УДК 340.1
ГРНТИ 10.07.27

О НЕОБХОДИМОСТИ ИЗУЧЕНИЯ И ПРЕПОДАВАНИЯ ФИЛОСОФИИ ПРАВА В СОВРЕМЕННОМ МИРЕ

Иванов Александр Михайлович
канд. юрид. наук, доцент кафедры теории и истории
государства и права Юридической школы
Дальневосточного федерального университета,
г. Владивосток
E-mail: Ami_25.07@bk.ru

IS TERE STILL THE NEED OF STUDY AND TEACHING OF PHILOSOPHY OF LAW IN THE MODERN WORLD?

Aleksandr M. Ivanov
Dr. of Law, Assistant professor of Chair of Theory &
History of State and Law,
Law School of Far Eastern Federal University,
Vladivostok

АННОТАЦИЯ

Четкое понимание природы и сути права позволяет не только выработать правильное определение данного явления, но и сформировать адекватное отношение к нему всех слоев населения, укрепить их консолидацию в решении социальных проблем, способствует участию населения в реализации прав человека, строительстве «правового государства», полагает автор, приглашая читателей к осмыслению этой проблемы.

ABSTRACT

The clear understanding of the nature and essence of law allows not only to elaborate a correct definition of that phenomenon, but to develop an adequate attitude toward it by all the layers of the population, to strengthen their consolidation in solving social problems, helps to involve the population into taking part in realization of human rights, and in the construction of ‘ruling law’

state /Rechtsstaat as well, supposes the author of the article, inviting the readers to consider of that problem.

Ключевые слова: мораль; право; естественное право; позитивное право; права человека; правовое государство; философия права.

Key words: law; morality; natural law; positive law; human rights; 'ruling law' state; philosophy of law.

"The ancient science ever young –

About sense of words

And of the righteous way,

Which turns a human being to a Man,

Lets us 'unjust' from 'just' divide

Without mistake".

General subject of philosophy of law. One of the main, if not the main, question - for the lawyers, law obedient citizens, politicians, even for the law offenders/ breakers etc., that is, for everybody, in every country is – "What is the Law"? Through the centuries people had noticed, that everything and every being in the world exist as the thing or the being itself and – as a part of the surrounding world. And the life of a thing or of a being goes in strict accordance with some relations or/and rules. Participation in relations with the outer world makes a thing or a being to a subject or to an object of relations, where it either influences the other things or beings of the world or itself undergoes some influences from other parts of those relations. And people also noticed, that following or not following the rules of the world causes different consequences. So that, the following the rules brings all the things and beings into some harmony, where not observing the rules may cause a damage, loss, harm. The dimensions of the damage depend on the degree of deviation from the rules of relations, from the "course of life". Those rules were called by some scholars "Universal Law" **[2]** or "Natural Law" **[11]**. One of the living beings, called "man", was not always satisfied by being sometimes an object of relations, and preferred to be acting only as a subject of relations, especially in relations with 'not living' things or beings. He tried to compose his own rules and make live other

beings as well as the "representatives of the kind of his own"/ relatives, according to the rules which, he thought, might satisfy him more, even if his rules contradict to the rules of the "universal law". Such rules, set by the "man", were called "positive law" **[9; 10]**.

As we see, even from the names of those "laws", they correlate or correspond to each other as "the law which cannot be changed, unchangeable law" (Universal), because it was set by the Super Power, independent of the will of human beings, and – "the law which can be changed, changeable law" (Positive), because it is being set depending on the will of human beings. Why should we distinguish both of those Laws? Because they may not coincide with each other, and making "positive" rules without taking into account the rules of "Natural law" may cause a serious harm for the mankind, even fatal, lethal.

So, if the "Universal law" does not depend on the man's will, we can only observe its action all over the world and try to adequately formulate its rules in order to avoid possible harm from not willingly disobeying them. It means, we have to pay attention to what happens round us and use our life's experience, we can rely on the previous experience, making prognosis for the future. And that, in its turn, ensures some self-confidence, allows people to feel comfort in relations with the outer world.

Not such a case is with the "Positive law". Here we can never rely on our life experience, can never pre-suppose the results of its rules, because they can be changed at will of the ruling party at any time. And the "will of the ruling party" highly depends on the temporal interests, dictated by the desire to keep the power in its hands.

It is clear, that the understanding and making understanding of law can be different by many reasons. First, as we know, there are different social groups, having different level of education, social and life environment, social and existential goals (including carrier), cultural development **[11]**. In other words, "philosophers of law recognize that it is one thing to be familiar with laws and legal systems, but it is

another to be able to analyze the concept of law" **[10]**. It is also one thing for a judge or lawyer to use legal reasoning, but it is something else to stand back and describe legal reasoning. It is one thing to hold persons legally responsible for their actions but something else, to be able to say what responsibility is **[8,38; 10]**. Philosophical inquiry has immediate effects on life and conduct. One can notice, that "judges who study legal reasoning are likely to carry out their job with heightened awareness of the resources appropriate to decision making. They will be more likely to engage other judges in debate about the purposes of legal systems, and about the limits of their own job in realizing those purposes. The citizen who has looked into the nature of responsibility may not be more responsible, but he or she will come to appreciate the dilemmas and compromises of criminal law and the complexity of human conduct" **[10]**.

Even a brief look at the "problems of legal philosophy shows us that many of them are problems of normative political philosophy". This means that they involve inquiry into what the relationship between persons and governments ought to be. In recent time some writers argue that governments exist to benefit their citizens and that any governmental action is justifiable to the extent that it contributes to general well-being. Others, and they seem not to be in minority, argue for a more limited role for government. They say that individuals are to be seen as having rights and that the actions of governments are limited by these rights. No action is justifiable if it interferes with the enjoyment of rights. In this view, governments exist to see that rights are protected and to promote wellbeing only when doing so does not involve infringement of rights. "To say that one has a "legal obligation" is to say that his case falls under a valid legal rule that requires him to do or to forbear from doing something" **[8,38].** To say he has a legal right, or has a legal power of some sort, or a legal privilege or immunity, is to assert, in a shorthand way, that others have actual or hypothetical legal obligations to act or not to act in certain ways touching them **[ibid].** Both of these theories, the theory of rights and the theory of maximal benefit, give primacy to individuals and argue that governments exist to serve individuals. Other theories, and to our opinion even more – practices, give priority to the state as

an end in itself. Such political theories have direct implications for the decisions of judges and legislators **[10,1,2].**

So, some of the people need to know the essence of the Law in order to *obey* it properly so that not to be punished, others – to *avoid*, and again so that not to be punished for that avoidance, thirds – to *manipulate* the behaviors of others, ruling them… Thus, we can hardly find anyone who never in his life had thought of the law.

But the scholars study the law from the universal point of view, so that to understand and to make understand it by the citizens helping them to avoid possible harm as a result of disobeying the "universal law". Some notice, that the condition of the modern philosophy of law during the recent decades is considered to be critical or – being politically more correct – transitional **[7,69].** Though, the "main question" of philosophy of law has still remained the same – comprehension of the essence of law, understanding of law. "Where is the criterion of justice of the law?" – is another additional question of philosophy of law, following out of the main question. And on the decision of that question depends the destiny of an individual: very often a formal obeying the law in a specific case obviously infringes the principle of justice or that of humanism **[5].** However, at the end of the 20th century in connection with post-modern deviation in philosophy and social science a new crisis occurs: the philosophy of law under conditions of axiological relativism loses its significance for development of legal principles. The representatives of modern western "intellectual elite" mention about an increase of the crisis in the European legal tradition, change of paradigm, epochs of law development of western countries **[ibid].** Though it should be noticed that the discussion concerning the essence of law forms the law itself, constructs its essence, thus philosophy of law constitutes by itself a means for construction of legal reality as a part of social reality **[5; 3].**

Legal education without philosophy of law? Actually, as it was mentioned above, the relations between human beings contain an indivisible ball of legal, moral, political, religious values and aspirations. The law does not give in to only one measure, to one and only correct definition, remaining imperceptible in the act of

scientific rationality and reflection. Its intuition is defined by those national and cultural images of sense, which a man absorbs from childhood. Thus juridical education, moving on and on away from philosophic and cultural context of the law in direction to legal positivism, that is that volume of education in humanities, to which the modern educational standard is restricted, going on and on away from the reality of human's life, creating a virtual system of senses of official law in prevailing system of social values **[5; 9; 11].**

There is an opinion **[5]**, which we do not share, that "it should be recognized, that nowadays there is practically no one own inborn, original philosophic and theoretic legal thought, the task of which could be not a blind imitation of western models, but looking for our own way of law development, corresponding to the legal Weltanschauung of Russian people" **[5, 67].** Though we accept, that "the deadlock of western European, liberal and individualistic philosophy of law becomes more and more obvious, and (to our mind – luckily) its main ideals have yet not turned to be "native" for the people of Russia" **[ibid]**.

What is it going here about? If the law appeared as an outer regulator, reinforcing itself by coercion and force, then could the person in our time become up to the limit egocentric and irresponsible? This problem is not new for our time. Quite for about a hundred years ago, in the very beginning of 20th century, a famous crime researcher, Henry M. Boies, seeking the effective methods of positive influence on criminals, in the foreword of his work on Penology wrote such words: "The more familiar one becomes with the details of the attempts of the society to secure protection from criminals, from early times to the present, the more profoundly he is likely to be impressed with their inordinate cost and their inutility. Notwithstanding our tremendous expenditure of effort and money, crime continues undiminished, and popular apprehension unrelieved. The laws do not protect" **[4].** And as a calling through the 20th century we hear till now: "When a great social grievance exists, it becomes everyone's duty to endeavor to discover its cause and cure. This responsibility has been very generally recognized". Before that time, and since his

words were issued, a lot of books, scientific studies have been published which have so expanded our knowledge that it appears possible to propose a complete solution of the problem. Yet the problem takes its greater dimension.

One could think, why then at present time, since more than one hundred years, the scholars continue their studies, seek for the most effective influence on the criminals, and develop new and new laws? For sure, the pessimism, which ruined Boies, at our days has obviously much more grounds. Does it mean then, that we should stop the experience of law studies, including crime studies and of methods of influence on it? We think, just on the contrary. The studies should take more covering scale, because at the present time we observe more and more integration of countries during the process of globalization. Interpenetration of legal systems has its noticeable advantages, though not without some lacks. But the hope for that the study of a positive experience of influence on the crime will give its positive results, also grows up. Why? Because the culture takes a unifying character. Following the tendencies in mass media, we can be convinced, that consumer needs are almost all already leveled. Similar tendency is noticed in the condition of spiritual needs. Thus, the influence is supposed to be more and more unified.

"National" vs. "international"? In the recent time very often, when speaking about the international process of democratization, the key link of which is the problem of human and citizen's rights, the term "universal values" is used. Say, just the availability of "universal values" dictates that or another behavior of governments of different countries, including Russian Federation. Moreover, such a behavior of the government had been even legally established in the article 15 of the Constitution of RF of 1993, where it says about the priority of international norms (i.e. "universal values") before the national norms. Let us record for ourselves this premise: by this, it is declared that the "common" ("international") prevails comparing to the "private" ("national").

It is known, that the law, as regulator of social relations, appears there, where, figurative speaking, there are at least two of human beings. In the society, as in one and unified organism, with diversity of individuals, it is now unthinkable how to get

the social life going without such a regulator. Small societies (micro-sociums, social groups, collectives of workers) have their own rules of common living. Bigger societies (macro-sociums) have already to take into account the diversity of their components, i.e. of micro-sociums, social groups etc. And, if when developing unified norms within the frames of more or less homogeneous in ethnic, religious, racial etc. structure of society (e.g. Korea, Japan, Germany, Spain et al.) due to that same homogeneity there are no specific problems, where then in the countries with multi-national, -confessional, -racial etc. societies (e.g. Russia, China, India, Indonesia, USA) even the development of inner law norms gets a rather difficult character. A corresponding taking into account that diversity within certain unity for successful decision of the task here presupposes some skills in regarding of legal and cultural traditions, customs of micro-sociums etc.

One can hardly question, that the modern world shows stable trend to reinforcing of interconnections between different countries and folks. And we become witnesses how today very often the ignoring of diversity even causes military conflicts, where the role of payment for an inexpert solution of such conflicts play the lives of human beings. It is clear that it is impossible to reach a situation fully without conflicts. Some suppose that conflicts are unavoidable, moreover they make the people better their conditions. Undecided problems force the society to find the most optimum decision. The task of the law is namely that to bring to a minimum the number of victims from occurring conflicts. Russian philosopher V.S. Solovyov making distinction of law from morality said in his figurative expression, that “the task of the law is not to turn the world lying in the evil into the Kingdom of Heaven, but to make all possible that it (the world) for the time being did not turn into the hell”. The point of the thought of Solovyov is made more understandable in his another expression: “The law is the lowest limit, some minimum of morality, binding for all” **[4].** The way to integration of countries is rather a difficult one and requires, apart from anything else, a new political, legal and common understanding or comprehension of reality. The law should be regarded as “a universal means to put social relations in good order and to socially control over deviating behavior”.

Prohibition as a means of social control, should be added by, though for the time being primitive one, but moral obligation to hold in check active actions. The human rights had become far more not equal for different social stratums and groups of Russian population as well as of other countries. Consequently, a twofold or even threefold scale for the evaluation of those rights can be observed. We can see an alienation of some people from the social power and merging with it of the others **[4].**

Philosophy of law in the global world. The experience of philosophy of law puts a philosopher into the role of some mediator, who tries his best to reconcile the parties in a conflict. The activity of philosophers of law on international level, within the world's socium (association) exerts a great influence upon formation of norms of international law. It might seem strange enough that European lawyers, dealing with continental law, "always preferred and welcomed the priority of statute law", while the English or American lawyers, "trying all ways to avoid the statute law", always felt themselves "more comfortable, when dealing with the case law, precedent law".

Among scholars there is an opinion, that the deficit of philosophy of law among lawyers, their enthusiasm for analysis of legal acts or statutes instead of more profound penetration into the law principles makes up a lot of obstacles on the way of a proper juridical education, fairly mentioned, that in everyday life a juridical experience at one and the same time can imply a logic form, economic interest and ethic axiological positions **[5,67].** Other scholars still believe that the turning of philosophy of law to the practice might show us a way out of the crisis. The practices of subjects of law are supposed to be mass and repeatedly occurring legally significant acts of subjects of law, formed on the basis of social conceptions about typical legal situations. They grow up as sedimentations and habitualness of an individual experience in correlation with the images of the due, which in their turn appear on the basis of law norms, methodology of application of law norms, recommendations of experts etc. Legally significant practices occur on the basis of social conceptions for law and form (or even re-form) new social images, stereotypes of law **[7,73].** As applied to the law, social conception means an image, predominant

within the given culture (subculture) of a society (or of part of it), concerning typical legally significant situation. Such an image produces categorization and qualification of a situation as a legal one – lawful or unlawful – and sets a frame for the due or proper behavior **[ibid].**

However, the law exists in a symbolic form of social conception and mass practices, realizing it. Thus, the action of law is a transformation of norms into predominant practices and personal or individual knowledge, but not juridical power of a normative legal act. The existence and activity of law – it is always activity of people who reproduce information which is contained in symbolic form of a rule of behavior. As subject of law can be a man and only a man, but not an impersonal legal status. A man in the legal reality (in legal relations) represents either himself (and in this case he is called "physical person"), or a post or an office (being public official), or a collective unity – collective subject **[7,74,75].** All mentioned above let form for some scholars a conclusion, that the 'practical turn' in philosophy of law is the most promising way to overcome the dragged on crisis **[7,75].** It should be noticed that we do not share that optimism.

Some other authors state that social relations have two sides, and accordingly, two notions for justice. On the one hand, there are institutes of marriage and family, economics and education, which are called 'objective justice' and, in the case of the law and state, - "political justice" **[1,193].** That developed countries infringe the rights of the power countries all over the world, and the references to the international law norms become unsuccessful method for finding grounds for those infringements **[1,195].** We may accept that, first, international law by itself does not lead to new obligations for justice, but international law (may and) should be the basis on which the constructions of relations of justice become possible; second, international organizations can be indeed useful in striving for justice, even in spite of the fact that they do not create new norms of justice; and, finally, international law system, as well as national one, is the main institute of justice due to its capability to define individual material resources and make influence on the vital activity of all

individuals **[1,199].** At present time the international law is often used as the means, by which some states find ground for their unjust actions towards each other, including military actions and interventions. Unfortunately, this law does not intend the foundation of some collective agent, having sufficient power to hold the states in check **[1,202].**

Conclusions. The task of the present research is limited. On the other hand, we made an effort to attract attention of scientific society, scholars and students, which could help to keeping philosophy of law between the law school educational subjects, thus contribute to mastering national legal norms as well as legal policy. Because the philosophers of law do not have a task to explain, whose law system is better or worse, they know that all the law systems are imperfect. Our goal was – looking for the ways of better regulation of social relations through mastering of our national system of law education and law system. And, to our mind, without knowing the basic principles of the law these ways will lead to nowhere.

References

1. Альбов А.П., Булавина М.А. Современное международное право и глобальная справедливость: оксюморон или новая нормальность. // Российский журнал правовых исследований. 2017. № 1(10). С.192-203. (Albov A.P., Bulavina M.A. (Modern International Law and Global Justice: Oxymoron or New Normal)// Rossiiskij zhurnal pravovykh issledovanij (Russian journal of legal studies). 2017. № 1(10). Pp.192-203.

2. Вашкевич Н.Н. Всемирный периодический закон. Введение в смысловую логику. М., 2010. (Vashkevich N.N. Vsemirniy priodicheskiy zakon. Vvedeniye v smyslovuyu logiku. Moscow, 2010. (Universal Recurrent Law. Introduction to the Logic of the Sense.)

3. Иванов А.М., Корчагин А.Г. Некоторые теоретические обоснования развития уголовного права в современной России. // Российский журнал правовых исследований. 2017. № 1(10). С.177-182. (Ivanov A.M., Korchagin A.G. Nekotoriye teoreticheskiye obosnovaniya razvitiya ugolovnogo prava v sovremennoi

Rossii (Some Theoretical Grounds of Development of Criminal Law in Modern Russia) // Rossiiskij zhurnal pravovykh issledovanij (Russian journal of legal studies). 2017. № 1(10). Pp.177-182.

4. Иванов А.М., Корчагин А.Г. Пути развития уголовного права до начала XXI века. Сравнительный анализ: монография. Lambert Publishing, 2014. 316 с. (Ivanov A.M., Korchagin A.G. Puti razvitiya ugolovnogo prava do nachala XXI veka. Sravnitel'nyy analiz: monografiya. Lambert Publishing, 2014. 316 p.)

5. Овчинников А.И. Основные направления, задачи и цели философии права: история и современность. // Российский журнал правовых исследований. 2017. № 1(10). С.63-68. (Ovchinnikov A.I. Osnovniye napravleniya, zadachi i tseli filosofii prava: istoriya i sovremennost. (The Main Directions, Tasks and Objectives of the Philosophy of Law: History and Modernity)// Rossiiskij zhurnal pravovykh issledovanij (Russian journal of legal studies). 2017. № 1(10). Pp.63-68.

6. Трубецкой Е.Н. Энциклопедия права. С-Пб., 1998. С.26-27. (Trubetskoj E.N. Entsiklopediya prava. Saint-Peterburg, 1998.)

7. Честнов И.Л. Практический поворот в современной философии права. // Российский журнал правовых исследований. 2017. № 1(10). С.69-76. (Chestnov I.L. Prakticheskij povorot v sovremennoj filosofii prava (Practical Turn in Contemporary Philosophy of Law) // Российский журнал правовых исследований. 2017. № 1(10). С.69-76.

8. Dworkin R.M. Is Law a System of Rules? // The Philosophy of Law. Edited by R.M. Dworkin. - Oxford Univ. Press, New York, 1977. Pp. 38-65.

9. Hart H.L.A. Positivism and the Separation of Law and Morals. // The Philosophy of Law. Edited by R.M. Dworkin. - Oxford Univ. Press, New York, 1977. Pp.17-37.

10. Morawetz T. The Philosophy of Law. – New York, 1980.

11. Surya Prakash Sinha. What is Law? The Differing Theories of Jurisprudence. – New York, 1989.