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## LEGAL THINKING IN THEORY AND PHILOSOPHY OF LAW

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### **Abstract.**

**Purpose:** *the necessity to use different approaches in a process of studying law as a complicated phenomenon has been substantiated in the article. Multidimensional legal thinking is important because a meaningful idea about the nature of law depends on approaches that have been used in its investigation.*

**Methods:** *phenomenological; hermeneutic; comparative-legal; sociological; logical; dialectical. Results:* *the nature and the place of the category of “legal thinking” within the limits of such legal sciences as state and law theory and philosophy of law have been analyzed; the relationship between some types of legal thinking has been analyzed; the necessity, importance, expediency and relevance of the integrative jurisprudence formation for a modern society’s functioning has been substantiated. Discussion:* *legal thinking issues, law as a phenomenon, as an instrument for satisfying subjects’ of legal relations needs, the interrelation of certain types of legal thinking with the requirements of legality.*

**Keywords:** *legal thinking, legalism, positivism, sources of law, being of law, theory of law, philosophy of law.*

**Introduction.** Understanding of the legal thinking essence is an initial, opening category of jurisprudence. This, in the first place, determines the topicality of the article. Philosophers, lawyers, political and religious leaders of all time sought to identify origins of law and find out its nature. Legal thinking is the expression of different points of view, judgments and assessments regarding the knowledge of the essence of law.

A type of legal thinking defines a paradigm of knowledge of legal and state phenomena. With the development of legal doctrines, opposite types of legal thinking such as juridical and legislative have been formed. The first one is based on the distinction between law and legislation, the second one identifies them.

For a long time, our domestic jurisprudence has been based on the legislative type of legal thinking. In the history of the development of domestic legal science there were periods of domi-

nance of an extreme form of legalism, and hard legal practice became the consequence of that.

**Analysis of the research and publications.** Different aspects of legal thinking issues became a subject of scientific interest for: H.O. Aksenok, S.S. Alekseev, T.H. Andrusyak, M.I. Baytin, V.A. Bachynin, S.V. Bobrovnyk, A.M. Vasyliev, A.B. Venherov, P.H. Vynohradov, M.F. Volodymyrskyi-Budanov, Yu.S. Hambarov, V.H. Hravskiy, M.A. Hredeskul, S.D. Husarev, S.S. Dnistrianskyi, A.P. Zayets, V.D. Zorkin, I.O. Ilyin, V.P. Kazyrmyrchuk, D.A. Kerimov, B.O. Kistyakivskiy, M.M. Kovalevskiy, A.A. Kozlovskiy, M.I. Kozyubra, A.M. Kolodiy, V.V. Kopeichykov, M.M. Korkunov, V.M. Kudryavtsev, V.V. Lazarev, V.V. Lapayeva, O.E. Leyst, S.L. Lysenkov, R.Z. Livshyts, O.A. Lukashova, D.I. Lukovskaya, M.O. Maksymenko, O.O. Malynovskiy, H.V. Maltsev, L.S. Mamut, V.K. Mamutov, J.V. Mykhaylovskiy, S.A. Muromtsev, K.O. Nevolin, V.S. Nersesyants, P.I. Novho-

rodtsev, A.Yu. Oliynyk, M.I. Palienko, L.J. Petrazhyskyi, L.V. Petrova, P.M. Rabinovych, P.H. Redkin, V.M. Selivanov, O.F. Skakun, S.S. Slyvka, O.V. Surilov, F.V. Taranovskyi, O.D. Tykhomyrov, V.A. Tumanov, I.B. Usenko, V.O. Chefranov, B.M. Chycherin, V.M. Shapoval, Yu.S. Shemshuchenko, H.F. Shershenevych, O.V. Shmotkin, F.P. Shulzhenko, L.S. Yavych, O.S. Yaschenko and others.

**Research tasks.** Nowadays legal science should use results of a wide range of legal schools; explore various approaches to understand the essence, the value and purpose of law to oppose the cultivation of one from legal concepts and groundless denial of others. The desire to analyze law as an integral social phenomenon causes the need to study issues of legal thinking in basic schools of law. This problem investigation is relevant for modern scientific, educational, practical jurisprudence.

**Research results.** Legal thinking is a result of research and evaluation process of legal sources, forms of law's expression, its social value, purpose and role in life of an individual, a society, a state. In legal thinking knowledge about law is generalized, moral, religious, socio-political and other theoretical and legal parameters of its subjects are embodied.

Legal thinking is a dynamic, constantly developing category, reflecting historical traditions, social and political situations developed in a society, and its culture. Consequently, it is the expression of views, judgments, points of view, that form an attitude to law, both as a phenomenon, as an instrument for satisfying needs of subjects of legal relations. Scientists' ideas, judgments, understanding about law in a form of separate legal concepts determine the contents of legal thinking.

Depending on legal essence understanding, in a legal doctrine, norms of law, sources of law, legal consciousness, legal relationships, law-making process, a legal status of a person, a citizen and a state, a system of law and a system of legislation, forms of legal rules implementation, lawful conduct, an offence and legal liability, legality and law and order, legal culture, a mechanism of legal regulation and a

legal system of a society in general are interpreted.

Philosophising on law has always played an important role. Unlike the pragmatism characteristic of Anglo-American tradition, European legal thinking with Roman-German roots has often made efforts – in a rather impractical manner, sometimes led by abstractly alienated and dry doctrines – to ground its answers by tracing them back to ready-made thesis-recipes as necessary and direct conclusions drawn from distant airy ideas. The fundamental of mental construction was formed in general by legal philosophical considerations, thus playing a definitive role at all [1, p. 14].

State and law theory and philosophy of law investigate the mentioned above categories' contents, thus, legal thinking, as the key category of jurisprudence is fundamental to them. A type of legal thinking defines a paradigm of cognition the legal phenomena. With the development of legal doctrines, such opposite types of legal thinking as legislative (lat. "Lex" – legislation) and juridical (lat. "Jus" – law) have been formed.

According to the legislative type of legal thinking, law is a set of legally established norms, that are, imperatives of a state. In accordance with the juridical type of legal thinking, law is a complicated social phenomenon, a social regulator that has its own objective nature, which does not depend on the will of State power. Thus, the juridical type of legal thinking is based on the distinction between law and legislation, and the legislative one is based on their identification. This is their fundamental difference.

At the heart of the legislative type of legal thinking is the interpretation of law as an order. State power originates law by its order, all that ordered by it is law. Consequently, a legislator is endowed with unlimited opportunities to create any law at his own reasoning. This leads to the separation of the law from its legal nature, the denial of its objective legal characteristics, the understanding of law, which has exclusively compulsory content. Legislative understanding of law exaggerates a moment of coercion in law, considers it the main attribute of law, whereas coercion is only a method of violated law restoration.

Law science can only adequately express what is called law. Taking as a basis the separation of law and legislation, combining with the concept of the

legislative type of legal understanding, a wide legal understanding has been formed.

There is one more title for this type of legal thinking that is libertarian (from the English “liberty” – freedom). At the first time, the concept of “libertarian legal thinking” was used by Russian lawyer V.S. Nersesyants [2, p. 34-35]. He called this legal thinking “a concept of law and legislation distinction” [3, p. 352-356].

Law is an innate human attribute. Therefore, the nature of the law is spiritual that is metaphysical [4, p. 5]. The sense of law, its goals and value are born inside a person. From a source of law, which is a person, an idea of law is originated. This is the metaphysical essence of law. If the idea of law is freedom, then the law itself is a form of freedom’s expression, the form of its existence. Sh.L. Montesquieu in the paper “The Spirit of Laws,” explaining various meanings of the category of freedom, wrote: “There is no word that would have received so many diverse meanings and would have produced so many different impressions on the minds that a word “freedom.” The first calls freedom as an easy opportunity dropping those who have been endowed with tyrannical power, the second determines it as a right to choose who they should obey, the third understands it as a right to carry weapons and to commit violence, the fourth sees it as being able to be under the direction of a person of their own nationality or to obey their own laws” [5, p. 288].

Freedom as an idea of law can not exist without interrelation with such categories as equality and justice. Only the unity of freedom with equality and justice is the basis of legal freedom. People are free as they are equal and they are equal according to the volume of their freedoms. “People are free to the extent of their equality and they are equal in proportion to their freedom” [6, p. 61].

One of the most common in modern legal science is a sociological approach to the distinction between law and legislation. According to this approach, the essence of law is not in the sum of laws established by a state, but in deeper parameters of social reality. Law genetically and functionally and in terms of develop-

ment is a certain system of social relations, the nature of which has a legal character, objectively programmed as legal [7, p. 6]. Their existence does not depend on the legislative determination. Law is a phenomenon that occurs in a process of human communication and activity. Such a definition of law does not diminish a role of current legislation but only indicates that a set of legislation is one of law’s expression, and it is not an identical concept. In addition, there may be contradictions between law and existing legislation, when norms of legislation do not conform to principles (or an idea) of law.

According to this approach, the true life of law is in its dynamics, acting, implementation, practical embodiment to society’s life, and not in a static-normative state. Therefore, it is impossible to understand the essence of law, studying only its static dogmata, an external form of its expression. That is why if law is rooted in the social life and not in its formal reflection, then legislative acts are legal only when they adequately reflect the dynamics of social development. Consequently, the connection content between law and legislation is in a fact that an adopted by State power legislative act must be the formulation of law that objectively arose, actually exists and is developed in a society. As well as the sociological approach, all other approaches to the distinction between law and legislation emphasize a fact that legislation must be legal, otherwise, it is ineffective.

Legislation may be an instrument of law’s implementation and may contradict it. It also may be a form of officially-imperious recognition of law as well as non-legal requirements and prohibitions, an instrument of restriction or suppression of human’s freedom. Only as a form of law’s expression legislation is a legal phenomenon. Thanks to such a legislation, a principle of fair and equal measure of freedom receives officially-imperious compulsory recognition and appropriate protection that is the legal force. Consequently, a legal legislation is an official form of recognition, normative concretization and protection of law.

According to wide legal thinking, the need for communication between law and legislation is connected with the necessity of communication between law and a state. If legislation has its value

only as a legal phenomenon, then a state possesses its value only as a legal institution, which is intended to implement law into legislation. A state does not invent law; it is intended to legitimize an idea about justice in a society.

Determination of the nature, goals and limits of state functioning depend on legal thinking [8, p. 5-6, 58-68]. That is, legal thinking affects on the understanding of the essence and purpose of a state. Wide legal thinking is connected with the legal understanding of a state, which legalizes supranational law in official regulations, and thus provides protection of every person's subjective rights.

In general, a state is connected with law according to the measure as it is civilized. For a state and legal acts, according to the content of wide legal thinking, law is the value and purpose at the same time. This means that a state and its regulations should be focused on the implementation and protection of law, since their significance depends on how much they are involved in law, as far as they are valuable in the legal sense, as far as they are legal.

Philosophy of law, as a legal discipline, explores the essence of law in connection with the need for a philosophical substantiation of its institutions and norms. So, in search of the essence of law philosophy and jurisprudence go beyond their scope and go to philosophy of law from different sides: the path of philosophy to philosophy of law goes from general through special to definite (being – legal reality – the essence of law), and the path of jurisprudence to philosophy of law is the movement from special through general to definite (legal reality – being – the essence of law).

Particular attention is needed to such parts of philosophy of law as epistemology and anthropology of law.

Legal theory needs to accommodate what legal practice has by now recognized, namely the influence of epistemic sources in legal argumentation and the positive contribution of such sources to the rule of law [9].

Gnoseology of law is a doctrine of cognition of law. Cognition is the deepest characteristic of law. If there is cognition, so there is law. If there is no cognition, so there is no law [10, p. 5]. Unrecog-

nized law is dead, and dead law cannot be a source of justice. Consequently, law without its cognition becomes injustice. It is impossible to make a fair sentence without knowing true circumstances of a legal case, it is impossible to adopt a legal regulation without analyzing a social situation. And by adopting a fair regulation, it is impossible to hope for its effective action, unless once reveals epistemological features of subjects' of law legal consciousness functioning. All phenomena and processes of legal reality are always epistemologically loaded.

Cognition of law is a prerequisite for its functioning. Unrecognized and unclear law will never become a true regulator of human behavior, except for fear of punishment, but only to the first possibility of its unpunished violation. Only well-known and the understandable law is able to rule behavior without a constant need for certain sanctions. Thus, law in a process of its functioning appears as a complicated cognitive process. Law's use effectiveness as a means of social regulation depends on detection of the mentioned above cognitive-legal process regularities and the disclosure of epistemological attributes of law.

Gnoseology of law is closely related to the anthropology of law, because a goal of legal cognition, above all, is to ensure conditions for maximum creative human's self-realization.

The anthropology of law – also known as legal anthropology – focuses in particular on legal systems, law, and law-like social phenomena across cultures. In recent years, anthropology's emphasis on 'particular places' has expanded to new kinds of locations (for example, virtual or global) in which human interaction now takes place [11, p. 2].

Anthropology of law explores the nature of law through the nature of human existence. Anthropology of law is a doctrine of law, a source of which is a person, his or her personality and thereby it defines the over the positive essence of law. On the one hand, it is a part of a methodology of philosophy of law, and on the other hand, it establishes its presentive foundation, which is the philosophy of human rights and the legitimization of state orders [12, p. 3-7]. That is, it provides a measure of humanity in philosophical-legal knowledge. Methodological dominants of the anthropology of law originate from a fact that a person perceives law

from a position of the own needs: biological, social, spiritual, etc., which determine person's anthropological properties [13, p. 24]. Anthropology of law recognizes a human that is the higher value as a source of law. Despite the fact that "an image of a person" depends on our choice, we can indicate a *modus operandi* that allows distinguishing a human from all other living beings [14, p. 148]. And this again provides "humanity" of law and humanization of jurisprudence.

And this means that the primary goal of any act of law-making and law-implementation must be the affirmation of a person as a higher value, and not as a "juridical material."

If philosophy of law explores natural law, law that is generated by the nature of a human, then it is quite understandable that it is necessary to know this nature. Anthropology of law is directed to master the mentioned knowledge. In this regard, an argument of G. Hegel that just laws that correspond to a human nature are reasonable [15, p. 385] is appropriate.

Analyzing the content of the mentioned parts of philosophy of law, we can conclude that this science gives an ideological explanation of law, forms world-view legal culture of a lawyer, and therefore affects the effectiveness of the professional activities. It teaches to correctly assess illegal situations and distinguish legal and non-legal regulations.

Philosophy of law is science through which law as a set of regulations turns into a spiritual phenomenon. Through philosophy of law, a lawyer assimilates those eternal values, which then serve as the guidance for him in law-making and law-enforcement activities. Along with this philosophical cognition of law does not deny its formal-logical research. Except clarifying the essence of natural law, it explores ways of its reflection in positive law and the possibility of its improvement.

**Conclusion.** Noting that philosophy makes law to be aware, it should be remembered that law, in turn, is a source of philosophy, because it is directly related to behavior and activity of people, various life situations. In this case, for philosophy

of law the category of "legal thinking" is central, one of the fundamental.

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**ПРАВОРОЗУМІННЯ В ТЕОРІЇ І ФІЛОСОФІЇ ПРАВА**

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**Мета:** у статті обґрунтовується необхідність використання різноманітних підходів у процесі дослідження права як складного явища. Багатоаспектне правопізнання є важливим, адже чим більше використано підходів у вивченні права, тим змістовнішим є уявлення про його природу. **Методи:** феноменологічний; герменевтичний; порівняльно-правовий; соціологічний; логічний; діалектичний. **Результати:** з'ясовано характер і місце категорії «праворозуміння» в межах таких юридичних наук, як теорія держави і права та філософія права; проаналізовано взаємозв'язок окремих типів праворозуміння; обґрунтовані необхідність, важливість, доцільність і актуальність формування інтегративної юриспруденції для функціонування сучасного суспільства. **Обговорення:** проблем праворозуміння, права, як явища, як інструменту для задоволення потреб суб'єктів правовідносин, взаємозв'язку окремих типів праворозуміння з вимогами законності.

**Ключові слова:** праворозуміння, легізм, позитивізм, джерела права, буття права, теорія права, філософія права.

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**ПРАВОПОНИМАНИЕ В ТЕОРИИ И ФИЛОСОФИИ ПРАВА**

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**Цель:** в статье обосновывается необходимость использования различных подходов в процессе исследования права как сложного, многогранного явления. Многоаспектное правопонимание является действительно важным, поскольку чем больше использовано подходов в изучении права, тем содержательнее является представление о его природе. **Методы:** феноменологический; герменевтический; сравнительно-правовой; социологический; логический; диалектический. **Результаты:** установлены характер и место категории «правопонимание» в пределах таких юридических наук, как теория государства и права и философия права; проанализирована взаимосвязь отдельных типов правопонимания. Обоснованы необходимость, важность, целесообразность и актуальность формирования интегративной юриспруденции для нормального функционирования современного общества. **Обсуждение:** проблем правопонимания, права, как явления, как инструмента для удовлетворения потребностей субъектов правоотношений, взаимосвязи отдельных типов правопонимания с требованиями законности.

**Ключевые слова:** правопонимание, легизм, позитивизм, источники права, бытие права, теория права, философия права.