Chapter 3. Justice in the Mechanism of Law-Application

§ 1. Justice and Problems of Law-Application

Law enforcement activity of a State is effectuated in various forms. Justice is one of the most important forms ensuring an objective evaluation of violations of legality, their prevention and elimination; justice is traditionally regarded as an independent and autonomous limb of the structure of State power. The orientation of justice in ensuring the operation of law is no less topical. In this sense it represents a complicated cognitive process during which an analysis is conducted of facts and actions and a legal evaluation and qualification is given. Strict procedural methods characteristic only of questions related to justice are used. Therefore, it is possible to understand more deeply the nature of justice by investigating the mechanism of application of law.

Many factors influence the realization of law. They explain digression from legal models and regulators in real life circumstances arising through legal mistakes and low quality legal acts, poor work of State agencies and other structures, and low legal culture of citizens. Objective factors also lead to such deviations. This happens in crisis periods when extreme economic, political and legal measures are taken. There are also more controlled digressions when foreknowledge allows timely reaction to sources of threats to national security (destabilization of the internal situation, terrorism, extremism, technogenic and natural disasters, and so on).

It is noteworthy that digression from legal models can have a positive sense as "signals" of legal gaps or the usefulness of non-legal regulators, institutions of normative self-regulation, finally, of mechanisms of lawful behavior of citizens.

The interest of society in a new law focuses the attention of all or of many of those applying law, but often interest then fades. When the application of law results is reduced to sporadic review and exposure of violations of law, this stereotype interferes. Such "signals" can serve as only one indicator of the level of legality.

In doctrinal writings, laws traditionally use such concepts as "compliance", "application", "execution", "use", and "realization" for designation of the operation of a law. Often the last concept, being generic, embraces all

of the remaining foregoing mentioned concepts. The question here concerns the various regimes of effectuation of legal norms and different forms of reaction to them by subjects of law. However, the content of the diverse process of application of law, which embraces the dynamics of the understanding of law, legal consciousness, legal acts, social institutions and behavior of subjects of law, is not exhausted by these regimes and forms.

Therefore, the established purposes of the application of law are justifiably very important: ensuring consistent realization of the provisions of laws, not only taken separately but in their systemic dimension; elimination of violations of legality and adoption of measures of responsibility; assistance with the formation of law-abidingness and raising the legal culture of citizens, and thus the prestige of law in society; confirmation of a stable legal order and formation of new legal statuses (in branches, spheres, regions and so forth); adjustment of legislative and other regulators in the event of their ineffectiveness or gaps.

In our opinion, stable notions concerning forms of realization of law can hardly be considered fully modern to the extent that a complete treatment of the given phenomenon is not given. This is represented only in certain static aspects. The conception of the application of law is a step forward worked out by the author of the present Chapter together with a group of like-minded thinkers. In it on the theoretical-methodological level, the application of law is successfully defined, on one hand, as an organic phase of a general cycle of the development of law, that is, a complex mechanism including legal, social-psychological, economic, institutional instruments, not reducible to the movement of legal acts, and on the other hand, as ensuring a coordinated operation of norms of national and international law.

Taking into account what has been said, it is possible to discuss the application of law as a mechanism of operation of law and realization of its elements in the framework of cycles of legal development. Certain stages of the formation of legal understanding, development of legal consciousness, legal culture, forecasting and legal designing, preparation and adoption of legal acts, creation and functioning of the institutes of State and society connected with them smoothly transition to a cycle of application of law with their own stages. These are legal information, knowledge of the law, activity of agencies and organizations, actual behavior of citizens, [right-defense systems, legal monitoring, adjustment of the activity of institutes and legal acts. In this way, a kind of reverse link from society to law in its renewed form is ensured.

The use of legal norms is always accompanied by analysis of their actual operation and valuation of facts, phenomena and events. There are many methods and means for this; however, justice has a special place among them.

It is called upon, on one hand, to generalize from earlier applied methods for the elimination of violations of legality, including informational, analytical and other material in its own sphere that can be used as evidence and expert opinions. On the other hand, justice in strict and precisely established procedural forms, not characteristic of other channels of realization of law, provides an objective and final evaluation of the character and level of violation of law. In its capacity as the last juridical instance, by its nature, justice examines these facts, phenomena, and events and gives them a final legal evaluation from the point of view of conformity to law. Decisions of courts, as it were, "lock up" a chain of applications of law in a concrete situation. At the same time in generalized form judicial practice serves as a "law-forming" factor for subsequent development of legislation. In either instance, the decisions of courts become binding upon all subjects of law and are taken into consideration by all channels of application of law.

In the context of our topic it is important to examine the genesis of justice, which has had a very lengthy history (see Chapter 1 above). In Ancient Rome during the changes of forms of government, methods of applying punishment changed, including the activity of special officials. But equality of the parties received recognition later, with the adoption of the Magna Carta, in which Section XXIX concerning imprisonment contrary to law was supplemented with provisions concerning the administering of justice and legal judgment by one's peers.

Later a system of courts and series of principles of justice were gradually embodied in constitutions. An example was Article III of the Constitution of the United States concerning the judiciary. The 1789 Declaration of Rights of Man and Citizen proclaimed law as the foundation for the establishment of punishments and presentation of an accusation. These provisions were developed in Chapter 5 "On the Judicature" of the 1791 Constitution of France, providing for the election of judges, independence of courts, the presence of jurors, jurisdiction of judges, some procedural rules, and others.

In Russia the formation of justice proceeded slowly and lagged behind in the development of principles and rules for court procedure. Chapter 10, "On Courts", in the 1649 Sobornoe Ulozhenie was applied to varying degrees during the settlement of court cases. Thus, in Pskov in the seventeenth century an elected noblemen most often decided cases in the chamber of clerks where there was a court table. In other places, the landowners became the main managers of cases. Only in the middle of the nineteenth century was a court system created with its own principles of activity[1].

[1] For more detailed material on the history of the development of the court system of Russia, see M. F. Vladimirskii-Budanov, Обзор истории русского права (Survey of the History of Russian Law] (1995); V. O. Kluchevskii, Русская история: полный курс лекций в трех книгах [Russian History: Complete Course of Lectures in Three Books| (1993).

As is obvious, only gradually did court procedure become connected with a law which established systems of crimes and punishment as the grounds for bringing a case to court. The formalization of judicial power as a type of State power accompanied the formation and consolidation of principles and rules of court procedure. Justice acquired the role of the most important institution ensuring the stability of legal order and realization of law. In this sense it was an autonomous and special type of State activity in contrast to legislative and especially executive power, where the principle of expediency took priority in the choice of questions for resolution.

§ 2. Essence and Basic Orientations of Development of Justice

The understanding of justice is very complex. It is regarded as a synonym of judicial power, judicial proceedings, a form of defense of rights and legal interests of citizens and juridical persons. Justice is analyzed in the context of judicial law, but the respective characteristics do not provide a notion of its actual place in conceptual categories. Each characteristic is true as far as it accentuates one facet of the given phenomenon.

A systemic evaluation, allowing the identification of the main - special form of State activity in the general mechanism of the application of law, is more constructive. Ensuring the operation of law and the strict compliance with its principles and norms includes the discovery, recording, and elimination of violations of legality. Here is where justice is assigned a special place.

In the realization of legal acts and norms contained in them, there arises the necessity for a stage for which special guarantees of objective consideration and resolution of arising conflicts, disputes, and violations of legality would be characteristic. An instance hierarchy characteristic of other forms of State activity is less necessary. Here an evaluation of the law by the court as an independent institution takes place using specific procedural rules determining the specific character of the conduct of persons participating in examination of the case and the sequence of actions of officials. There is no similar normative linkage within the framework of other forms of activity, although it is precisely this that allows "judging on the basis of law", evaluation of actions (or failure to act), the actual events, phenomena, and facts only from the position of the correct application of norms of law.

In Russia a new stage has arrived after long years of passivity in the realization of laws. The Edict of the President of 20 May 2011, No. 657, "On Monitoring the Application of Law in the Russian Federation", in which a

system of permanent measures in the given sphere is confirmed, responds to regulating and the effectiveness of the institution of legal monitoring.

In the context of our topic, recognition of judicial practice as a channel of legal monitoring is especially essential. A recommendation was made to the Constitutional Court of the Russian Federation, the Supreme Court of the Russian Federation, and the High Arbitrazh Court of the Russian Federation to send yearly to the Ministry of Justice of the Russian Federation proposals for a draft monitoring plan and a report to the President of the Russian Federation, and for the latter two of the said courts, to take into account the results of monitoring when giving authorizations relating to questions of judicial practice. Justice is becoming as a result of this an even more powerful means of the correct application of laws, as a result of which additional measures are needed.

Special law enforcement systems operate within the mechanism of law application, which in their diversity are united by the purposes of the law enforcement function of the State. These are justice agencies, judicial organs, procuracy agencies, control-supervisory services, and power structures, together with regimes of activity inherent to them. However, only judicial agencies operate at the final point of application of law as the last link in ensuring legality through the effectuation of justice; that is, an analysis and evaluation of the actual activity of the different subjects from the position of law — its general and constitutional principles and regulatory provisions. Only a court has the right and is obliged to assess the level of compliance with law not from the standpoint of the expediency of the evaluated actions, but only from their conformity with law.

Thus, justice is the activity provided by law of a court during the considered of court cases for the purpose of the restoration and defense of violated legal interests and rights. The main purpose of justice is achieved by ensuring the basic foundations thereof:

a) Justice is effectuated by special agencies and representatives of power - judges and a court created in a special procedure. Courts are empowered to act on the basis of the Constitution and laws independently of other State institutions. Interference in their activity is not allowed;

b) Injustice a special procedural form of activity of courts is established, in which stages of court proceedings are determined, successively carried out within their frameworks of operation and the legal roles of participants in the process. These and other general attributes are characteristic for all forms of trials - constitutional, civil, criminal, and administrative;

c) Injustice methods and means for the consideration and settlement of judicial cases calling for the ensuring of just and legal court decisions are

determined. In particular, a system of evidence used in the judicial process, adversarial ity and equality of the parties;

d) Obligatoriness and the irreproachable nature of judicial decisions subject to execution with the assistance of special institutions (bailiffs and others).

Such elements of justice as forms of State activity are typical for many States. However, model characteristics of justice cited by us in reality often change. Violations of principles of justice (pressure on a court, corruption, limitation of the rights of parties, etc.) are allowed. This provokes dissatisfaction in society resulting in a sharp reduction of trust in judicial activity and the effectiveness of judicial activity, as a result of which it is necessary to search for other realizations of justice. Sociological research persuasively confirms this.

Change in the characteristics of justice is also occurring through judicial reforms which periodically are conducted in various countries and within the framework of general State reorganization or as special judicial reforms. Thus, in Russia and the countries of Eastern Europe in the early 1990s, reforms were conducted calling for the ensuring of great independence of courts and the democratization of the judicial process, broad access of citizens to justice, and an expansion of the infrastructure of judicial power. This led to the anticipated positive results.

The application of law as an aspect of justice is connected with the use by courts of a complex of legal means. We are referring in the first place to the correct and consistent understanding by courts of the purposes and principles of law, the mechanism of legal regulation, and the evaluation of its effectiveness that is determined by the world vision and legal ideology of judges, reflecting western, Islamic and other legal traditions and culture, doctrines of the rights and freedoms of man and citizens and the rule-of-law State. In various countries this element is expressed differently.

At the same time, the afore-mentioned diversity to a certain extent acquires an identical basis in the form of generally-recognized principles of law and international regulators of systems of justice. Unification of a similar sort is found in in the constitutions of States, which must comply with the interpretation of the constitution and legal positions of the European Court of Human Rights and, in Russia, also with the holdings of the Constitutional Court of the Russian Federation. All this takes justice beyond the usual "single" dimension of the number and character of judicial cases in an individual country. Basically, world society recognizes the responsibility of the State to man.

In the process of effectuation of justice, the focus is not so much on motives of the expediency of decisions and actions of citizens and juridical persons, as on correct elucidation of the sense of norms of the law and other

normative legal acts; the formation is occurring of the position of the court concerning the question. The judicial discretion is precisely within the framework of the law and not in arbitrary corrupted and other motives.

Judicial discretion is distinguished from administrative by stricter parameters. A deliberate choice of variants of a decision is the result of a complex, intellectually volitional activity of the judge where it is necessary for him to analyze correctly the factual circumstances with the assistance of a system of formalized evidence, to choose a norm, and to correctly apply it in a concrete case. The question is about legal limits of judicial discretion, meaning the correct reflection of the principles and norms of law as well as moral-legal limits. Such limitations serve at the same time as guarantees of objective judgments and evaluations by judges.

Yet, on the other hand, judicial discretion remains the most mobile element of justice, particularly subject to influence of the personal qualities of the judges. For example, several judges in Russia consider civil procedure so excessively regulated (in contrast to English procedure) that it results in cases being decided on the principle that "that which is not expressly permitted by law is prohibited." As before, the deforming influence of external factors is manifested.

Justice in the world is formed along various worldview models when national culture and traditions, religious consciousness, and moral values impart certain peculiarities to the activity of evaluation by courts. Thus, for the European countries, characteristically, western values and concepts of human rights exert more influence on court proceedings. The focus on the individual, although with reservations, is evident and justice often serves as "the start" of the application of the law, as noted in the work of foreign scholars'.

In the countries of the Muslim world, the constitutional recognition of Islam as the basis of legislation imparts to the interpretation and application of legal norms a kind of derivative meaning based on religious norms. An obvious level of "activeness" of justice agencies and expansion of the sphere of judicial activity can be observed in China in combination with the principle of restraint, reflecting the traditional spirit of Confucianism.

In studying the long path of development of justice in many countries, the following basic trends may be noted.

' See, for example, J. Marceau, Регламентарная власть и субъекты частного права во Французской системе права: Предоставление, Осуществление и контроль регламентарной власти | Regulatory Power and Subjects of Private Law in the French Legal System: Granting, Effectuation, and Control of Regulatory Power], in T. la. Khabrieva and J. Marceau (eds.), Административные процедуры и контроль в свете европейского опыта (Administrative Procedures and Control in Light of European Experience! (2011).

First, the framework of justice has expanded in view of the predictability of the guaranteed predictability of actions of the participants. There is a transition from the settlement of concrete individual cases in the context of criminal and civil law to the inclusion within the parameters of justice of a broad circle of social and public cases, including disputes in connection with the activity and acts of agencies of public power and even international institutions.

Second, the constant deepening of democratic principles of justice is occurring which promotes greater accessibility for citizens and the strengthening of guarantees of their procedural rights. However, violations in this sphere unfortunately are not eliminated, provoking social discontent. The informatization thereof is furthering an improvement in the quality of judicial activity.

Third, a notable expansion is observed in the volume of pre-judicial and non-judicial procedures that enriches justice by removing comparatively simple cases from the court's primary jurisdictional sphere.

Arbitration, mediation, administrative-social commissions for the consideration of administrative complaints, and other institutions further the formation of a more significant role for justice in the settlement of legal conflicts and accordingly a type of legal consciousness and law-abidingness of citizens so that they are to a greater extent are prepared to autonomously participate in the prevention and elimination of conflict situations.

Fourth, the trend towards the enhancement of the role of judicial acts as a law-forming factor is noteworthy. In Russia the foregoing is reflected in the interpretation of the Constitution of the Russian Federation, legal holdings of the Constitutional Court of the Russian Federation and guiding explanations of the plenums of the Supreme Court of the Russian Federation and the High Arbitrazh Court of the Russian Federation. The use of precedent in common law countries is being actualized in other legal systems. The role of judicial acts is thereby strengthened not only by expanding the limits of its traditional activity in concrete cases, but motivating legislators to adopt new or change existing laws.

Justice is the most important type of State activity having a direct connection with people who are endowed with procedural rights and duties. Both the ensuring thereof, and the ensuring of the effectiveness of all State activity, are indicators of the level of growth of democracy in society and the State.