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Law

The Peculiarities and Role of the Legal Should-Be in Formation of the Normative Behavior

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ABSTRACT. The paper presents an attempt to establish a normative power of the law and a normative power of the factual through referring to the concepts of the Legal Should-Be and Interest. Specific signs characteristic of, in general, to Should-Be and Legal Should-Be are discussed, the peculiarities of the notion of the Legal Should-Be and history of its origin are revealed, the opportunity of founding a normative force of the law is analyzed through introducing the notion of interest, which on its side is based on the category of Should-Be and consequently, Legal Should-Be. In Law, an effective Should-Be is represented as an ideal construction of the legal reality, demonstrating its role in interpreting normative, valued, targeted and ideological parameters of the of Law as a certain injunction. *© 2019 Bull. Georg. Natl. Acad. Sci.*

Key words: Legal Should-Be, value, interest

Legal Should-Be is little studied category in the Legal Philosophy of Georgia; furthermore, the problem of establishment of the Normative Force of Law [1] and the Normative Force of the Factual [2] is even less studied. Our aim is to clarify the notion and peculiarities of the Should-Be and to discuss the above-mentioned issue referring to them.

Notion of the legal essence. Legal Should-Be is in general a type of the Should-Be, which is characterized by the signs of the notion Should-Be. To understand the notion of Should-Be we will compare it with the notion of the Essence. Truth and falseness is characteristic of the essence, which is not applicable to Should-Be, as evaluator elements are significant in the Should-Be. In contrast to the essence, Should-Be is not evaluated with the categories of existence-non-existence, Should-Be can be evaluated according to its significance and advisability. With their concept, they denote existence in reality with its Should-Be, something which does not exist yet, though it Should-Be. It belongs to such a non-existing category, which requires implementation. Interrelation between Should-Be and essence is the same as one between the desired and genuine. The Should-Be and essence are related to each other as the aim and result. Should-Be indicates what should be, whereas an essence is already implemented

opportunity, whereas Should-Be represents an opportunity which requires implementation. Should-Be is something which should be present, existence of which is not guaranteed due to natural pacing of the items. Should-Be is the fact of neither the past nor the present, it is not expected neither with the past nor with the present, i.e. does not represent a necessity. In view of this, it is a requested opportunity and relevant, it cannot be and indeed is not what should exist. Should-Be could have been or could not have existed. Should-Be serves as a requested opportunity meaning an internal consent of an individual, which in view of the in-depth interests of a person is a request and is relevant to the universal-objective tendency of the human existence [3].

Should-Being effective in the Law is considered under the Legal Should-Be, which is represented by the following specific signs:

1. In general, Should-Be considers spontaneous implementation of a certain ideal, which is calculated on voluntary implementation, in Law realization of the Should-Be, its transformation into the Essence can be implemented through external compulsion;
2. As a whole, Should-Be is non-homogenous and contains the opportunity to make a choice, therefore, it admits freedom of a social subject, whereas in Law the Should-Be is partially defined and requires essential implementation [4];
3. In general, Should-Be in itself contains the opportunity of happening in a different way, whereas a Legal Should-Be is devoid of this opportunity, it necessarily should happen as it was formed;
4. A Legal Should-Be, Norm ceases existence in the form of Should-Be, if it is devoid of an opportunity for self-actualization. Meanwhile, no matter whether in general Should-Be is actualized or not, though it will remain as a value. [5].

In view of the above-listed characteristics of the Should-Be, in Law interrelation between Should-Be and Essence can be discussed as an interrelation between Norm (Should-Be) and Behavior (Essence); as an interrelation between Freedom (Should-Be) and Necessity (Essence); as an interrelation between the Value (Should-Be) and value-based relationship (Essence), and so on. In view of this, in Law Should-Be is something which should be, which is the goal, "Telos, Aim is a basis for understanding all the types of legal norms and subjects" [6], a model, an ideal construction of the legal reality of the future. Should-Be simultaneously includes the ordained norm of conduct, as well as the value, aim of conduct, an ideal. Hence, Should-Be also has a certain ideological function. As the result of actualization of Should-Be the Essence is formed, i.e. which is a result of the value and ambition put into the still incomplete norm. Actualized Should-Be or Essence can be referred to as Law and Order in Law, as in the Law the Essence is something what actually exists, being a realized legal reality, legal truth, "All types of Law is the Essence" [7]. A dilemma existing in the sphere of Law - "How it should be" and "How it is" – is expressed with the categories of Legal Should-Be and Essence.

Origin of the legal Should-Be. The origin of the Legal Should-Be, similar to in general origin of the Essence, is based on the evaluating the skills of a person. Legal Should-Be cannot be an unconditional Should-Be resulting only from the internal human nature, the foundation of which according to Kant, lies in the transcendental subject, which it can be said, is rather intersubjective [8]. Even social reality has a meaning in it, which in contrast to natural existence, is characterized by the values. The Socium (Society) consists of the individuals equipped with freedom and reason, the actors of which are voluntary being, their behavior being defined not with the cause by with the motivation. A legal Should-Be is unconditional, which means that it is not the expression of the fact, though, a

legal law is not logically evolving from the empiric fact [9]. Nevertheless „all legal provisions are calculated on the known factual circumstance" [10] and to certain extent, it also provides evaluation of the factual. The future, past and present are evaluated from the position of Should-Be [11], which as it can be said, in the origin of the legal Should-Be the past and present participate. It is such behavior of the Future, in which the present and future are both considered with a certain form. "This 'Have to', i.e. Should-Be is defined by the norms, imperatives acting within the society" [12]. It is impossible to create essence from the legal Should-Be from the viewpoint that essence is present, whereas Should-Be is something that is not present yet, but it has to be and not from the viewpoint that the essence participates in formation of the legal Should-Be. The power of the legal Should-Be lies in the fact that it not only assessed but also requests identification, implementation and transformation into the reality. Legal Should-Be can be opposed to the factual not with the opinion that one is reality and the second is not, but with the opinion that the Law in conflict with everything factual – is the truth of the righteous opinion [13].

Legal Should-Be primarily serves as a value, "Value is always price for something, which means that valuable interrelation requires presence of the valuable item" [14] and this item, in our case, is a social reality. Item content of the cognition is nothing more that its social content [15].

The mechanism of formation of the Legal Should-Be can be imagined in the following way: first, the individuals rationally perceive their own requirement and interest and on the basis of this cognition form the values, which are later formed into Should-Be and the law with their nature.

Should-Be as a basis for normativeness of the law. Opposition of the Law (non-positive) as an opportunity, as Should-Be with the Factual can be explained through introducing the concept of the "Interest". "Interest" serves as a basis for formation of the Should-Be. A person is always interested, "the state of being Interested" serves as a feeling of insufficiency with the existing and striving for reforming the latter. In cognition of the factual, an interest or "More interest" is involved (Huserl), which recognizes not only theoretically but also existentially important sides.

Interest is evoked not so much with the factual, but more with not being factual, which is different from the factual and serves as a possibility of transforming into the factual. A preliminary vision formed on the basis of the interest is basically related to the freedom and value [16]. A person with the quality of interest differentiates, opposes with each other the factual and the future, the possible, i.e. still unachieved which is formed as a value, which provides food to the law and takes on its content. With the help of the value, so called moment of "it does not matter" is opened in the conduct of law subject and restorative, obliging and banning behaviors are formed [17].

Therefore, Should-Be as a requested possibility turned into the possibility, which is to be necessarily implemented, i.e. a normative nature is being granted to it, establishment of which is possible through introducing the notion of the interest. The category of a legal Should-Be explains the Law, as normative valuable, targeted and ideological parameters of a certain injunction.

სამართალი

სამართლებრივი ჯერარსის თავისებურებები და როლი ნორმატიული ქცევის ჩამოყალიბებაში

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(წარმოდგენილია აკადემიის წევრის ლ. ალექსიძის მიერ)

ნაშრომში მოცემულია სამართლის ნორმატიული ძალისა და ფაქტიურის ნორმატიული ძალის დაფუძნების ცდა სამართლებრივი ჯერარსისა და ინტერესის ცნებების მოშველიებით. განხილულია, როგორც ზოგადად ჯერარსისათვის, ასევე სამართლებრივი ჯერარსისთვის დამახასიათებელი, სპეციფიკური ნიშნები, მითითებულია სამართლებრივი ჯერარსის ცნებისა და წარმოშობის თავისებურებებზე. გაანალიზებულია სამართლის ნორმატიული ძალის დაფუძნების შესაძლებლობა ინტერესის ცნების შემოტანით, რომელსაც, თავის მხრივ, ჯერარსის და, შესაბამისად, სამართლებრივი ჯერარსის კატეგორია ეყრდნობა. სამართალში მოქმედი ჯერარსი წარმოდგენილია, როგორც სამართლებრივი რეალობის იდეალური კონსტრუქცია, ნაჩვენებია, მისი როლი სამართლის, როგორც გარკვეული დანაწესის, ნორმატიული, ღირებულებითი, მიზნობრივი თუ მსოფლმხედველობითი პარამეტრების ახსნაში.

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