

UDC 32

## Theories of justice in contemporary Western European political and legal discourse

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### Abstract

This article discusses the key problems of the application of the theories of social justice in modern Western European political and legal discourse. According to the interpretation of the vast majority of contemporary authors, the idea of social justice is the continuity and development of Aristotle's idea of distributive justice and does not include the principles of corrective (retributive) justice. The exceptional relevance of the topic of the political and legal understanding of justice is explained by the large-scale expansion of this category into the Russian political and legal reality. In this work, we consider various historically developed theories that fill this concept with an ambiguous content with a real political and legal meaning. The difference in the views of researchers exists due to the fact that different theories stand behind different values: freedom, equality, utility and welfare, morality. The differences are also because of different methodological approaches. Traditionally, there are two methodological approaches to creating the concept of justice: transcendental institutionalism and implementation-oriented comparison. Thus, transcendental institutionalism implies creating ideal, fair institutions in a fictional ideal society, while comparative methodology assumes considering the specifics of the society in which the concept is supposed to be implemented, that is, this method is aimed at practical implementation.

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### Keywords

Theories of justice, utilitarianism, egalitarianism, libertarians, politics.

## Introduction

The taxonomy of the basic theories of justice in contemporary Western European political and legal discourse is determined on the basis of the values which are essential for each of the group of theories.

According to this principle, these theories can be divided into three groups [Sandel, 2009, 14-15]:

- Theories that defend the idea of welfare as the quintessence of justice are, perhaps, the most influential current of the political philosophy of modernity: utilitarianism. The utilitarians see the main task in the production of the maximum good for the maximum number of people.
- Theories that uphold the position that justice is in freedom. Adherents of this direction are by no means united, but in reality, they represent two opposing camps. Adherents of the first camp are libertarians defending freedom as the highest value and professing the values of the laissez-faire doctrine (free market, free trade, freedom of contract without any restrictions). Adherents of the second camp are advocates of egalitarianism, advocating for equal, primarily economic rights and for an honest market.
- Theories that reveal the concept of justice through the idea of virtue. Representatives of this direction propose to build morality in the law [10, C. 709-749].

The purpose of this article is to explore these concepts.

Methods of research: comparative, method of analysis and synthesis, hypothetical-deductive method. Traditionally, there are two methodological approaches to the construction of the concept of justice: transcendental institutionalism and an implementation-oriented comparison. Transcendental institutionalism implies the creating ideal fair institutions in a fictitious ideal society, while the comparative methodology presupposes considering the specifics of the society in which the concept is supposed to be realized. Both approaches are in demand by scientists who are exploring the idea of justice. The task of the researcher is to find a combination that helps to avoid described methodological problems that can potentially exist as a consequence of these approaches. Structure of research is determined by the goals.

### Different ways of distributing goods in society

Different theories suggest different ways of distributing goods in society. The difference in approaches can be demonstrated by an example, which leads in A. Sen [Sen, 1985, 175].

Consider the following hypothetical situation. Three children claim the flute. In this case, the first child justifies his claims by the fact that he is the only one who can play the flute. The second believes that he must receive a flute, because he is poor and parents cannot buy him a flute, while two of his competitors are from wealthy families. The third thinks that the flute should be with him, since it belongs to him by right, because he created it. The solution for this task may be different, depending on which of the designated concepts of justice is shared by the hypothetical judge. It is quite obvious that there is no unequivocal solution and, perhaps, it cannot be.

The whole inconsistency and ambiguity of social justice can be demonstrated by the fact that I, having given this task to my family members, received three different answers. The compassionate son replied that the flute should be given to the poor child, and this answer corresponds to the logic of economic egalitarianism. Its main goal is to overcome economic inequality. A pragmatic daughter decided that a flute should be given to a child who can play it, since he can get the greatest value out of having a flute. This answer, of course, is based on the ideas of utilitarianism. The husband was absolutely sure that the only one who has the right to claim a flute is the one who created it, and,

consequently, he is its owner. This approach seems to correspond to the principles of libertarianism. Let us consider in detail each of the indicated groups of theories

### **Utilitarianism**

The founder of this influential current of modern political philosophy is the English philosopher-moralist, jurist, sociologist Jeremy Bentham (February 15, 1748, London - June 6, 1832, *ibid.*).

According to I. Bentham, mankind is ruled by two rulers: pleasure and suffering, the task of law and intellect is to subordinate them to the will. To do this is the theory of utility or utilitarianism [Parekh, 1973, 44].

This is how I. Bentham himself explains the utility principle: "The principle of utility is understood as the principle that approves or disapproves of any action, depending on whether it has (as it seems to us) the desire to increase or reduce the happiness of that party, about the interest of which the matter is, or, in other words, to promote or hinder this happiness. I say: any action whatsoever, and therefore I speak not only of every action of a private person, but of every measure of government".

To date, several currents of utilitarianism can be identified: consequentialism (evaluation of decisions based on the results of their implementation), welfarism (decisions are estimated using the social welfare function), the total score (the criterion for estimating decisions is the sum of individual utilities).

The criticism of utilitarianism has traditionally been reduced to the following arguments. First, an approach aimed at multiplying the happiness of the majority ignores the rights of the suffering minority. At the same time, according to critics, the rights of anyone are worthy of equal respect. Supporters of the concept of human rights as the highest value argue that even the happiness of millions is unacceptable if achieved through the suffering of one child. Indeed, if one is guided by the logic of utilitarians, the ancient execution of *Damnatio ad bestias* (or the tradition of beasts) practiced in ancient Rome to punish early Christians fully corresponds to the criteria of justice, since the tortures of the condemned, thrown into the jaws of lions delivered [Sandel, 1998, 14-15].

### **Libertarianism**

Representatives of libertarianism defend the idea of freedom as the basis of justice.

Let us consider the basic postulates of libertarianism. Supporters of this concept of justice uphold the following principles.

1. Representatives of this trend oppose the policy of paternalism, based in their arguments on the a priori rationality of the subjects. Everyone knows what he wants, and, taking risks, clearly realizes all the consequences of his actions, therefore, does not need protection from the state. And sometimes such protection simply violates the principle of autonomy and free will. It is worth noting that at present there are no jurisdictions that profess such a refined libertarian approach. Thus, paternalism in contract law is presented in all legal systems of the western world, even of the most liberal orientation. Even the most persistent apologists for freedom of contract, in particular, the country of common law, were bent in the direction of defending the rights of the weak side of the contract.

2. Representatives of this direction strictly share morality and law, and do not consider that the moral principles shared by the majority are the criterion determining the fairness of the rules of law. Suppose that most of the representatives of a certain society do not recognize homosexuality, consider such connections to be immoral. But this fact cannot be a just basis for forbidding homosexuals to live by the law that lives up to their nature.

3. Libertarians oppose the redistribution of income, property, seeing in this violation of individual rights. An example of the described phenomenon can be the introduction of a progressive scale of taxation

### **Egalitarianism**

Egalitarianism extols the idea of equality and fair market, revealing the concept of justice as fairness and contrasting such an understanding of justice with the unlimited freedom of an individual advocated by representatives of libertarianism. As noted above, at present, the ideas of economic egalitarianism are in demand by all modern law and order, including the Russian one.

### **Theories associating justice and moral norms**

Theories associating justice and moral norms [Gauthier, 1986, 25-50] penetrate the European discourse from the United States, where the Puritan currents are historically strong.

As an illustration, consider a similar theory from the field of contract law. S. Shiffrin considers the divergence of the contract and promises as a consequence of the dichotomization of law and morality, while characterizing these phenomena as negative. Whereas, in the opinion of this author, the revision of some institutions of contract law based on morality will make these institutions fairer.

S. Shiffrin characterizes the promise as a category of morality and morality, and the contract as a purely legal category [Shiffrin, 2007, 709-741].

### **Conclusion**

Let us summarize our review and make conclusions.

1. Firstly, speaking of justice, we mean social justice, which must be distinguished from justice punitive or retributive. In the interpretation of most modern authors, social justice is a continuation and development of Aristotle's idea of distributive (distributive) justice and does not include the principles of corrective (re-attributive) justice.

2. The taxonomy of the basic theories of justice in contemporary Western European political and legal discourse is determined on the basis of the values underlying each of the group of theories: the utility (this value is protected by utilitarianism), freedom and equality (libertarianism and egalitarianism), a group of theories based on protection of moral values.

4. The most popular among modern scholars are theories that uphold equality and freedom as the basis of justice, although in modern legislation, including Russian one, one can find the influence of all the theories described.

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## **Теории справедливости в современном западноевропейском политико-правовом дискурсе**

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### **Аннотация**

В данной статье рассматриваются ключевые проблемы применения теорий социальной справедливости в современном западноевропейском политико-правовом дискурсе. В интерпретации большинства современных авторов идея социальной справедливости являет собой развитие идеи Аристотеля о распределяющей (дистрибутивной) справедливости и не включает в себя принципы корректирующей (ретрибутивной) справедливости. Исключительная актуальность темы политического и правового понимания справедливости объясняется широкомасштабной экспансией данной категории в российскую политическую и правовую действительность. В настоящей работе рассмотрены различные исторически сложившиеся теории, наполняющие это понятие с неоднозначным содержанием реальным политико-правовым смыслом. Различие во взглядах исследователей обусловлено тем фактом, что различные теории встают на защиту разных ценностей: свободы, равенства, пользы и благосостояния, морали. Различия обусловлены также и различными методологическими подходами. Традиционно существует два методологических подхода к построению концепции справедливости: трансцендентальный институционализм и ориентированное на реализацию сравнение. Так, трансцендентальный институционализм подразумевает выстраивание идеальных справедливых институтов в вымышленном идеальном обществе, сравнительная методология же предполагает учет специфики того социума, в котором предполагается реализация концепции, то есть данный метод нацелен на практическую реализацию.

### **Для цитирования в научных исследованиях**

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### **Ключевые слова**

Теории справедливости, утилитаризм, эгалитаризм, либертарианцы, политика.

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