

Legal Understanding as A Methodological Basis of Jurisprudence

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The concept of law influences the doctrinal, legislative, and law-realization activities of the state, the strengthening of legality and legitimacy, and the unity and cohesion of society.

The purpose of the work is to analyze the basic concepts of legal understanding and formulate an author's version that can be used as a methodology of modern jurisprudence.

Material and methods. The research material was scientific and educational literature, conceptual approaches of leading pre-revolutionary and modern foreign and national authors on the problems of legal understanding, normative legal acts of the Republic of Belarus. Methodology – dialectical-materialistic, synergetic methods, including historical-sophistic, comprehensive approaches, analytical-synthetic, inductive-deductive methods, methods of concretization, interpretation of law, legal criticism, legal modeling, allowing to study the versatility of law to formulate its holistic integrative concept.

The results and their discussion. The article attempts to unify existing approaches to legal understanding from the point of view of the existing challenges facing the digital society, taking into account traditions and existing developments.

Conclusion. Law is a system of legal principles and norms, a measure of freedom, justice, democracy, equality and humanism, mutual responsibility, as a concentrated embodiment of objective social laws and patterns, an expression of the interests and needs of the people realized in a state-civil society.

Key words: law, legal understanding, methodology, state, civil society, jurisprudence, justice, tectology, comprehensive theory of law.

Правопонимание как методологическая основа юриспруденции

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Понятие права влияет на доктринальную, законодательную, правореализационную деятельность государства, укрепление легальности и легитимности, единство и сплочение общества.

Цель работы – проанализировать основные концепции правовопонимания и сформулировать авторский вариант, который можно использовать в качестве методологии современной юриспруденции.

Материал и методы. Материалом исследования послужила научная и учебная литература, концептуальные подходы ведущих дореволюционных и современных зарубежных и национальных авторов по проблемам правовопонимания, нормативные правовые акты Республики Беларусь. Методология – диалектико-материалистический, синергетический методы, включающие историко-софийный, компрекендный подходы, аналитико-синтетический, индуктивно-дедуктивный методы, методы конкретизации, толкования права, правовой критики, правового моделирования, позволяющие изучать многогранность права для формулирования холистического интегративного его понятия.

Результаты и их обсуждение. В статье предпринята попытка унифицировать существующие подходы к правовопониманию с точки зрения существующих задач, стоящих перед цифровым обществом, учитывая традиции и имеющиеся наработки.

Заключение. Право – это система юридических принципов и норм, мера свободы, справедливости, демократии, равенства и гуманизма, взаимной ответственности, как концентрированное воплощение объективных социальных законов и закономерностей, выражение интересов и потребностей народа, реализуемых в государственно-гражданском обществе.

Ключевые слова: право, правовопонимание, методология, государство, гражданское общество, юриспруденция, справедливость, тектология, компрекендная теория права.

Law is a "thing in itself" and cannot be known by science

I. Kant

Jurisprudence is the science of freedom

V.S. Nersesyants

The complexity of the concept and operation of law is that it is a product of human, biopsychosocial nature, its depth and inconsistency. Law is interdisciplinary and multidisciplinary, attractive and repulsive,

influential and neutral, uplifts and destroys, regulates and leaves room for self-regulation, establishes a rigid order and relies on democracy and freedom, it can be calculated, but it is difficult to unravel.

It is located on the border of such concepts as legality and expediency, truth and falsehood, objectivity and subjectivity, democracy and centralization, power and disorder, honor and dishonor, good and evil, legality and illegality, science and faith, legal and moral responsibility, rationalism and irrationalism.

Material and methods. The research material is scientific and educational literature, conceptual approaches of leading pre-revolutionary and modern foreign and national authors on the problems of legal understanding, normative legal acts of the Republic of Belarus. Methodology – dialectical-materialistic, synergetic methods, including historical-sophistic, comprehensive approaches, analytical-synthetic, inductive-deductive methods, methods of concretization, interpretation of law, legal criticism, legal modeling, allowing to study the versatility of law to formulate its holistic integrative concept.

The results and their discussion. The etymology of the word “law” comes from justice, truth, correctness, rules, grounds, authority, claims, norms, law, the existence of rights and obligations. If religion appeals to God, soul, faith, love; morality – to goodness, conscience, honor, mercy; art – to an artistic image, harmony, inspiration, sublime, beautiful, then law – to rights, responsibility, freedom, equality, proportionality.

The decision of a legal case is based on legal and factual qualifications, legal assessment based on internal conviction, independence and independence of the law enforcement officer. He is obliged to be guided by the materials of the case, to rely on the relevant official normative legal acts and established legal facts. A fair result includes: truthfulness, objectivity, reliability within the framework of material and procedural norms used through the prism of the category of legal understanding.

Methodology is not just a set of principles, methods, ways, and tools for cognizing reality, but above all, an epistemological and axiological process of comprehending and evaluating state-legal reality in a specific place and time. According to Prof. V.P. Malakhov, the central problem that exhausts the content of the general theory of law and the state is the understanding of law and the understanding of the state [1, p. 4].

The outstanding German philosopher I. Kant (1724–1804) believed that the question of what law is can confuse a jurist in the same way as the question of truth might embarrass a teacher of logic [2, p. 284]. From the standpoint of the Russian philosopher, jurist, one of the ideologists of Eurasianism, Moscow University Prof. N.N. Alekseev (1879–1964), lawyers

will never answer the question of what law is, just as natural scientists will not answer the question of what nature is in general [3, p. 73]. This is the main problem of all jurisprudence. Quoting Academician V.S. Nersesyanets, if “the concept of law is a concise legal theory, then legal theory is a detailed concept of law”, systematically disclosed by legal science as a whole [4, p. 158].

Despite the fact that there are more than 10 scientific schools, including about 130 definitions, this does not give grounds to assert that all its sides have been identified (especially in modern digital conditions). Until now, we do not know how this multifaceted natural and artificial, scientific and unscientific, material and virtual socio-state organism will develop.

In order for the law to be valid and working, it must be objective, real, understandable, and psychologically attractive. For it to be implemented on a mass level, you need to believe in it. All this is ensured by its sociality, nationality and democracy. The main thing in Belarusian-Russian law is the common good and personal dignity, their protection, preservation and enhancement [5, pp. 40–50].

The facets of the definition of law. The concept of law includes the following definitions:

1) norms, generally binding rules of conduct governing the most important spheres of public life created by the state (positive law);

2) inalienable, organically inherent human natural rights and freedoms coming from God, nature, reason, human birth, norms of community (natural law);

3) actually, officially existing on paper (and electronic) media normative legal acts containing generally binding, legally fixed, mass rules of conduct expressing social laws and patterns as a reflection of the interests and needs of the majority of the people (objective law);

4) the type and measure of the subject's possible behavior, his will, desire and free choice within the framework of objective law (subjective law);

5) inescapable, natural, objective, causal conditions, factors of social and state life, inevitably, automatically generating and ensuring the existence of law (fatalistic law);

6) the probabilistic generation, change and action of law, entirely dependent on the manifestation of will (“will for power”), discipline, social activity of subjects: passionaries, a personified leader of the state, the ruling elite, the electorate, their conviction, faith, willingness to overcome difficulties, go through “thorns” to the stars, the opportunity to change everything at will (voluntary law);

7) a system of objectified, institutional state-legal institutions and organizations exercising power functions (parliament, government, court, law enforcement agencies, election commissions), ensuring the functioning of the state-legal mechanism;

8) a measure of intelligence, legal conscience, feeling, democracy, morality, goodness, freedom, justice, equality, humanism, culture, civility, harmony, provided with legal protection;

9) the manifestation of “living law” through the mechanisms of the embodiment of ideal (“book”) law in practical (real) legal relations (legality, law and order);

10) law, as “the most sacred thing that God has on earth” (I. Kant), the idea (‘eidos’), which is inherent in justice, humanism, goodness, freedom, equality, publicity, effectiveness, punishment of evil, the will of the people;

11) a system of punishments, violence, courts, prisons, penal colonies, legal liability, fines, deprivations, penalties, seizures, taxes, customs payments for the organization and management, preservation of state power;

12) the system of state legal regulation, protection of law and order, legality, provision of rights, freedoms, guarantees, benefits provided by the state;

13) contradictory versatility, where law is expressed by the mathematical formula “A” to the degree of “n”, where “n” tends to infinity, and versatility does not form a conceptual and practical integrity. It has at least 87 facets like a diamond (comprehensive theory of law) [6];

14) law is a system of normative legal acts that enshrine the principles and norms of legal regulation of the most important (most important, priority, defined) public relations [7].

Law through the prism of various legal theories.

There are traditional theories of the origin and essence of law: conciliatory, theological, natural law theory (contractual), Marxist, psychological theory, historical, theory of solidarity, etc.

The concept of law can be considered on the basis of the following legal theories:

1. dialectical-materialistic – the emergence and development of law is mainly due to socio-economic reasons. This is the will of the ruling class, a form of violence, elevated to law, imposed on the masses with the help of the state machine. Economics and power generate and define law.

2. synergetic is a flexible, open, nonlinear, self-organizing, autonomous system that creates many development options, the transition of society

from order to chaos and vice versa, where random deviations (attractors) can be crucial for a non-equilibrium system;

3. communicative is legal communication, interaction between subjects who “hear” and understand each other on the basis of clarification of legal texts defining their rights and obligations, with the aim of dialogue, streamlining public relations;

4. socio-cultural anthropology is a concentrated social cross-section of human activity in certain socio-cultural conditions that regulate their behavior in socially significant situations;

5. existential is a set of intrapersonal legal experiences, insights, shocks comprehended during the period of the highest epiphany in “borderline” situations of wars, revolutions, coups, riots, pandemics, diseases, rescues, deaths, love, betrayal, the birth of a child, as a condition of true understanding, allowing “to understand everything” and make the right choice;

6. hermeneutical is a legal text (historical artifact, normative legal act, judicial decision) that exists through language and needs interpretation for uniform understanding and application;

7. comparative is a homogeneous transnational, international institution containing internationally recognized rules of conduct: normativity, formality, formal certainty, effectiveness, legitimacy, recognized and actually effective in practice;

8. tectological is an equilibrium system (A.A. Bogdanov) based on the interconnection, interaction, and cooperation of elements. This is achieved by strengthening organic unity, establishing additional connections, where formal connections are complemented by informal, natural, traditional, personal, reverse ones. A synthesis of undifferentiated economic, social, political, legal, and psychological knowledge is needed to systematize organizational experience [8, p. 10].

The following concepts of legal understanding enjoy the greatest authority among various secular legal systems of the world: natural law, normative, sociological and integrative.

The origins of the natural law (moral) system are in Ancient India, Ancient China, Ancient Greece, Ancient Rome. Its authors are Lao Tzu, Confucius, G. Grotius, T. Hobbes, J. Locke, J.J. Rousseau, A.N. Radishchev. It is based on spiritual, philosophical, religious, psychological, historical, biological, moral, material factors, human rights and freedoms. Man is the center, the crown of the universe (anthropocentrism). With the weakening of the restraining mechanisms of culture, this can generate

selfishness, individualism, consumerism, and lead to the destruction of civilization. The law is of natural character. It appeared before and independently of the state. The concept is cemented by two principles: the inalienable human rights and freedoms; and the equality of people by Nature. This is the right to life, health, freedom, equality and justice, determination of one's destiny, independence. This is a kind of ethical minimum of conscience, justice, honesty, and social responsibility that arises with a person. The state and law are obliged to guarantee them (paternalism, welfare state, "nanny state"). Natural law as an expression of divine order and providence governing the world (B.P. Vysheslavtsev).

Advantages of this concept:

1. The idea of natural, inalienable human rights, humane, careful, caring attitude on the part of society and the state, the creation of favorable conditions for the development of personality, a well-fed, serene life;

2. Restriction of arbitrary power, exploitation of the ruling class (oligarchy), struggle against authoritarianism, totalitarianism, bureaucracy, corruption, non-democracy, for freedom, equality, equal rights and opportunity;

3. Monitoring (evaluation) of positive law through the prism of the requirements of natural law, corresponding to the aspirations of the masses;

- 4 Bringing state legislation in line with the requirements of natural law;

5. The requirement for the government is to serve the people, the common good, justice, the rights and freedoms of citizens, the interests of ordinary people, and create a decent standard of living.

Minuses:

1. Lack of specificity, national, class, cultural ambiguity, uncertainty, historical variability of the concepts of "freedom", "goodness", "equality", "brotherhood", "justice", etc.;

2. Difficulty (impossibility) of implementation in a legal norm (NPA), in practice; there is no mechanism for the form, figures, implementations;

3. Myth, utopia, deception, mirage, a means of distracting the masses from the class struggle;

4. De jure does not correspond to de facto, formal equality has turned into actual inequality and exploitation of the people in the context of globalization (alienation of power from the people and the people from power, property, labor, patriotism, faith);

5. Commercialization, bureaucratization of many concepts, institutions and relations, their falsification.

G. Kelsen, the founder of the normative (positivist) doctrine, characterized natural law theory as "a verbal fiction, a chimera of imagination, nonsense on stilts".

This theoretical concept is the basis of the theory of Western liberal bourgeois democracy, the rule of law. It was actively imposed on the countries of the former USSR, did not justify itself and was largely discredited. It protects the interests of big capital, the oligarchy, and the powerful political elite.

The authors of the normative (positivist) concept are G. Kelsen, I. Bentham, D. Austin, G. Shershenevich. It was created in the wake of criticism of natural law theory.

It is the state law that is real, positive, official, existing, acting. Its strength lies in legislation, might, coercion, and state guarantees. It ensures stability, order, peace, legality in the country, legalizing and legitimizing the stability of the government. There is a rigid, unquestioning power of the sovereign directed at the subject, a hierarchy, a pyramid of legal norms: a constitutional norm, a general norm, an individual norm. Law is a coercive, logically consistent, lawless norms, a soulless legal machine (digital, with automatic punishment). "Let laws rule, not people".

G. Kelsen in his work "Pure Theory of Law" advocated its purification from ideology, politics, religion, philosophy, various "isms".

Advantages of the theory:

1. Universality, publicity, objectivity, impartiality, effectiveness, legality, obligation (soulless legal mechanism), clarity, predictability;

2. Formal certainty: accuracy, clarity, capacity, stability of norms;

3. The law is specific, realistic in legislation and legal practice, a communicative text;

4. Guarantees security, order, stability, protection from offenders, a certain standard of living, and the opportunity for unified development;

5. The rules are typical, repetitive, multiple, rational, born in society, the legal field, provided with the power and guarantees of the state.

Minuses:

1. The absolutization of the decisive role of state power in law-making. The domineering will is the decisive factor;

2. It is difficult to prepare, adopt, preserve, monitor, and determine the effectiveness of legal norms, especially at the level of unstable codes and laws, local norms, and the "war of laws";

3. Inflexible legislation, unification of behavior, deindividualization, depersonalization of a person (a person is a "cog" of the legal

machine), blind, unconditional submission, scope for authoritarianism and totalitarianism, formal approval at the mass level;

4. It is difficult to formalize: ideas, concepts, principles, strategic programs, declarations, definitions, mentality, psychology, etc.;

5. It is difficult to implement in practice, there is no electronic implementation mechanism;

6. It does not save from arbitrariness and corruption, it depends on expediency, honesty, dedication, selflessness of the authorities in serving the people;

7. Self-regulation, self-adjustment, self-adaptation, self-discipline, mass activity are not used properly;

8. The main emphasis is on state law, rather than social law, which is closely related to corporate, traditional, customary law, morality, religion, art, and the “national spirit”.

In the countries of the Romano-German legal system, including the Republic of Belarus, this is the leading concept of legal understanding, where normative legal acts, principles and norms of law act as its main sources. The scientific nature of jurisprudence is primarily related to the norm, its formalization and dogmatization, which are clearly manifested in modern digital and electronic law. However, the disadvantages of the theory suggest that the norm needs serious improvement.

The sociological concept of law is presented by G. Gurvich, R. Pound, E. Ehrlich, S.A. Muromtsev, L. Dugi.

Law is a system of legal relations, the practical behavior of people in society, conditioned by social interests and conflicts. It manifests itself as a dynamic legal order, a real legal reality. Law is a set of legal relations protected in an organized, legal way. Society, people “give birth” to law, rules of conduct when they are needed. Positive (“bookish” law) does not work by itself (“dead law”). Government orders that are not implemented in practice do not constitute law. An important task of law is to establish order in public places. Judicial and administrative bodies are called upon to identify its essence and resolve a specific dispute (S.A. Muromtsev). The law of judges and officials is a “living law”. “From a single nod from a judge, people can often lose or gain more than from any general resolution of parliament or Congress,” wrote the American philosopher, lawyer and researcher of US constitutional law, professor of law and philosophy at New York University R. Dvorkin [9, p. 17].

Advantages of the theory:

1. Law forms not only the state, but primarily social life (citizens), therefore there is also social law (civil society law), corporate law. It is the latter that are primary;

2. Law is not so much a system of social norms as the actual way of life of society. If the norms cannot improve life, then it is necessary for the highest judicial and administrative bodies themselves to create and “revive” the law;

3. Responds flexibly to the needs of the public environment;

4. Studies not only the norms of law, but the whole set of social relations;

5. It is close to folk life and practice.

Minuses:

1. Denies the role of normativity, formalization of law;

2. Does not pay due attention to its spiritual and moral principles;

3. Exaggerates the role of judicial and administrative bodies in law-making, state power, which in itself belittles the role of parliament and the people;

4. It may contribute to judicial and administrative arbitrariness, subjectivism, lawlessness, and actual disenfranchisement;

5. It may create conditions for violating the principle of separation of powers, promote the establishment of administrative and judicial totalitarianism, and violate citizens' freedoms.

This concept is typical for the Anglo-Saxon, Anglo-American legal system. It seeks to bring the law to a creative, “living” level that quickly reacts to any changing situation, even when legislation does not normalize it. The doctrine, based on judicial and administrative precedent, tries to justify the fairness of its decision.

Integrative (holistic) concept (V.S. Solovyov, P.A. Sorokin, S.L. Frank, A.S. Yashchenko, B.A. Kistyakovsky, L.I. Petrazhitsky). Multifaceted, comprehensive jurisprudence has been going on since ancient times from the Egyptian pharaohs, the Babylonian king Hammurabi, the prophet Moses, Roman and medieval law. Attempts to combine divine and natural law, public and private, civil and canonical, positive and sociological, philosophical and intuitive, the right of personal freedom and public good, law and custom, to develop a philosophy of unity (V.S. Solovyov) have been undertaken for a long time. Law is the embodiment in a legal norm of the ideas of reason, goodness, interests, freedom, equality and justice. The task is to create a systemic integrity based on principles, norms, and natural

human rights guaranteed by the state and civil society, and implemented in life; to embody ideal law in legislation and social practice. The source of legitimacy of law is in objectivity, truthfulness, service to the people, honesty, truth, authority, justice, spirituality (the realization of moral, religious, national, cultural values).

Conclusion. The law of the modern post-non-classical period is a complex, synergetic, open, unstable, self-organizing system of semi-controlled chaos, possessing programs of reproduction and self-regulation, characterized by a hierarchical organization of elements (academician T.Ya. Khabrieva).

Postmodern law increasingly has to operate in a world of fakes, “simulacra”, images of a virtual environment created by a frustrated subject. Society, according to E. Toffler, is experiencing “the shock of a collision with the future.” Post-law is based on the principles of relativism, pluralism, contextualism and constructivism, pragmatism. It increasingly expresses official, oligarchic, supranational, corporate, group interests. There is a transformation of society from a single, solidary one into a massive, disunited one, where the law is provided with an authoritative, administrative, mainly power resource for regulatory regulation. These are probabilistic, spontaneous, poorly coordinated, uncertain processes, largely non-deterministic. Hence the global crisis of national and international law, their principles, the presence of incompatible concepts (abuse of law, substitution of legality by expediency, criminal misconduct, criminal liability of a legal entity, presumption of knowledge of law, etc.). Pessimism and disillusionment with postmodernism once again make us talk about the “collapse of idols”, “the end of history”, “the decline of Europe”, “the unattainability of the kingdom of truth and justice”, the utopianism of socialism, the venality and immorality of capitalism, which need to be supplemented, converged. Digital, machine-generated law requires an automated, electronically realizable legal mechanism. This requires an innovative revolution in organization and management, de-bureaucratization, de-corruption of the state apparatus, social and economic stimulation of the activity of the masses, the growth of patriotism, citizenship, consciousness, unity and cohesion of society.

The integrative (comprehensive) concept of law tries to combine the positive features of various theories and reach a qualitatively new level. The problem is to identify them, to find compatibility, an opportunity for positive unification, ways to unify all facets without loss of quality. Only this will give a qualitative leap not only in theory, but also in practice, in legislation and the implementation of law. This requires political will, joint efforts, and a dialogue of various concepts, which will make it truly effective and efficient, legal and legitimate.

Law is a system of legal principles and norms, a measure of freedom, justice, democracy, equality and humanism, mutual responsibility, as a concentrated embodiment of objective social laws and patterns, an expression of the interests and needs of the people realized in a state-civil society.

References

1. Malakhov, V.P. General theory of law and the state. Course of lectures: studies. handbook for university students studying in the field of Law / V.P. Malakhov. – M.: UNITY-DANA: Law and Law, 2018. – 271 p.
2. Kant, I. Fundamentals of metaphysics of morality. Criticism of practical reason. Metaphysics of morals / I. Kant. – St. Petersburg, 1995. – 528 p.
3. Alekseev, N.N. Fundamentals of philosophy of law / N.N. Alekseev. – St. Petersburg, 1999. – 216 p.
4. Nersesyants, V.S. Basic concepts of legal understanding / Problems of the general theory of law and the State: textbook // under the general editorship of V.S. Nersesyants. – 2nd ed., revised. – M.: Norm: INFRA-M., 2016. – 816 p.
5. Demichev, D.M. General theory of law: textbook / D.M. Demichev, A.A. Bochkov. – 2nd ed., corrected. – Minsk: Higher School, 2022. – 480 p.
6. Zakhartsev, S.I. A comprehensive approach is proposed for the knowledge of law / S.I. Zakhartsev, V.P. Salnikov // Russian Journal of Legal Studies. – 2017. – № 1(100). – Pp. 77–87.
7. See: articles 12–22. The Law of the Republic of Belarus dated July 17, 2018 No. 130–Z “On Regulatory Legal Acts” (as amended and supplemented) Law of the Republic of Belarus dated June 28, 2024 №. 15–Z – URL: <https://pravo.by/document/?guid=3871&p0=H11800130> is the National Legal Internet Portal of the Republic of Belarus (date of access: 18.11. 2024).
8. Bochkov, A.A. General theory of law and the state. A short course in definitions and tables. Second edition, revised and supplemented. A manual for university students studying in the field of Law / A.A. Bochkov, P.G. Shelengovsky. – M.: UNITY-DANA, 2024. – 175 p.
9. Dvorkin, R. Empire of Law / R. Dvorkin; translated from the English by S. Moiseev; edited by S. Koval, A. Pavlov. – M.: Publishing House of the Gaidar Institute, 2020. – 592 p.

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