Цивільне право і цивільний процес; сімейне право;
міжнародне приватне право

UDC 340+347.1

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LAW, MORALITY AND ECONOMICS: SOME METHODOLOGICAL REMARKS ON BASISES OF SUBJECTIVE RIGHTS
ПРАВО, МОРАЛЬ ТА ЕКОНОМІКА: ДЕЯКІ МЕТОДОЛОГІЧНІ ЗАУВАЖЕННЯ ДО ПИТАННЯ ЩОДО ПІДҐРУНТЯ СУБ'ЄКТИВНИХ ПРАВ

Summary. *The article examines some methodological issues related to the concept of "subjective right" and corresponding civil law constructions based on moral imperatives, on the one hand, and those based on the utilitarian approach developed within the methodology of the school of Law and economics, on the other. The author demonstrates that the primary element of civil-law constructions – subjective right is the result of the construction of social reality based on a universal moral category – the golden rule of morality. In the author's view, any other factual aspects should not regarded as legal transcendences, but the latter are in all cases assessed within the framework of certain legal constructs. The economic and law approach, in the author's opinion, reflects the*

politics of law in its ideological form, which is the reason for the transition from the paradigm of natural law to the law considered in the context of the school of "law and economics". Following the basic hypothesis of Law matters, the author concludes that civil law constructions not be regarded solely as legal instruments or legal and technical instruments serving to achieve a utilitarian result. The author supports his conclusions with a critical analysis of the basic provisions of the economic analysis of law and empirical material. In particular, noted that the logic of law and economics relies on the analysis of limit values in a stable system, whereas the constructivist view of law based on legal constructions designed for significant socio-political and socio-economic fluctuations. The economic approach focuses on ex ante incentives, while the legal effect aims to establish fairness on the basis of an ex post assessment of the prevailing legal situation. The author shows that the stability and elasticity of legal constructions determine the limits of the impact of imperatives dictated by the vision of law as a factor of economic development. According to the author, the limits of the relevant normative components of civil law constructions are the imperatives of the "morality of duty" and the "morality of aspiration". In other cases, in the Law enforcement process, the moral and ethical imperatives are subject to the rules of specific legal constructions.

Key words: *law and morality, law and economics, law methodology, law policy, subjective right, Civil legal construction, fact, opportunistic behavior, morality of duty, morality of aspiration.*

Анотація. *У роботі досліджуються деякі методологічні питання, пов'язані з поняттям «суб'єктивне право» та відповідними цивільно-правовими конструкціями в контексті моральних імперативів, з одного боку, і утилітаристським підходом, що розвивається в рамках методології економічного аналізу права, з іншого. Автор демонструє, що первинний елемент цивільно-правових конструкцій – суб'єктивне право є наслідком*

конструювання соціальної реальності на основі універсальної моральної категорії – золотого правила моральності. На думку автора, будь-які інші фактичні аспекти не потрібно розглядати як правові трансцеденції, але останні оцінюються виключно в межах певних юридичних конструкцій. Економіко-правовий підхід, на думку автора, відображає політику права в ідеологічній її формі, саме цим фактором зумовлений перехід від парадигми природного права до права, що розглядається в контексті методології школи «Права та економіка». Дотримуючись базової гіпотези Law matters, автор робить висновок, що конструкції цивільного права не можна розглядати виключно як правові інструменти, юридико-технічні засоби, що служать досягненню утилітарного результату. Зроблені висновки автор підтримує критичним аналізом базових положень із аналізом права та емпіричним матеріалом. Зокрема, відзначається, що логіка права та економіки спирається на аналіз граничної величини в стабільних системах, тоді як в основі конструктивістського погляду на право знаходяться юридичні конструкції, розраховані на значні соціально-політичні та соціально-економічні коливання. Економічний підхід до права приділяє увагу стимулам, що діють ex ante, тоді як правовий вплив має на меті встановлення справедливості, виходячи з оцінки правової ситуації, що склалася – ex post. Автор демонструє, що саме стійкість та еластичність юридичних конструкцій, що ґрунтуються на моральних постулатах, визначає очікуваною від них утилітарну цінність. На думку автора, межами відповідних нормативних складових конструкцій цивільного права виступають імперативи «моралі обов'язку» та «моралі прагнення». В інших випадках при здійсненні права, моральні та етичні імперативи підпорядковуються правилам певних юридичних конструкцій.

Ключові слова: *право і мораль, право та економіка, методологія права, політика права, суб'єктивне право, юридична конструкція, факт, опортуністична поведінка, мораль обов'язку, мораль прагнення.*

The starting point for the methodological approach in the field of law is the search for a sufficient basis for legal phenomena (*ratio*) relevant to the application of a legal technique aimed at resolving contradictions arising from the application of an abstract rule (*ratio iuris*) to a concrete legal situation (*ratio facti*). The study of methodological issues initially aimed not so much at the consideration of positive issues of law, but related to the problems of means and methods of research of legal phenomena and processes. In this sense, "Methodology is the grammar of legal argument and the fabric of legal practice" [1].

Noted that in the conditions of uncomplicated legal life the problem of finding the basis of legal phenomena could forever remain in the field of pure theory. In this case, jurisprudence, comprehending the infinite (*infinitum*), would retain its limited character (*finite doctrina*), which has found its fixation in attributing it to the sphere of arts (*ars*). However, the increasing complexity of legal reality and the consequent need to systematize legal matter in order to optimize the law-making process, and, most importantly, – the unification of law in areas of law united by the commonality of legal tradition, suggest the development of a methodology that meets the challenges of reality.

One of the most important issues in building a civil law system and determining its effectiveness is to resolve the question of the central element that should serve as the core of the structure of the legal material in question. In European civil law systems, this is either a private act or a subjective right. However, the focus and methodology set by legal policy has the potential to significantly change and possibly deform the system and structure of the legal matter. In this respect, the subject of this study is a critical examination of the positions of the two leading methodological currents in law (in relation to private law) – the school of law and economics on the one hand, and the proponents of modern natural law, who see a close connection between moral categories and legal rules.

The author sees the solution to the questions in connection with the above-mentioned problem of the correlation of positive legal material, interpreted in the context of economic efficiency, on the one hand, and moral components of the idea of law, on the other, in the application of the methodology of legal constructivism, whose history goes back to Immanuel Kant [2].

In the course of working on the tasks set in relation to the subject of this study, the positions of the representatives of the economic analysis of law were critically examined – Milton Friedman [3], Richard Allen Posner [4; 5], Ugo Mattei [6], Nicholas Mercuro and Steven G. Medema [7], the views of the representatives of legal positivism – Herbert Lionel Adolphus Hart [8] and of legal normativism – Hans Kelsen [9], as well as the critics of positivism on the part of the economic analysis of law – Ronald Dworkin [10; 11] and of natural law – Lon Luvois Fuller [12].

The aim of this study is to offer a methodologically clear solution to the question of the correlation of moral and legal components in the matter of civil law within the framework of constructivist approaches to the origin and functioning of law.

At the heart of the European tradition of law is the concept of a law as a measure of the freedom of the person to whom such a right belongs. (In this case, we are talking about the Civic Law space, which together with the Anglo-American cultural and legal space based on the Western tradition of law). This understanding of law is based on the notion that an actor is free to dispose of a good that he or she has legally acquired (freedom to pursue a particular legal goal) and is also free from interference by others with respect to the legally acquired good (freedom from interference by others).

The central category of this understanding of law is the construction "subjective right" (claims, liberties, powers, immunities, permissions and competences) and its derivative construction "legal relationship". Subjective right is interpreted either as freedom from certain duties (secular natural law theory) or

as self-limitation of freedom in a legal relationship, when a person's freedom imposes duties on her/him in the process of legal communication (Kantian version of right, which underwent further doctrinal and later normative consolidation in German modern pandectism as well as in the legal systems that follow this vector of legal development) [see 2, p. 30-56; 13, p. 227]. Both the secular natural-law theory of subjective right and the Kantian version of the basic category of law under consideration characterized by the fact that the idea of right is liberated from external factors, and its foundation rests on a moral maxim, namely, the Golden Rule of morality.

The Golden Rule is the principle of treating others, as one would want to be treated by them. It is sometimes called an ethics of reciprocity, meaning that you should reciprocate to others how you would like them to treat you (not necessarily how they actually treat you) [14, p. 125].

The category of "subjective right" as a basic legal construction gives the whole corpus of law an autonomous status, making it possible to recognize the category in question as free from external transcendence. The latter could be recognize as relevant or irrelevant with respect to a particular legal construction. It follows that any factual aspects of legal existence assessed only in the context of certain legal constructs, which makes them immanent to law.

The classic example of an institutional conflict between legal facts and scientific facts is then resolved according to the rules established for *res judicata*. Even if it turns out later that what was said at the trial was clearly wrong, the court decision and its legal, economic and social consequences will not be overturned if the procedural requirements have been met and appeals have been exhausted. It follows that in order to be recognized as legally relevant, all scientific facts must be evaluated within the accepted constructs of the legal community.

The above example confirms the autopoietic character of legal phenomena and processes, as "a system capable of producing and maintaining itself by creating its own parts" [15]. Autopoietic discourse allows us to argue that the

fundamental element of the legal system is not the norm of law and political power as a form of legitimate violence perceived by the actors of legal communication, but the determinate outcome of communication itself. As Gunther Teubner notes "The law autonomously processes information, creates worlds of meaning, establishes goals and objectives, creates constructions of reality and defines normative expectations – all quite independently of the views of the world in the minds of lawyers" [16, p. 739]. Since the legal system is autopoietic, it is subordinate to the regulations developed in other socially connected systems such as politics, economics, ecology, medicine, *etc* [see 17, p. 104-114].

Thus, law is an autonomous phenomenon of social reality. Other approaches to law, in particular economic determinism (direct – representing law as a derivative product of socio-economic reality, or reverse – considering law exclusively as a factor of economic development) eliminate its very essence. In these theories, legal phenomena seen as consequence of the external action of certain factors. In essence, law contrasted with any other phenomenon that does not have a legal dimension, i.e., fact. In this regard, the words of J. J. Rousseau come to mind, who noted: "to constitute a correct phenomenon of what exists, it is necessary to know what ought to be" [18, p. 13] – rather than what is. Indeed, no method maybe so favorable to the enemies of freedom as trying to establish law from fact.

Actual reality may described by patterns of probability and, in ordered systems, by cause-and-effect relationships; the sphere of legal phenomena is subject to other patterns, so law cannot be arbitrarily derived from actual reality. Law determines the measure of a person's freedom, releasing him or her from the variability characteristic of the actual state of affairs.

When addressing the question of the correlation between the real and the proper, it is the legal state, not the actual state (contrary to the assertion of the instrumentalist schools that consider law as a factor of social engineering) that represents the very social value (in the broad sense, the good) that the rule of law

recognizes and protects. Indeed, the assessment of facts (actual states) carried out by the legal order only in connection with the legal effects associated with these facts. And even when a fact, for one reason or another not becoming a right, is still recognized as worthy of protection (for example, in certain possession situations), the legal order recognizes and protects bona fide possession, based on the assumption of the possibility of legal consequences associated with it – the acquisition of ownership. Thus, the mere existence of a legal defense serves as an incentive for the formation of factual relationships.

In the sphere of law, a form of social communication is enshrined in normative expressions. In this regard, the question arises how political-legal *peremptories*, expressed in certain ideological forms, connected with legal constructions, the normative content of which is the concept of "subjective right".

It is well known that modern methodological research relies on the legal-political approach, which is mainly reduced to a utilitarian, economically efficient vision of law. However, it should be borne in mind that in the early days of its emergence, legal politics expressed in the consolidation of the provisions of natural law. In particular, according to Leon Petrazhitsky, "nothing but the politics of law was represented by the science of the so-called natural law, and that section of it, which was devoted to civil law, was nothing but civil politics" [19, p. 33]. The goal of modern legal politics, however, is to expel natural-law metaphysics from the corpus of law.

Thus, the legal-political approach to law, when it is based on legal pragmatism, is transformed into the method of the school of economic analysis of law (law and economics), which has become widespread since the second half of the 20th century. Representatives of this school relate the foundation of law to the economic efficiency of legal regulators, taking into account the criterion of utility and estimating behavioral acts in the context of the activity of a rational economic agent who *aim is more to earn satisfactory profits and play safe than to maximize profits*. In this approach, private law constructions (property, contract, tort, etc.)

considered as the best choice, as the efficient solution that provides the best use of society's resources [see 20, p. 90-91].

Indeed, we can see that the worth of many private law constructs is largely determined by their economic efficiency. Thus, the protective and legitimizing function of possession aims at the stability of civil turnover and the saving of money spent by the interested party when it is necessary to confirm the proper legal ground as situations of legal possession. It is obvious that the establishment of legal presumptions through the rules of property law seems more appropriate than the introduction of a very complex system of formal requirements for the proof of the corresponding legal ground. Among the various means of legitimizing the right to movable property, possession can ultimately be recognized as the most effective [see 6, p. 173-174].

Economic analysis suggests that the more the legal system is in favor of *possession*, the more the owner is incentivized to maintain physical control over the thing in his possession. Conversely, the more protective the legal system is of the title, the less the owner is interested in such control, and the more money a prospective buyer must invest in researching the quality of the title he or she intends to purchase. As consequence, many expedient property transactions may not take place due to high turnover costs resulting from the need to verify the formal quality of the legal reason [see 6, p. 178].

The close connection between the right and the expected economic effect certainly fixed also in the relevant obligation-law constructions. However, the idea of obligation as an effective economic means nevertheless does not mean that the law of obligation should considered as a shell of economic relations, and in obligation-law constructions one should see only effective means aimed exclusively at the extraction of economic income. It is true that economic institutions differ from legal institutions both at the level of function, structure and design. Awareness of the price to be paid in order to achieve a result should

not be equated with awareness of the value of the legal instrument that produced the expected result.

A vivid example of the determining influence of moral categories in law genesis is demonstrated by the development of contract law. A review of the problems associated with finding the basis of a contract leads to the following conclusion: the Western legal tradition sees the basis of free, mutual self-restraint in contractual relations as the intrinsically moral obligation of counterparties to refrain from disloyal behavior towards each other. Such obligations accepted by the parties in the process of legal communication voluntarily, and in accordance with the legal constructions of contract law. At the same time, contract law binds mutual restrictions on the parties' free will to their respective interests. Where will and obligation are differentiated, the commutative effect and the corresponding defense against wrongful and unfair claims is provided under the rules on *synallagmatic* contracts in the form of objections (as is the case in Civic Law jurisdictions) [21, p. 131-135]. If, however, the provision is not separable from the will (consideration), and it is not subject to special legal assessment, the provision is regarded as a requisite of the contract (as under the Common Law). Yet even in this case, the conflict between the utilitarian effects of the contract and its moral basis is resolved ultimately in favor of the latter.

It should be noted that modern law of obligations and judicial practice in cases involving the protection of rights of obligation are increasingly permeated by social factors [see 22], that are not so much efficiency-oriented as equity-oriented. The increasing socialization of the law of obligation traced in the observed restriction of the discretion of the parties to the contract in favor of society and individuals. The very nature of the obligatory contract is changing: it is actively used not only as a means of exchange, mediating the movement of material goods, but also as a tool for organizing socio-economic activities, which leads to the recognition of organizational and property obligations. The performance of such contracts consists in the obliged person's performance of

"organizational" actions or even abstention from them. The rules on standard contractual clauses are being legislated. There is a tendency to differentiate the legal regulation of contractual obligations depending on their subjects in the law of obligations. Along with general civil contracts, there is a group of contractual obligations involving entrepreneurs (entrepreneurial contracts). Entrepreneurs, given their professional status, are subject to higher social and legal requirements. Special legal regulation applies to relationships involving consumers. Accordingly, there is a clear tendency in modern law of obligations to differentiate the liability of persons by placing it in relation to the type of role in which they participate in the relationship. In particular, the liability of entrepreneurs to pay damages increased compared to the general rules on liability in the presence of culpability.

The socialization of the law of obligations can also be traced in the institution of pre-contractual liability (*culpa in contrahendo*), in the recognition of the institution of preventive liability, as well as in the establishment, in cases provided for by law, of an objective (*risk*) liability.

So, we see that the search for the basis of law in some manifested utilitarian result is certainly useful, but cannot be recognized as universal – such an effect, alas, can also be obtained as a result of wrongful behavior. The economic result in relation to legally relevant behavior should not obviously regarded as the main or, indeed, the only determinant (Law matters hypothesis).

A consistent proof of this hypothesis, by Alon Harel, allows us to argue: rights are not simple instruments to realize values that exist independently of these rights and public institutions are not mere contingent instruments to facilitate the making of decisions and performing actions whose desirability, correctness, or appropriateness is independent of the identity of the agent performing them [see 23].

Thus, the connection between law and economics is not causal but correlative. In a correlative relationship, there is not a complete correspondence between cause and effect, but is observed only a certain relation.

It is no coincidence that the legal material of existing legal systems is based on immutable constructions whose history goes back at least to antiquity. Being universal, such constructions guarantee socio-economic stability of relations regardless of the type of organization of society. Indeed, if we proceed from the determinism of being, from the idea of law as a "result of experience", it follows that the idea of law expressed exclusively in the reflection of actual legal situations. The transfer of such a conception of law into the realm of legal science makes the argument that there is nothing in common between modern civil law and the law of ancient Rome seem irresistible at *prima facie*. However, practice demonstrates the opposite: Roman legal constructions that satisfied the needs of society two thousand years ago are still in demand today [24, p. 80]. In this regard, we can agree with the opinion of European jurists that "the Civil order cannot be reduced to a market order" [25, p. 119].

First, from the position of economists, on the other hand, the complex and unorganized set of legal norms conceals purely economic logic. The distinctive features of such logic are that, the first, it relies on the analysis of limit values in a stable system. Yet at the heart of law are constructs whose social value designed to withstand significant socio-political and socio-economic fluctuations.

Secondly, the economic approach focuses on incentives that operate ex ante, before the event requiring the intervention of the legal system has occurred. Hence law is viewed by economists in terms of the incentives it creates, rather than as a dispute resolution mechanism, which is characteristic of jurisprudence. In contrast, jurisprudence evaluates law most often from an ex post perspective and analyzes whether a particular solution to a particular dispute that has arisen is just or not [7, p. 43-45].

The desire to realize the *ex ante* approach in the field of jurisprudence from the point of view of legal and economic theory leads to the formation of the so-called "normative economic theory" aimed at improving the world by finding a formula for a *better rule*. Normative economic theory uses the results of positive economic analysis, supplementing them with value judgments about what the goals of society should be. Thus, the normative approach to law involves making changes to legal norms based on the findings of the economic theory of law. However, the implementation of the results of the theory in question often meets serious valid objections in different legal cultures, even if these cultures appear to be homogeneous in their formal features. An example previously noted is the debate regarding the extension of private ownership of agricultural land in Asian jurisdictions [26. p. 12-23].

The analysis of the thesis that opportunistic (unfair) behavior of the participants of legal communication serves, in fact, as the main incentive in making economically effective decisions, leads to the need to address the issue of the correlation between moral imperatives and legal prescriptions. There are many constructions of civil law show that law and morality are correlated systems, in particular: the idea of the inadmissibility of private actions that offend common decency; the prohibition of the use of immoral customs; the inadmissibility of immoral contractual terms; the recognition of moral obligations; the inadmissibility of unjust enrichment; the priority of liability for damages over criminal liability.

Really, "any form of legal order is at its healthiest when there is a generally diffused sense that it is morally obligatory to conform to it" [8, p. 231-232]. In other words, any legal order, unless it aimed at self-destruction, is subject to the influence of morality, primarily through legislation and judicial practice. Such alliance between law and morality highlights the complexity of their relationship and the need for ongoing ethical debates within legal frameworks.

To quote Ronald Dworkin's fair comment, "Economic analysis provides standards for identifying and measuring the welfare of the individuals who make up a community (though the nature of these standards is much dispute) and holds that the normative questions of theory of legitimacy, legislative justice, jurisdiction and controversy, as well as difference and enforcement, must all be answered by supporting that legal institutions compose a system whose overall goal is the promotion of the highest average welfare among these individuals" [10, p. 9]. So, in the economic analysis of law, judgments about legal norms based on the analysis of the efficiency of these norms, while the main purpose of law is to establish justice [see 10, p. 150-183; 11, p. 191-226].

From the perspective of the law and economics school, efficiency should be the primary goal of society. In the opinion of Richard Allen Posner and William M. Landes, "The language of justice and equity that dominates judicial opinions could represent simply the translation of economic principles into ethical language" [4, p. 863]. According to the Law and Economics school, when the principle of efficiency violated, every member of society is worse off, including anyone to whom the concept of fairness may have applied. From this standpoint, there is no conflict between efficiency and fairness, since the individual who suffers, as a result, of the application of an efficient norm still benefits the increase in the welfare of society [4, p. 88-115]. However, practice shows that an effective legal decision is not necessarily just and that a just decision is not necessarily effective. A prime example of the imbalance between efficiency and fairness is the protection of the economically weaker party in consumer contracts.

In our opinion, the correlation of law and morality in certain civil law constructions is determined by the content of the subjective right itself. In legal culture, power is recognized as the freedom of a person in relation to objects (subjects of the world outside the actor) as a social value. Its evaluation depends on the one hand on its recognition by society and its protection by the legal system, and on the other hand on the person who rules over the object, so that it is possible

to impose responsibility on him or her if the recognized limits of lawful behavior are violated.

The limits of freedom based on the imperatives of the "morality of duty" and the "morality of aspiration" – these categories were introduced by the American jurist Lon L. Fuller, who studied specific moral requirements for law, and are used in this paper in a slightly different sense [see 12, p. 3-30]. The "morality of duty", being the ultimate lower limit of the individual's freedom, aims at preventing conflict within society, since the law prescribes not to desire another's goods, rewarding everyone with their own: "*Iustitia est constans et perpetua voluntas ius suum cuique tribuendi. Iuris praecepta sunt haec: honeste vivere alterum non laedere, suum cuique tribuere"* [28]. The ultimate upper limit of an individual's freedom determined by the freedom of others to dispose of legitimately appropriated limited resources ("the morality of aspiration"). In its moral dimension, the law is thus based on a well-known contradiction: While it does not permit prescribing how a person should behave in order to achieve the best possible outcome, it requires compliance with the above-mentioned "morality of duty", which obliges everyone to refrain from encroaching on a limited resource that a person has rightfully appropriated.

These lower and upper limits of a person's freedom set the contours of a person's acceptable legal behavior. The freedom recognized by the individual to behave within the boundaries recognized serves as the natural-law basis of the law. Accordingly, in a law-based society, the limits of a person's freedom with respect to a legitimately appropriated good correspond to the measure of the person's possible behavior.

We thus see that the maintenance of the basic legal phenomena as a subjective right guaranteed by reference to the limits coordinated with the moral imperatives. However, legal phenomena should not considered exclusively from the point of view of the implementation of moral imperatives, if only because not the entire content of law is determined by moral principles, for many legal

provisions appear to be completely indifferent from a moral point of view. On the other hand, the actual moral imperatives in the implementation of the law only can assessed within the framework of the corresponding legal constructions. When it comes to the question of the relationship between morality and law (more precisely, the assessment of moral imperatives in the corresponding legal constructions), Hans Kelsen's point of view is acceptable:

"But the relationship between law and morality itself shows that two normative systems cannot be regarded as valid at the same time, unless they are considered as parts of a single system cannot be simultaneously considered as valid unless they are thought of as parts of a single system" [29, p. 373].

Indeed*, the content of law cannot reduced to the realization of a moral ideal: It must also provide a distinction between different conflicting moral ideals that may clash in their practical implementation*.

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