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**Stovpets Oleksandr Vasylovych**
Doctor of Philosophical Sciences, Professor,
Professor at the Criminal and Administrative Law Department,
Professor of Philosophy Department
Odessa National Maritime University
34, Mechnykova str., Odesa, Ukraine
orcid.org/0000-0001-8001-4223

**Kulichenko Volodymyr Viktorovych**
Candidate of Philosophical Sciences, Associate Professor,
Head of the Philosophy Department
Odessa National Maritime University
34, Mechnykova str., Odesa, Ukraine
orcid.org/0000-0002-3761-6330

**Stovpets Vasyl Grygorovych**
Candidate of Philological Sciences, Associate Professor,
Professor at the Criminal and Administrative Law Department,
Director of the Educational Service Centre
Odessa National Maritime University
34, Mechnykova str., Odesa, Ukraine
orcid.org/0000-0002-2354-2852

# CONCEPTUAL POTENTIAL OF PHILOSOPHICAL AND STATE-LAW DISCOURSES OF UNIVERSAL JUSTICE

*In the article, we explore the potential of philosophical and state-law discourses on the concept of universal justice. Evaluating justice as a moral category and a value, simultaneously we emphasize its priority place in the critical assessment and legitimization of legal institutions. The law is good because it is fair, not fair because it is good. People do not just expect fair behavior from others, we demand it from each other. For this reason, fair behavior is recognized as the most socially important and most valuable (from the legal point of view) among all virtues. Justice is also used as a criterion in the distribution of benefits, which allows us to distinguish such facets of justice as "distributive" and "equalizing". The purpose of justice is traditionally considered to be the maintenance and reproduction of equilibrium, or equal measure. It is applicable both for critical assessment of human behavior and for criticism of the rules themselves and the practice of their application, i.e. for assessment of existing institutions. The essence of the so-called formal justice is the consistent, impartial, objective application of rules. The implementation of the principles of formal justice makes social institutions largely fair due to their legitimization through public consciousness. However, there is no complete identity between formal justice and justice as such. At the same time, a common and unconditional point of all modern conceptions of justice is the idea of universal human rights. Justice is seen as a moral criterion that is used in analyzing the essence of the state as a means of domination. Within the framework of the problem of justice, the question of the grounds and principles of legitimization of the state in its relations with citizens is resolved. A condition for sufficient legitimization is a social contract as a model of mutually beneficial voluntary obligation. The connection of political justice with social institutions determines the applied aspect of the theory of justice, which is expressed in the analysis of the relationship between justice and the effectiveness of institutions.*

***Key words:*** *concept of justice, morality, law, ethics, efficiency, legitimation, universalism, social contract.*

**Actuality.** The relevance of the research problem is connected with a human nature, currently being tested by heavy challenges of the modern era, with its processes of rivalry and partnership, globalization and deglobalization. Contemporary global ideological collision between democracies and autocracies is a factor, which especially calls for an intercultural discourse of justice and the development of principles of universal justice. The content of universal justice includes: a) the requirement of equality: to act equally in the same conditions, which is formulated as the requirement of impartiality, and the prohibition of arbitrariness and discrimination; b) the idea of the interconnection between the deed and the retribution for it, i.e. the principle of proportionality; c) the requirement of balance between loss and gain – the justice of exchange. Universal justice is characterized primarily by the recognition of such legal values as life, property, and freedom, which are embodied in the recognition of human rights. The existence of universal moments of justice can be justified from the standpoint of political and legal anthropology. Humanity is a certain moral community based on anthropological facts common to all people. On the one hand, in conditions of limited material resources, the freedom of action of people leads them to competition and conflict. On the other hand, the presence of reason and the ability to negotiate creates the possibility of uniting people on the basis of consensus.

According to the two dimensions of social life – personal and institutional – there are two concepts of justice: 1) justice as a characteristic trait of the individual, which Plato also included among the four main human virtues along with prudence, courage and wisdom (subjective justice), and 2) justice related to social institutions (objective justice), primarily political justice, which belongs to the sphere of law, state and politics.

The problem of the correlation between personal and institutional (political) justice is one of the most important problems of modern social philosophy and legal theory. To the legal consciousness, which focuses exclusively on positive law, this problem seems far-fetched. The established legal order seems to be completely indifferent to any personal virtues, and where there is a lack of internal sentiments and feelings, coercive sanctions and external authority will do their job. But in fact, the law of a civilized legal system is the principle of correspondence between the external status of justice and the internal status of virtue.

**Degree of scientific development of the problem.** Various aspects of justice as a universal principle and a complex social phenomenon have repeatedly been the subject of scientific research. The recognized classics of the philosophy of law did not ignore this issue, including H. Hart [1], J. Rawls [2], H. Kelsen, L. Fuller, O. Höffe, and some others. Also, the phenomenon of justice has become the object of our own philosophical research [3; 4; 5; 6]. However, in this study, we will focus on the still insufficiently developed aspects of the problem of justice.

**Main purpose of research** – to explore the potential of philosophical and state-legal discourses on the concept of universal justice, and to make an appropriate representation of main conceptual possibilities within the framework of justice.

**Presentation of the main material**

None of the modern legal philosophers, including legal positivists, deny the close connection between law and justice. At the same time, while natural law theories interpret this relationship quite broadly, legal positivism recognizes this relationship only to a minimum extent, focusing on facts that cannot be ignored. In this respect, positivism is a "minimalist theory of law" while the theory of natural law is a "maximalist theory". The positivist conception of justice by H. Hart [1] has the same "minimalist" character and could be called the conception of justice as "certainty", unlike the conception of justice as "fairness" by J. Rawls [2].

Justice applies to the distribution of benefits or burdens (distributive justice), as well as to compensation in the process of exchange, including compensation for damages (equalizing justice). The principle of the former is "to each his due, to each his own", the principle of the latter: "to each an equal share", i.e. no party should have any losses or advantages.

A general principle that can be identified in analyzing different embodiments of justice is that, in relation to each other, people are entitled to some relative state of equality or inequality according to which burdens or benefits are distributed. There is a general agreement that "institutions are

just and fair when no arbitrary distinctions are made between people with respect to basic rights and obligations and when rules determine the proper balance between competing claims to the benefits of social life" [2, p. 39]. The purpose of justice is traditionally considered to be the maintenance and reproduction of equilibrium, or equal measure. It is applicable both for critical assessment of human behavior and for criticism of the rules themselves and their application, i.e. for evaluation of institutions.

The structure of justice is divided into two parts: permanent (indisputable), or formal justice, and variable (debatable), or real justice. The principle of formal justice – "to treat similar cases in the same way and different cases in a different way" – requires that each case be judged from the same perspective. The second part presents different conceptions of justice that provide different explanations for which cases should be considered the same and which should not. For example, depending on the real concept of justice (the criterion of similarity or dissimilarity), we can distribute according to need, work, or merit, while still agreeing with the principle of formal justice (i.e. applying the same criterion consistently).

Regardless of whether we approve or disapprove of the real concept of justice on which a political and legal institution is based, we can and should consider the legal system from the point of view of formal justice. The essence of formal justice is the consistent (i.e. impartial, objective) application of rules. In many ways, the exercise of formal justice makes an institution largely fair. However, there is no complete identity between formal justice and justice in general. Formal justice requires a certain criterion of "sameness" and "unequal" of cases. And here, significant differences in moral and political views can lead to differences in interpretations of the grounds for considering which cases are the same and which are not. At the same time, significant differences in moral and political views may lead to disagreement about which properties of people should be considered relevant for criticizing the law as unjust. At the same time, the common and unconditional point of all modern conceptions of justice is the idea of human rights, i.e. the presumption of equal treatment of people, and the rejection of privileges related to national or religious characteristics.

Modern theories of justice can be divided into substantive, formal and procedural. *Substantive theories of justice* are a type of contractual theories, which are based on the views of Kant. Among modern contractual theories, the most significant are those of J. Rawls, R. Nozick and O. Höffe. These theories focus mainly on the question of "what", i.e. what is justice and what is its criterion. *Formal (analytical) theories* ask the question of "how" by studying the logical structures and language forms that serve to express justice (H. Hart). *Procedural theories* seek to express the "what" through the "how". The most significant here are the concepts of J. Habermas and A. Kaufmann. In all these theories of justice, it is not about personal but political justice.

In substantive theories, justice is seen as a moral criterion that applies to the state as a mode of domination. Within the framework of the problem of justice, the question of the conditions and principles of state legitimization is addressed. The condition for legitimization is a contract as a model of mutually beneficial voluntary obligation. This is not a historical contract, but a metaphor of a "social contract".

The most influential theory of justice is that of John Rawls, which deals with reflections on the best moral foundations of a democratic society. Rawls envisages a hypothetical "basic structure of society" within which free and rationally acting individuals (justice agents) jointly choose a system of basic principles that govern the distribution of society's resources. In formulating the principles of fair coexistence of citizens, Rawls proposed an intersubjective interpretation of the Kantian concept of autonomy: we act autonomously if we obey exactly those laws that could be applied by all participants in the situation, on the basis of the public application of their reason [7, p. 263].

The first principle (the principle of equal freedoms), being essentially a modification of the Kantian fundamental principle of law, justifies the priority of maximum individual freedom over other social values: "every individual should have an equal right to the most general system of equal fundamental freedoms, compatible with similar systems of freedoms for all other people" [2, p. 284]. The second principle justifies the possibility of social and economic inequalities a) by the fact that they "lead to

the greatest benefit for those who are least successful, in accordance with the principle of equitable savings" (the principle of differentiation), and b) "make some positions open to all, in conditions of fair equality of opportunity" (the principle of equal opportunities) [2, p. 296].

The principles of justice imply a strict hierarchy: the principle of equal freedoms takes precedence over all other principles, since fundamental human rights and freedoms cannot be subject to political bargaining, and the principle of equal opportunities takes precedence over the principle of differentiation. Thus, both principles simultaneously justify a liberal and social state governed by the rule of law with a democratic political and economic system. Being deontological, Rawls's theory is opposed to teleological theories that assert the primacy of the good over justice.

Robert Nozick's theory of justice is called the "claims theory" and is liberal in nature, i.e. he defends classical liberalism and considers the welfare state illegitimate. The requirements of justice in the field of property are expressed in three points: 1) the one who acquired property by honest means, has the right to it; 2) the one who receives it in accordance with the principle of fair transfer of property from the person to whom the property belongs by right, also has the right to it; 3) only those persons who acquired it according to the above-mentioned, first and second rules, have the right to property [8, p. 202].

Otfried Höffe, understanding justice as the highest principle of common human life and the basis for the realization of human social essence, draws attention to three elements of the semantics of the concept of "justice": a) justice has the nature of a moral obligation; b) it is closest to duties that are recognized voluntarily and are above simple coercion; c) its measure is distributive benefit – what is just is useful to every person [9, p. 121]. His theory of justice expresses the idea of justice as exchange.

The main principle of this theory is the principle of equivalence of gains and losses. Exchange is interpreted not as a narrowly economic concept, but as a democratic form of cooperation. Reconstructing the natural state, that is, the coexistence of people free from domination, and from any social restrictions on their freedom, it considers this state, free from the state and law, as a state of inevitable conflicts. This situation can only be overcome through a mutual renunciation of the use of violence. Such an exchange meets the simplest criterion of justice – it is distributive, i.e. beneficial to everyone. Mutual refusal is a condition for the possibility of free action. This argument justifies human rights as the rights that people as subjects of law confer on each other. It also legitimizes the state as a "sword of justice" and considers ways to connect power with justice through "moral and political discourses" [9, p. 128].

What is the best criterion of justice proposed by this or that theory? Ideas about human nature and the basic political goal of society largely determine the *choice of the concept* of justice. If any concept of justice at the institutional level expresses the measure of the ratio of freedom and equality, then the semantic basis for such a decision is the image of a human being in his or her most fundamental qualities. The act of recognition as the most fundamental legal sense has grounds to be seen in the image of a human being as a being both capable of self-improvement, i.e. worthy, and an autonomous being, i.e. intelligent and capable of self-limitation. J. Finnis emphasized that for true legislation, an individual is valuable as a person possessing the qualities of human dignity and positive responsibility [10, p. 84]. Therefore, the most acceptable principle of justice will be the one that provides the best conditions for self-realization and autonomy of the individual.

Since in matters of justice it is impossible to achieve convictions that would be shared by absolutely everyone, it is necessary to be satisfied with at least those shared by the majority. For this purpose, there are special institutional methods that seek to achieve a result where conscience and legal sense acquire permanent characteristics. For this purpose, in particular, the representative system with its state-legal rules of the game, the appropriate distribution of roles and the preservation of role distance may be methodologically useful. This relationship also justifies the question of how to make the prevailing notions of justice understandable and applicable in a particular situation.

The methodological basis for this analysis can be the concept of the nature of human action by E. Agazzi [11], who, as a specific feature that distinguishes humans from all living beings, emphasizes

that every human action must be accompanied by an idea of what it *should be*. Depending on the degree of "duty", two types of behavior are distinguished: 1) goal-oriented and 2) aimed at achieving perfection (value). Human actions performed for the sake of a deliberate goal are performed according to certain rules. They are oriented toward a certain result and therefore appear in a constructive aspect. The rules that govern these actions are internally hypothetical and are expressed in the form of a requirement: "If you want to achieve the goal, do this and that."

Another dimension of human action arises when it is oriented toward "perfection" or "ideal models" as a goal. Here, perfection is pursued for its own sake, not for the sake of a hypothetical goal, and the principle is: "You must achieve the goal." Such actions are governed not by rules but by norms. Unlike rules, norms are not conditionally but categorically imperative. They are not constructive, but simply prescriptive. "Norms are not a tool for achieving a hypothetical goal, but recommend certain behavior because they are considered unconditionally good, that is, valuable in and for themselves" [11, p. 34].

The existence of norms depends on the recognition of values. The goal and value aspects of human activity are closely intertwined. All human actions are oriented toward a certain goal, i.e. they are intentional, and we also can say, all human actions are evaluated in terms of the degree of perfection of actions aimed at fulfilling this goal, i.e. they have value. The requirement that a goal be realized is a requirement of *efficiency*. The highest expression of effectiveness is to perform an action in the best way possible. The requirement that a person's action be carried out in accordance with existing values, regardless of the hypothetical condition, is the requirement of morality, which in the normative institutional sphere is expressed in the requirement of justice.

In classical political and legal philosophy, this problem was posed and solved in terms of the relationship between ethics and politics. While Aristotle viewed ethics and politics as a unity, "praxis", considering the goal of politics to be a good life, Machiavelli separated them. He proceeded from the fact that in politics, the result justifies the means, which are intended for manipulation and are immoral. For Machiavelli, politics is manipulation, "poetry". Its goal is political power aimed at maintaining might and stability. The means used to achieve this goal are judged by the criterion of *efficiency*, not by independent moral standards.

In the late nineteenth and early twentieth centuries, the connection between these two forms of assessment of human activity was revealed in the formulation and resolution of the traditional philosophical question of the correlation between the *effectiveness* and *validity* of law and its institutions. According to Hans Kelsen, validity (according to another translation, "significance") and effectiveness (or "efficiency") are two specific forms of existence of a legal rule. The validity of a rule consists in its obligation, i.e. in authorizing, prescribing or prohibiting certain behavior, which is expressed by the phrase: "something must /or must not/ be or happen". The effectiveness of a norm refers to the sphere of being. It is expressed in the fact that the norm is actually applied and observed, and that people actually act in accordance with this norm. Kelsen saw the connection between reality and the effectiveness of a norm in the fact, that a certain minimum of effectiveness is a condition for its validity. "A norm that is never applied or observed by anyone, that is not effective in any way, even in the slightest degree, is not considered a *valid* legal norm" [12, p. 245]. H. Kelsen expresses that the priority of effectiveness over the validity of a legal norm is a reflection of his positivist position, which did not allow going beyond the positive law and did not take into account a more universal criterion – justice.

The conceptual basis for the modern interpretation of the relationship between justice and efficiency is the idea of different types of social obligation, and the corresponding normative and critical concepts. O. Höffe [9, p. 108], for instance, identifies the following three levels of obligation and evaluation:

1. Mandatory, which is instrumental in nature. It is limited to technical and strategic issues, and concerns the assessment of only tools, ways and means, not goals and objectives. When evaluating something as "good", it means "good in relation to something". The main form of evaluation at this level is efficiency.

2. Mandatory, which is pragmatic in nature, i.e. focused on well-being (good). Here, goals and objectives are subject to evaluation. At this level, "good" means "good for anyone". There is also an individual pragmatic evaluation, which means the good of an individual, and a social pragmatic evaluation, which refers to the good of a group. The extreme positions here are egoism and utilitarianism.

3. Obligations of a moral and ethical nature. It goes beyond the technical and pragmatic dimension, and refers not to means and ends (aims), but to values. *Justice* refers to *this* higher normative level, or to the sphere of duty.

Thus, legal and state phenomena (actions and their subjects, laws and rules, institutions) can be assessed as positive and negative: a) in the technical sense (effective – ineffective), b) in the pragmatic sense (useful – harmful), c) in the moral sense (just – unjust).

The effectiveness of legal institutions expresses the correlation between the goals of these institutions and the result of their action. The goals of these institutions can be understood as extra-legal goals, such as economic, political, and ideological goals. In this case, institutions and law as a whole are understood only as tools for realization of some higher goals. However, in accordance with the new realities of today, it should not be a goal external to law, but an inherent goal, which is to harmonize social interests on the basis of the law-forming interest. In this way, the maximum possible overall degree of freedom is ensured for the development of the relevant sphere of public life.

In terms of correlation between justice and efficiency of political and legal institutions, the principles that are the minimum conditions for the effectiveness of the modern legal system are of particular importance. According to the American legal philosopher L. Fuller, these principles are as follows: 1) generality of rules; 2) openness, accessibility of the law to those to whom it applies; 3) predictability of legal action, general prohibition of retroactive effect of the law; 4) clarity and comprehensibility of the law; 5) absence of contradictions; 6) absence of unrealizable requirements; 7) constancy in time, stability, absence of frequent changes; 8) correspondence between official actions and the declared rule [13, p. 76]. These principles are nothing more than "procedural natural law", or the principles of "rule of leges" as one aspect of the idea of "rule of law", which is recognized as an important regulatory ideal for Western legal systems.

It should be emphasized that in relation to law, efficiency is understood somewhat differently than in relation to economic or political activity. For law, efficiency is not related to any substantive result. Therefore, these principles make sense only where a person is recognized as a rational and goal-oriented subject, i.e. in a democratic rather than totalitarian society [14, p. 129]. This creates favorable conditions for purposeful creative activity, since the latter is possible only in the context of a social order based on the observance of clear and proclaimed rules by society, i.e. under the rule of law.

The most important applied aspect of the problem of justice is also the question of whether it belongs to universal values or not, whether the principles of justice are universal, or whether the question of them should be resolved within each culture individually. Since justice is the essence of any right, the basic legal value, the question of the relationship between the universal and the culturally specific in its content – in relation to law – can be specified as the question of the relationship between international and national law.

In the classical philosophy of law, the principle of the priority of international law over domestic law was most consistently defended by Kant. This principle was justified by him from the standpoint of universalist (universal humanitarian) ethics of justice, which emphasizes the rights and duties of all. The Kantian idea of a world civil order, or "eternal peace" within a confederation of legal-oriented states, was based on the same grounds. However, different views and concepts of justice can be compatible with respect for the rule of law, though at the same time, "the rule of law" does not always guarantee the undisputable fairness of laws.

**Conclusions.** Justice appears as a moral criterion that is applied to the state as a mechanism of domination. Within the framework of the problem of justice, the question about the conditions and principles of legitimization of the state is resolved. The main condition for

legitimization is fair contract, as a model of mutually beneficial voluntary obligation. This is not a formal agreement, but a metaphor for a social contract, in its understanding in classical liberal thought.

A social system is only viable in the long run when effective means of achieving social goals are compatible with the requirements of justice. In the absence of a measure and social consensus about what is fair and what is unjust, it is more difficult for individuals to coordinate their plans to achieve mutual benefit. Mistrust and resentment erode the feeling of respect for one another, then suspicion and hostility tempt people to act in ways that should be avoided. Unjust political and legal institutions cannot ensure harmony, and lose their legitimacy.

Thus, among all the goals of the axiosphere of social dialogue, justice is a priority; it is an unconditional value that cannot be sacrificed for considerations of efficiency or level of organization. The notion of justice as the highest virtue in the categories of state-organized society appears as a categorical imperative. Due to the fact that justice is a measure of the moral dignity of power, it is a prerequisite for the moral recognition of power by its subjects, respect and trust in it, which implies efficiency and legitimacy.

From the standpoint of the classical liberal philosophy of law, the concern for justice should be unconditionally put at the forefront of all government actions. Any other goals and objectives are secondary, subordinate to it. The government can only hope that its observance of justice will objectively serve as a means to economic, social and cultural progress, but it should never consider and practice justice as a mere means to these ends. Justice can only contribute to progress if it is placed *above* any progressive aspirations, and is pursued by the government as its first moral obligation.

The development of *criteria of justice* that are shared by all members of society is the result of long and frank discussions, which should contribute to the constitutional (real, not declarative) consolidation of these principles. The problem of correlation between the priorities of the rule of law and the social state naturally arises. Thus, the ultimate goal of political and legal institutions is to ensure their *fairness*, and the effectiveness of their functioning is a means to achieve this goal. It is justice, and not some external goals, that constitutes a condition for the effectiveness of political and legal institutions. Any major social reform should be preceded by measures to ensure legal justice as a prerequisite for its success. Only in this case, it will meet the approval and support of citizens. The connection of political justice with social institutions determines the applied aspect of the theory of universal justice.

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14. Bernstorff J., Dunlap T. (2010). The public international law theory of Hans Kelsen: believing in universal law. Cambridge: Cambridge University Press, 324 p.

**Стовпець Олександр Васильович**
доктор філософських наук, професор,
професор кафедри кримінального і адміністративного права,
професор кафедри філософії
Одеського національного морського університету
вул. Мечникова, 34, Одеса, Україна
orcid.org/0000-0001-8001-4223

**Куліченко Володимир Вікторович**
кандидат філософських наук, доцент,
завідувач кафедри філософії
Одеського національного морського університету
вул. Мечникова, 34, Одеса, Україна
orcid.org/0000-0002-3761-6330

**Стовпець Василь Григорович**
кандидат філологічних наук, доцент,
професор кафедри кримінального і адміністративного права,
директор Центру освітніх послуг
Одеського національного морського університету
вул. Мечникова, 34, Одеса, Україна
orcid.org/0000-0002-2354-2852

# КОНЦЕПТУАЛЬНІ МОЖЛИВОСТІ ФІЛОСОФСЬКОГО ТА ДЕРЖАВНО-ПРАВОВОГО ДИСКУРСІВ УНІВЕРСАЛЬНОЇ СПРАВЕДЛИВОСТІ

*У статті досліджується потенціал філософського та державно-правового дискурсів щодо концепту універсальної справедливості. Справедливість є моральною категорією і цінністю, і при цьому вона займає пріоритетне місце у критичній оцінці й легітимації правових інститутів. Закон є хорошим тому, що справедливий, а не справедливий тому, що хороший. Справедливої поведінки ми не просто очікуємо від інших, а вимагаємо один від одного. В силу цього справедлива поведінка визнається найбільш соціально-значущою і найбільш цінною (з погляду права) з усіх чеснот. Справедливість застосовується і в якості критерію у питаннях розподілу благ, що дозволяє виокремлювати такі грані справедливості, як «розподіляюча» та «урівнююча». Призначенням справедливості традиційно вважається підтримання та відтворення рівноваги, або рівної міри. Вона застосовна як для критичної оцінки поведінки людини, так і для критики самих цих правил та практики їх застосування, тобто для оцінки діючих інститутів. Сутність т.зв. формальної справедливості полягає в послідовному, неупередженому, об'єктивному застосуванні правил. Реалізація принципів формальної справедливості робить соціальні інститути значною мірою справедливими завдяки їхній легітимації через суспільну свідомість. Однак повної тотожності між формальною справедливістю і справедливістю як такою не настає. У той же час загальним і безумовним моментом всіх сучасних концепцій справедливості є ідея універсальних прав людини. Справедливість розглядається в якості морального критерію, який застосовується в аналізі сутності держави як способу панування. У рамках проблеми справедливості вирішується питання про підстави і принципи легітимації держави у відносинах із громадянами. Умовою достатньої легітимації виступає суспільний договір як зразок взаємовигідного добровільного обоюдного обов'язку. Зв'язок політичної справедливості з соціальними інститутами обумовлює прикладний аспект теорії справедливості, який виражається в аналізі співвідношення справедливості та ефективності цих інститутів.*

***Ключові слова:*** *концепт справедливості, мораль, право, етика, ефективність, легітимація, універсалізм, суспільний договір.*