

**Naoumov Svetoslav**

Ph.D. candidate, Law Faculty, Sofia University “St. Clement of Ochrid”, Bulgaria

## **LEGAL-Philosophical PARAMETERS of the connection between JUSTICE AND SECURITY**

### **S u m m a r y**

The article is dedicated to the connection between justice and security in the context of the philosophical concept of fairness, equality and freedom. Philosophical-juridical discourse of justice brings forth the particular actuality of the topic given the context of the contemporary international standards and regulations that shape the institutional frame of modern legal policy.

**Key words:** Security, Justice, Philosophy of Law, Legal Consciousness, Legislation

The issue of the connection between justice and security has its historical, political and purely legal and legal-philosophical aspects. The analysis of that relationship needs a short philosophical and historical overview to be made, as well as to outline its contemporary aspects. At the same time it should be pointed out that there is not such ideal society where the justice and the security to be of equal value and in equal measure. Both security and justice are the values that are reflected in the legal consciousness of the people. In the legal-philosophical and sociological aspect it is necessary to establish what the role of legal and extra-legal mechanisms may be used for mastering and controlling the manifestations of social deviance that threaten the stability and integrity of society. Every society has some kind of legal system which, to various degrees, satisfies public expectations regarding order, justice, and the balancing of interests. To a great degree society, self-organized as a state, strives to sustain the principles of the supremacy of the Constitution and of law, and this serves as the chief guarantee that the sovereign (the people) possesses defense mechanisms against social anomie. In the context of its legal interpretation, the question seems elementary: as long as there are legitimate mechanisms for a likewise legitimate legislation, the risks of deviance are reduced to a minimum. But this is only seemingly so. Even in the best organized society, the legitimacy of law can be questioned by the very creators of law or by those who apply it. In a sociological aspect there are at least two possible directions for reasoning on the problem. On one hand the Constitution and the legislation based on it are factors guaranteeing the legitimate stability of society and avoidance of social anomie. On the other hand the realities of life produce ever new social relations, new systems of values, and hence, new forms of social disorganization and disintegration. Consequently, law can only "correct" the possible misbalance, and it does so either preventively or subsequently.

This a starting formulation is far from being new. For example, one of the most prominent philosophers of law – Gustav Radbruch (1878–1949), through all of his life, had struggled for the solution of the conflict between justice and legal certainty. The enduring significance of Radbruch's legal philosophy is chiefly based on his thesis on the relationship of justice, legal certainty and usefulness, which find their final expression in the "Radbruch's formula" of 1946. It states: *"The conflict between justice and legal certainty should be able to be solved because positive law secured by statutes and power even takes priority when its contents are unjust and inappropriate, unless the contradiction between positive law and justice reaches such an extent that law as „unjust legislation“ gives way to justice. It is impossible to draw a sharper line between the cases of statutory injustice and the laws which still remain valid despite incorrect content; however another line can be drawn with more preciseness: where justice is not even aimed at, where equality, which is at the core of justice, is consciously repudiated when laying down positive law, then the law is not even only „incorrect law“, but completely dispenses with the*

*legal structure*“ [1, 2]. This is one of the most influential legal philosophical theses of the 20<sup>th</sup> century and can be summarised as: extreme injustice is not law. However, it has also been fiercely criticised. This discussion has a breadth unequalled by almost any other legal, philosophical debate.

If we go back into the history of philosophical thought we will discover many varieties of the debates on the relationship between justice and security. In the fundamental work „*Leviathan*” written during the English Civil War (1642–1651), Thomas Hobbes argues that „*Life in the natural state of humans is so solitary, poor, evil, brutal and short, that for them freedom always will be of secondary importance – a luxury that few can afford*“ [3,4]. Therefore, according to Hobbes, people have volunteered to provide freedom and all the power of the sovereign (state). Since the natural state of human freedom is a „*constant war against each other,*“ Hobbs says that the main objective of management is the stability of the state and the security of its citizens, and individual rights and freedoms are secondary.

As opposed to Hobbes, his contemporary John Locke (1632–1704) first formulated some liberal conceptions of power. According to him the primary purpose, role and mission of the state is to protect citizens’ rights to life, liberty and property and to work for the common good. Locke argues that this can be achieved only through legitimate political power and fair judges who equitable to resolve the disputes. Unlike Thomas Hobbes, Locke believed that human nature is characterised by reason and tolerance. In a natural state all people were equal and independent, and everyone had a natural right to defend his “*Life, Health, Liberty, or Possessions*“ [5,6,8]. Most scholars trace the phrase *life, liberty, and the pursuit of happiness* in the American Declaration of Independence, to Locke’s theory of rights, though other origins have been suggested [7, p. 99].

In “*Philosophy of Law*” (*Grundlinien der Philosophie des Rechts*) Hegel points out that wisdom, knowledge and human experience have retrospective nature. So today no one can say what challenges and trials will be facing mankind tomorrow and what resources will be trying to deal with them [9, pp. 7–9]. Therefore, the dilemma of “*liberty, justice or security*” will stand over the next generations who, from the perspective of their experience, their values and concepts of law and morality, will be looking for its decision.

Nowadays, in the context of the liberal traditions of the oldest democracies the dilemma of *justice and security* sounds more like an oxymoron, given the dominant understanding that individual and public security are a function, depending on the degree of protection of fundamental rights and freedoms. Unfortunately, this concept is quite fragile and unstable. Any crisis caused by military conflicts, acts of terrorism and social conflict is a challenge to its persuasiveness and credibility. Confrontation of values „*liberty or security*“ acquires new dimensions in terms of global terrorism, marked with their shade the early 21<sup>st</sup> century. In A “*Theory of Justice*”, Rawls argues that the concepts of freedom and equality (justice) on

the one hand, and security – on the other – are not mutually exclusive [10]. His assessment of the justice system leads him to conclude that for justice to be truly just, everyone must be afforded the same rights under the law. Rawls attempts to establish a reasoned account of social justice through the social contract approach. This approach holds that a society is in some sense an agreement among all those within that society. If a society were an agreement, Rawls asks, what kind of arrangement would everyone agree to? He states that the contract is a purely hypothetical one: He does not argue that people had existed outside the social state or had made agreements to establish a particular type of society. Rawls asks: if everyone were stripped of their privileges and social status and made entirely equal, what kind of justice system would they want to be subject to? He includes that the only logical choice is to pick a system that treats people equally, regardless of their race, class, gender, etc. He discusses how his theory of justice would affect institutions today. Without pointing fingers, he makes it clear that no one is living up to his standards.

Nowadays more than ever before the question of the relation between security and justice becomes relevant. The Lisbon Treaty attaches great importance to the creation of an area of freedom, security and justice. It introduced several important new features: a more efficient and more democratic decision-making procedure that comes in response to the abolition of the old pillar structure, bringing more accountability and legitimacy; increased powers for the Court of Justice of the European Union; and a new role for national parliaments. Basic rights are strengthened by a Charter of Fundamental Rights that is now legally binding on the EU and by the obligation on the EU to sign up to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Therefore safer world takes a much broader perspective, one that focuses on people's experiences of insecurity and injustice. This people-centred approach moves beyond just addressing immediate threats of violence and instead recognises that more traditionally developmental issues – such as access to adequate food, health, employment, education and housing – must also be discussed and provided if peace is to have a chance of being sustainable. There has been criticism that the EU's activities have been too focused on security and not on justice. For example, the EU created the European Arrest Warrant but no common rights for defendants arrested under it. With the strengthened powers under Lisbon, the second Barroso Commission created a dedicated commissioner for justice (previously combined with security under one portfolio) who is obliging member states to provide reports on their implementation of the Charter of Fundamental Rights. Furthermore, the Commission is putting forward proposals for common rights for defendants (such as interpretation), minimum standards for prison conditions and ensure that victims of crime are taken care of properly wherever they are in the EU. This is intended to create a common judicial area where each system

can be sure of trusting each other. The 2009 Treaty of Lisbon abolished the pillar structure, reuniting the areas separated at Amsterdam. The European Parliament and Court of Justice gained a say over the whole area while the Council changed to majority voting for the remaining PJCC matters. The Charter of Fundamental Rights also gained legal force and Europol was brought within the EU's legal framework. As the Treaty of Lisbon came into force, the European Council adopted the Stockholm Programme to provide EU action on developing the area over the following five years.

Article 3(2) TEU reads as follows: 'The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.' It should be noted that this article, which sets out the EU's key objectives, attaches greater importance to the creation of an area of freedom, security and justice (AFSJ) than the preceding Treaty of Nice, as this aim is now mentioned even before that of establishing an internal market. Most such efforts, however, are more concerned with redefining the policy agendas of nation-states than with the concept of security itself. Often, this takes the form of proposals for giving high priority to such issues as human rights, economics, the environment, drug traffic, epidemics, crime, or social injustice, in addition to the traditional concern with security from external military threats. Such proposals are usually buttressed with a mixture of normative arguments about which values of which people or groups of people should be protected, and empirical arguments as to the nature and magnitude of threats to those values. Relatively little attention is devoted to conceptual issues as such.

The objectives for the AFSJ are laid down in Article 67 TFEU:

1. 'The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.
2. It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals.
3. The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.

4. The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.<sup>7</sup>
5. Various agencies have been set up to help oversee policies in a number of important areas of the AFSJ. Article 12 TEU and Protocols No 1 and No 2 lay down the role of the national parliaments in the EU.

In conclusion it can be said that the legal aspects of security are relatively well studied. However, mankind is faced with new challenges that put people before new trials. Dilemma *security* or *freedom* has various dimensions. From a philosophical perspective, it is important to establish how the legal consciousness of the legislators and of the citizens as well has been changing. In this respect particularly empirical legal and sociological studies are useful that provide information about the level of this legal awareness.

When we refer to law as a source of *social injustice*, we should have in mind multiple factors. The existence of a number of legal institutes or regulations (for instance in the field of tax legislation, regime of licensing, over-complicated regime of authorization etc.) are preminent sources of corruption, tax evasion, or other deviant behaviour. This limits fairness and security as well. Sometimes the legislation limits fairness but gives greater security and vice versa. However, philosophy of law studies the role of legal coercion in the context of the general concept of social control through law in taking into account the perpetual modification of the principle *ubi societas ibi ius*. This brings to the fore the study of the dynamics of social relationships that engender the dynamics of the legal system.

Without a clear picture of the state of public and individual legal consciousness, without delineating the parameters of the connection 'power-realization of power – conformism – deviance', we cannot succeed in creating rational models of counteraction against those forms of social pathology which, once they become a norm of conduct, may lead to the total disruption of humanity's hierarchy of values (including justice and security), which serves as a backbone for society in general.

## References:

- Fuller L. L. (1954). American Legal Philosophy at Mid-Century. The Legal Philosophy of Gustav Radbruch. – 6 *Journal of Legal Education*. 457 (48).
- Wolf E. (1958). Revolution or Evolution in Gustav Radbruch's Legal Philosophy. *Natural Law Forum*. Paper 25. [http://scholarship.law.nd.edu/nd\\_naturallaw\\_forum/25](http://scholarship.law.nd.edu/nd_naturallaw_forum/25).
- Hobbes T. *Leviathan*. Chapter XIII.: Of the Natural Condition of Mankind As Concerning Their Felicity, and Misery. Harvard : The Harvard Classics. 1909–14.
- Hobbes T. (1998 [1642]) .On the Citizen, ed & trans Richard Tuck and Michael Silverthorne. Cambridge: Cambridge University Press.

- Locke J. (1997). Woolhouse, Roger (ed.). *An Essay Concerning Human Understanding*. New York: Penguin Books.
- Locke J. (1690). *Second Treatise of Government* (10th ed.), Project Gutenberg, retrieved, 25 March 2012.
- Dunn J. (1969), *The Political Thought of John Locke: A Historical Account of the Argument of the 'Two Treatises of Government'*, Cambridge, UK: Cambridge University Press.
- Milton J. R. and Philip Milton (eds). (2006). *The Clarendon Edition of the Works of John Locke: An Essay Concerning Toleration: And Other Writings on Law and Politics, 1667–1683*.
- Knowles D. (2002). *Hegel and the philosophy of right* (Transferred to digital print. ed.). London: Routledge.
- Rawls J. B. (1971). *A Theory of Justice*, Cambridge, MA: Belknap Press of Harvard University Press.