rationalistic and self-contained picture of adjudication inherent in classical legal theorists, the legal pragmatist argues in favor of empirical jurisprudence.

As indicated above, representatives of legal pragmatism include R. Posner, whose concept is based on an *economic analysis of law*.

Economic analysis of law stems from several intellectual traditions. Here we can immediately recall Marxism with its deduction of law from economic relations. However, this theoretical line has never been considered sufficiently influential in American Philosophy of law. We can also talk about the influence of A. Smith and J. Bentham.

According to L. Kornhauser [22], the economic analysis of law applies the tools of microeconomic theory to the analysis of legal norms and institutions. In America, John R. Commons [23] initiated the study of the interaction of economics and law back in the 1920s. In the 1950s, this direction was continued by R. Hale Robert Hale [24]. In the early 1960s, thanks to the works of Ronald Coase [25] and Guido Calabresi [26], this direction of the philosophy of law was finally established.

The closest authoritative modern representative of this direction is R. Posner, the most cited American author. Such popularity of R. Posner is explained by the fact that he acts simultaneously as a legal scholar, as an economist, and as an authoritative judge. Already his 1972 work «Economic analysis of law» [10] brought the corresponding approach to the epicenter of interest of the wider legal community, and his subsequent works («Antimonopoly legislation from an economic point of view» [9] and «Economic theory of justice» [11]) provoked energetic discussions around the philosophical foundations of this direction of legal theory.

Richard Posner took an active part in the movement for the inclusion of economic theory in the curricula of law schools, as well as for the real implementation of economic analysis of the causes and consequences of the functioning of the legal system. In his writings, R. Posner proves that non-market methods of organizing economic activity appear when transaction costs (for committing a transaction) are too great for normal market exchange. The firm and the legal system replace the market in cases where market transactions become unfeasible. The result of a voluntary market agreement is in most cases an increase in public welfare. This deal simply wouldn't happen if it wasn't beneficial to all its parties. The main

question of economic analysis is whether the agreements executed by adjudication have a similar property?

R. Posner's principle thesis is the statement that common law and even criminal law increase economic efficiency, as does the market mechanism. R. Posner analyzes the operation of the legal system not from the point of view of such traditionally non-economic concepts as justice, but from the point of view of opportunity costs or willingness to pay and comes to the conclusion that most legislative decisions are more effective than alternative bureaucratic methods of solving problems that the market cannot handle. In other words, R. Posner rethought the traditional definition of justice and proposed instead to turn to the economic definition of efficiency: the criterion of justice and correctness of a particular action is its impact on economic efficiency, which can be measured by the increase in national income.

R. Posner put forward two postulates:

(I) the rules of common law are effective in practice, and

(II) legal norms must be effective.

The epithet «effective» means in both cases the maximization of the social willingness-to-pay for the functioning of such norms.

In the course of the further discussion, L. Kornhauser [22] put forward two more postulates:

(III) the selection of effective rules is carried out in court proceedings, and

(IV) individuals respond economically to legal norms.

In this context, emphasized L. Kornhauser, «effectiveness» is understood in a behavioral sense, which constitutes the core of the justification for adopting one or another norm.

Postulate (I) is ambiguous. On the one hand, it can mean that common law norms *induce* effective behavior. On the other hand, it may mean that the *norm* itself is effective, that is, that the very content of the law determines its effectiveness. The postulate in this sense will be denoted by (I)′.

As L. Kornhauser admits, postulate (I)′ is difficult to assess, at least for two reasons. First, its truth is obviously related to the doctrinal concept of law, which determines what legal norms are in effect in society. It should be borne in mind that the debate about the adequate concept of law has been going on for more than two thousand years. Secondly, the relation between the criterion of effectiveness determined by the content of the law and the effectiveness of actual behavior induced in accordance with legal norms remains unclear. In one interpretation, postulate (I)′ can mean postulate (I). Then the thesis that effectiveness determines the content of the law means that the legal norm actually causes effective behavior. Such determination of the prevailing norm (according to postulate (I)′ as a doctrinal concept of law) becomes a purely empirical question. After all, a judge can make a mistake, adjudication according to an ineffective norm.

On the other hand, we could recognize that postulate (I)' depends on a doctrinal conception of law that usually refers judges and lawyers to texts such as statutes, administrative orders, and judicial opinions. According to (I)', the analyst interprets these texts to identify the *economic model* that underlies the legal worldview that is the basis of the court decision. According to this interpretation, (I)' can be true even if legal norms are induced by inefficient behavior in the real world. That is, the declared legal norm may be effective in the implicit model used by judges, but ineffective in the real world.

All five requirements do not directly answer the traditional questions of the philosophy of law. Postulate (I)' raises questions about the concept of law, about which the economic analysis of law is largely silent. *Evaluative postulate (II)* (that legal norms must be effective), if it is addressed to judges, should qualify as a theory of judicial decision. This is one of the central tasks of the Anglo-American philosophy of law. The behavioral postulate (IV), as well as the evolutionary postulate (III) and the positive statement (II), on the other hand, concern empirical questions that are generally neglected by legal philosophers. Nevertheless, despite the controversy, in US legal science as a whole, the economic analysis of law is considered as a factor in providing a universal theory of law that challenges traditional approaches. It is, first of all, about the principled orientation to welfare and well-being, good life, as a practical ideal of society, which should be served by the current legal system.

Conclusions of the research. There are a large number of trends, approaches and schools in modern philosophical and legal thought. The modern philosophy of law is in constant contact with current events and problems, thanks to which it plays a leading role in the development of the legal system. Through highlighting the theoretical context of modern philosophical and legal directions of legal pragmatism and economic analysis of law as necessary components of building the personal philosophical and legal position of a judge, the influence on the formation of court decisions in the conditions of public life is noted.

It is indicated that the theory of legal pragmatism is critical of traditional concepts of adjudication. It is believed that the law depends significantly on the specific context, does not have once and for all defined grounds, is instrumental and must always take into account the prospects of court decisions. In particular, B. Butler points out R. Dworkin among the modern representatives of pragmatism.

It is shown that one of the branches of pragmatism is the *economic analysis* of law, the most authoritative representative of which is R. Posner. He proposed to consider its impact on economic efficiency as a criterion for the validity of a legal norm. R. Posner analyzes the operation of the legal system from the point of view of *opportunity costs* or *willingness to pay*. Economic analysis of law focuses on the ideals of welfare and well-being, good life, which should be ensured by the current legal system.

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ЗНАЧЕННЯ ЮРИДИЧНОГО ПРАГМАТИЗМУ ТА ЕКОНОМІЧНОГО АНАЛІЗУ ПРАВА ДЛЯ ТЕОРІЇ УХВАЛЕННЯ СУДОВОГО РІШЕННЯ В УМОВАХ СУСПІЛЬНОГО ЖИТТЯ

Розглянуто погляди та ідеї мислителів і діячів, що представляють напрям юридичного прагматизму та економічного аналізу права, ідеї яких мали найбільш великий вплив на світову філософсько-правову думку та формування філософсько-правових поглядів суддів. Показано взаємодію між напрямками юридичного прагматизму, економічного аналізу права та формуванням суддівської філософії. Виділено роль та значення юридичного прагматизму та економічного аналізу права для розвитку філософії правосуддя, яка має знаходитись у постійному контакті з актуальними подіями і проблемами, завдяки чому відбувалося б забезпечення її провідної ролі в розвитку юридичної теорії і практики, через вплив на сучасну правову думку, в умовах сучасного суспільства.

Ключові слова: *судове рішення, юридичний прагматизм, економічний аналіз права, контекстуалізм, антифундаменталізм, інструменталізм, перспективізм, дескриптивна теорія.*

