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FREEDOM OF EXPRESSION: NATURAL LAW AND LEGAL INTERPRETATION

monograph

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The monograph reveals the natural law and legal interpretation of freedom of expression. The content and constituent elements of the freedom of expression as a natural and subjective legal right enshrined in the legislation of Ukraine are highlighted. The legal mechanism for ensuring the realization of the freedom of expression in Ukraine is analyzed, and proposals for its improvement are formulated.

For scientists, teachers, students, and postgraduates of legal and other humanities educational institutions, practicing lawyers, public human rights defenders, and everyone who is not indifferent to human rights issues.

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LIST OF ABBREVIATIONS

Euroconvention – Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe, 1950)

EU – European Union

ECtHR – European Court of Human Rights

Mass media - means of mass information

IMI - Institute of Mass Information

Criminal Code of Ukraine - Criminal Code of Ukraine (2001)

ICCPR – International Covenant on Civil and Political Rights (UN, 1966)

CSCE - Conference on Security and Cooperation in Europe

OSCE - Organization for Security and Cooperation in Europe

UDHR – Universal Declaration of Human Rights (UN, 1948)

UN - United Nations Organization

UNESCO - United Nations Educational, Scientific and Cultural Organization

FOREWORD

THE CONTRIBUTION OF LEGAL PHILOSOPHY TO LEGAL PRACTICE

In reading Liliia Yarmol's "Freedom of expression. Natural Law and Legal Interpretation" we enter the sphere of legal philosophy, it's legal philosophy that discovers legal practice, it is a legal practice that discovers legal philosophy. We should accordingly emphasize that legal philosophy explains itself mainly as an activity than as a corpus of knowledge, it is something we 'do' rather than something we 'know about. In this sense, legal philosophy is understood not as an abstraction, an idea, or a theory but more as a travel companion, a friend, a partner, legal practice, or judicial activity. Understood in this way, the philosophy of law is there to allow us to reflect on the meaning of the modern legal project and on the direction that we want to give it. We must consider it as a field of reflections and thoughts, of which publicity is the necessary and obvious consequence.

Liliia Yarmol's book aims to enlighten the questions of freedom of expression, human rights, political freedom, religious freedom, violations of journalists' rights in war conditions, as well as natural law doctrine and the methodology of interpretation of national and international "legal" texts. It's a *must* for making arguments and evaluating the doctrine of law. At its most basic, the book is questioning what we want politically, socially, religiously, and "in law". All under the auspice of questioning how we ought to live together and what is the "law" that serves us best.

The monograph responds in this sense to the question of how to understand modern legal philosophy. As I will defend it, as mentioned above, modern legal philosophy is a companion to legal practice, a companion that follows and respects legal practice. Let us examine what is at stake in such a conception.

The philosophy of law, as we understand it, focuses on the intellectual health of "law". As legal clinicians, we should examine "law" in the role of an "activity" that needs vigilance and attention based on a sound conception of legal philosophy. Not because "law" is sick, or in any case no sicker than all the other cultural artifacts that humans make up for themselves as to live comfortably and in harmony on our blue

planet, even if it is cracking under the effect of nonsense and egotism of men and women, lawyers or not. We should rather say that intellectual health must always be cultivated on its own value and even more so as it allows us to think critically and rationally about the challenges put forward by legal modernity. Seen in this way, the philosophy of law is conceived as a work of eternal renewal, where, like the task of a Sisyphus that is impossible to complete, we defend, with vigilance and ardor, the endeavor, so singular and so fragile, that we call "law". It is a Sisyphean task that should be protected against the greed of the forces of heteronomy who dream of neutralizing the threat "law" has always represented to their dark designs. Like Judas, these forces are always there to give us a kiss on the forehead, to betray the possibility of "law" and to triumph the "power" at our expense and to our misfortune.

The philosophy of law is above all a place of reflection, investigation, analysis, assessment, study, and intellectual dialogue. It is a practical and public act of thought which has proven its worth, which has been able to impose itself with nobility, which has produced texts which have inspired and enriched legal culture in all its nooks and crannies. Engaging in the battle of meaning, in the intellectual contest of our time, about a *topoï* (place) like "law" (or what claims to be) can only be done by deploying, honestly and with all due respect, this banner of reflection, judgment, and commitment that we understand in its modern sense. Above all, we must not cheat and let ourselves be fooled by *wishful thinking* or idealistic complacency or smuggle in ideology through concepts, "principles", "rules", and a claim to be philosophical. False pretensions and erroneous ideas only bring misfortunes and disappointments that should be avoided as much as possible.

Today, a sound philosophy of law can hardly be practiced and written as in the past time by referring to authoritative names (name-dropping) or to "recognized texts" (authority-exploitation). Between the authority of big names and that of "textual positivity", there is an immense space available to legal thought and, above all, to the critical and realistic sense which should characterize it and adding nothing about the benefit of rational analysis clarifying the practical setting of "law". Discourses about "law" (i.e., doctrinal/dogmatic/theoretical writing on questions related to "law"), as well as the prospective reflections about the doctrinal

contributions to "law", must always be considered rationally and critically as well. The philosophy of modern law is today affirming itself as a major actor in the great debates relating to modern (and democratic) "self-legislation" and to the choice that must be made as to what should count, political and socially, as acceptable or as "good" and "just", in the public sphere. "Law" is an assurance (textual and potential) for our fellow society members to assure that there is always an appeal to "law" in the face of violence, oppression, discrimination, crimes, and criminality.

The philosophy of law must never wallow in the self-sufficiency of its system, of its "construction", or be satisfied with a pure exercise of style with reference to its own creations, namely by feeding itself with its own presupposed principles, its basic rules (rules), its systems (or systematics), its "pluralism", and its *tutti quanti*. We must give up sowing sympathetic, catchy, and politically correct concepts in the hope of receiving applause in return from the league of political, moral, and philosophical correctness. Better, instead, take the gamble of legal modernity perpetually in motion, in development, and in the process of being rationalized for the benefit of concrete individuals in flesh and blood.

It is distressing to observe that a large part of contemporary writing in the philosophy of law can be reduced, alas, to such exercises in self-sufficiency, or even lurking literally in autarky. It is a "legal thought" where the meaning of this term has been lost in the substantive of a "the" – "the law". It is a thought that has been cut off from all relationship with the practice of law, to only have before it the noun "the", fraudulently assuming the existence of this same thing as being "the law". When the noun stands alone, it is the monologue (or even the soliloquy) that replaces sense and establishes the distances of what can be shared together, mutually, and as a legal requirement for all. It does not only amount to affirming that the theoretical partisans of "the law" are detached from reality (which is the case), it goes deeper as their "reality" is rather identically to what the noun of this "[the law]" encompasses theoretically. It is a "theoretical law", a law-chimera, which seeks partisan adherence like a sect seeks converts, proselytes, and members and which is blinded by any understanding outside a "theoretical reality". Such a philosophy of law, however, is particularized "theoretically" and, above all, problematic regarding what constitutes,

after all, the heart of the legal enterprise, namely "law" to be rendered in and by a fair and equitable judicial procedure; it is thus a construction of a "law-chimera" that condemns itself to be eternally sterile and esoteric. By severing the relationship between theory and practice, it can only harm the practice of law as well as the sense of legal modernity.

We must do the opposite! We must argue that a philosophy of law written today without taking the legal practice into account is rather worthless and useless, even harmful. Clearly, we should invest in the field of the practice of law and see from the files which are pleaded and which are decided in and by the courtroom how "law" is realized (or not realized) in contemporary society. "Law" is made in practice, with individuals who feel their interests have been harmed and who appeal to the "law" to rectify wrong, prejudice, theft, fraud, crime, etc. Thinking" law" through practice gives us a sense of how to understand it in its own sight, it let us understand why "law" is practical and its reason for being there, available to all, and as a contingent possibility to settle disputes in a legal way. Understood in this way, "law" is no more than a judicial outcome of a pre-constituted controversial situation that has been proven to be irresolvable without a "fair and equitable" procedure that can guarantee the voice of each party. "Law" is the reality of lawyers, lawyers who plead their cases before an invited third party (the jury, the judge, the magistrate, the arbitrator, etc.) in order to win their cases.

The 1960s to the 1990s had grossly idealized, even caricatured, conflict, controversy, opposition, and combat as a politics of contestation, while the new millennium, like backwash, is put to sleep in a litany of 'we all agree' and 'we all want the same thing', and other nonsense that is accepted desperately as plain truth. The problem of mentality that confronts today's legal practice (and legal philosophy) is that it refers realistically to an image of conflict, controversy, struggle, and antagonism (social, political, economic, etc.), that our contemporaneity refuses. Many legal philosophers today (to whom we distance ourselves) prefer a legal philosophy constructed as "theoretical" and which slides (surf) on the image of *Épinal prints* (i.e., naïve depictions) of "law", of an irenic image of "law", ready to serve the ideology of politically (morally, philosophically) correctness. It is the construction of a

philosophy of law putting forward a singular conception of "justice", or a belief in applied ethics or mores, or system-thinking, "pluralistic" ideology, to cover an irenic misconception of modern law. It's the glory of theories that present "law-chimeras" as being "systemic", "pluralistic", "pure", but never as problematic, tricky, challenging, and never as open to practical discussions as democratically large and open as possible. The partisans of "law-chimera" have just forgotten that the "idiot" in its etymological sense is the one who refuses to get involved in society, the one who chooses to shut himself up in his own (theoretical) world, or even the one who has no "practice" with others.

Against these ideologies of "law-chimera", we plead for a philosophy of law that is rooted in the practice of legal actors, that is situated in the legal process, and in the work of lawyers. Consequently, we must oppose a philosophy of law that enthusiastically seeks refuge in authority in the revalorization of the heterogeneity of the judge. The proverb confirms that "authority is a bad argument", but contemporary legal philosophy has learned nothing from that lesson and especially noting from the warning that accompanies it: submission to authority prevents critical and thoughtful examination and verification, and instead of enlightening, it is *epigonism* that is valued. A philosophy of law built, for example, by Ronald Dworkin, on the figure of the judge – of the Judge-Herculean – is misleading; it deceives the mind and reroutes reason because it is limited to the fidelity of what is embodied in this figure, in its authority. If the argument of authority seduces, it must also be added that it is a fragile and shaky foundation and should be avoided for a sound philosophy of law.

A philosophy of law that agrees to make judicial practice its point of reference certainly testifies as to its realism, but it also highlights a concern for the real stakes felt by individuals engaged in a quarrel about "law". In the world of legal practice, it is the everyday noise that rings and resonates in every human. It is this world that should interest us, the world populated by individuals in flesh and blood with their problems, difficulties, troubles, and the "case" to be solved in practice and in thought. Our society is modern and communicative in the sense that individuals who compose it agree to evaluate the arguments that fuse from one corner of the public space to another.

The possibility of doing "law" is never realized in a neutral vacuum but relates itself rather to public space, to a space of communication understood as a dialectic of "agreements and compromises", to a public space where hardly is found any a priori (theoretical, abstract, or positive). A public space is an arena working an "a posteriori" which is made, undone, and remade. It is a "space" where thoughts can hardly claim to stay in place because as soon as they have been publicized begins their intellectual questioning. The project of legal modernity has simply lost some of its topicality, and it is this same modernity that must be problematized intellectually.

We often forget that "law" does not exist as an observable object, that it is, strictly speaking, impossible to prove or to have access to "law" in terms such as "is" or "ought". Even thinking "law" in the mode of "is" and "ought" is irrational and illogical as to a modern understanding. Those who engage themselves in such irrationality risk their intellectual health as well as the well-being of their conscience.

The question of "law" should only be described in the register of possibilities and, above all, as a probability that frequently betrays itself and quickly becomes obscured if our sense of reality and of "legal reality" are not on guard. To always favor a practical solution of "law", to defend it ardently and tirelessly, to work in favor of the intellectual health of "law", is therefore not fortuitous but represents, as we uphold, a defense without illusions. It is necessary, with vigilance, to ensure that "law" will be measured as to our measure and not only serve as an accessory measuring in favor of the forces of heterogeneity and their desires to see our backs bent by obedience and servitude. Being aware that all battles are not won; they are often lost heroically with the flag in the hands and despair in the heart, the option of a potential "law" has all its value as it reminds us that our engagement count. Like the Sisyphus task already mentioned, it is in the act of defending intellectual health that victory (and defeat) lies and not in some magical moment of fleeting finitude that will continually roll "the stone" (the possibility of law) to its point zero.

Seen in this way, the philosophy of law is firmly committed to the prospect of doing "law". Such a comprehension hardly overshadows the traditional task of legal philosophy regarding participation in argumentation, assisting the writing of legal doctrine, reflecting on the interpretation of sources of law, examining the use of the

word "scientific" in the legal field, and drawing parallels between logic and logic for lawyers… The philosophy of law is simply a part of intellectual attention as to the health of "law" that we want to give ourselves. We are wrong if we take part for the whole since the latter has meaning only insofar as it relates to the latter; in other words, if the horizon of a potential "law", *hic et nunc*, will be at the rendezvous. What good does dogmatic or doctrinal conceptions, or even anthropological or sociological theories, if the probability of "law" to which it refers is no longer there? We are wrong, terribly wrong, to believe, against reason, in the beauty of a law-chimera as governing our modern societies – taking up the pagan myth of Zeus reigning by "law" as much over the cosmos as over society of humans - and to be silent about the many nations of the world where the word "law" is rather sneering and conspicuous by its absence. Far from the metaphysical images of a reigning "law", or of a situation of metaphysical normativity, the truth is that "law" does not govern anything, that all the speeches that ramble that human conduct is governed by law lie outright. Be affirmed that human behavior is not in any way governed by "law" (or "law-chimera") and that those who think likewise have pledged their intelligence to the pawnbroker. Far from such imaginations, a little lucidity and realism will certainly not hurt and will serve to defend the intellectual health of "law"!

Situating the philosophy of law in the role of a defender of the intellectual health of law means establishing diagnoses, vaccines, and care. Why? Because if health belongs to the patient, the first lesson will be to give up trying to replace him and instead put us at his service. Let us, therefore, affirm that the "law" belongs exclusively to its owners, to the co-members of society who agree to settle their affairs, their disputes, and their enmities by means of a modernist "law". The philosophy of law works only on the level of argument and contributes, strictly speaking, nothing to the substance of "law", whether positive or normative, except serve to sharpen our sensitivity as to the importance of a prophylactic work regarding a possible "law". The domain of "law" must literally be vaccinated to prevent irrationality, obscurantism, biases, ideologies, "political correctness", etc., from becoming encrusted, proliferating, and taking control. It is a question of keeping away from the ideologies of circumstances, such as ontology, normativism,

positivity, cosmo-theology, criticism, pluralism, postmodernism, "cultural studies", political correctness, and *tutti quanti*, and doing it openly, having no other concern than the intellectual health of "law".

Intellectual health is the mind that agrees to take charge of itself; it is a step on the road to the freedom to think.

Bjarne Melkevik,
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Quebec, November 11, 2022

INTRODUCTION

Actuality of theme. Freedom of expression is the foundation of civil society. Its real and maximum provision is a criterion of the state's democracy, and its effective implementation is an important indicator of the level of provision of other human opportunities.

Freedom of expression as a natural right of a person is their possibility inherent from birth, inalienable, and independent of the will of the state. The right of a person to freely express their views is embedded in the very nature of man, which was created by God. Freedom of expression is a mandatory component of the personal self-determination of every person. This freedom is the “breathing” of a person in the social environment, without which they will not be able to exist.

The basis of freedom of expression is a person's views as an integral element of their consciousness, in particular, their worldview. Views interact; they are in connection with all other elements of consciousness - faith, thoughts, beliefs, ideas, etc. A person's views are one of the main forms of modern knowledge and communication in all spheres of social life, including the state and legal sphere.

In the modern world, freedom of expression is fully and most effectively realized through mass media. The role of mass media in Ukraine is especially important in the modern conditions of the full-scale military invasion of the Russian Federation on the territory of Ukraine, in countering the information war waged by this totalitarian, terrorist state, in spreading true information in the temporarily occupied territories of Ukraine. Mass media, covering reliable information, contribute to the activation of integration processes in civil society.

Freedom of expression as a fundamental human right is reflected in the main international human rights documents of global and regional significance. In Ukraine, the basis of the legal mechanism for ensuring freedom of expression is national legislation, primarily the Constitution of Ukraine dated June 28, 1996, which “guarantees everyone the right to freedom of thought and speech, and to the free expression of his or her views and beliefs” (Part 1, Article 34), the Law of Ukraine “On Information” dated October 2, 1992 (as amended by the Law of Ukraine dated

January 13, 2011), as well as other normative legal acts.

Theoretical-legal, international, and branch aspects of freedom of expression, its individual elements (possibilities) and the relationship with other human rights are investigated by the following famous domestic and foreign scientists: V. Bed, V. Benedek, M. Verpo, J. Wilcke, D. Vovk, V. Gvozdev, T. Ganna, M. Jenis, R. Kay, E. Bradley, N. Dovnar, O. Zhukovska, E. Zakharov, M. Kettemana, O. Kokhanovska, N. Korchenkova, N. Kushakova-Kostytska, N. Lerner, D. Little, M. Makovey, O. Martsenyuk, R. Melnyk, T. Mendel, O. Nesterenko, O. Oliinyk, V. Pavlykivskyi, E. Titko, M. Shvets, S. Shevchuk and others.

An analysis of Ukrainian legislation on freedom of expression and legal guarantees for its provision provides grounds for asserting that it needs improvement and coordination with the norms of international legal documents on human rights.

In Ukraine, human rights are massively violated, in particular, freedom of expression, as a result of the full-scale military invasion of the Russian Federation on the territory of Ukraine.

All these arguments confirm the relevance of the research topic and its scientific, theoretical, and practical significance.