PROBLEMS OF THE DEFINITION OF LAW

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Reasons for Multiplicity of Definitions of Law. The multiplicity of definitions of law which exist in doctrinal writings depends upon the multiplicity of views on the origin of law, the sources of law, the vision of the nature of its links with the State, and also what essential indicia, peculiarities, and features of law underlie a particular definition, and what aspect of it as a complex social phenomenon is being investigated.

An important reason for differences in the definition of law is that each legal doctrine contributes to the basis of such a definition — natural-law, normativist, or sociological. This is characteristic for western and for Ukrainian legal doctrine. We consider this in greater detail.

During the formation of the Western legal tradition, natural law theory was the dominant theory; therefore law was defined as a model of human behavior, as the rule of the ought, the necessary, and not as actually existing positive norms.

Thereafter, when legal positivism dominated (however, while retaining a general pluralism of views of law) the view of law as norms of behavior in force dependent upon the will of the legislator dominated. This position is widely shared today. What conditions this position? It is evident that under conditions of a high level of the legitimacy of power and development of democratic institutions which take into account the opinions of the population when laws are adopted, there is no significant chasm between public opinion and the prescriptions of laws. Legislation has become an continuation of the will of the population, and does not operate contrary to this will. A correct, just lex also is jus. Jus acquires the expression of lex, and lex becomes the embodiment of jus. However, because there is no absolute identity in any society, for the West, the question of the conformity of jus to the moral and ethical foundations of society and corresponding adjustment of lex has been for all times a very topical one. Therefore, many scholars do not link law solely with the prescriptions of the State.

Harold J. Berman noted that traditionally the received concept of law as a body of rules derived from statutes and from decisions of courts which reflect the theory of the will of the legislator, or State, because the highest source of law was wholly unsuitable for supporting research into a transnational legal culture. To speak about the Western legal tradition, he said, means to postulate a concept of law not as a body

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of rules, but as a process, a measure in which rules have content only in the context of institutions and procedures, values, and ways of thinking. As a consequence of this broader approach, the sources of law contain not only the will of the legislator, but also reason, the conscience of society, and its customs and habits.[1]

Jurists are increasingly enlarging the foundation of law, including therein rules which exist in various social communities (the family, corporations, social associations, social courts, and so on) and the State. Lawrence Friedman, referring to the experience of the functioning of the legal system in the United States, singled out four types of law: simultaneously formal and public law (acts of Congress), public or governmental law which is not formal (norms actually existing; for example, norms relating to limiting speed on the roads), simultaneously formal and private law (procedure for the consideration of suits and appeals with the assistance of unofficial courts which decide disputes privately, but in compliance with all rules and procedures usually occurring in courts), and, finally, the law simultaneously private and informal (rules of behavior in the family).[2] When using the word «law» [jus], Friedman believes, we are obliged to embrace all human life in all of its manifestations and classify all forms of human behavior as an element of law.[3]

In Soviet legal doctrine, because of the dominance of a narrow-normative understanding of law, it was defined as the aggregate of norms established or sanctioned by the State which are upheld by the coercive power of the State. Only in the 1970–80s did works appear which expanded the narrow-normative understanding of law (by including in the definition of law the rights and duties of the individual, legal consciousness legal relations), rejecting the absolute identification of law with State prescriptions (especially in the works of V. Kazimirchuk, N. Koziubra, G. Maltsev, V. Nersesiants, L. Iavich, and others).[4] Thanks to efforts in approaches to the understanding of law, pluralism is persistently breaking through and, moreover, other legal trends are being formed — moral (natural-law) and sociological, among which the normativist trend, although it occupies a leading place, nonetheless is increasingly subject to critique.

The normativist conception is based on the traditional Marxist-Leninist understanding of law as the aggregate of norms established by the State and protected by its coercive force. The moral-legal theory emanates from an understanding of law as a system of generally binding concepts of rights and duties of citizens, responsibility thereof, and so on, comprehended by society. The third, sociological theory, emanates from the fact that law is the social relations themselves, the real practice of State protection.

Each of these theories rests on weighty arguments which cannot be ignored when construing the concept of law because they explain those aspects of the manifestation of law which do not find satisfactory explanation in other theories. But the number of

[1] *H. J. Berman*, Западная традиция права: эпоха формирования [Law and Revolution: The Formation of the Western Legal Tradition], transl. from English (Moscow, 1999), p. 28.
[2] *L. Friedman,* Введение в американское право [Introduction to American Law], transl. from English (Moscow, 1993), p. 26.
[3] Ibid., p. 23.
[4] *N. I. Koziubra,* Социалистическое право и общественное сознание [Socialist Law and Social Consciousness] (Kyiv, 1979); *G. V. Maltsev,* Социальная справедливость и право [Social Justness and Law] (Moscow, 1977); *V. S. Nersesiants,* Право и закон: Из истории правовых учений [Jus and Lex: From the History of Legal Doctrines] (Moscow, 1983); *L. S. Iavich*, Сущность права: Социально-философское понимание генезиса, развития и функцирования юридической формы общественных отношений [Essence of Law: Socio-Philosophical Understanding of the Genesis, Development, and Functioning of the Legal Form of Social Relations] (Leningrad, 1985).

arguments directed against each of them is no less. In the view of the opponents of the normativist theory, the existence in legislation of «dormant» norms, declarative prescriptions, which are not consistent with the essence of social relations, undermines the assertion about the coincidence of legislation and law (jus). Proponents of the normative definition of law, on the contrary, among the arguments against natural-law doctrine, name the existence of a very broad range of legal notions in society, and opponents of the sociological theory — the fact that the identification of social relations with law does not enable legal and non-legal relations to be precisely delimited, and so on. To be sure, these legal theories do not depart from the mainstream development of legal doctrines. Rather, on the contrary, they are a temporary rejection of a new stage in the development of society, and from a theoretical viewpoint, nothing other than a manifestation of centuries-old disputes relating to the nature of law. The normativist theory is, in essence, a modification of the historical positivist school of law in a Marxist-Leninist interpretation, and the moral theory — of the natural-law school.

The extension of the sociological conception of law to Soviet jurisprudence (and, indeed, in the West) became a reaction to positive law lagging behind new social relations and its failure to conform to new trends in the development of society which positive law was incapable of adequately reflecting. The sociological conception was orientated primarily towards a rejection of existing formal laws and on this basis crossed the legal historical doctrine. It combined general indicia with a normative doctrine — in the sense that it declared actual relations to be positive, acknowledging them to be real norms. The sociological conception became a moment of thinking over the peculiarities of the realization of law in existing social relations. In fact, this significance is revealed only when law is not identified, but is derived from «factual situations», «life», «specific relations», and is considered in an inextricable link with social processes. The justness of this assessment becomes obvious when considering the sociological conception within the framework of this approach to the objectification of law, when an authoritative command, a norm of law, should be recognized as legal in society, that is, objectified in society, and power — to receive legitimacy.

We consider the legal system of England and the United States at the outset of the twentieth century. It was virtually orientated to such law when judges «created» legal norms in each specific instance, proceeding from the fact that these rules found resonance in society (the granting of these powers was dictated by the need to take the will of the population into account). The power of judges, in turn, acquires legitimacy through the selection of judges. The law which was formed in the process of decision-making had all the social attributes. It might be mistaken only from the standpoint of «pure» normativists who recognized only the prescriptions of the State as legal norms.

Beyond dispute is the fact that in various social measures law is manifested by its various faces. But the problem is that distinctions are observed in greater detail when determining the essential, deep indicia of law. Moreover, several approaches to the understanding of law have been formed in doctrinal writings on the basis of these indicia.

Accentuating various indicia and characteristics and an arbitrary understanding of the essence of law are common reasons for differences in the definition of law. We cite several examples. Iavich, understanding law as the product of spiritual activity, as a variety of an evaluative spiritual mastery of reality, a moment of regulation and

procedure in social relations, a sphere of social freedom, as the aggregate of legal norms, and so on, applied a multi-stage cognition of law.[1] He recognized several essences: those built in lex and materially determining the will of authority, a scale of freedom equal and just in particular conditions, and, finally, a deep essence — relations of ownership, appropriation of social benefits under conditions of exchange.[2]

Alekseev adhered for a long time to the position that law was deemed to be legal norms sanctioned by the State which grant a certain freedom to participants of social relations, expressly separating «social claims» from law.[3]

Thereafter he somewhat softened his views, having acknowledged «social law directly», that is, natural rights,[4] and also the existence of non-juridical law, law under conditions of a primitive system. With regard to the last, he pointed out that «law in a number of instances may also designate a qualitatively different phenomenon rather than strict legal regulation, that is, have a non-juridical significance, be understood in a directly social meaning as natural law».[5]

However, he also expressed the thought that such natural rights may receive and actually have received either at once or with time a particular ideal (or ideological) normative-organizational form of mediation, including legal.[6] It is worth emphasizing that the views of Alekseev on law are virtually unchanged.

He believed, as before, that it would be unjustified to attach a universal significance of a philosophical characterization to law, that law as an institutional formation is a system of norms reflected in lex and other sources recognized by the State which are a generally binding criterion of a lawful-permissive (and also prohibited and prescribed) behavior.[7] Both Iavich and Alekseev recognized that law has various essences.[8]

One must agree with Nersesiants, who believed that Iavich and Alekseev are imprecise in treating the understanding of the unending nature of the process of deepening human cognition, which does not concern at all recognition that the subject-matter here explored has several essences.[9] We note in this instance that recognition of the several essences of law inspired notions about the multi-stage penetration into the essence of things and phenomena, which was actively propagandized from the 1970s.[10]

Law as Equal Measure of Freedom

The understanding of law suggested by Nersesiants deserves special attention because it is the most original and precise one in comparison with that set out in doctrinal writings of the 1980–90s.

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[1] *L. S. Iavich*, Сущность права: Социально-философское понимание генезиса, развития и функционирования юридической формы общественных отношений [Essence of Law: Socio-Philosophical Understanding of the Genesis, Development, and Functioning of the Legal Form of Social Relations] (Leningrad, 1985), p. 10.
[2] Ibid., pp. 83–84.
[3] *S. S. Alekseev*, Общая теория права [General Theory of Law] (Moscow, 1981), I, pp. 66, 104.
[4] *Alekseev*, Теория права [Theory of Law] (Moscow, 1995), I, p. 117.
[5] Ibid., I, p. 66.
[6] Ibid, I, p. 118.
[7] Ibid., I, pp. 154, 157. Also see *V. S. Nersesiants,* Философия права [Philosophy of Law] (Moscow, 1997), pp. 25–53.
[8] *Alekseev*, ibid., I, p. 70.
[9] *Nersesiants*, «Право: многообразие определений и единство понятия» [Law: Diversity of Definitions and Unity of Concept], Советское государство и право [Soviet State and Law], no. 10 (1983), p. 30.
[10] See *B. M. Kedrov*, Единство диалектики, логики и теории познания [Unity of the Dialectic, Logic, and Theory of Cognition] (Moscow, 1963), p. 182.

In a number of his works,[1] Nersesiants substantiated two definitions that, in his view, are mutually reinforcing. The first is a definition of jus as an «objectively conditioned requirement of the justness of the general measure (forms, norms) of freedom and equality having a socio-class character»; the second is the definition of lex (jus in the form of lex) as an «official (State-power expressing State will of the dominant class of a formally-determined and generally binding normative) expression and establishment of jus endowed with legal force».[2]

Nersesiants acknowledged that jus arises before its consolidation in lex; that lex merely endows jus with legal force; that the distinctions between the objective process of forming jus and the conscious-volitional process of its official acknowledgement lead to contradictions between jus and lex.[3] He used formal equality to prove that jus recognized formal equality, thanks to which it becomes an essential form of being. Jus thereby itself regulates the distinctions between people on equal grounds and by an equal measure.[4]

Nersesiants attempts to combine two different approaches: one from the standpoint of natural law, and the second from the standpoint of positivist law-comprehension, the second definition materially augmenting, developing, and clarifying the first and in their unity they reflect the most essential in the general concept of law as an historical changing, objectively conditioned, determined socio-class relations, just, general measure of freedom and equality obtained through the official expression of generally-binding force.

Nersesiants ultimately renounced the class approach, clarifying and defining jus as a generally-binding form of equality, freedom, and justness.[5]

For the purposes of our study the ideas of Nersesiants are important with respect to equality, especially his conclusion that the manifestation of equality has specific historical expression and that equality does not destroy and may not destroy the actual differences between different individuals.

We also note that the views on jus similar to those of Nersesiants (with regard to an understanding of jus as a measure of freedom and equality) were rather widely held in prerevolutionary Russia. The religious thinker and theoretician of law, V. Solovev, noted that the concept of the individual, freedom, and equality comprise the essence of so-called natural law. The individual, because he or she who is not an individual cannot be a subject of law. Freedom is a characteristic indicator of the individual who is capable of absolute resistance, both internal and original, that cannot be eliminated, not as a choice between two antitheses *(libertum arbitrium indifferentiae)*, but as a complete certainty and constant feature of any substance. Thus,

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[1] *V. S. Nersesiants*, «Право и закон: многообразие определений и единство понятия» [Law: Diversity of Definitions and Unity of Concept], Советское государство и право [Soviet State and Law], no. 10 (1983), pp. 26–35; *Nersesiants*, Право и закон. Из истории правовых учений [Jus and Lex: From the History of Legal Doctrines] (Moscow, 1983); *Nersesiants*, «Право и закон: их различение и соотношение» [Jus and Lex: Their Distinction and Correlation], Вопросы философии [Questions of Philosophy], no. 5 (1988); *Nersesiants*, Наш путь к праву: от социализма к цивилизму [Our Path to Jus: From Socialism to Civilism] (Moscow, 1992); *Nersesiants*, Философия права [Philosophy of Law] (Moscow, 1997); *Nersesiants*, Право — математика свободы: Опыт прошлого и перспективы [Jus — Mathematics of Freedom: Experience of the Past and Prospects] (1996); *Nersesiants*, Юриспруденция. Введение в курс общей теории права и государства [Jurisprudence. Introduction to the Course of General Theory of Law and State] (Moscow, 1998).

[2] *Nersesiants*, «Право и закон: многообразие определений и единство понятия» [Law: Diversity of Definitions and Unity of Concept], Советское государство и право [Soviet State and Law], no. 10 (1983), p. 26.

[3] Ibid., p. 29.

[4] *Nersesiants*, Философия права [Philosophy of Law] (Moscow, 1997), pp. 17, 20, 21.

[5] *Nersesiants*, Право — математика свободы: Опыт прошлого и перспективы [Jus — Mathematics of Freedom. Experience of the Past and Prospects] (1996), p. 54.

freedom — as a requirement of autonomy. Finally, equality — as a need to recognize for others the same freedom in principle.[1]

Solovev represented the interaction of these elements as follows: «But freedom, in and of itself, is the property of a person taken individually that does not form law; because here freedom is manifested only externally, as the actual appurtenance of the person coinciding with this power. Left to myself, I freely act within the limits of my power: there can be no mention of law. There is also no law when my action collides with the free action of another because the matter is resolved by the rebalancing of power. But if I as a manifestation of my freedom limit or condition by recognition for another of the same freedom in principle or I acknowledge this for the same person as I myself, by such recognition I make my freedom obligatory for him and transform this into my right. This relation has a universal character by virtue of the universal significance of the individual: every man is a person and, consequently, freedom in principle must be recognized for all identically. Thus, my freedom, as a right and not force depends directly upon recognition of an equal right for all others. Hence we receive the basic definition of a right: a right is freedom conditioned by equality. In this definition of a right, the individualistic principle of freedom is inextricably linked by society with the principle of equality, and, one may say, that a right is nothing more than the synthesis of freedom and equality. The concepts of the individual, freedom, and equality comprise the essence of so-called natural law».[2]

It follows that «freedom as the basis of any human existence and equality as the necessary form of any social being in their combination creates human society as a lawful order. These are affirmed by something general and identical, because the rights of all are equally binding for everyone and the right of each, for all. But it is evident that this simple equality may relate only to that which is identical, to that which all have in common. Common for all subjects of law is the fact that their essence as a person is identical, that is, autonomous or free essences. Thus, proceeding from their equality as a necessary form of right, we come to freedom as a necessary sub-stratum thereof».[3]

It is interesting that a similar understanding of a right resounded in the legal doctrines of Kant. Personal freedom according to Kant, which he considered formally, is arbitrariness or the capacity of an individual to act at his discretion insofar as he has the authority to do so. The possibility of individual persons coming into conflict lies therein. Therefore, the lex of freedom is that the arbitrariness of one person is limited by the arbitrariness of another person and that no one violates the freedom of another. That is, the personal freedom of any individual is limited by certain boundaries and establishes and fills a certain sphere, which also is a right.[4]

Solovev called this the «rational essence of a right which is an ideal condition of all positive legal relations, in them and through them».[5] Under this approach, the freedom of a right, as Rousseau indicated, is a form of the realization of the common will. This is the ability of free individuals to freely interact with other people, enter

[1] *V. M. Solovev,* Власть и право. Из истории русской правовой мысли [Power and Law: From the History of Russian Legal Thought] (Leningrad, 1990), pp. 97–98.
[2] Ibid., p. 98.
[3] Ibid., p. 99–100.
[4] *Kuno Fischer,* История новой философии [History of Modern Philosophy], transl. from German (St. Petersburg, 1906), V, p. 135.
[5] *Solovev,* Власть и право. Из истории русской правовой мысли [Power and Law: From the History of Russian Legal Thought] (Leningrad, 1990), p. 98.

into legal relations with them with a view to the achievement of their interests and requirements, individuals who opposed such individuals.

The definition of law on the basis of equality and freedom is cognitive-rationalistic because it orientates towards the elucidation of the content of law as a phenomenon belonging to the thinking individual which interacts with such individuals on the basis of equality. This «libertarian» approach is important not only from the standpoint of defining the essence, but also the necessity of strengthening the humanitarian aspect of law, overcoming the perception thereof as punitive (which is characteristic of totalitarian systems), reorientating the prohibitions thereof towards permissive and dispositive norms. The ideas of equality and freedom relating to many classes were recognized and reflected in constitutions and laws; these classes underwent a lengthy struggle for their rights. Ideas of equality and freedom were on the banners of virtually all revolutions.

However, freedom and equality are reflected in that understanding of law only as an abstract idea; they retain their importance as indicia which are suitable for a general definition of a right only in the abstract sense. This occurred because freedom and equality, unlike concrete relations, have a general and not a concretized expression. Outside these limits, both freedom and equality acquire a distinction depending upon the real conditions of their exercise. Moreover, the use of the concept of an abstract freedom in the definition of law obliges an explanation of the need for legal differentiation between individual subjects of law and a quest for optimal criteria to establish the legal features of the legal regulation of particular relations (to be considered in detail below).

As regards justness or equity, this has a common basis with law, but is not identical with it. Nersesiants believed that social justness is the same as legal justness, that is, a legal approach, compliance with the legal principle of equality, and not some special non-legal justness; that is just which is consistent with jus, and to act justly means to act according to jus, in accordance with its universal scale and measures or norms of freedom equal for all.[1]

Justness is an evaluative means, a moral criterion, with whose assistance we establish the admissibility or inadmissibility of the existence of particular behests of authorities. If we come to the view that law finds its legitimation through its recognition by society as the ought, then the standard of social justness finds its reflection in jus; justness also is an evaluative criterion of norms legitimized by society, will justify or subject them to doubt, and hence affirm their operation or adjust these norms in accordance with new ideals of justness.

That is why these concepts have their greatest sense when distinguishing them. Social justness is filled with own social content. The realization thereof is effectuated with the assistance of various forms and methods, although legal forms and means are rather effective. If justness is a correct, true, and justified social distinction of people in social relations, the law itself, perceiving them as fundamental criteria, is transformed into a means for the realization of justness.

To underscore this thought, we turn to Hart, who says that «... law is best understood as a “branch” of morality or justice and that its congruence with the principles of morality or justice rather than its incorporation or orders and threats is of its

[1] *Nersesiants*, Право — математика свободы: Опыт прошлого и перспективы [Jus — Mathematics of Freedom: Experience of the Past and Prospects] (1996), pp. 10–11.

"essence". This is the doctrine», he continues, «characteristic not only of scholastic theories of natural law but of some contemporary legal theory which is critical of the legal "positivism" inherited from Austin. Yet here again theories that make this close assimilation of law to morality seem, in the end, often to confuse one kind of obligatory conduct with another, and to leave insufficient room for differences in kind between legal and moral rules and for divergences in their requirements».[1]

It should be pointed out that a number of legal norms have a limited or unlimited ethical evaluation because of the regulation of organizational, technical, or technological processes where principles of morality or ethics do not operate, but rather principles of rationality or of a technological nature. This does not mean that the respective spheres do not ultimately combine with morality or ethics because where man operates, ethics is always present. We refer only to the fact that the ethical aspect of particular relations is inadequately represented in specific legal relations (for example, requirements for the behavior of people in the sphere of production, technological norms which service the application of other norms in the legal system — definitions, presumptions, procedural norms, and others).

Law as Regulator of Human Behavior

We turn to the definition of law. The cognitive-rationalist definition mentioned above encompassed only one aspect of the essence of law. The essence of law is revealed in this definition through the rational nature of man, his coexistence in society with other free and equal individuals. But the essence of law is manifest not only from the aspect of it as rational, which is static. It also is manifest in the purposes and designation of law, its orientation towards ordering social relations, that is, in a dynamic, regulatory aspect.

Law acts in society not only as a «phenomenon in and of itself», but as an external phenomenon, a powerful regulatory means, which obliged the individual to act in accordance with its requirements.

In this aspect, law is a norm, a rule, a yardstick, a measure of how it is essential for the individual to act in relations with other people. Law provides the measure of this behavior for the individual person which appears in the sphere of the respective relations and becomes an equal measure for all other persons who are subjected to the operation of this norm. Thus, a person wishing to transfer property by way of inheritance to a stranger is obliged to draw up a will in accordance with the requirements of civil law. This requirement is a norm, a measure, for this person under these circumstances. Simultaneously, this norm, under equal circumstances, will be a general, equal measure for other persons who intend to transfer their property by way of inheritance. On what does this measure depend? Under a regulatory definition of law as a measure or norm of the ought, or the necessary, moral and ethical criteria play an especially important role — freedom, equality, justness. However, here they act not as elements of the essence of law which they were in the cognitive-rationalist definition, but as external moral and ethical criteria defining the measure of law itself, the power of authoritative impact on the subjects of law, on the content of law in accordance with moral and ethical conceptions achieved in society. It is logical to distinguish in law not only individual elements of the moral and technical superstructure, the spiritual sphere, but also everything existing. The constituent elements of the moral

[1] *H. L. A. Hart,* The Concept of Law (1990), pp. 7–8.

and ethical sphere, such as goodness, mercy, respect for the dignity of the individual, and so on, must be taken into account. They are exceedingly material for an understanding of the content of legal regulation, serve as justification or reject it, become a yardstick for law itself, that is, in and of themselves, not as absolute characteristics of law, but as moral value criteria of law.

We shall turn to this question in greater detail — beginning with equality.

It seems that the problem of formal equality is simpler, the principle of which in most generalized form is regulated by the 1996 Constitution of Ukraine (Article 24) as equality before the law, that is, any privileges or limitations by indicia of race, color of skin, political, religious, and other convictions, sex, ethnic or social origin, property status, place of residence, language, and other indicia, are inadmissible.

The 1996 Constitution of Ukraine, for example, guarantees the independence and inviolability of judges and prohibits influence on judges by any means (Article 126). From the standpoint of formal equality, every subject of law (citizen or official, namely, the President, Prime Minister, or head of State administration, agencies of State power, and so on) should adhere to these prescriptions. This, with respect to judges: every judge is guaranteed such independence and inviolability.

The law has regulated distinctions (sex, office, and so on) which exist between people, between subjects of law in general, on equal grounds. This became an equal yardstick for behavior in certain identical instances.

Such equality is formal equality, equality before the law, equality before its prohibitions, equality in punishment in the event of a violation of law. Here formal equality requires the exercise of a right without exceptions, notwithstanding the individual. The general operation of a law and the impossibility of removing anyone from the operation of a law also comprise the content of formal equality. All subjects of law to an equal degree are endowed with rights and freedoms, and everyone is prohibited from acting in the interests of or against an individual and in a privileged manner to remove him from the group of other equal subjects.

However, another type of legal equality is possible. Among all subjects, if we take as an example responsibility for the commission of assault with intent to rob, groups are singled out in legislation by age. Under otherwise equal circumstances, a minor will be punished more lightly than a person who has reached majority. Differentiated responsibility may apply if the victim of the attack is a male in one instance and a pregnant woman in another. We observe that both the 1996 Constitution and the law regulate differently questions of the legal status of hired workers — State employees, judges, teachers, and so on. Even within a single category various approaches are seen to legal regulation. Judges of general courts and judges of the Constitutional Court of Ukraine have a different legal age limit for appointment to office. What criterion operates here?

We refer in these instances to so-called substantive equality, which the 1996 Constitution of Ukraine regards as equality (absolute equality here is impossible because we refer not to equality, but to identity).[1] Here we observe certain complications in determining common approaches to the norming of social relations. The content of equality provides for equal treatment of people in all relations and does not allow unequal relations under equal circumstances.[2] If, assume, we refer to

[1] *Konrad Hesse*, Основы конституционного права ФРГ [Fundamental Principles of Constitutional Law of the Federal Republic of Germany] (Moscow, 1981), p. 215.
[2] Ibid.

pensioners, one cannot single out some small category of citizens and regulate pension relations completely differently. At the same time, absolute coincidence of all indicia (temporal, territorial, and so on) is logically excluded because this would not be equality, but identity. That is why that when we refer to differences, one should abstract from petty distinctions and single out the essential ones. The existence of such essential distinctions is an important basis for the different regulation of social relations by legislation, and the absence thereof, on the contrary, may be a basis for rejecting the different regulation of these relations. Thus, the decisive stage in defining the concept of equality is the establishment of material indicia. They are consolidated in the 1996 Constitution. The Constitution provides a basis for equating in rights, say, men and women in a certain relation — political and social — and departs from this principle of equality when determining the age for the appointment or election of certain persons.

At the same time, the Constitution establishes only general principles of equality which should be clarified by parliament in legislation. We turn again to a specific example. The 1996 Constitution of Ukraine (Article 40) provides that all have the right to send individual or collective recourses or personally to have recourse to agencies of State power and agencies of local self-government and officials of these agencies, who are obliged to consider the recourse and to give a substantiated reply within the period provided by a law. That is, this is a norm grants to all this possibility and with respect to this right determined a single grounds and a single scale. But only the general principle of the right to written recourses is determined in Article 40. The Law of Ukraine «On Recourses of Citizens» clarifies both the subjects of this right and the content of the legal relations, grounds for recourse, and also the framework of this right. In accordance with this Law (Article 1), the right to collective recourses is limited for military servicemen (they may not collectively have recourse with regard to questions of their service activity). A special procedure for the consideration thereof is laid down for applications and recourses of certain categories of citizens (Articles 11 and 12). The peculiarities of the realization of this right may apply to foreigners. But even this detail does not eliminate the negative influence of this peculiarity of the right to legal relations which are regulated, and therefore to take into account all the peculiarities of subjects of law and the diversity of life situations, the law immanently contains a selection of necessary legal mechanisms. The duty exists, say, of a court and other law enforcement and law-application agencies to take into account when considering cases the degree of fault of the individual, and his material position, age, and other important circumstances. The law thereby comes closer to the individual and more justly regulated the respective relations.

We offer a specific example. On 19 November 1997, two groups of people's deputies turned to the Constitutional Court of Ukraine to deem unconstitutional individual provisions of and the Law of Ukraine as a whole «On the Elections of People's Deputies of Ukraine» adopted on 24 September 1997.[1] It was asserted in the submissions that this Law, which introduced mixed (proportional-majority) system of elections, was contrary to Article 76 of the 1996 Constitution of Ukraine on equal suffrage, and also Article 24 of the Constitution on the equality of the constitutional rights of citizens. In addition to other aspects, the subjects of the constitutional submission, seeing a violation of the principle of the equality of rights and freedoms

[1] *Голос* Украины [Voice of Ukraine], 23 October 1997.

of citizens as a whole and the rights of suffrage in particular (Articles 24, 38, and 76, Constitution), appeals the electoral system itself, and also the establishment of a 4 % electoral quota, the nomination of candidacies for deputy by a multi-mandate electoral district through political parties, and electoral blocks of parties (citizen-party members would receive under the law a double opportunity to nominate their candidacies in elections), distinctions in the nomination of candidates for deputy in multi-mandate and single-mandate electoral districts (relating to the collection of signatures, information on the candidate and the promulgation thereof, periods for nomination, and others). In the submission the thesis was substantiated that half of the mandates would cease to be the object of free competition in a multi-mandate electoral district, and privileges were granted in the nomination of candidates by political parties and electoral blocks.

The submissions analyzed, in our view, did not succeed in proving the identity of the conditions of the majority and proportional electoral systems — such a peculiarity exists both for one system and the other. Hence the use of the 4 % electoral quota for parties could not be grounds for the accusation of a violation of the principle of equality of the electoral rights of citizens.

Ignoring this circumstance is a methodological mistake. The decision of the Constitutional Court on this issue was unexpected: it did not agree with the thesis of a violation of the equality of constitutional rights and electoral rights of citizens that was conditioned by the very existence of a mixed system. However, with regard to interpreting the principle of equality of electoral rights, the Constitutional Court stated that, *inter alia*, the Law of Ukraine «On Elections of People's Deputies of Ukraine» did not ensure equal legal possibilities in the exercise of the right of suffrage by citizens at the stage of the nomination of candidates for people's deputy of Ukraine. The Constitutional Court also acknowledged that the Law deprives subjects of the electoral of equal opportunities by the establishment of different periods for the nomination and registration of candidates for people's deputy from political parties and electoral blocks and periods for the nomination and candidates for people's deputy in single-mandate electoral districts, and also the establishment of a different period for ensuring the manufacture of pre-election posters in multi-mandate general-State and single-mandate electoral districts.

As a result, the Constitutional Court deemed the respective provisions of the Law to be unconstitutional, ignoring material distinctions existing between majority and proportional systems, the absence of dependence between receiving mandates in one system or in another. The Constitutional Court in this situation, in our view, did not take into account the principle of essential distinctions between the relations regulated.

The experience of the Constitutional Court of the Federal Republic of Germany is interesting in this respect, which in one of its decisions pointed out that the means of regulation may be deemed to be arbitrary which is not consistent with the Constitution if in order to differentiate one does not find reasonable, natural, or other convincing evidence.[1] An analogous position was taken by the United States Supreme Court, which in McGowan v. Maryland (1961) noted: «... the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which

[1] *Hesse*, Основы конституционного права ФРГ [Fundamental Principles of Constitutional Law of the Federal Republic of Germany] (Moscow, 1981), pp. 217–218.

affect some groups of citizens differently than others ... State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in certain inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it».[1]

The principle of equality should not be absolutized because this may harm justness itself and the ethical foundations of society. The law seeks to ensure the equality of all before the law, to ensure the equality of the initial possibilities of people in society in order to achieve a larger social justness. John Rawls set out rather convincingly in this respect an understanding of the basic criteria:

It seems reasonable to suppose that the parties in the original position are equal. That is, all have the same rights in the procedure for choosing principles; each can make proposals, submit reasons for their acceptance, and so on. Obviously the purpose of these conditions is to represent equality between human beings as moral persons, as creatures having a conception of their good and capable of a sense of justice. The basis of equality is taken to be similarity in these two respects. Systems of ends are not ranked in value; and each man is presumed to have the requisite ability to understand and to act upon whatever principles are adopted. Together with the veil of ignorance, these conditions define the principles of justice as those which rational persons concerned to advance their interests would consent to as equals when none are known to be advantaged or disadvantaged by social and natural contingencies.[2]

Excessive equalizing becomes the «equalizing of justness», that is, actual injustice, formal, a flagrant expression of equality and inequality. That is why it makes no sense to speak about a general historical trend of strengthening the equality of law. Law develops in each historical stage according to general natural laws and is based on the level of ethics achieved by society. If such conformity exists, this is progress. If not — this becomes a factor in the deterioration of law itself, the essence thereof, because existing differences between people are eliminated to a greater degree.

Strengthening the equality of law in historical perspective may be seen through the prism of what is understood by such equality. If this is a rejection of minor distinctions between relations regulated variously — the strengthening of such equality would be a blessing. If this is a rejection of material indicia which are characteristic of various people, different relations, then the strengthening of such equality will be nothing other than subjective and arbitrary.

For these reasons one should come to the view that law seeks ever greater equality, that the history of law is the history of the «progressing evolution of the content, scale, and measure of formal (or legal) equality while preserving this principle as a principle of any system of law, or law in general».[3]

The use of freedom as an external value criterion of law makes it possible to determine the true measure of freedom which legal norms provide. Freedom is manifest in specific rights (the right to freedom and personal inviolability, the right to freedom of thought and speech), and in available rights in each legal empowerment, duty, or prohibition to act within certain limits. A right may also be viewed through the prism of the necessity to expand freedom for citizens and economic subjects.

[1] *McGowan v. Maryland,* 366 U. S. 425–426 (1961).
[2] *John Rawls,* A Theory of Justice (1971), p. 19.
[3] *Nersesiants,* Право — математика свободы: Опыт прошлого и перспективы [Jus — Mathematics of Freedom. Experience of the Past and Prospects] (1996), p. 7.

Modern conceptions of law are inseparable from notions of maximum freedom for the citizen, the individual. The principle that «all is permitted which is not prohibited by a law» is part of the «flesh and blood» of law (in the Ukrainian legal system it is consolidated at the constitutional level: Article 19, Constitution of Ukraine). Ensuring the free, autonomous, and initiative activity of the individual has become a major criterion of the legislative activity of parliaments and law-making of administrative agencies in civilized States. It has acquired significant weight in Ukraine. But this is not purely physical or mechanical, but an ethical measure of law, underlying which is an assessment of the advisability of expanding freedom, condemning unsubstantiated limitations of freedom, and so on. On the other hand, the principle operates in the constitutional rank of Ukraine and many other countries pursuant to which «agencies of State power and agencies of local self-government and officials thereof are obliged to act only on the basis, within the limits of powers, and in a means provided by the Constitution and laws of Ukraine» (Article 19, Constitution of Ukraine). This already is a principle of the limitation of freedom, of legal limitations for a whole number of subjects of law, indeed, that are on the whole justified. Law in this understanding limits agencies of State power and officials, obliges them to act on the basis of and in execution of the law, verifying all actions by them.

Having regard to the foregoing, under a regulatory definition of law one may resort to a comparison of a perfected system of law with a «kingdom» incarnate with freedom, equality, and justness.

The influence of moral and ethical factors on law and the content thereof is so material that it comprises the moral and ethical foundation of law and serves as its justification and explanation. Morals and ethics fill law with the values of truth, justness, goodness, mercy, and good order, thereby transforming law from a formal measure or yardstick into a moral social measure.

Thus, the fact that law is based on the level of morality and ethics achieved by society which simultaneously determines the measure of law is important for the definition of law.

A material indicator of the regulatory definition of law is the legitimacy thereof, referred to above, that is, recognition of its norms by society as those which one must obey, which are necessary, and which should determine the means of the vital activity of society. Legitimacy transforms the ideas of the ought, the necessary, which exist in society and claim to be transformed into legal norms, or formal prescriptions of the State, agencies thereof, and officials into an immanent regulator imperative for society which becomes a necessary normative standard, law proper, through the approval of society. Such approval imparts a binding nature to these norms for each member of society, that is, they are generally binding. Legitimation transforms law into that which it is, imparts to it a power sanctified by public authority.

From the standpoint of the means of the realization of this measure of a norm of behavior, law is a compulsory requirement, a categorical imperative, an authoritative regulator of human behavior, a means of the ought, the necessary.

From the position of the importance of achieving the purpose of legal regulation, the authoritativeness of law provides not only for the possibility of the conscious realization of the requirements which are contained therein, realization on the basis of conscious compliance with these requirements, marginal behavior, or realization thereof with the assistance of the power of public opinion, power of traditions, and other social means. The authoritativeness of law provides for the obligatory realiza-

tion of its requirements, and therefore ultimately for the possibility of compulsory realization with the assistance of special social institutions and agencies for the enforcement of law created and functioning in society (courts, procuracy, advokatura, notariat, police, and so on). They do not all fulfill only legal functions, but each of them bears a certain burden for the effectuation of law. As already noted, in all societies agencies exist to ensure the effectuation of law, although the list and types thereof do not coincide at various stages of the development of society.

Thus, to the material characteristics of law should be relegated the immanently inherent requirement for special means for the enforcement of authoritative behests that regulate the behavior of the individual. The volitional character of law emanates from the authoritativeness of legal norms. It is most often deemed to be a major indicator of law. But it is evident from the foregoing that the volitional character of law is an indicator of the authoritativeness of law derivative from this authoritativeness. That is, wills are mediated in law through authoritativeness, and is not a direct indicator of law.

The authoritativeness of law, however, does not reduce only to its compulsory character, just as power itself does not reduce only to coercion. Such identification is characteristic only for totalitarian States, but under conditions of totalitarianism and dictatorial regimes it is not appropriate to speak about the existence of law. The model of law should be combined not only and not so much with a compulsory command, compulsory authoritativeness, although this indicator cannot be completely discarded (the more so, punitive prescriptions). However, this is derivative from an understanding of the ought in law and from notions concerning the mechanism for the effectuation of law. Normativeness as the ought, the necessity of legal norms differs from the normativeness of other regulators only by the means of their realization, guarantee, provision. That is, if necessity, the general significance of any other social regulators has an expression of their significance conditioned by the conviction intime of members of society relating to their value, the necessary and the general significance of legal norms, in addition, have also an expression of general bindingness — that necessity which is based on the impossibility and insolubility of the other, the necessity, which is ensured with the assistance of special legal institutions.

Summing up, it should be noted that the essence of law is identified through the two principal, in our view, definitions of law. From the cognitive-rationalist standpoint, law is freedom conditioned by equality, an equal yardstick of freedom (lawful order). However, the definition is augmented by the regulatory definition of law as norms legitimized in society determined by the level of morality and ethics achieved by society which rest on authoritative means of enforcement.

Eliciting the essence of law makes it possible to move on to eliciting its rule in the functioning of the State.

Law — Basis of Public Law Union of the People

Role of law in the organization and functioning of the State in ancient times. A study of the phenomenon of law, nature thereof, essential indicia, and establishment of a scientific identity is not sufficient for a precise and full contemplation of its role in the function of the State and the extent of conditionality of the State by law. We can ascertain the significance of the role thereof by clarifying the nature of the State

itself, essence thereof, and consideration of specific historical forms and means for the regulation of State life.

It is worth emphasizing that the concept of the State is not less complex than the concept of law. Throughout the entire period of the existence of the State itself, approaches to an understanding thereof have been subjected to significant transformation. Three approaches to an investigation of the State are determined rather precisely. The first, the political-philosophical (ancient), considers any State as a type of communion organized for public benefit the satisfaction of daily needs, a means of resolution «common affairs», and regulating the relations «people — State» (Aristotle),[1] as people linked by an agreement on questions of law and community of interests (Cicero).[2] The second, class approach, sees in the State the result of the division of society into classes and means of class struggle, a machine for the suppression of one class by another (Marxist-Leninist approach). The third approach is organizational-legal: it defines the State as the organizational and legal means of regulating class relations.

In the specific historical aspect, a large number of forms of States have existed whose State ideology provides a basis for the conclusion that law has a minimal role in the organization and exercise of State power and the regulation of social relations. However, notions about the role of law in the functioning of the State developed in parallel with the development of doctrines on the State and the strengthening of States themselves.

The Greek idea of the State,[3] based on the harmony of social life, did not know such concepts as individual citizens endowed with personal rights or the concept of a State defending its citizens with the assistance of law, and did not link the effectiveness of authority with the sufficient freedom of the citizen. The rights of a citizen depended upon his rank, and not the individual. The periodic replacement of bureaucrats in posts with the assistance of lots (rotation) and the most extensive involvement of the population in administration, the formal and informal discussion of State affairs, the election of agencies of State administration by the people, people's control over judges — is a far from complete enumeration of the democratic institutions of Ancient Greece. The power of State authority was thus based not on compulsion, but on the force of persuasion, tradition, and respect for law. Law was declared by the legal ruler to those subject to him, and it comprised the meaning of respectable State administration.

Although a theory of the separation of power did not exist in those times, one may already speak about legal mechanisms for control over representative, executive, and judicial power. With regard to executive power, these were the appointment and rotation of State employees and control over their actions; with regard to judicial power — the people's appointment of the judges of tribunals (the demos annually elected six thousand persons who considered cases); and with regard to decisions of representative councils or assemblies — the judicial annulment thereof. However, did law enjoy priority in the system of social regulators? Obviously, not. Law and justness, although they should have regulated the social system and social life, did

[1] *Aristotle*, «Политика» [Politics], in Сочинения [Works], IV, p. 376.
[2] *Marcus Tullius Cicero*, Про державу; про закони; про природу богів [On the State; On Laws; On the Nature of Gods], transl. from the Latin by V. Litvinov (Kyiv, 1998), p. 48.
[3] *G. H. Sabine* and *T. L. Thorson*, Історія політичної думки [History of Political Thought] (Kyiv, 1997), pp. 34–49.

not become general regulators of social life. Respective political ideals were more influential in ordering the political spheres than was law.

To perceive these ideals one should take into account the direct link between notions concerning an effective and perfected socio-political structure with notions concerning the city-State, which Athens was at the time and where all vital interests of citizens were concentrated.

The theory of the city, a place of general habitation, replaced in essence the theory of the State and became a major ethical, economic, sociological, and political idea. Justness, freedom, piety, good, the need for trusteeship over one's city-State, social harmony, notions about the force of unwritten laws, faith in the need for the adoption of State decisions by means of discussing them, voluntary subjection to law which is a benefit for all became ideals. The good deeds of the individual citizen such as goodness, valor, modesty, and courage were especially honored.

In the theoretical political thought of the ancients views dominated on State power, the power of the ruler as derivative, dependent on the will and positive qualities of the last. Democritus asserted that in accordance with the existing form of government there were no means to prevent a ruler, even a very good one, from dispensing injustice. Because it was not befitting that a ruler responsible to someone else proved after a year himself to be under the authority of these others. «Therefore, it should be arranged», said Democritus, «that the ruler who has not committed any injustice, even if he strictly prosecuted injustices committed, should not fall under their power but that some law or other means defended the ruler who dispensed injustice».[1]

Plato said that the ruler may listen or not to the opinion of the people at his discretion and therefore to link this with norms of law is impossible. The way out is for States to be ruled by philosophers.[2]

The views of Aristotle have influenced the concept of the State and the factors which limit it. To him belongs one of the major ideas of Antiquity — the delimitation in principle of the State (political relations) and society.[3] Aristotle distinguished these types of State structure: imperial power (monarchic rule), oligarchy (from the aristocracy), democracy (from the polity).[4] Tyranny has the aim of benefitting one ruler, an oligarchy works to benefit wealthy citizens, and democracy — to the benefit of the non-wealthy.[5] The most important under any system, Aristotle noted, is by means of laws and other procedures to deprive officials of the opportunity to enrich themselves. The most useful laws, unanimously approved by all those participating in the administration of the State, will be in vain unless citizens are involved in State order and brought up in this spirit, that is, if the laws of the State are democratic — in the spirit of democracy; if oligarchic — in the spirit of oligarchy; and if one is undisciplined, then the entire State is undisciplined.[6]

A leading orator of Antiquity, Cicero, believed the State to be the most perfected form of human communion, community living. Any State, he observed, is the owner-

[1] *Democritus*, «Фрагменты» [Fragments], in Антология мировой политической мысли [Anthology of World Political Thought] (Moscow, 1997), I, p. 83.
[2] *Plato*, «Государство» [The State], in *Plato*, Государство. Законы. Политика [State. Laws. Politics] (Moscow, 1998), p. 227.
[3] *Aristotle*, «Политика» [Politics], in *Aristotle*, Сочинения [Works], IV, p. 455.
[4] Ibid., IV, pp. 458–462.
[5] Ibid., IV, p. 551.
[6] Ibid., IV, p. 125.

ship of the people, and the people are not any assembly of individuals but are combined in some way, connected by amity in matters of law and community of interests.[1]

Cicero defined the basic principles of self-government, especially relating to the fact that power is delegated by the people and should operate on the basis of a moral law.[2] As Sabine and Thorson noted, these principles of administration «for a comparatively brief period after Cicero wrote them down received virtually universal recognition and for many centuries served as generally-known propositions in the theory of political philosophy ... entered the general treasury of political ideas».[3]

The works of Cicero were in the mainstream of doctrines in the era of stoicism, the representatives of which (Chrysippus, Panaetius, Polybius, and others) believed justice is the best means of restraining the authorities from collapse and formulated the idea of the universal brotherhood of all people.

We note that analogous ideas were widespread in the Orient — in ancient India and China. In ancient India the «Arthashastra, or Science of Politics» (a work on statecraft) testified to the importance of the moral foundations of the reliability of power because the ruler who rules unjustly cannot count on the support of his subjects, and emaciated subjects become greedy and hostile towards their ruler.[4]

Sun Tzu (Chinese philosopher — ca. 313–238 b.c.) asserted that «if a ruler seeks serenity, to achieve this there is nothing better than to issue just orders and love the people; if the ruler seeks glory, then to achieve this there is nothing better than to esteem ritual and respect scholars; if the ruler aspires to affirm his merits — for this there is nothing better than to esteem the wise and recruit capable people».[5]

After the decline of the Roman Empire, a lengthy crisis of law is observed which ends entirely only in the thirteenth century with the recognition of this idea: society must be governed by law.[6]

Role of law in the organization and functioning of the State in the Middle Ages and Renaissance. Forming of concept of State and popular sovereignty and idea of the rule-of-law State. The forming of the concept of the State as a common community continued during the Middle Ages and the theory of State sovereignty and sovereignty of the people come into being. Jean Bodin formulated the concept of sovereignty and substantiated the principle of the indivisibility of State sovereignty, averring that States create under the coercion of the strongest or as a result of the consent of some people voluntarily to transfer their freedom as a whole to the subordinate of others so that they dispose of it while relying on sovereign power or without any laws, or on the basis of certain laws and in accordance with certain conditions. A people may surrender sovereign power without any conditions; however, this does not mean that the sovereign enjoys power without any limitations. The laws of God and nature extend to him, and it is not within the power of a sovereign to abolish them.[7]

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[1] *Marcus Tullius Cicero,* Про державу; про закони; про природу богів [On the State; On Laws; On the Nature of Gods], transl. from the Latin by V. Litvinov (Kyiv, 1998), p. 48.
[2] Ibid., pp. 49–66.
[3] *G. H Sabine* and *T. L. Thorson*, Історія політичної думки [History of Political Thought] (Kyiv, 1997), pp. 169–170.
[4] *Антология* мировой политической мысли [Anthology of World Political Thought] (Moscow, 1997), I, p. 138.
[5] Ibid., I, p. 143.
[6] *R. David,* Основные правовые системы современности [Principal Legal Systems of Modern Times] (Moscow, 1979), p. 61.
[7] *J. Bodin,* «Шесть книг о государстве» [Six Books on the State], in Антология мировой политической мысли [Anthology of World Political Thought] (Moscow, 1997), I, p. 303.

The tradition of the Middle Ages, as Richard Hooker understood, was the responsibility of each political force (government or king, parliament, etc.) to the people or community which they administered and limitation by a moral law, constitutional traditions, and compacts which were concluded during the era of the monarchy.[1] Indeed, law always has had a certain (greater or lesser) degree of legitimation in the West because of this fact, and the identification of jus and lex is sufficiently widespread, a view that has numerous proponents in doctrine down to the present time.

Subjecting to analysis the development of the idea of State sovereignty and interconnection of society and the State, it is impossible to avoid giving attention to the views of Thomas Hobbes. The State, in his view, is formed as follows:

«The only way to erect such a Common Power, as may be able to defend them from the invasion of Foreigners, and the injuries of one another, and thereby to secure them in such sort, as that by their owne industrie, and by the fruits of the Earth, they may nourish themselves and live contentedly; is to conferre all their power and strength upon one Man, or upon one Assembly of men, that may reduce all their Wills, by pluralit of voices, unto one Will: which is as much to say, to appoint one Man, or Assembly of men, to beare their Person; and every one to owne, and acknowledge himselfe to be Author of whatsoever he that so beareth their Person, shall Act, or cause to be Acted, in those things which concerne the Common Peace and Safetie; and therein to submit their Wills, every one to his Will, and their Judgements to his Judgment ... [the Common-wealth] is One Person, of whose Acts a great Multitude, by mutuall covenants one with another, have made themselves every one the Author, to the end he may use the strength and means of them all, as he shall think expedient, for their Peace and Common Defence».[2]

Hobbes singled out three forms of State — monarchy, aristocracy, and democracy — and also two types of political power: paternal and despotic. In the first, power is acquired by consent, and in the second, by force. However, the sovereignty of State power arises in full plenitude: the power of a sovereign may not without his consent be transferred to someone else; he may not be deprived of it by his subjects, and may not be punished by them; he is the sole legislator and the supreme judge. That is, for Hobbes there exist no limitations of power. The law of the State is merely the will of the sovereign.

Machiavelli divided States into those in which subjects are accustomed to subjecting themselves to rulers and those where they from ancient days had lived freely. In *The Prince*, he asserted that the reasonable Prince cannot and should not adhere to his promise which would harm his interests.[3] Hence there are no means to prevent a Prince from failing to comply with his promises.

Utopian socialists believed it necessary to adhere to social laws when distributing the advantages of life which, while using the rules of equity, the ruler published or affirmed with the unanimous consent of the people.[4]

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[1] See *Sabine* and *Thorson*, Історія політичної думки [History of Political Thought] (Kyiv, 1997), pp. 393. 466.
[2] *T. Hobbes,* Leviathan, or, The Matter, Form, and Power of a Commonwealth Ecclesiastical and Civil (1651), pp. 87–88.
[3] *N. Machiavelli,* «Государь» [The Prince], in Антология мировой политической мысли [Anthology of World Political Thought] (Moscow, 1997), I, p. 257.
[4] See *Thomas More,* «Золотая книга, настолько полезна, как и забавна, о самом лучшем устройстве государства и про новый его остров Утопию» [A Truly Golden Little Book, No Less Beneficial than Entertaining, of the Best State of a Republic, and of the New Island Utopia], in Антология мировой политической мысли [Anthology of World Political Thought] (Moscow, 1997), I, p. 280.

During the civil wars in England during the seventeenth century, people's discussions played an active role in forming the idea of statehood and furthered the origin of various theories of revolutionary liberalism. Equality, freedom, and other natural rights, justness of laws, and the idea of consent (social contract) became the slogans of these revolutions. The idea was supported of the pacification of each sphere of administration in accordance with the supreme power of the people, guaranteed by a written recording of alienable rights.[1]

Unlike Hobbes, John Locke opposed the absolute, unlimited character of State power. He believed that people are free, equal, and independent by nature, and therefore no one may be removed from this state and subjected to the political power of another without his consent. The sole means of rejecting political freedom is a contract with other people to combine into a community.[2] The merit of Locke was that he laid down the basic principles of the theory of the separation and limitation of power, to be sure, from the standpoint of parliamentary priority. Locke asserted that the power of society and legislative organ created by it could not extend farther that was necessary for the general benefit, and whosoever possessed legislative or supreme power was obliged to rule according to established permanent laws proclaimed by the people and known to the people, to rule with the assistance of impartial and just judges which should resolve disputes only when fulfilling these laws.[3]

The idea of the separation of power or the idea of mixed administration, as Sabine and Thorson observed, is one of the most venerable in political theory; however it was never given definite content. Whereas in England this conception was given specific importance by the conflict between the crown and common law courts, and Locke allotted a subsidiary place to it in the theory of parliamentary sovereignty, Montesquieu reduced the limitation of power to a system of legal checks and balances between various parts of a particular constitution.[4]

Jean-Jacques Rousseau elaborated the most comprehensive theory of people's sovereignty. Proceeding from notions about man as citizen, which is a basic moral category, he suggests that the community is the main moral factor which forms the citizen. Common acquisitions (language, common interest and prosperity) are the reason for the creation of the State. «If the State is a moral person whose life is in the union of its members, and the most important of its cares is the care for its own preservation, it must have a universal and compelling force, in order to move and dispose each part as may be most advantageous to the whole. As nature gives each man absolute power over all his members, the social compact gives the body politic absolute power over all its members also; and it is this power which, under the direction of the general will, bears, as I have said, the name of Sovereignty».[5]

What is the nature of this company and where are the limits of supreme power? Rousseau answered this question as follows: «It is not a convention between a superior and an inferior, but a convention between the body and each of its members. It is legitimate, because based on the social contract, and equitable, because common to all;

[1] *Sabine* and *Thorson*, Історія політичної думки [History of Political Thought] (Kyiv, 1997), p. 435.
[2] *J. Locke*, «Два трактата о правлении» [Two Treatises on Government], in Антология мировой политической мысли [Anthology of World Political Thought] (Moscow, 1997), I, pp. 360–361.
[3] Ibid., p. 365.
[4] *Sabine* and *Thorson*, Історія політичної думки [History of Political Thought] (Kyiv, 1997), p. 495.
[5] *J. J. Rousseau*, «Об общественном договоре, или принципы политического права» [On the Social Compact, or the Principles of Political Law], in Антология мировой политической мысли [Anthology of World Political Thought] (Moscow, 1997), I, p. 428.

useful, because it can have no other object than the general good, and stable, because guaranteed by the public force and the supreme power. So long as the subjects have to submit only to conventions of this sort, they obey no-one but their own will; and to ask how far the respective rights of the Sovereign and the citizens extend, is to ask up to what point the latter can enter into undertakings with themselves, each with all, and all with each. We can see from this that the sovereign power, absolute, sacred, and inviolable as it is, does not and cannot exceed the limits of general conventions, and that every man may dispose at will of such goods and liberty as these conventions leave him; so that the Sovereign never has a right to lay more charges on one subject than another, because, in that case, the question becomes particular, and ceases to be within its competency».[1]

The ideals of social justice born of reason and the need for mutuality of this justice led Rousseau to conclude there was a necessity for laws which should have a character common to all because the general will cannot be reflected with regard to a particular subject-matter.

Laws are merely conditions of a civil association, and therefore the people should be the creators thereof. However, Rousseau noted, in order to transform the people's will into acts a legislator is needed (Rousseau did not believe in popular representation). And whereas legislative power belongs to the people and only to them, executive power belongs only to the sovereign.[2]

The ideas of the French Enlightenment were developed by scholars in other countries of Europe. They acquired a special resonance among the people.

During the French Revolution in the eighteenth century and the Civil War in the United States, a doctrine of constitutionalism was formed whose basic values proclaim the sovereign power of the people or the nation, the idea of popular representation, the natural and inalienable rights of the individual, the right to resist, and the principle of the separation of power.

The idea of popular sovereignty found reflection in the idea of the rule-of-law State, formulated for the first time in the works of German philosophers. Kant's idea of a *Rechtsstaat* was based on a primary contract and the conformity of laws to the pure principles of law. Kant substantiated the understanding of the State as an association of people subject to lawful laws, and also to other conditions of a rule-of-law State, in particular, the principle of the separation of power, the affiliation of power to the people, civil equality and autonomy of people, and devised a process for the creation of law.[3]

The views of Jellinek had material importance for an understanding of the nature of the State as a State which should be governed by law. He believed the existence of legal order to be material for a State which could not be joined with the theory of absolute, unlimited State power. «Law», he wrote, «does not depend upon the State to the extent that the State may exempt itself from any law. A particular character is imparted to legal order within its power, both actual and legal, but not to resolve the question of its existence».[4]

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[1] *J. J. Rousseau*, «Об общественном договоре, или принципы политического права» [On the Social Compact, or the Principles of Political Law], in Антология мировой политической мысли [Anthology of World Political Thought] (Moscow, 1997), I, p. 430.
[2] Ibid., I, pp. 433–435.
[3] *I. Kant*, «Метафизика нравов» [Metaphysics of Morals], Сочинения [Works] (Moscow, 1965), IV(2).
[4] *G. Jellinek*, «Общее учение о государстве» [General Doctrine on the State], in Антология мировой политической мысли [Anthology of World Political Thought] (Moscow, 1997), I, p. 823.

Nevzorov, who traced the development of the idea of a rule-of-law State in Russia to the platitude of the limitation of State power, noted that during the Boyar rule (from the «Time of Troubles» to the reign of Anna Pavlovna in 1730), «legally the Tsar of Muscovy ruled his State without limitation, but, having regard to custom, shared power with the Boyars»; during the time of the nobility (up to 1825), the Tsar alone reigned, but the nobility governed.[1]

The sole limitation under conditions of autocracy when legislative and executive power was combined in the person of the sovereign was «mental boundaries» (M. M. Speranskii).

Such extra-legal limitations as reason and morality, traditions, conscience, and others existed always; however, their use was not strictly determined and depended upon many factors and did not entail unavoidable legal responsibility. In confirmation, we recall the words of Empress Catherine II addressed to her State-Secretary, Popov: «You know with what caution I act when issuing my enactments. I collect all the facts, elicit the thoughts of the Enlightened, and I determine what action my edict should perform. When I am persuaded beforehand of their general approbation, I then issue my behest and have the satisfaction to see that which you call blind subordination — and there is the basis of unlimited power. But I am convinced that they do not obey blindly when my order is not adapted to the customs or when I have not myself followed my own will, without thinking of the consequences».[2]

Only with the abolition of serfdom and recognition of political rights, including suffrage, did the process commence of the creation of representative organs, forming of a judicial system, gradual movement away from autocracy, and broader participation of the people in the management of State affairs and introduction of real levers of control over power.

Contemporary notions of the role of law and State. Doctrinal writings cite various classifications of States depending upon influence on decision-making by the political regime, which is one of the main factors determining the essence of a State.

Mann, in particular, noted that in the West it is accepted to single out three theories of the State: class, pluralist, and elitist. Briefly, the essence thereof comes down to the following. The majority of class theories are Marxist, where the State serves particular means of production and classes. The two other theories designate the modernist States. Pluralist theories rely on the thesis that modern western States are ultimately divided into Party democracy, which gradually expands (these States are deemed to be «representative»). Elitist theories (there exist several varieties of these theories) concentrate their attention on the autonomous potential which a State has. In the center of attention of the elitists is political power as relations between the State and a civil society.[3] Mann, indeed, rejects the thesis of democracy as a decisive and determinative factor of the State, believing that the personnel of a State may act as an autonomous formation. In our view, the democratic potential of a State has not exhausted itself, although the modern State and bureaucracy are capable of supporting their own political interests, often acting as an own political force.

[1] *N. P. Nevzorov*, По пути к правовому государству (Конституционные проекты и попытки в Русской истории) [On the Path to a Rule-of-Law State (Constitutional Drafts and Efforts in Russian History)] (Moscow, 1913), p. 34.
[2] Ibid., p. 73.
[3] *M. Mann*, «Теория государства модерна» [Theory of the State Moderne], РЖ «Государство и право» [Abstract Journal «State and Law»] (Moscow, 1997), no. 2, pp. 37–42.

To an undemocratic regime should be juxtaposed a democratic regime, to which is inherent the freedom of creating and acting in an organization, freedom of expression, the right to participate in elections, the right to join social organizations, the right of political leaders to compete for support, alternative sources of information, free and fair elections, and the existence of institutions to form governmental policy dependent on the voters.

The division to divide all States into democratic and undemocratic emanates from the classification of political regimes. Ukrainian doctrinal writings separate democratic, totalitarian, authoritarian, autocratic, anarchic, and ohlocratic regimes.[1]

Peculiar to a democratic regime is the electivity of major agencies of power, deciding the main political problems in accordance with the expression of will by the majority of citizens, ensuring a broad range of personal, civil, and political rights and freedoms, legal equality of citizens, guarantees of the rights of minorities, and prevention of arbitrariness on the part of the majority.

An authoritarian regime is characterized by the predominance of methods of a command and open dictatorship, the granting of discretionary powers to agencies of political authority, that is, decision-making on the basis of political advisability and not law; endowing executive agencies with extensive legislative powers; limitation or abolition of the principle of glasnost in the activity of agencies of political power.

An autocratic regime is characterized by the limited range of persons who exercise political authority and the existence of a single center of real political power.

A totalitarian regime is characterized by strict control over all spheres of the life of society, the lack of legal opposition, the existence of an obligatory official ideology, intolerance towards political dissidence, and anti-intellectualism in the sphere of humanitarian knowledge.

An anarchical political regime is the destruction of organized foundations of a single State and the political system, autonomization of power structures, lack of a system of normative regulation of social relations, arbitrariness of the stronger or more agile, absence of guarantees of safety of the population, and so on.

The indicia of an ohlocratic political regime are the competence of political authorities, a contemptuous attitude towards knowledge and experience of world civilization, and the absence among representatives of the organs of political power of a real feeling of civil responsibility to the people of their country and the world.

This classification demonstrates that anti-democratic regimes, whatever their grouping, are based not on the consent of their citizens or the truth and justness of society, but on arbitrariness and fear. These States are not governed by law, because without justice, as Plato correctly observed, there is no law. Only in those States in which the people in various forms (through agreement, actual recognition of sovereignty, or a Constitution) influence the forming of State power and the content of laws of the State is the existence possible of law as rules of joint life which are recognized, or legitimized, by the people, and therefore based on the justice and truth of these people and the ethical principles thereof.

Following Claude Helvetius (1715–1771), who divided all forms of government from the standpoint of conformity to the common interest into good and bad,[2] one

[1] *V. Iakushyk*, «Різновиди політичних режимів» [Varieties of Political Regimes], Віче [Chamber], no. 9 (1995), pp. 129–133.
[2] *C. A. Helvetius*, Про людину, її розумові здібності та її виховання [On Man, His Intellectual Faculties and His Education] (Kyiv, 1994), p. 328.

may say that law as an expression of the common will of the citizens of a State exists only in those societies which are governed by the opinion of the majority of its citizens and State prescriptions are a reflection of the common interest and are perceived and approved by society.

Modern civilization, it seems, is irrevocably on the path of propagating the principles of liberalism and democracy. Democracy may be defined not only as the self-government of people, but also as a government which is responsive to the conceptions and desires of people. The basic principle thereof is rule by the majority; however, under present conditions, the understanding of democracy is orientated towards its initial interpretation as a type of power exercised with the involvement of all who the question being considered affects (idea of consensus) through direct participation or through their representatives (idea of popular representation). The idea of democracy, with some differences, necessarily makes provision for the principle of separation of rule (which the withholding of power furthers), multi-party system, decentralization of power, free and fair elections, and ensuring the right of citizens to participate in them, existence of a free press, freedom of speech, and freedom of political organizations. The functioning of these elements is a guarantee of a democratic political regime, a free society in which all rights and freedoms of citizens are guaranteed.

The ideas of democracy and liberalism fill with real content the doctrine on the rule-of-law State.

Only in a rule-of-law State is the flourishing of law possible because it does not step at the level of public legal consciousness, but is completed by the legitimation by society of norms of behavior and therefore becomes a truly operating body of rules.

From the position that these norms of behavior are legitimized by society, are recognized by this society (as the aggregate of all citizens) to be generally binding, they become a genuine regulator of social relations, especially in the public sphere.

On the basis of law as the general will of citizens who are the bearers of political power and sovereign rights for the exercise of democratic powers, the State grows and functions. Proceeding from the fact that a democratic State exists not on the basis of relations of «power — subordinate», but on the basis of the right of the people as the primary bearer of political power on the forming of the State, the State acquires the expression of a public-law union of the people.

Because this union is based on the right of the people to power, law becomes the foundation of this union.

Only law becomes capable of truly ordering power relations, because the people as the participant of a State acquire the rights to exercise State powers, and hence — also the right to control State power and the direct exercise thereof, including by means of representation. All activity of the State and the agencies thereof is exercised in legal forms which are determined by the mandate of the people.

Law becomes a means of limiting power, linking it to the benefit of its citizens, because the authority thereof rests on the will and authority of the people. This authority is underpinned by the political responsibility of power to the people through period free elections and the participation of citizens in the real exercise of State policy and management of the State.

From the foregoing arises a certain generalization. The idea of the rule-of-law State and management of the State by law only is partially suitable for the ideology of a State build on a positivist understanding of law because there remains the link

of the State not with jus, but with lex, and this linkage is half-and-half and unstable. Such linkage is possible, on one hand, when there are stable democratic traditions for forming and exercising State power, an awareness of the indestructibility of State-law precepts not only for the individual, but for agencies of State power and their officials. On the other hand, the link by lex provided for the obligatory existence of developed procedures for appeal against the unlawful decisions of agencies of State power and officials thereof.

The idea of a rule-of-law State is incompatible with an ideology of the State whose basis is absolute power, authority which rests on extra-legal forms of substantiation of the State and legitimation of State power, and holding power by means of coercion. Many such States are known to history, and many exist today. The absence of forms of representative democracy and involvement in resolving social conflicts of the police apparatus and coercion are characteristic of these States.

Zaiets A. Problems of the Definition of Law

Abstract. The article considers the problems of the definition of law. Attention is paid to the fact that in different social dimensions law shows its different facets, namely at determining of the essential, deep-laid attributes of law.

Key words: law, legal doctrine, legal understanding.

Заєць А. П. Проблеми визначення права

Анотація. У статті висвітлено проблеми визначення права. Звернено увагу на те, що в різних соціальних вимірах право проявляється своїми різними гранями, а саме під час визначення сутнісних, глибинних ознак права.

Ключові слова: право, правова доктрина, праворозуміння.

Заец А. П. Проблемы определения права

Аннотация. В статье освещены проблемы определения права. Обращено внимание на то, что в разных социальных измерениях право проявляется своими различными гранями, а именно при определении сущностных, глубинных признаков права.

Ключевые слова: право, правовая доктрина, правопонимание.