

School of Legal Realism and its prospects in Ukrainian jurisprudence

Школа правового реалізму та перспективи використання її здобутків в українській юриспруденції

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legal realism, mechanical jurisprudence, formalism, facts, induction, judicial reasoning, decision-making, education.

Ключові слова:

правовий реалізм, механічна юриспруденція, формалізм, факти, індуктивний метод, судова аргументація, процес прийняття рішення, освіта.

Legal realism has been the most important jurisprudence movement in the United States of America and Scandinavian countries during the 20th century¹.

Historically, the school of legal realism was formed as a response to mechanical jurisprudence, which has long prevailed in the science of law and legal practice.

A research conducted in this article is highly important for the Ukrainian jurisprudence, since the achievements of legal realism and its influence on theory of legal reasoning haven't been thoroughly analyzed by national legal science; moreover, in Soviet times school has been considered solely from a critical perspective.

Being an antipode to formalism and mechanical jurisprudence, legal realism requires that legal practitioners are tasked with the duty to deeply and thoroughly analyze, weigh, and apply the relevant and operable facts of each particular case under any given dispute, in order to reach the highest and best decision, based upon a thorough and deep legal analysis of: law, ethics, social reality, precedence, procedure, facts, fairness, justice, and other elements². With the view to arrive at this degree of full and complete justice, legal practitioners should apply the method of induction and move from the specific facts of each case to the general concept of fairness. Contrary to the formalism of a mechanical jurisprudence, judges (those endowed with the highest form of legal power) should not merely use the methods of deductive logic, thereby solely analyzing existing legislation to deduce an application to the facts of the case. Hence, judges should not be solely bound by simple rules of jurisprudence; instead, they are to be bound by the facts and their deep and fundamental evaluation and specific application to each and every case, taking into consideration social, psychological, and communication reality³. Therefore, with the complete application of legal realism, justice may fully rise to its highest and purest level of intended purpose.

The main objective of legal realism is essentiality to overcome legal formalism, which has long been expressed in a mechanical, syllogistic approach to solving disputes and in the formation of judicial reasoning, using both logic and the deduction method in the analysis of law, which was then applied to the facts of the case.

According to the approach of legal formalism, judges apply the law to the facts of the case mechanically, using methods of logic. Justice – a “giant syllogism machine” and the main task of judges is the need to act as “highly skilled mechanic”⁴. The rules for the formalists are the alpha and omega – something that begins and ends judicial reasoning, and logical thinking is the main instrument⁵.

¹ Leiter B. American Legal Realism // B. Lieter. U. of Texac Law, Public Law Research Paper № 42, 2002. – P. 1.

² Roederer C. Jurisprudence // C. Roederer, D. Moellendorf. Kluwer, 2004 – P.159; Holmes O. The common Law / O. Holmes [Electronic resource]. – Available at : <http://www.gutenberg.org/files/2449/2449-h/2449-h.htm>.

³ Frank J. Law and Modern Mind // J. Frank, Transaction Publishers, 1930 – P.103–105, 111.

⁴ Guthrie C. Blinking on the Bench: How Judges Decide Cases // C. Guthrie, J. Rachlinski, A. Wistrich, Cornell Law Review, Vol. 93:1, 2007 – P. 2.

⁵ Tumonis V. Legal Realism and Judicial Decision-Making // V. Tumonis, Jurisprudence, № 19 (4), 2012 – P. 1362.

The inherent feature of formalism is that in each situation, the legal practitioner must deduce the fundamentals of the general, abstract provisions, regulated by law, which don't have loopholes. Therefore, there is no necessity to analyze something extra beyond legal rules. Thus, lawyers use general principles that form well-defined concepts, in order to make concrete decisions in coming to a logical, rational, and objective opinion using the deductive method⁶.

Since the legal system of Ukraine to this day contains features of formalism, particularly in the process of decision-making by judges and in the formation of judicial reasoning, analysis and application of legal realists' findings are extremely important. Undoubtedly, realistic school achievements are not to be adopted mechanically, without taking into account the specifics of the Ukrainian legal system. Additionally, legal practitioners should analyze and implement the achievements of other countries' legal systems, which have proven to demonstrate positive and forward-thinking tendencies that should take place.

The question remains whether it is possible to implement findings of legal realism within the Ukrainian legal system. School of legal realism, which has been searching for the most effective tools against formalism, was evaluated in the United States of America, where the precedent system is exploitive.

As stated by Ukrainian professor Mykola Koziubra, due to a complex symbiosis of regulatory material of a heterogeneous nature and considering the systems of different legal cultures in Ukraine at different times, the national legal system cannot be unequivocally attributed to a particular legal family⁷. In turn, taking into account the "multi-directionality" of the national legal system, it is reasonable to conclude that the application of the achievements of the school of legal realism in national law is possible because it constitutes an entry focus of the legal system in Ukraine (the vector of the civilized West), where was launched and operates "universal human values as protection of non-derogable human rights and freedoms, rule of law, fair trial, etc."⁸.

Certainly, it may not be denied that the existence of a common number of criteria for the Ukrainian legal system falls within the Romano-Germanic law family, such as the main source of law, ways of systematizing regulatory material, terminology⁹.

Due to the above-mentioned, it should be deeply and thoroughly investigated whether the virtues of precedent system are possible to be introduced to the Ukrainian legal system, where judges traditionally reach a verdict in each particular case starting from the analysis of legislation and its further application to the facts.

As was fairly mentioned by Roscoe Pound in *Jurisprudence*, American realists think in terms of judicial process, while the continental realist thinks about codified law and legislative process. However, as per his position, which is fair, if continental lawyers will consider the findings of legal realism, then "there will be recognition of a plurality of elements in all situations and of the possibility of dealing with human rights in more than one way"¹⁰.

One of the first legal realists Jerome Frank in *Law and Modern Mind* wrote that "Until court has passed on those facts no law on that subject is yet in existence"¹¹. Hence, legal realists believe that practitioners in each case create the law by turning the verdict, which should be based on a deep analysis of facts, governed by the principles of fairness and justice.

In practice such operates as mentioned by Jerome Frank in his book by citing the American judge, Chancellor Kent: "He first made himself "master of facts". Then saw where justice lay, and the moral sense decided the court half the time; I then sat down to search the authorities. I might once in a while be embarrassed by a technical rule, but I almost always found principles suited to my view of the case"¹².

⁶ Singer J. Legal realism now // J. Singer, California Law Review, Vol.76:465,1988 – P. 496–497.

⁷ Козюбра М. Особливості правової системи України і їх вплив на втілення європейських правових стандартів у національну законодавчу й правозастосовну практику / М.. Козюбра // Проблеми застосування міжнародних стандартів у правовій системі України. – К. : ПрАТ «Юридична практика», 2013 – С. 84.

⁸ Ibid. – P. 87.

⁹ Козюбра М.Євразійська або слов'янська правова сім'я: реальність чи міф / М. Козюбра, О. Лисенко // Укр. право. № 1, 2003 – С. 15.

¹⁰ Pound R. *Jurisprudence*, Part I *Jurisprudence* // R. Pound, The Lawbook Exchange, Ltd., 1959 – P. 285–286.

¹¹ Frank J. *Law and Modern Mind* // F. Jerome. – Transaction Publishers, 1930. – P. 50.

¹² Frank J. *Law and Modern Mind* // F. Jerome, Transaction Publishers, 1930 – P. 112.

By emphasizing the recommendation to use the method of induction and “arguing against the practice of deducing rules from abstractions, the realists hoped to focus attention on the facts of specific cases and to understand the development of the law in terms of situation-types”¹³.

As Professor Hutcheson J. stated, judges, firstly, have an internal feeling – “hunches” on the outcome and only then turn to legal rules to find the justification for their intuitive impression concerning the decision to be reached¹⁴.

The school of legal realism experienced an internal development of positions that had a manifestation in the dialogues between the realists themselves and in the personal positions of founders – from the absolutization of facts (the empirical part) and the complete ignorance of norms, to looking for a compromise, so to speak, the balance between these two phenomena.

Benjamin Cardozo in *The Nature of Judicial Process* mentioned that “Obscurity of the statute or of precedent or of custom or morals, or collision between some or all of them, may leave the law unsettled, and cast a duty upon the courts to declare it retrospectively in the exercise of a power frankly legislative in function”. At the same time looking for balance between discretion and formal part, realist stated following: “We must not let these occasional and relatively rare instances blind our eyes to the innumerable instances where there is neither obscurity nor collision nor opportunity for diverse judgement”¹⁵.

Roscoe Pound stated that administration of justice may face a conflict of “two antagonistic ideas, the technical and discretionary”¹⁶. At the same time, he considered that “for the certainty attained by mechanical application of fixed rules attained by mechanical application of fixed rules to human conduct has always been illusory”¹⁷.

Realists stressed the importance of judge’s individuality in finding justice. They, among other things, claimed that the court decision is not always only based on existing precedents and other legal sources, but also reflects the personal views of judges¹⁸. Benjamin Cardozo believed that psychological background of judge constitutes a “living forces of our law”¹⁹. In turn, the psychological portrait of the judge is embodied by such phenomena, as “inherited instincts, traditional beliefs, acquired conviction; and the resultant is an outlook on life”²⁰.

Considering the works of realists, a number of positive tendencies should be stressed. Firstly, the main achievement of legal realism is that this school has formed the main objective of law in a civilized society, which is to provide the necessary tools and mechanisms for judges, lawyers, and legislators to serve human interests and meet their needs²¹. Secondly, the formulation of the main tasks of law, changed the approach to decision-making by judges. School guidance reformed legal realism and forced judges to overestimate the importance of detailed analysis of the facts of the case in the construction of judicial reasoning, giving it extraordinary importance of this process. Thirdly, as the analysis of the facts – is not a mechanical activity but a process that requires specialized knowledge, realists have contributed to the reform of studying legal sciences in higher education, stressing the importance of providing the necessary knowledge and skills development in the first years of training future lawyers.

As fairly mentioned by Mykola Koziubra, findings of legal realists greatly influenced the theory of legal reasoning that reflected in the perception of law as a phenomenon that is not remote from real life, and this affects the need to analyze in detail the facts of the case by judges while reaching decision²².

¹³ Singer J. Legal realism now // J. Singer, California Law Review, Vol.76:465,1988 – P. 500.

¹⁴ Hutcheson J. The Judgement Intuitive: The Function of the “Hunch” in Judicial Decision / J. Hutcheson, Cornell Law Journal, Vol. 14:2, 1929 – P. 274–288.

¹⁵ Cardozo B. The Nature of the Judicial Process / B. Cardozo, Yale University Press, 1921. – P. 128.

¹⁶ Pound R. Justice According to Law/ R. Pound, Columbia Law Review, Volume 13, 1913 – P. 696.

¹⁷ Pound R. An Introduction to the Philosophy of law / R. Pound, Yale University, 1922 – P. 142–143.

¹⁸ Grechenig K. The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism / K. Grechenig, M. Gelter // Hastings International and Comparative Law Review, Vol. 31, No. 1, 2008. – P. 359.

¹⁹ Cardozo B. The Nature Of The Judicial Process / B. Cardozo, Yale University Press, 1921 – P. 22

²⁰ Ibid. – P. 12.

²¹ Pound R. An Introduction to the Philosophy of law / R. Pound, Yale University, 1922 – P. 284.

²² Козюбра М.. Теорія юридичної аргументації: становлення, стан та перспективи у вітчизняній юриспруденції / М. Козюбра // Наукові записки НаУКМА, Том 129, 2012 – С. 9.

Unfortunately, characteristics of legal formalism are inherent and outline the current Ukrainian legal reality. This, primarily, is reflected in the actuality that for Ukrainian judges, the legal rules are the alpha and omega, and the facts of the case are analyzed superficially that is caused by the lack of necessary knowledge, which actually constitutes the achievements of the school of legal realism. Judges are not accustomed to a detailed analysis of the facts and, by using a deductive approach while deciding the case, they overlook what is essential to the case.

Virtually, the demand to overcome formalism caused by the fact that the central place in the mechanism of ensuring the rule of law in a democratic society belongs to court²³. In order to find justice in each case, while drawing up the argumentation, a detailed analysis of all the facts of the case necessary to be considered, avoiding use of the formal logic method, but appealing to empirical criteria.

Along with the above-mentioned analysis of the scientific achievements of the legal realists, we are lead to the following conclusion: to teach, encourage, motivate judges to work in line with the concept of legal realism, it is necessary, as a matter of priority, to start with the reform of legal education.

Realistic movement has been aimed to transform the teaching methodology of law for future lawyers. An important element of reform should be the need to analyze not only legal but also illegal phenomena, as well as the study of social, psychological, economic and other factors, coupled with socially significant legal actions²⁴. Besides that, while teaching legal disciplines, considerable emphasis must be placed on the analysis and study of the facts of the case.

It is worthwhile to note that certain mechanisms developed and implemented by legal realists successfully applied in Ukraine. In particular, the institution of "legal clinic" allows students to analyze the actual legal situation, communicate with clients, and inspect and investigate the facts of the case. With outstanding popularity among Ukrainian students, the participation in simulated court competitions can produce the application of international substantive and procedural law. Positive tendencies in the implementation of achievements in the school of legal realism in Ukrainian education are visible, but it still needs to be determined how much formalism is an inherent characteristic of the teaching of Law. Unfortunately, analysis and study of law are more significant components in the teaching of legal disciplines than mastering skills in building argumentation based on a detailed analysis of the facts of each legal case.

Inasmuch as the formalism is still a characteristic feature of Ukrainian legal system, it is extremely important and necessary to analyze the achievements of the school of legal realism, the application of which will have a lasting, positive impact on the legal system of Ukraine. Moreover, the enrichment of Ukrainian science with the findings of school can help to enhance knowledge, master skills and competence of judges in the legal reasoning process.

Summary

The article is devoted to fundamentals of school of legal realism. Author brings into focus the analysis of school findings concerning functions of judges in the decision-making and legal reasoning processes. The light has been shed on positive achievements of legal realism that could be implemented for improving Ukrainian jurisprudence.

Анотація

Стаття присвячена основам школи правового реалізму. Автор ставить у центр уваги аналіз висновків школи, що стосуються функції суддів у процесах прийняття рішень і формування аргументації. Проаналізовано здобутки правового реалізму, які можуть бути використані для вдосконалення української юриспруденції.

²³ Козюбра М. Принцип верховенства права і судова влада / М. Козюбра. // Наукові записки НаУКМА, Том 116, 2011 – С. 3.

²⁴ Афонасин Е. Философия права : [учебное пособие] / Е. Афонасин, А. Дидикин. – Новосиб. гос. ун-т, Новосибирск, 2006 – С. 47.

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