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Tolerance as a law and legal value

Abstract

Despite the fact that the term "tolerance" came into use relatively recently, tolerance itself as a legal and juridical value has long been the subject of research by many philosophers and theorists. Moreover, it has even been reflected in international legal instruments, for example, the Declaration of Principles of Tolerance of 1995. Tolerance is often associated with religious or moral views, actions. In this respect, tolerance is evidence of the nobility of man, his high moral culture, humanity and civilization in society. In all major religious and ethical systems, the theme of tolerance occupies an important place. It is an important political tool and influences the adoption of important decisions of state importance in the activities of high-ranking officials. The existence of any legal system is impossible without the principle of tolerance. Law is always a measure of freedom in society, and tolerance determines the limits of this freedom. Of course, in different branches of law, the principle (requirement, imperative) of tolerance manifests itself in different ways. For example, in relatively young constitutional law, tolerance is closely linked to political freedom, ideological pluralism, and cultural diversity in general. Undoubtedly, tolerance is one of the greatest legal values that every conscious citizen must cultivate in order to ensure wise decisions, avoid conflict situations, and proper legal interaction.

Keywords: tolerance, civil society, respect, law, value.

Introduction

The concept of "tolerance" has an extremely long history of its formation and in the modern sense means the ability to perceive the thoughts, behavior, forms of self-expression and lifestyle of another person, which are different from their own, without aggression. As a social phenomenon, it emerged in Western civilization at the religious level after signing the Edict of Nantes.

The basis of modern tolerance is openness of thought and communication, personal freedom of the individual and evaluation of human rights and freedoms. Tolerance is an active position of a man, not passive tolerance to environmental events. It does not necessarily mean that a tolerant person should tolerate human rights violations or manipulation and speculation. What violates universal morality should not be tolerated. Therefore, a distinction should be made between tolerant behavior and slavish tolerance, which does not lead to anything good. It is necessary to carefully distinguish these concepts, because manipulators (including most politicians) call for false tolerance, because people who are loyal to everything are easier to be managed and guided.

Tolerance as a social phenomenon was studied by such thinkers as F.M. Voltaire, John Locke, Dzh. St. Mill, P. Reeker, M. Luther, E. Rotterdam, G. Lessing, J.-J. Rousseau, T. Moore, M. Dammit, N. Bobbio, D. Hyde. This notion was also analyzed by V.T. Busel, D.N. Ushakov, V. Mironov, K. Sparrow, K.A. Panchenko.

Research methods

The study was based on the following research methods: *historical and legal method* helped to identify the essence of tolerance during its development and formation; *systemic method which* contributed to the study of patterns and architectonics of tolerance as a legal phenomenon and legal value; *anthropological method* demonstrated the "human nature" of tolerance; *comparative method* allowed to determine the independence of this phenomenon in comparison with others; *formal-dogmatic method* allowed to clarify the meaning and significance of tolerance in modern society.

The aim of the article is a comprehensive study of tolerance as a legal phenomenon and legal value.

Research results

Today, the topic of legal values in domestic jurisprudence has already passed its Rubicon It became especially widespread at the end of the last and the beginning of this century. Axiological and legal studies or their elements have become forms of "good manners" in the study of legal phenomena. The articulation of the axiological theme and the theme of legal values, in particular within the domestic legal space, was a response to the challenge of contemporary legal science and under the influence of the development of axiological issues in other areas of social science. It should be noted that the concept of "value" in the European cultural space has gone from religious through ethical and aesthetic to ontological, epistemological, methodological and instrumental content. As N. Bobbio once pointed out: "The ideal of tolerance arose only after centuries of brutal religious wars". As for tolerance as a legal value, it "sounded" only in the XXI century, giving rise to even the category of "legal tolerance"[1], which is understood as "a tolerant attitude towards otherness, mediated by legal reality".

The analysis of the scientific literature on the stated problem showed that today in domestic jurisprudence the distinction between tolerance as a value and tolerance as a legal phenomenon, legal and juridical tolerance is insufficient, due to the multifaceted nature of this phenomenon: instruction, both as a norm

[1] Panchenko K., *On the concept of legal tolerance*, "Bulletin of the Ministry of Internal Affairs of Russia" 2017, No. 4, pp. 22–27.

of social action and as a political necessity. Tolerance is manifested in various spheres of society (moral, legal, political, religious, economic, etc.)[2].

Differentiation of concept and phenomenon that affects them is quite a difficult process and the result of serious mental activity. Considering the chosen subject of research (the concept that denotes the phenomenon or the phenomenon itself) it is necessary to mind the content of each specific scientific intelligence. It is clear that the research of the phenomenon will be dominated by empirical and substantive aspects and they will be examples of ontologically oriented works, while a high level of generalization and techniques of abstract thinking will be presented in studies of the concept of a particular phenomenon and these studies will have epistemological content. This is exactly what G. Lotze remarked in the 19th century, separating the sphere of value definition from the sphere of phenomena of reality (facts) and their cognition (truths) and giving the concept of "value" a categorical meaning that is important both for being and for cognition[3].

What do we have in the case of tolerance in law? For the first time the category of "tolerance" in the legal field sounded only in the late twentieth century. This happened on November 16, 1995, when the "Declaration of Principles of Tolerance" was adopted at the twenty-eighth session of the UN General Conference on Education, Science and Culture in Paris. In the text of this document, tolerance was proclaimed as a necessary condition for peace and socio-economic development of all peoples, an important principle of society. Tolerance was defined as "respect, perception and understanding of the rich diversity of cultures of our world, forms of self-expression and self-expression of the human personality; unity in diversity; what makes peace possible facilitates the transition from a culture of war to a culture of peace"; "Tolerance is not concession or indulgence. Tolerance is, first of all, an active position formed on the basis of recognition of universal human rights and fundamental freedoms. Tolerance can in no way be an excuse for encroachment on these core values". It is significant that tolerance in this text has no legal emphasis, it is proclaimed as a condition, a factor, a context for self-realization of the subject (and the collective in particular — culture, people, etc.). Later, "tolerance" will become a worn-out coin for all areas of social sciences and humanities.

On the one hand, we regard tolerance as a value, and on the other, as a phenomenon. Considering the second point of tolerance in law, a significant part of the publications is devoted to it, which scrupulously describes the relationship between tolerance and various types of discrimination, tolerance and

[2] Mironov V.G., *Tolerance as an existential state of the person: social and philosophical aspect: dissertation of the candidate of philosophical sciences: 09.00.11*, Ulyanovsk 2003, http://www.dslib.net/soc-filosofia/tolerantnost-kak-jekzistencialnoe-sostojanie-cheloveka-socialno-filosofskij.html.

[3] Panchenko K., *op. cit.*, pp. 22–27.

legal equality, tolerance and the requirements of tolerance for otherness, and so on. In this aspect it is a question of carefully worked out social matter and classification of antipodes "tolerant — intolerant". To prove their rightness, the authors refer to the rules of international documents and provisions of domestic law, as well as indicate the ways and means of implementing the rules of international law in terms of tolerance in the domestic legal reality. Which actually means: "The manifestation of legal tolerance through legal permission can be reflected directly in the formulated text of the normative act or follow from a set of legal norms. Thus, the permit as a way of legal regulation allows to promote the establishment of human rights and law and order by revealing the subject of tolerance. The limits of permissible behavior other than permission are determined by prohibitions. In turn, permits and prohibitions are organically the same"[4]. Attempts to "make" tolerance a legal phenomenon are also guidelines for representatives of various legal specialties and law enforcement. It should be borne in mind that the texts of such recommendations contain specific algorithms for both language and behavior.

Thus, tolerance appears as one of the system-creating and architectural elements of social reality, which must be organized, regulated and protected by current law, the order of inter-individual relations, i.e. legislation.

Then, another question arises: is tolerance a legal value if it needs to be protected by legal means and instruments? Obviously, this question needs a reasonable and detailed answer. To answer this question, we need to make another digression. The vast majority of lawyers and jurists do not differentiate between the concepts of "law" and "legal". This distinction of real existential forms of law is presented in the field of philosophical and legal research and is focused on the metaphysical comprehension of the essence of law. Without going into the details of the problem, we emphasize that "legal" means "secondary" system of inter-individual regulations, and "legal" refers to the written, sanctioned by the state, the will, which is given through the system of current legislation. According to this approach, it becomes clear why tolerance is distinguished as a legal and juridical value. Legal values are also called instrumental, technical values.

Tolerance as a legal value, i.e. a requirement enshrined in legal documents. It is a precautionary tool aimed at requiring compliance with prescribed algorithms of behavior in cases where society does not work tolerance as a legal value, because "[…] where external relations come into play with other persons, where a person by his actions interferes in the legal sphere of another person,

[4] *Ibidem*, pp. 24–25.

the state can and should act with its right"[5], but tolerance as a legal value cannot be a "constitutional consensus" codified in law as a civil law[6].

As for tolerance as a legal value, the formulation and consolidation of which takes place in the provisions of positive law, it is actualized when the society does not work ideological and ideological guidelines, one of which is tolerance as a value (including as a legal, this is what you can explain the legislative enshrinement of religious tolerance). We are talking about the formation of rational, enshrined in regulations notions of tolerance, which today are mainly based on the idea of human rights and other liberal values[7]. Tolerance as a legal value, in terms of content and technical functions, is closely related to the political. At the present stage, this is reflected in the political courses of states, taking into account globalization processes, in particular, it is presented in the realities of today's Ukraine: "The Union is based on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States, in a society dominated by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men"[8].

If we talk about tolerance as a legal value, we need to go beyond the current legislation and other political and legal phenomena. In the sense of legal value, tolerance is an organic component of law as a cultural phenomenon, and therefore: "The relationship between law and tolerance is deeply substantive in this sense, because they appeal to common cultural codes. Human rights-oriented law, as well as tolerance, is possible only in a culture that carries the ideas of tolerance. And vice versa: tolerance is possible only in those communities where respect for human rights is a social maxim, as it is impossible to question"[9]. Thus, tolerance as one of the elements of culture is the code of this culture and the mentality of the bearers of this culture. And this, in the course of further reflection, leads to the conclusion that tolerance as a legal value and cultural code is organically connected with legal, religious and moral realities.

From such positions, the fact of formation and consolidation of tolerance as a legal value in society is obvious, it is formed on the basis of "natural" chan-

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[5] *History of the European mentality*, ed. P. Dinzel Bacher, Lviv 2004, p. 512.
[6] Shebzukhova F.A., *The mental foundations of tolerance in a multi-ethnic society: dissertation of Doctor of Philosophy: 09.00.11*, Rostov-na-Donu 2004, p. 3.
[7] *Ibidem*, p. 3.
[8] Hapunenko A.V., *Tolerance as a criterion for accession to the European Union*, [in:] *European integration in the context of modern geopolitics: collection of scientific articles based on the materials of the scientific conference*, Kharkiv, May 24, 2016, Kharkiv 2016, p. 299.
[9] Horobets K.V., *Axiosphere of law: philosophical and legal discourse*, Odessa 2013, http://dspace.onua.edu.ua/handle/11300/1908.

nels — educational practices in the family, religious organizations, educational institutions, media, and not through the tools of positive (legal) rights.

In this sense, tolerance is part of the value-ideological range of a particular culture: "Tolerance involves not just concessions or indulgences to other religious, gender or national characteristics of people, but, above all, the recognition of each individual as equal in human rights and freedoms, i.e. tolerance requires an active civil position to protect everyone's right to their cultural identity"[10].

However, the main problem of tolerance lies in the relationship of this concept with respect. Respect is the pinnacle of an individual's activity, dictated by his actions, not by his high status in society, and tolerance is a path to true respect that cannot be instilled by force.

Along with tolerance, one should cultivate compassion for others, which is an expression of external and internal freedom, as the ability to make informed choices between alternative points of view and ways of behaving.

It is important to emphasize that tolerance of another's point of view does not mean abandoning one's criticism or one's own beliefs. It means recognizing pluralism. Tolerance is especially needed in those areas where there is no precise criterion for assessing and proving the superiority of any views, principles or decisions (whether it is a matter of religious faith, moral beliefs, national traditions, etc.).

Tolerance as a legal value has a deep moral content, because it exists only where the Other is recognized as the same value as I am, despite the presence of n-no number of differences between us.

The idea of the Other as a full-fledged subject of law is the basis and foundation of tolerance as a legal value. Cultural studies only confirm this position. For medieval Europe, tolerance as a legal value is obvious and sufficient for the architecture of living space.

Christianity establishes a single scale in the normalization of the behavior of believers, which is equality in God. In fact, in Christianity tolerance is clearly represented as a legal value: everyone takes his place in the natural order of things created by God; each is self-sufficient and at the same time equal to other Christians, regardless of gender, nationality and age (the Apostle Paul said: "There is neither Jew nor Gentile; there is neither slave nor free; there is neither male nor female; for ye are all one in Christ Jesus").

The modern interpretation of tolerance as a legal value can be represented as a conscious and accepted right of the Other to be the same subject of law as You, regardless of its specific features. Another is also a Man like you. To paraphrase W. Schild, it can be argued that tolerance as a legal value can be effective provided that each member of society builds its behavior on their inner

[10] Bachynyn W.A., *Moral and legal philosophy*, Kharkiv 2000, p. 207.

convictions, conscience, realized in the recognition of the dignity of the Other, freedom of conscience of the Other, recognition of free territory as the right to develop one's personality[11].

Tolerance as a legal value can be a concretization of tolerance as a socio-cultural value, which focuses on the recognition of the right of another person to be different. Tolerance is the art of living with dissimilar people, as cultural diversity is growing, including religious and ethnic diversity. We generally live in a world of diversity. Tolerance as a civilizational norm in a world of diversity helps us, on the one hand, to remain ourselves and, on the other, to enter into dialogue with other cultures and to accept all that they are rich in. This is the key to the development and stability of any system. Therefore, tolerance is not just good wishes, not only kindness. In fact, it is an evolutionary norm that helps man to be human[12].

It should be noted that when talking about tolerance as a legal value, it should not be said that it is inherent in birth. Of course, it needs to be educated by improving its level of legal culture, general education.

Conclusions

As an important element of the culture of communication, tolerance is nowadays a necessary condition for the social unity of people of different beliefs, cultural traditions and political ideas. In this respect, it acts as a unity of spontaneously-negative perception of another (rejection, condemnation) and positive her actions; tolerant acceptance is not the same as indulgence in another or forced reconciliation.

Tolerance as a legal value is the result of the free choice of the subject, and as a legal value it becomes the bearer of coercive measures of influence. Tolerance is often seen as a legal value in tandem with equality. Again, it is the equality of free subjects of law within the current legislation. The current legislation is changeable in time and space, is the result of the voluntarism of authorized persons and bodies, which brings subjectivism to the legal norms on tolerance.

Tolerance is a key moral principle of civil society. At the same time, experience shows that absolute tolerance opens the way to arbitrariness and violence; so that under no circumstances should tolerance turn into indulgence in evil, in particular tolerance of encroachments on liberty and moral dignity. Tolerance as a legal value, by and large, is the other side of tolerance — the legal value. Tolerance as a legal value is the result of the free choice of the subject, and as

[11] Lotze G., *Fundamentals of practical philosophy* [translated from German by J. Ogus], St. Petersburg 1882, p. 52.

[12] Asmolov O.G., *From the culture of usefulness to the culture of dignity*, http://newacropolis.org.ua/articles/vid-kultury-korysnosti-do-kultury-hidnosti.

a legal value it becomes the bearer of coercive measures of influence. Tolerance is often seen as a legal value in tandem with equality. And again, the equality of free subjects of law within the current legislation. The current legislation is changeable in time and space, is the result of voluntarism of authorized persons and bodies, which brings subjectivism to the legal norms that are dedicated to tolerance.

Thus, the concept of "tolerance as a legal value" in the legal field and jurisprudence is relatively new, although the very phenomenon of tolerance has a long history of existence. Tolerance as a legal value is a concretization of the moral value of the Other, and thus a socio-cultural heritage and a guideline in regulating interpersonal relations, as it can guarantee comfortable coexistence of members of society, which is based on the ability to see and perceive otherness and value of the other subject. Formation and "effectiveness" of tolerance as a legal value as a manifestation of cultural pluralism, religious tolerance, respect and acceptance the Other happens in the process of education and self-education, the influence of the media, state ideology

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