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Justice: between law and Conscience

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Andrey I. Vinogradov *
Maiia E. Pankratova **
Anatoly N. Yashin ***
Natalya Yu. Rasheva ****
Anton V. Emelyanov *****
Oksana P. Chernykh *****

Abstract

From the philosophical perspective article deals with the correlation between law and consciousness. To address the issue, ideas from renowned thinkers are used. It specifically describes the experience of addressing the subject in Russian philosophy from the late nineteenth to the early twentieth century. The article shows the reasons for preferring law or consciousness in different periods of history and demonstrates the rational nature of law and the irrational nature of consciousness, indicating that law and consciousness are not mutually exclusive. It concludes with an attempt to combine the two concepts in activities of people who must enforce legal norms. Using the experience of Russian philosophy, which regards the law as a moral minimum, people are advised to govern their actions not only by legal rules, but by listening to the voice of their conscience. The authors suggest understanding conscience as a spiritual and moral human law that makes it possible to make decisions without being forced or motivated

* Dr. of Philosophy, Professor, Director of the Institute of Social Sciences and Humanities, Murmansk Arctic State University, 15 Egorov street, Murmansk, 183038, Russia. ORCID ID: <https://orcid.org/0000-0002-7008-1980>. Email: andvinogradovoo@mail.ru

** PhD in Law, Associate Professor, Head of the Civil and Financial Law Department, Institute of Social Sciences and Humanities, Murmansk Arctic State University, 15 Egorov street, Murmansk, 183038, Russia. ORCID ID: <https://orcid.org/0000-0001-8281-8727>. Email: Pankratova.mayya@gmail.com

*** Doctor of Philosophy, Associate Professor, Head of the Department of Criminal and Administrative Law, Institute of Social Sciences and Humanities, Murmansk Arctic State University, 15 Egorov street, Murmansk, 183038, Russia. ORCID ID: <https://orcid.org/0000-0003-4262-8894>. Email: yashin58@mail.ru

**** PhD in Law, Associate Professor at the Civil and Financial Law Department, Institute of Social Sciences and Humanities, Murmansk Arctic State University, 15 Egorov street, Murmansk, 183038, Russia. ORCID ID: <https://orcid.org/0000-0003-0063-9253>. Email: Anyta_us@mail.ru

***** Senior Lecturer at the Department of Sports Development, Nosov Magnitogorsk State Technical University, 38 Lenin Avenue, 455000, Chelyabinsk Region, Magnitogorsk, Russia. ORCID ID: <https://orcid.org/0000-0001-5304-980X>. Email: daryatanchuk@mail.ru

***** Ph.D., deputy Director for Scientific and Methodological Work, House of Students «Magnet», 33 Leningradskaya str., 455000, Chelyabinsk Region, Magnitogorsk, Russia. ORCID ID: <https://orcid.org/0000-0002-7508-8049>. Email: cherry-100@yandex.ru

from the outside, governed by the internal realization of good and evil and identifying the veracity, justice, and rectitude of an act.

Keywords: philosophy of law; history of philosophy; law and conscience; justice and morals; conceptual binomials

Justicia: entre la ley y la conciencia

Resumen

Desde la perspectiva filosófica artículo trata de la correlación entre ley y conciencia. Para abordar el tema se utilizan ideas de reconocidos pensadores. Describe específicamente la experiencia de abordar el tema en la filosofía rusa desde finales del siglo XIX hasta principios del siglo XX. El artículo muestra las razones para preferir la ley o la conciencia en diferentes períodos de la historia y demuestra la naturaleza racional de la ley y la naturaleza irracional de la conciencia, indicando que la ley y la conciencia no son mutuamente excluyentes. Concluye con un intento de combinar los dos conceptos en actividades de personas que tienen que hacer cumplir las normas legales. Utilizando la experiencia de la filosofía rusa, que considera la ley como un mínimo moral, se aconseja a las personas que gobiernen sus acciones no solo mediante reglas legales, sino escuchando la voz de su conciencia. Los autores sugieren entender la conciencia como una ley humana espiritual y moral que hace posible la toma de decisiones sin ser obligada o motivada desde el exterior, gobernada por la realización interna del bien y el mal e identificando la veracidad, justicia y rectitud de un acto.

Palabras clave: filosofía del derecho; historia de la filosofía; derecho y conciencia; justicia y moral; binomios conceptuales.

Introduction

Philosophers of various eras and civilisations tried to answer the question of correlation between law and conscience. Losing the link with moral human nature, the law does not evoke any reaction in the human heart and becomes useless, if not harmful, for human society. In a sound society, law and conscience do not contradict but complement each other. It is no coincidence that modern legal theorists point out that, in a lawful environment, each person reasonably has both legal and moral duty to obey the rules because what the law mandates in external behaviour is the same as what the voice of conscience approves of as moral and just (Sorokin, 2010).

Relevance of the topic is due to the need to find a sound basis for justice. The title reflects an eternal dilemma: what should people enforcing the law be governed by? Technically, the answer is obvious: they have to be governed by law since their main goal is to enforce it. Yet, it is not that easy if we try to make sense of it. There are situations where enforcing the law will be at odds with conscience. For instance, there is a law-enforcement practice called “plea bargain”, completely legal but morally questionable. That is why judges, lawyers, prosecutors, police officers, and other people in law enforcement are sometimes caught between law and conscience, when they have to choose between exact law application and clear conscience. The true correlation between law and conscience is possible to understand only through the historical and philosophical study of conscience as applied to justice.

The history of philosophy shows that the true value of the law is exercised when it is based on moral sense of people, when requirements of the law are consistent with the voice of conscience within the human being.

1. Correlation of law and morality in history of philosophy

Ancient thinkers believed that legal requirements had to conform to those of conscience. For example, according to Plato, a legislator was “in their power to make use in their law-making of two methods, namely, persuasion and force” (Plato, 1961). The thinker criticises those who only use the latter. According to him, the law must have a moral mandate apart from force alone. Aristotle also tried to combine legal and moral categories. He viewed justice as the basis of law through compassion, which is a moral feeling: “The equitable man is above all others a man of sympathetic judgement and identify equity with sympathetic judgement about certain facts” (Aristotle, 1999: 136).

Cicero preferred unwritten laws that had appeared before any written law since: “Our lawyers often divide a legal doctrine, which is essentially simple, into an infinite variety of technical distinctions” (Cicerone, 1853: 325). He recurrently mentions the unbreakable link between the idea of justice and Roman laws (Cicerone, 1853). According to Cicero: “For we shall have to explain the true nature of moral justice, which must be traced back the nature of man” (Cicerone, 1853: 63).

Thomas Aquinas “distinguishes two elements in what we should call “conscience” – the synderesis, or intuitive grasp of first principles or standards by which alone moral comparisons can be made and the conscientia, or process of applying these first principles in estimating the rightness and wrongness of particular actions” (Kirk, 1999).

Before the modern era, all thinkers were united in their understanding of morals as the basis of law. They considered conscience to be a natural source of legal regulation. The modern era brought about an idea of separate existence of law and conscience, independent from each other.

The Christian tradition supported the idea of a divine nature of morality. Naturally, this standpoint implied a superior position of morality in relation to law. However, gradual secularisation of human life was a characteristic of the Renaissance and modern era, with the will of the state becoming the main foundation of law. The Renaissance and modernity were the eras when nations took shape, requiring national legislations based on interests of the state rather than on moral principles. N. Machiavelli stated that politicians had to do evil for benevolent means: “a prince wishing to keep his state is very often forced to do evil” (Machiavelli, 1908). According to T. Hobbes, the law is based on force, with only those appointed by the state having the right to interpret it: “the interpreters can be none but those, which the sovereign... shall appoint” (Hobbes, 2010: 141).

A point of view that would later be called legal positivism started to dominate the ideas on the correlation between law and conscience. This point of view relieves the lawmaker of the necessity to consider moral norms when making laws. The lawmaker is left with the only guidance: rational practicality of the regulations adopted. However, conscience is not rational. It is guided by intuition rather than logic. Encyclopaedia Britannica underlines the intuitive nature of conscience: “Conscience usually informed by acculturation an instruction, is thus generally understood to give intuitively authoritative judgments regarding the moral quality of single actions” (Britannica Encyclopaedia, 1990: 44). The positivist thinking does not accept any phenomena that cannot be unequivocally verified. Consequently, positivist-leaning philosophers started to promote the freedom of reason-based law from moral ideas, primarily, from conscience.

These two interrelated factors – the rise of secularisation and promotion of positivism – resulted in the modern correlation between law and conscience. Its underlying idea is a separate existence of these two spiritual areas of human life. In the 20th century, that state of affairs seemed quite normal. The outer human life and social relations were regulated by universally binding, standardised, and reasonable forms of behaviour described in the law. The inner life was governed by individual ideas depending on the way the person was brought up as well as their cultural and personal background. These ideas are at a significant disadvantage to legal norms: they cannot be standardised; they are unwritten and intuitively perceived by people and therefore unreliable and suspicious. Consequently, they can be applied exclusively to personal human life.

Current state of affairs

Now, in the 21st century, we are starting to understand that the situation is not normal. First, it is becoming increasingly popular to think that people cannot be viewed as exclusively rational beings. It is the ability to have emotions, feelings, and beliefs that makes people different from computers. People cannot be squeezed into the limits of rationality. In particular, they can use their conscience to make the right decision in a difficult situation. It means that conscience has to be taken into account when dealing with people. Secondly, law without a moral sanction loses its authority, turning into an external force people have to obey just because it is a force.

However, such law resembles the laws of nature, which also lack a moral sanction. If an animal eats another one, this action cannot be viewed from a moral perspective because it is just a manifestation of the natural laws those animals live by, which cannot be applied to a situation of one person eating another. In spite of the fact that one of the people has satisfied the natural need for food, the act will be condemned by both public law and moral ideas of the people who have learned about the act. One of the main characteristics of people is their ability of judgement. People always judge what they deal with in two ways: formally, from a legal perspective, and essentially, from the standpoint of their conscience. If, in this judgement, the form (law) contradicts the substance (conscience), a spiritual discord appears within the human being.

When people compare law and conscience, we can observe two curious things:

- 1) in such a comparison, demands of conscience are the criteria of judgement, and law the object of it, but not vice versa.
- 2) it is always conscience that wins, not law.

These phenomena are caused by the fact that conscience is an internal human conviction about what is good and evil, or, according to Kant, an “internal court in man” (Kant, 1991), whereas law is nothing but an external declaration by other people. Consequently, no matter what legal positivists want, people have always judged the law with their conscience and always will. We should accept this situation as a manifestation of a normal human quality and consider it while dealing with problems faced by the people who enforce the law.

2. Russian philosophy’s experience in solving the problem

Russian philosophy of the late 19th and early 20th centuries contains some fruitful experience of reflecting on the problem in question, which can be very useful for understanding the current state of affairs. It was the time when a school of scientific positivism formed in Russia. Its representatives

considered it unnecessary to subject law to moral judgement. They made no difference between law as justice and law as a collection of legal norms, its only source being the will of the state. It resulted in a fiery debate between the positivists and representatives of Russian religious philosophy. A lot of Russian philosophers of that era were sceptical towards the technicalities of positivist law, connecting the issue of civil society with the ethnic and religious specifics and culture of Russian spirituality. By the end of the 19th century, criticism of the state and law had become commonplace, sometimes taking an extreme shape. In particular, the great Russian writer Leo Tolstoy criticised the state and law from a moral perspective, declaring an anti-law morality.

Having adopted a lot of Western philosophical ideas on the nature of conscience, representatives of Russian philosophical thought of the late 19th and early 20th centuries gave a new meaning to those ideas. The Russian mind was traditionally characterised by a specifically fine-tuned, “conscience-based” perception of reality, which could be proven by the specific focus on the issue of conscience in Russian religious philosophy.

Aleksei Khomyakov called the state-sanctioned law external law, and conscience was the internal law. According to his opinion, for conflicts to be resolved and social peace to be maintained, internal social regulations, such as customs, traditions, and moral norms, should prevail over external laws (Vinogradov and Yashin, 2018). Khomyakov viewed the state-sanctioned law as a middle ground, with criminals below it and saints above it, adding that the external law was more tolerant to crime than pangs of conscience were (Khomyakov, 1900). Nikolai Lossky considered pangs of conscience to be the true punishment: “The main form of suffering making the most obvious moral sense is pangs of conscience” (Lossky, 1994). Ivan Ilyin viewed conscience as the personal moral genius, source of justice, and “altar of one’s life” (Ilyin, 1993).

However, thoughts on the correlation between law and conscience are most prominently featured in philosophical works by two Russian thinkers: Fyodor Dostoyevsky and Vladimir Solovyov.

For instance, Dostoyevsky’s works show the phenomenon of conscience in its relation to law and explore the pangs of conscience and repentance of a criminal sinner to the depths that had not been reached by philosophical and legal thought before. Dostoyevsky “completely rejects the ethics of pure reason” (Lauth, 1996) and believes that laws of reason cannot hold people within the limits of state-mandated regulation of social behaviour. The philosopher reaches “new hidden layers but does not dive deep into the unconscious but soars to the heights of consciousness” (Hobbes, 2010: 23). So, according to Dostoyevsky, justice invariably contains the idea of a court of one’s conscience as the most just court, without imperative instructions and external will: “The pain of his heart alone, before any punishment, will kill him with its torment. He will judge himself for his crime more ruthlessly,

more mercilessly than the strictest law” (Dostoevsky, 1972: 102). The idea of a court of one’s own makes the state-administered justice pointless.

Whichever of the ideas Dostoyevsky substantiates in his philosophy, the conflict between nature and reason, heart and mind manifest itself. The ethics of the sense is always at the forefront, and the main sense is conscience, “the organ that perceives God” (Berdyayev, 1993: 14), the regulator of ethics that serves as a wake-up call for the moral nature of every person, including a criminal: “Conscience is by itself repentance”, wrote Dostoevsky (Dostoevsky, 1976). Pangs of conscience and suffering punish the evil and calm wicked passions of people. Only through suffering, as a kind of an Orthodox Christian purgatory, will a previously-unknown ethical and moral existence filled with truth revealed to the criminal sinner.

With the character of Dmitry in *The Brothers Karamazov*, Dostoyevsky demonstrated an example of how a spiritually driven person should perceive sin. Technically and legally, Dmitry’s sentence is unjust (it was not him who killed the father), but Dmitry himself sees it as higher justice because he wished death upon his father, and it is a grave sin, a crime in Orthodox Christian ethics. Dmitry therefore sees the twenty years of hard labour as his duty; as a true believer, he realises that it is only through suffering that he can atone for his sin: “...I want to suffer, and by suffering shall I be purged! Well, maybe I will, gentlemen, right?” (Dostoevsky, 1976: 46).

Dostoyevsky believed that formal and soulless legal regulations that do not account for conscience and moral motives of an act lead to unjust verdicts in practice (Dostoevsky, 2004). The writer does not doubt the necessity of legal norms; he merely explains the gap between the legislative authority (government morality) and the spiritual component of personality, calling for “humanising” the legal norms, which is fairly consistent with the spirit of Russian philosophy of law.

The writer also emphasises the issue of conscience in *Crime and Punishment*, where the author basically creates a situation that focuses the whole plot on the issue of conscience. The point of the story is to lead the character to atonement through “worldly law”, “human nature”, and “God’s truth”. The latter is exclusively connected with conscience. Raskolnikov’s atonement required him to judge himself, fully accept responsibility for his crimes, and to understand his deeds from the perspective of conscience. According to the author, conscience is a sense of moral responsibility for one’s actions to others, an ability to recognise the moral nature of one’s behaviour deep inside one’s soul. Conscience implies an absolute moral law of taking good from evil.

In the Christian tradition, every person has a conscience that is both an internal witness and a prosecutor thought to be “God’s eye and voice”. Since God is all-knowing and omnipresent, the judgement by conscience is

inescapable. For Dostoyevsky, Christ is not an abstract ideal, not an intrinsic idea of idealist philosophy, but a historical fact. Conscience is understood as the immaculate way of living Christ had on Earth. For Dostoyevsky, the function of conscience is to lead Raskolnikov to repentance, partially through fear, so as to save him. It is conscience that leads Raskolnikov to admitting: "...was it a little old woman I killed? It was me, not the old woman who I killed. I just did myself in, forever..." (Dostoevsky, 1973: 69).

The issue of conscience, guilt, and shame was elaborated in depth in the works of Vladimir Solovyov. He identified three human needs: to live, to learn about life, and to correct it. Satisfying the former makes people similar to other living beings, and knowledge of life leads people to understanding the sinfulness of natural ways and overcoming it: "Not only does man understand, with his mind, the inadequacy of the natural way as leading to death and nothingness, he also realises in his conscience that this way is sinful" (Solovyov, 1999: 65). The philosopher concludes that people should live their lives obeying their sense of duty and conscience.

Russian culture, where, in 19th and early 20th centuries, the communal and ethics-based nature of all aspects of life, undivided truth, and human-centeredness were main ideas, specifically focuses on people, their moral choice, and ability to improve themselves and society. Works of Russian philosophers show a change in understanding conscience: from a focus on a social fear in the presence of others to a deeper understanding of it as a spiritual core of a personality expressed in the feelings of guilt and repentance.

Law carries the main burden of protecting society from harmful and dangerous deeds of persons who disregard rights and interests of other people and society as a whole. Consequently, law, where state coercion is concentrated and monopolised, restrains and punishes crime against public morals. "...The existence of a society depends on safety for all rather than on perfection of some", wrote Solovyov, "While not secured by itself with moral law that does not exist for people with prevailing antisocial instincts, this safety is guarded by the coercive law that applies to them as well" (Solovyov, 1998: 39).

Solovyov's philosophy formulates the issue of the correlation between law and morality this way: can law be immoral and morality anti-legal? "The interrelation between the moral and legal," he writes, "is one of the core issues of practical philosophy" (Solovyov, 1988: 446). For Solovyov, law is "a certain minimum of morality" (Solovyov, 1988: 446) and it must be correlated with moral ideas and assumptions, the philosopher believes. He therefore concludes that a crime is not merely a technical breach of a legal norm but also a violation of moral Truth that becomes violated in relation to both the victim and the criminal. Violating moral and legal principles, the criminal harms his or her own personality, rejecting God's grace.

In Solovyov's moral philosophy, human sense takes the shape of moral law. Solovyov legitimises sense as a moral instance. For him, sense is not simply a way of cognition of the world, but also a tool of its mortal transformation. According to Solovyov, good cannot be senseless, and the sense of conscience therefore requires a proper attitude towards any life situation rather than a manifestation of "pure will". The philosopher believes that acting in accordance with one's conscience is sufficient for a moral act.

In its meaning, Soloviev's idea of "conscience" is closest to the Kantian *Pflicht* (duty) since the German word *Gewissen* (conscience) is, for Kant, merely a formal notion that does not correspond to what people should do and therefore is not a moral law. For him, "practical reason" alone is responsible for moral decisions. Conscience may require moral actions from a person, but it cannot justify them. Moral justification of such actions is beyond its scope. It is solely a goal of "practical" reason. For Kant, conscience is therefore a moral sense but not a moral law. At the same time, it is the force that makes people observe the moral law (Kant, 1990). That is the reason why Solovyov's idea of conscience is comparable to Kant's idea of duty.

Duty and conscience are related but they are not the same. What they share is the fact that both the sense of conscience and idea of duty include an absolute or unconditional principle. For example, Solovyov thinks that "the moral law is based both in us and independently from us. To put it otherwise, this unconditional law implies an absolute legislator" (Solovyov, 1988).

V. S. Solovyov was profoundly right when he called shame and conscience the primary basis of morality, the senses that serve as a foundation of human existence and ground zero of humanity in people. The "high" senses make people people, and losing them, they lose everything that makes them human.

The notion of conscience is a sense of a sentient being or a sensuous reason. Neither sense without sensibility nor sensibility without sense is moral and therefore human. In the notion of conscience, people overcome both the senselessness of their reason and unreasonableness of their senses and achieve a convergence of the objective basis of morality with the subjective one, i.e. discover and actualise things divine within themselves. Conscience as an internal spiritual and moral law makes it possible to respect and observe the law without external coercion. The law is the external rational coercion whereas conscience is the internal irrational motivation.

3. Practical experience in addressing the issue

It is not surprising that Russian thinkers paid so much attention to the correlation between law and conscience. Historically, the very idea of a Russian system of justice was based on understanding conscience, truth, and fairness. From the ancient times, people in Russia understood the word “law” as moral and religious commandments rather than a legal act. In Russian legal consciousness, true justice can only have a sacral meaning. The government understood that as well; it is no coincidence that in the late 18th century Catherine II created the Court of Conscience in Russia, and the judicial reform of the second half of the 19th century kept the practice of peasant justice based on the traditional customary law. For example, the law of the Russian Empire let peasants instead of litigation in *volost* courts, refer by mutual agreement to arbitration by conscience in any form possible. Justice “by conscience” may be justified when verdicts and sentences are not flawless from the positivist standpoint. Here, it is important to reach a compromise between law and conscience, but the main legitimacy criterion for these judicial decisions is repentance of the criminal because the ideas of mercy and absolution are also fundamental for the philosophy of Russian justice. It is important that the judge, jury, and victim see, in the repenting convict, a miserable person who made a false step by fate or own sinful choice rather than a hopeless criminal. In this case, conscience helps some people to understand their sin and other people to show mercy by conviction or acquittal.

In the second half of the 19th century Russia had both interesting theoretical ideas on the correlation between law and conscience and practical experience in combining them. We mean professional legal scholars who created a truly democratic justice system. Their ideas, in particular, on morality and conscience in administering justice, are relevant and necessary to this day.

Anatoly Koni (1844–1927), a prominent Russian legal thinker of the late 19th and early 20th centuries, theoretically proved and practically exemplified (he presided over the Saint Petersburg district court) what true justice should be. He would put moral values, primarily conscience, on top of his hierarchy of values. His book *Moral Principles in Criminal Proceedings* should be a handbook for a judge. In the book, Koni, a jurist and philosopher, described a paradigm of justice, and there is no doubt that we would have a different system of justice if we followed the spirit of the guidance created by the jurist and thinker. In particular, he emphasised that “... a guilty verdict is a result of complex internal work by the judge who is limited, in determining the strength of evidence, by nothing but guidance from reason and a voice of conscience” (Koni, 1967). He also writes there that “what is called ‘judge’s conscience’ is a force that supports the judge and brings a special, sublime meaning to his trade... He must reckon with

its voice lest he bring a profound discord upon his soul” (Koni, 1967). In another analytical work, *Fathers and Sons of Judicial Reform*, he also points out the decisive importance of conscience in justice: “In no other trade does one need to stir one’s conscience so often, at times calling it to judgement, at times demanding instructions from it, at times searching for support in it alone” (Koni, 1914).

Fyodor Plevako (1842–1908), a contemporary of Anatoly Koni and prominent lawyer, built his defence in court both strictly in line with the law and in accordance with conscience. It was “by conscience” when a case was closed against his client, a priest who had violated the criminal law but repented. F. N. Plevako’s address to the court was short: “Dear members of jury! ...Before you sit a man who has been granting you absolution of your sins at confession. Now he is waiting for you to say whether you will absolve him of his sins” (Plevako, 1909). The priest was acquitted by jury verdict. The case showed the true nature of justice when conscience became the higher judge alongside a strict law.

The current Russian law obliges a judge, in administering justice, to apply law but also be guided by conscience (Article 17 of the Criminal Procedure Code of the Russian Federation). Undoubtedly, conscience enriches the law and fills it with new substance, determining its meaning. Deciding, a judge evaluates both the legal content and moral essence of facts.

Conclusions

Concluding our reflection on the issue of the correlation between law and conscience, we can state that there is a lot of theoretical and practical experience of addressing it. In spite of that, the issue is far from being resolved. A lot of thinkers have tried to define conscience, but we have to state that there is still no commonly accepted definition of this notion. Probably, it is an impossible task. In our view, the reason for this is in the irrational and unverifiable nature of the notion. Even the rational definitions of conscience contain irrational characteristics. For example, Vladimir Dal defined conscience as “moral consciousness; a moral feeling or sense in a person; intrinsic understanding of good and evil; a secret place in the soul reflecting approval or condemnation of every act; the ability to recognise the quality of an act; a sense that attracts the truth and kindness and repels lies and wickedness; an unconditional love of things good and true; an inborn truth, in various degree of development” (Dal, 1882). V. Dal also directly connects justice with conscience: a just court, a just verdict, a decision by law, by conscience, or the truth.

We suggest understanding conscience as a human spiritual and moral law that makes it possible to make decisions without being compelled or

motivated from the outside, governed by internal realisation of good and evil and by identifying the verity, fairness, and righteousness of an act. This definition implies relativity of justice because it is administered by flawed people with their own moral assumptions and understanding of conscience. It means that every person has to solve the issue in question on their own. Nobody can formulate any universal guidelines on the “correct” use of conscience in legal practice. They can only rely on experience in reflection and actions of others, but everyone chooses independently what experience, of what people, and to what degree they will eventually use.

It is a challenging task: the person has to combine the rational law with the irrational conscience. Modern people are used to computers. They are used to trusting the machine with making a lot of decisions for them, that is why, choosing between law and conscience, they mostly prefer the law that fits into a machine algorithm. Yet, they have to remember that machine-like thinking creates machine-like decisions and machine-like actions. Human nature is richer than that. It is not limited to pre-defined algorithms.

Using the experience of Russian philosophy, which views law as a minimum of morality, we can give advice to people enforcing the law in practice. The advice is not to be guided by legal norms alone but to listen to the voice conscience as well. Being included in moral norms, the legal norms are guaranteed to be observed, but there will also appear an opportunity to combine administering justice with making the world a better place.

Conflict of Interests

The authors confirm that the data provided does not contain any conflict of interests

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