Philosophy of Civil Law

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INTRODUCTION

The differences between the philosophical approach to civil law and the scientific one, represented by the discipline with the same name, are so significant that they actually take it beyond the scope of civil research as such, in its common forms. Scientific studies of civil law, with a practical or theoretical focus, always take the available regulatory material "at face value" – sometimes as a subject of comments, sometimes in the search of the ways to apply it, sometimes with the purpose of generalization, sometimes as an object for criticism, in order to improve it or replace it with something else. Anyway, in the context of science, it is impossible to abandon those rules and structures that are enshrined in law according to the established procedure and have become part of the official legal system.

Any philosophical study, on the contrary, is based on the principle of radical doubt. In case of reference to the regulatory foundations of civil law and order, without focusing on the specific content of those requirements, this principle requires to identify their stable axiomatic grounds and critically analyze them, finding weak points and contradictions, i.e., conducting philosophical problematization. It appears that the common feature of all options of philosophical analysis of civil law (as well as law in general), despite their complete divergence at the conceptual level, consists in the fact that the available provisions of civil legislation are nothing more than a convention for them. For example, within the framework of Hegelian philosophy of law, this is caused by the objective legal idea that can be perceived by the legislator to a greater or a lesser degree of precision; for Marxist philosophy, any regulatory prescriptions are only subjective reflections of relations of production, and so forth.

> According to Adolf Reinach, "So-called specifically legal fundamental concepts exist outside the field of positive law, just as numbers exist independently of mathematical science. Positive law can develop and transform them in its own way: they themselves are identified but not produced by this law. In addition, in relation to these legal formations, eternal laws are significant, they are independent of our understanding, like the laws of mathematics. Positive law can take them into its own field, but it can also deviate from them. Even if they turn into their opposite, this cannot affect their own existence" (Reinach, 2001).

Philosophy is "post factum" thinking about events that have already occurred and are known originally, with respect to law in general and civil law in particular, about frameworks, institutions, relations that have become part of legal practice and as such have already been described at the level of legislative recognition and scientific statements.

> This is exactly what Hegel says in his well-known aphorism: "Minerva's owl begins its flight only at dusk"; according to the philosopher, to teach about what is right, "philosophy always comes too late. As a thought about the world, it appears only after reality finishes its formation process and achieves its completion" (Hegel, 1990).

The Russian philosopher M.K. Mamardashvili expresses the same idea through the metaphor of philosophy as a "second journey":

> "The first journey — a person was born and naturally passes through the years of his life, as he grows and then gets old, some events take place, he floats in the sea of life circumstances. There is also a second journey, which is a special act, a second birth, the act of collecting one's life into a whole, collecting one's consciousness into a whole, a whole in the sense in which people apply this word to a work of art, as some organic unity that is not developed by itself and is exactly a whole" (Mamardashvili, 2012).

Without giving any ready and final knowledge, philosophy of law is mainly focused on giving an impetus to intellectual practices of any kind:

> "Philosophy, which is in full force, never appears as something inert, as a passive and already completed unity of knowledge; generated by the social movement, it is movement itself and extends its influence on the future..." (Sartre, 2008).

This thinking work is not identical to theoretical abstraction, drafting, or criticism of the current legislation, however, it can accompany them, relying on their results or creating conditions for them.

The necessity of the philosophical approach to civil law today is also a historically caused reaction to many years of dominance of the sentiments and views introduced by legal positivism in Russian civil law. Having achieved its main objective, to determine the subject field of legal studies and therefore provide a scientific status to jurisprudence, positivism at the same time had an adverse side effect because, wishing or not, it narrowed down the study of law to observation of the lawmaking activity of state authorities.

The influence of Marxism appeared to be dual as well. On the one hand, it proposed a very strong philosophical idea of the reflecting nature of civil law in relation to the production field of society, and, on the other hand, it thus blocked further philosophical thinking, since all civil law theorization forcedly centered around the undoubted dogmatized economic determinism, which ultimately lost its philosophical nature. Consequently, it is not surprising that even natural law theories, with their rather naive postulates about the existence of principles and rules of civil law objectively arising out of nature or reason, can be perceived as a "breath of fresh air" after the dominance of Marxist and positivist ideas, which leave almost no room for the dynamics of philosophical thinking about law.

The need to realize the beliefs underlying civil law rules and institutions in order to question them is common to the two leading and most efficient methods in philosophy of law, phenomenological and hermeneutic.

For example, in phenomenological research, it is important to identify one's own and others' opinions, assessments, and interpretations in order to conduct the operation of "epoché", that is, to separate the phenomenon under study from the extraneous meanings accompanying it and clarify its own original meaning due to this. Therefore, if the goal is to conduct a phenomenological study of civil law phenomena, for example, ownership, obligation, or agreement, all the knowledge about these phenomena enshrined in legislative acts will have to be "bracketed", that is, not considered, because these judgments will represent not the sought essence of phenomena but only private statements about them that are to be ignored.

For example, according to par. 1, Art. 420 of the Civil Code of the Russian Federation, a contract is an agreement of two or several persons on establishing, changing, or terminating civil rights and duties. If this statement is to be believed, the contract is a single, holistic phenomenon, in relation to which certain types of contracts are only variations. At the same time, phenomenological consideration of experience is indicative of the opposite: there are two fundamentally different phenomena – a written contract and an oral contract, which have almost nothing in common.

The hermeneutic paradigm in philosophy of law, on the contrary, is based on the priority given to texts in general and, consequently, to official sources in particular. However, the text is perceived as a starting, rather than ending point for interpretation, as source material with the meaning to be discovered rather than ready knowledge. As the founder of philosophical hermeneutics F. Schleiermacher believed,

> "Every utterance is to be understood only via the whole life to which it belongs, i.e., because every utterance can only be recognized as a moment of the life of the language-user in the determinedness of all the moments of

> their life, and this only from the totality of their environments, via which their development and continued existence are determined, every language-user can only be understood via their nationality and their era" (Schleiermacher, 2004).

In addition, one of the fundamental ideas of hermeneutics is that the meanings of any text are always multiple, and, moreover, contradictory (the idea of "conflict of interpretations").

From the point of view of hermeneutics, any texts, including laws, court decisions, doctrines, etc., are based on particular beliefs and attitudes that are not expressed directly in them, but can be identified through interpretation. In fact, it appears that the objective of philosophy is to discover these foundations and further subject them to analysis, criticism, or problematization.

However, to establish the meaning of the text adequately, interpreters must first of all be aware of their own worldview ideas (prejudices), so that they would not distort their understanding of the subject under study. According to one of the leading figures of philosophical hermeneutics Hans-Georg Gadamer,

> "This is the critical question of hermeneutics: how to separate the true prejudices, due to which we understand, from the false ones, by virtue of which we misunderstand. This is why hermeneutically educated consciousness includes historical consciousness. It tends to realize its own prejudices that guide understanding, so that the tradition, as a different opinion, could also stand out and make its presence felt. In order to single out a prejudice as such, it is obviously necessary to suspend its impact" (Gadamer, 1988).

For example, paragraph 1 of Article 10 of the Civil Code of the Russian Federation, "Limits of Exercise of Civil Rights", reads as follows: "Exercise of civil rights exclusively with the intent to cause harm to another person, actions bypassing the law with an unlawful purpose, as well as other knowingly unfair exercise of civil rights (abuse of rights) shall not be allowed". Interpretation of this text makes it possible to reveal in it the following worldview ideas that are not expressed directly:

1) People are free to choose both the ways to behave and the motives;
2) In their actions, people can be guided by the desire to commit evil;
3) The mental state of people can be influenced from the outside;
4) The internal motives of people are subject to evaluation from the point of view of legality and illegality;
5) (Legal) rights are ambivalent in their meaning, since they can be used for good or for ill.

In philosophical thinking, we face the reflexivity regarding civil law phenomena in various forms:

- civil law is one of the points in the comprehensive philosophical system (I. Kant, J.G. Fichte, G.W.F. Hegel);
- civil law issues become a special case of application of some philosophical and legal concept (B.N. Chicherin, G. Radbruch, V.S. Nersesyants);
- the rarest option: philosophical understanding of civil law is expressed in an independent and complete work.

The few examples of special works on philosophy of civil law include two classical treatises that appeared almost simultaneously: The Apriori Foundations of Civil Law by the German philosopher A. Reinach (1913) and The Main Problems of Civil Law by the Russian legal scholar I.A. Pokrovsky (1998).

The study by Reinach is an example of in-depth phenomenological analysis of one particular basic category of civil law – obligation:

> "Through the act of promising, something new enters the world. A claim [Anspruch] arises in the one party and an obligation [Verbindlichkeit] in the other. What are these curious entities? They are surely not *nothing*. How can nothing be eliminated after rejection or abandonment of it, or its execution? But they cannot be brought under any of the categories which are otherwise familiar. They are nothing physical, that is certain" Reinach, 2001).

The main conclusions of Reinach are that an obligation, like all main phenomena of law, is a reality of a particular kind ("social act") that is not reduced to either mental or ideological content:

> "Recently, along with the mental and the physical, the peculiarity of ideological subjects has been recognized again. The nontemporal nature is a significant distinctive feature of these subjects, i.e., numbers, concepts, provisions, etc. Claims and obligations, on the contrary, emerge, last for a certain period of time and then disappear. This is why they appear to be basically temporal subjects of a very special kind that have not been noticed before" (Reinach, 2001).

I.A. Pokrovsky demonstrates another style of philosophical thinking. In his summary work, he presents an impressive panorama of all the main civil law institutions united by a recurrent motif – the problem of combination of individualistic and collectivistic principles:

> "Civil law was originally and structurally the law of individual human persons, the field of their freedom and self-determination. The idea of a person as a subject of rights, i.e., as something legally independent even in relation to the state and its authorities, originated here for the first time. Since it is recognized that the person has a particular legal right, the person already occupies a certain position in relation to the latter, the person can claim something from them, the person is already a known unit of will, not a voiceless individual of someone's herd. Let us suppose that those objective rules which are the basis for legal rights of individual persons can be changed or even abolished by the state, but as long as this is not the case, persons have particular stable positions in the life of the whole social organism, and, using these positions, they can develop their powers to satisfy their interests, they can live for themselves within the limits of these positions" (Pokrovsky, 1998).

Worldview foundations determining the content of civil law institutions and rules are most often of a philosophical and anthropological (ideas about human nature) or social and philosophical nature (ideas about the structure of society).

The philosophical reflection of these foundations makes it possible, in particular, to view their historical and cultural limitations, which opens up opportunities for understanding the scenarios for further development of civil law; otherwise, the "reformation" of civil legislation, as it often happens, turns into aimless combination or equally mechanical borrowing.

CHAPTER 1

HISTORY

§ 1. Philosophy of Civil Law of I. Kant

The considerable influence of ideas of Immanuel Kant on the modern theory and philosophy of law is primarily due to the recognition and substantiation of the priority of the individual in political and legal life, which is characteristic of this thinker. For example, thinking about the source of duties, Kant comes to the following conclusion:

> "It is nothing but the person, i.e. freedom and independence from the mechanism of all nature considered at the same time as the ability of the being that is subject to pure practical laws due to the special, in particular, own reason..." (Kant, 1965).

Therefore, the basis of law is, first of all, the ability of the person to overcome the natural need and to build his or her life on other principles, which are established by people themselves based on their rational thinking.

One of the peculiarities of Kant's doctrine is that he denies the importance of not only natural conditions but also human goals and inclinations in development of law,

> "when considering law, he is abstracts himself from all external relations and factors *in order to* focus only on the legal form in the name of the consistently objective approach" (Alekseev, 2010).

According to B.N. Chicherin, this Kant's idea played a decisive role in the further development of German culture:

> "This was the source in which the best people of Germany drew their spiritual strength. Hence follows the highest flight of German spirit, which marked the beginning of this century and led to the awakening of the national ethos, to the expulsion of aliens and to the comprehensive powerful movement in the field of science and art. From now forth the moral doctrine of Kant must remain a refuge for lofty minds that can look at all attempts to

> produce moral requirements from human inclinations and practical goals with nothing but the deepest contempt..." (Chicherin, 2008).

Nature of civil (private) law. The fundamentals of Kant's philosophical ideas about civil law can be found in his work "Metaphysics of Morals" dated 1797. From a terminological point of view, it is noteworthy that the terms used by Kant differ from those accepted today, at least, in Russian jurisprudence. The field of law the content of which corresponds to the modern civil law (including the right of ownership, agreement, etc.) is called "private law" by Kant; on the contrary, he equates "civil law" with public law, since he associates it also with the so-called "civil status", which implies the availability of power guaranteeing protection of rights due to public laws. At the same time, the status of "private law" in Kant's doctrine has one significant uncertainty from the very beginning. On the one hand, he initially states that private law is the same as natural law. In its turn, natural law is the law which is based only on a priori principles and independent from the legislator's will (Kant, 1965). "A priori" is used by Kant for knowledge that does not depend on experience and sensible impressions (Kant, 1964). Consequently, it can be concluded that private law can exist without any legislative provisions.

On the other hand, discussing ownership issues, Kant quite definitely states that it is impossible to consider a thing one's own and require that others refrain from using it only on the basis of a unilateral will, which does not oblige anybody to anything:

> "Therefore, only the will obliging others, collectively general (joint) and powerful will, can provide everybody with a guarantee. - The status when there is general external (i.e. public) legislation accompanied by power is the civil status. Consequently, only the civil status can imply external mine and yours" (Kant, 1965).

There is a contradiction: private law is a priori, based only on reason, and it does not require laws; at the same time, private law is not possible without legislation supported by public authority. Kant resolves this contradiction in the following way: possession in its natural state (i.e. without any civil structure) is only "preliminary" possession, which becomes final only with the emergence of legislation.

Right of ownership. The concept of the right of ownership is presented by Kant at four different levels: 1) Mine and Yours; 2) Possession; 3) Real right; 4) Ownership. The expression *"mine by law"* (meum juris) is understood by Kant as a special way of connection between the person and the subject. This connection is characterized by such a degree of strength

that, first, it excludes use of this subject by anyone else without the owner's consent, and, second, if such use takes place, it is damaged. *Possession* is defined by Kant as a subjective condition of use; it is reasonable to say that possession is the connection of the person with something that is "mine by law" for him or her. However, the nature of this connection is still to be explained. The difference between two main types of possession, physical and intellectual, is essential in this context.

Physical possession takes place in case of body contact with a thing - for example, when a person holds an apple in his or her hands or is on some piece of land; otherwise, it is called "empirical possession" or "detention" (detentio).

Intellectual possession is the connection with a thing that continues also without any direct contact (in other words "noumenal possession").

In addition, the latter type of possession has a privileged value, since only it, in contrast to the former (physical) one, provides sufficient grounds for considering the thing one's own:

> "I can not call any subject (any physical thing) in space mine, except when, though not possessing it physically, I can state that I really possess it in another way (consequently, not physically). - For example, I call an apple mine not because I hold it in my hand (possess it physically), but just because that I can say: I possess it, though I have just let it out of my hands (it does not matter in which direction); in the same manner, about a piece of land on which I stayed, I can not say that therefore it is mine; I can say this only if I have the right to state that it is still in my possession, though I have left that place" (Kant, 1965).

Therefore, possession is not actual dominance but rather an ideal psychological connection of a person with a thing. It is this connection, rather than physical "holding", that is actually legal in nature. According to Kant,

> "the way to have something that is outside me as mine is a purely legal connection of the object's will with the subject - irrespective of the relation to this subject in space and time – according to the concept of noumenal possession" (Kant, 1965).

However, the question of the nature of actual possession remains open. It could be assumed that it has no legal meaning. However, Kant does not make such a conclusion. On the contrary, speaking of possession of land, he expressly states:

> "Purely physical possession (holding) of land is already a right..." (Kant, 1965).

In order to clarify this issue, it is reasonable to refer to the way in which Kant defines the concept of right: first, it relates only to the external practical relations of people; second, only to the choice (behavior) but not to the wishes or intents; third, only to the form of actions but not to their purposes. Hence there is the following well-known definition:

> "right is the sum of the conditions under which the choice of one can be united with the choice of the other in accordance with a universal law of freedom" (Kant, 1965).

D.O. Aronson notes in this regard:

> "If we consider the free choice as an attribute of numerous beings coexisting in the single material world (which implies the concept of "freedom of external relations between people"), free actions of each of the beings have involuntary consequences for others" (Aronson, 2015).

From this point of view, actual possession can be really considered a right, since the person possessing a thing already implements his or her freedom in relation to it, and this requires its protection from encroachment of all others. Indeed, as emphasized by Kant,

> "if I am the holder of some thing (consequently, I am connected with it physically), the one who makes an impact on it contrary to my consent (for example, snatches an apple out of my hands), affects and diminishes the inner mine (my freedom), consequently, is in his or her maxim in direct contradiction with the axiom of law" (Aronson, 2015).

Therefore, both ways of possession belong to the field of law. However, only the "remote" form of possession, not connected with actual holding, is "purely legal", since the right itself by nature is an absolutely intellectual phenomenon; as for physical possession, it is also a right, but not pure and with a bit of a material element. Therefore, one of the peculiarities of Kant's philosophical doctrine of possession is that he "dematerializes" it. The current Civil Code of the Russian Federation does not clarify the concept of possession either in the context of the owner's legal powers (Art. 209) or in the context of protection of real rights (Art. 301-305); however, the civil doctrine, as a rule, considers possession exactly as actual belonging (Ihering, 1895; Sklovsky, 2000). For example, K.I. Sklovsky expressly states:

> "*possession is not a right at all.* Possession totally belongs to material (actual) phenomena" (Sklovsky, 2008).

From the point of view of Kant's concept, a direct contact of a person with a thing in terms of possession is not required, just a mental idea is enough; in this regard, the remark of S.N. Bulgakov that Kant's philosophy is focused not on the practical but only on the cognitive activity appears quite justified:

> "Kant's philosophy by its subject could not be and was not a philosophy of action, which is necessary for the philosophy of economy, it was exclusively a philosophy of quietistic contemplation, calm theoretical separation of the subject and the object, when the object is only reflected in the subject and there is just an issue of conditions for the possibility of this mirror reflection. Kant's subject is inactive, it only contemplates, that is why this doctrine is quite an armchair philosophy" (Bulgakov, 1993).

Kant understands *real right* (ius reale) as a possibility to use a thing, also to require its return from any external holder.

According to Kant, the real right has a complex social structure. The peculiarity of its subjects consists in the fact that it always implies not a single holder but a plurality of possessors. This is explained by the fact that only in terms of a plurality of persons possessing a thing the subject of the real right acquires the need to protect it from possible use by other persons:

> "without the assumption of this joint possession it is impossible to think how I, who does not possess the thing, can be prejudiced by others, who possess this thing and use it" (Kant, 1965).

However, the possessor's unilateral will is not enough to exclude infringement of one's real right, since it does not have a priority over the will of others. The common will of all other potential possessors is necessary for the emergence of the real right:

> "With a unilateral choice, I can not oblige anyone else to refrain from using the thing, they would have no obligation to do this; consequently, I can impose the obligation to do this only with a joint choice of all persons [involved] in the joint possession" (Kant, 1965).

Therefore, the structure of the real right according to Kant includes, first, joint possession of a thing, and, second, voluntary refusal of all possessors, except one, of using this thing (Semyakin, 2013).

Consequently, though Kant describes possession and real right as phenomena inherent in individual persons, regarding their scope they fundamentally depend not so much on persons as on the will of society:

> "a truly legal ground for possession can consist only in the collective will of all members of society which is recognized as binding on each individual person" (Asmus, 1973).

Finally, *ownership* (dominium) is defined by Kant as the subject in relation to which the person inherently owns all the entirety of rights of disposal at his or her own discretion.

Agreement. In general, Kant understands obligation as a necessary action on the basis of coercion. At the same time, there is a distinction between active obligations, which are imposed by people on themselves, and passive, arising out of relations with other people (Kant, 2000). Recognizing the fact of the emergence of obligations from agreements, Kant actually refuses to give it any philosophical justification:

> "The question was posed as follows: why must I keep my promise? Indeed, the fact that I must keep it is quite clear to everybody. But it is completely impossible to introduce some other evidence of this categorical imperative..." (Kant, 1965).

Let us try to clarify this issue. Agreement can be understood as a sum of two or more acts of expression of will; in this case change of the intents of one of the parties could affect the binding nature of the agreement. However, the agreement for Kant is an act of joint will of its parties expressed simultaneously. This is why none of them can unilaterally withdraw from the fulfillment of the terms and conditions established by them together; this would require a new joint expression of will.

Therefore, the following ideas can be attributed to the main philosophical achievements of Immanuel Kant in the area of civil law.

1. Justification of the duality of private law as, on the one hand, natural and existing on the basis of reason, irrespective of the legislator's will; on the other hand, in its entirety requiring guarantees in the form of public legislation.
2. Differentiated analysis of the right of ownership at several levels:
   – "mine" as the thing with which the person is connected in a particular way excluding intervention of others;
   – possession as a condition of use in the form of physical possession of a thing or an intellectual idea of it as one's own,

which does not depend on the availability or lack of bodily contact;
- the real right as the possibility to use a subject in one's own possession excluding its use by someone else;
- ownership as the thing in relation to which the possessor has all the entirety of rights allowing disposal of it at his or her own discretion.

3. Justification of the collective nature of possession expressed in the initial plurality of possessors who refuse to use the thing in favor of one person;
4. Understanding of the binding nature of the agreement as the consequence of the joint will of the parties to it.

§ 2. Hegelian Philosophy of Civil Law

"Although the world literature on Hegel is very extensive, however, the studies of Hegel's problems, including political and legal ones, are often fragmentary in nature," noted V.S. Nersesyants, the leading Russian expert on Hegel's philosophy of law and Academician of the Russian Academy of Sciences. "In the huge stream of publications about Hegel there are still few generalizing and comprehensive works with particular profiles of studies of Hegel. For example, literature on Hegel does not include any thematically and logically coherent research in Hegelian problems with a political and legal profile" (Nersesyants, 1998).

All these words refer also to the scientific analysis of Hegel's philosophical ideas about civil law.

It is characteristic that the cognitive interest in civil law issues is not only invariably maintained by G.W.F. Hegel but even increases at all stages of his philosophical work, which is reflected, for example, in such texts as the manuscript titled "System of Ethical Life" (1802-1803), lectures "Jenaer Realphilosophie" (1805-1806) (Hegel, 1970), "Philosophy of Mind" (the third part of the Encyclopedia of the Philosophical Sciences) (1817), and, finally, is summarized in his major generalizing work titled "Elements of the Philosophy of Right" (1820), traditionally better known in Russia under the abbreviated title "Philosophy of Law" (Novgorodtsev, 1901; Chicherin, 2010).

This indicates that Hegel always placed the highest value on civil law in his exceptionally large-scale extensive philosophical system. Moreover, a number of civil law phenomena are considered by him as universals of human life and the necessary conditions for people to implement their generic essence.

At the same time, first of all, it is necessary to clarify the correlation between Hegelian philosophical legal structures and real positive law (civil legislation). This correlation is distinguished by duality.

On the one hand, Hegel always insists that genuine philosophical research cannot be utopian, on the contrary, it must be based on the available regulatory provisions of society, since

> "*the truth about law, morality and the state has been long established and been made common knowledge in public laws, as well as being common property in the morality of everyday life and in religion*" (Hegel, 1990).

As N.M. Korkunov clarifies this idea,

> "Hegel proceeds here from the basic assumption that the objective of philosophy of law or natural law can not be the search for perfect law which would have to replace the actually existing law. He does not recognize, like the followers of Kant, the differences between positive law and law of reason" (Korkunov, 2011).

On the other hand, the non-correspondence between civil law institutions, first of all, ownership and agreement, and the rules contained in laws of the state is indicated by the systematics of Hegelian philosophy of law: in its terms the idea of law is considered at three levels of its development, and each of them, in its turn, consists of three parts; at the same time, ownership and agreement form respectively the first and the second of these nine elements, and legislation of the state is observed only in sections "Civil Society" and "State", i.e. refers to the eighth and the ninth elements of the idea of law, it is part of its highest level – morality.

At the same time, positive law can provide for the rules which, according to Hegel, do not comply with the genuine nature of such phenomena as ownership and agreement: for example, although actually the agreement is to come into force upon expression of will, in civil law there are "real" agreements the effect of which is associated with the beginning of their performance; however, this legislative institution does not change the essence of the agreement and, as Hegel writes, "it is besides the point" (Korkunov, 2011).

Actual positive law does not reflect fully the idea of law in general and its separate levels:

> "a collision is possible between something that there is and something that there must be, between the law existing in itself and for itself and an arbitrary definition of what law is" (Korkunov, 2011).

Therefore, the prominent researcher on Hegel's works I.A. Ilin makes quite a justified conclusion: Hegel understands law not as a set of rules established by the state, and not so much a rule as a condition of human mind;

> "*law is right existence of will*, a right way of its life or *a right condition of a human spirit*" (Ilin, 1994).

Based on the foregoing, it would not be totally right to conclude that the Hegelian doctrine is a variety of natural law theory. They are related, undoubtedly, by the search for objective grounds of law that do not depend on the legislator's choice. Meanwhile, Hegel repeatedly expressed skepticism regarding the idea of "natural law", primarily because of the "natural" semantic nuances typical of it. In his opinion, there is nothing actually natural in the field of law:

> "In fact, however, law and all its definitions are based solely on *free person*, on *self-determination*, which is rather the opposite of *natural definition*" (Hegel, 1977).

As G.A. Gadzhiev notes in the same regard, if the idea of natural law is observed in Hegel's work in some cases,

> "there is only use of the term common for the reader, however, its meaning intended by the author is different: he does not hint at a certain natural genesis of this law — it is a product of man, not of nature. It is natural only because it is determined by the nature of the subject itself, i.e. the idea, and this is free will" (Gadzhiev, 2013).

Therefore, the Hegelian idea of law is the result of philosophical analysis of the existing positive law (legislation) that distinguishes permanent and necessary from temporary and accidental:

> "In law people must find their reason, must, consequently, consider the reasonability of law, and our science is concerned with it in contrast to positive jurisprudence, which often deals only with contradictions" (Hegel, 1990).

The concept of "will" is undoubtedly the central category of Hegel's doctrine of civil law. Without overstating it, it is Hegel who must be considered the founder of the will theory of civil law, which has a considerable influence also on Russian civil tradition.

The concept of will in Hegel's philosophical legal doctrine is clarified many times and endowed with the following features:

- will is a practical attitude;
- will is a thought that moves itself into actual existence;
- will is self-identification of "I", etc. (Hegel, 1990).

Attribution of civil law institutions of ownership and agreement to the field of so-called "abstract law" with its basic principle "be a person and respect others as persons" (Hegel, 1990), first of all, raises a question of civil equality. On the one hand, since a person is something abstract devoid of individual features, persons are fundamentally indistinguishable from each other and enter into relations with each other as identical subjects. On the other hand, this seemingly axiomatic principle is seriously questioned by another Hegelian idea – the necessary nature of relations of domination and slavery. Hegel is convinced that it is they that are the foundation of any society:

> "where there are many individuals, their relationship is obvious, and this relationship is domination and slavery..." (Hegel, 1978).

The contradiction between equality arising out of the full legal equivalence of persons and objectively existing relations of domination and slavery can be resolved in at least two ways:

- first, recognition that domination and slavery do not manifest themselves in the field of "abstract law", in other words, that the master and the slave are equal in the relations of ownership and agreement;
- second, consideration that "abstract law" itself can emerge only inside one of these groups – either only between the masters or only between the slaves (certainly, assuming that the slaves have civil legal capacity in general).

In terms of the Marxist interpretation it was accepted to associate the Hegelian concept of "abstract law" with the structure of bourgeois legal relations:

> "His concept of abstract law was an abstract concept of the main type of legal relations typical of bourgeois society as a volitional relationship between two commodity owners who recognize each other as private owners" (Piontkovsky, 1973).

According to Hegel, ownership is the fundamental and at the same time elementary, primary principle of "abstract law". It is stated more definitely in handwritten notes of Hegel: "Law in itself is ownership" (Handwritten notes of G.W.F. Hegel…, 2001). Its existence is primarily due to the fact that human will is unlimited in nature and tends to expansion, i.e. the constant extensive spread over all available subjects of the external world. The pragmatic function (i.e. personal and social usefulness) of ownership is only secondary in comparison with its anthropological value:

> "Reasonableness of ownership consists not in satisfaction of needs but in the fact that naked personal subjectivity is removed" (Handwritten notes of G.W.F. Hegel…, 2001).

Since things are not endowed with will and can not resist human choice, they are initially intended to be appropriated; hence there is the Hegelian principle of universality of appropriation:

> "All things can become property of people, since they are free will and as such in themselves and for themselves, the opposite to them does not have this feature. Consequently, everyone has a right to turn their will into a thing, or a thing into their will, in other words, to remove the thing and make it their own, because the thing as something external has no goal in itself, it is not an eternal correlation with itself, but something external to itself. Something similar and external is also a living being (animal) and thereby a thing itself" (Handwritten notes of G.W.F. Hegel…, 2001).

Since will in the Hegelian doctrine is individual rather than collective, this implies a privileged value given by him to private ownership in comparison with its other forms:

> "As I give actual existence to my will through ownership, also ownership must be defined as this, mine. This is the essence of the important doctrine of the necessity of *private ownership"* (Handwritten notes of G.W.F. Hegel…, 2001).

Consequently, common ownership appears as something secondary or derivative, due to its "dissolubility", i.e. the possibility to cease it at the individual choice. In relation to Roman agrarian laws, Hegel expressly states that private ownership is a more reasonable phenomenon than common ownership.

At the same time, however, Hegel emphasizes that private ownership can have also a subordinate position in society if only it is necessary for a reasonably organized state organism (Handwritten notes of G.W.F.

Hegel…, 2001). The state as a higher level of the idea of law has a priority over ownership.

Hegel does not consider separately the possibility of existence of corporate ownership, and the very ideological attitudes that could become the basis for resolution of this problem are quite contradictory in Hegel's philosophy of law. On the one hand, the corporation along with the police belongs to the third highest level of development of law – morality, specifically, to the field of civil society, and at the same time

> "*as well as the corporation family* forms the second, *ethical*, root of the state existing in civil society" (Handwritten notes of G.W.F. Hegel…, 2001).

On the other hand, Hegel does not consider the corporation as a subject of ownership possessing full rights and notes that

> "a social union in the end does not have a right to ownership as an individual person" (Handwritten notes of G.W.F. Hegel…, 2001).

Implementation of the idea of ownership, according to Hegel, has four basic forms:

1) Internal act of will, or "placement of one's own will into a thing" (this is already the "concept of ownership" for Hegel);
2) Entry into possession (first of all, physical capture, according to Hegel, is "the most perfect" way of taking possession, since the subject is present in it directly, and its will is expressed in the most open way);
3) Consumption (implementation of the purpose of a thing by means of its destruction, alteration or intake);
4) Alienation of property, which occurs in two forms:
   - as a simple abandoning of things (for example, when they become ownerless after a long time);
   - as their transfer into the possession of another person. At the same time, there can be a situation where the owner of a thing does not have the right to alienate it – in this case, according to Hegel's explanations, the owner of the thing is not the owner of its value (benefices or fideicommissa can serve as examples); however, these restrictions do not correspond to the nature of ownership and therefore must disappear (Handwritten notes of G.W.F. Hegel…, 2001).

From this perspective, such an institution of civil law as agreement is a direct continuation, a logical consequence and an expression of the idea of ownership.

Despite the nature of agreement for Hegel, like the nature of ownership and all other legal phenomena, comes down to will, this general principle is corrected in a particular way in this case. For example, if the agreement would be equal to expression of will, it could be assumed that the force of the agreement is already included in such an act as a promise. Indeed, a promise itself is not just formed but even openly expressed will. However, Hegel fundamentally distinguishes between the promise and the agreement:

> "The difference between a simple promise and the agreement consists in the fact that in terms of the promise something that I want to give, do, fulfill is expressed as relating to *the future* and remains also a subjective definition of my will, which I therefore can also change" (Handwritten notes of G.W.F. Hegel…, 2001).

First, the agreement contains not only expression of will aimed at transfer of the thing but also another, not so obvious but no less important act, namely, mutual recognition of the parties as subjects of law:

> "The agreement implies that those entering into it *recognize* each other as persons and owners; since it is a relation of an objective nature, the moment of recognition is already contained and implied in it" (Handwritten notes of G.W.F. Hegel…, 2001).

Second, although the coordination of wills remains the main content of the agreement, along with the necessity it includes external symbolic and procedural formalization; this leads to Hegel's fundamental conclusion on the independent significance of the stipulation procedure. As is known, the stipulation is an institution of Roman private law which is a special strict communicative formula in the format of oral question and answer used for conclusion of deals and emergence or transformation of obligations: the creditor asked: "Do you promise to give me this much?..", to which the debtor replied: "I promise." ("spondeo") (Muromtsev, 1883; Pokrovsky, 1998; Bartoshek, 1989). For Hegel the stipulation is the best example of how the agreement of the parties is given a new quality ("special actual existence") by performing a set of symbolic and ritual actions including both gestures and speech. This formalization is a condition for legal fullness of the agreement:

> "the agreement stipulation itself is already *actual existence* of the resolution of my will to the extent that I alienate my thing, that it is already *now* ceases

> to be my property and I already recognize it as property of another person" (Hegel, 1990).

The connection between the formal and the actual sides of legal relations, which already seems somewhat weakened in Hegel's description of ownership above, is almost devoid of its significance in relation to the agreement:

> *"Actual existence* of *will* in formality of gestures or in speech defined for itself is already its – as of intellectual will – full actual existence in relation to which fulfilment is a consequence devoid of self" (Hegel, 1990).

The agreement, in other words, must be considered already quite completed when two individual wills resonate with each other and find an adequate formal and symbolic expression for it, the moment of real fulfilment of the agreement, important only from a practical point of view, legally – at least, from the point of view of the essence of the agreement, – appears as something insignificant. The direct follower of Hegel B.N. Chicherin explains this as follows:

> "the arrangement, i.e. the expression of wills, is a significant point here; fulfilment is just a consequence of this act, because through the arrangement the subject ceases to be property of one and becomes property of the other one" (Chicherin, 2010).

This is why the so-called "real contracts", which are recognized as entering into force only upon the beginning of their fulfilment (like, for example, agreements which are recognized as concluded upon transfer of the property by virtue of part. 2, Art. 433 of the Civil Code of the Russian Federation), are considered by Hegel only as a misunderstanding.

Therefore, even the most general and brief essay on Hegel's philosophical ideas about civil law leads to the following conclusions:

1. As for its method and manner, this doctrine is always based on analytical processing and interpretation of empirical legal material, but it is not limited to its simple description or even generalization, but always implies its in-depth anthropological assessment: according to I.A. Ilin,

   > "Hegel always means not 'law' but *'legal state of will'*; and not 'legal institution' but *'act and the state of will that becomes free in its external life and deepens internally'*. Hegel raises one and the same question in relation to each legal state: *is this a right status of will?*" (Ilin, 1994).

2. In this sense the Hegelian approach provides potentially efficient tools not only for cognition but also for criticism and enhancement of civil legislation – if its rationality rather than only its social or economic effectiveness is taken as a criterion.
3. As for its basic attitudes, Hegel's philosophy of civil law has a pronounced individualistic nature; Hegel recognizes the institutions of ownership and agreement as forms of expression and coordination of separate wills (which manifests itself, for example, in the establishment of the priority of private ownership and in the denial of the ownership right of "social unions").
4. At the same time, Hegel, considering the state as the highest form of development of the legal idea, acknowledges that it is possible and necessary for the state to intervene in the relations based on "abstract law" and to change abstract legal foundations of human interaction taking into account the needs of the state organization of society already not as a sum of individuals but as a qualitatively new whole.
5. The principle of balance between two elements, internal (psychological) and external (formalistic), identified and substantiated by Hegel in his philosophical study of such civil law phenomena as ownership and agreement is extremely productive. This balance is expressed respectively in the combination of a volitional factor and speech formulas (for example, in terms of the stipulation), however, the moment of actual behavior of subjects of law retains only a purely secondary legal significance in all cases.

§ 3. Philosophy of Civil Law of B.N. Chicherin

Civil law, like law in general, can be studied at three different levels. At the first level, *empirical,* the object of cognition is specific rules of civil law and the practice of their application, and the subject is the sense of these rules, both general and with respect to specific cases. The second level, *theoretical,* is aimed at summarizing empirical data, i.e., identification of in their repetition, regularity, universal principles, etc. Finally, the third level, *philosophical,* is observed more rarely. Its objective is to search for the underlying foundations of those generalized ideas that are obtained in a theoretical way. Boris Nikolayevich Chicherin was one of few Russian scholars that conducted a serious philosophical study of civil law. He was a renowned thinker, professor of state law at the University of Moscow, home teacher of the heir to the imperial throne, and, for a brief period, political figure (he held the post of Moscow mayor in 1882-1883).

Not being a professional scholar of civil law, Chicherin started his academic career as a historian of law, studying ancient and medieval Russian law, where, naturally, civil law rules and relations themselves were not even distinguished on purpose and were merged with other fields of regulation, and he was particularly interested in the issues of property relations, first of all, the emergence of land ownership and serfdom in Russia (Chicherin, 1858).

Afterward, Chicherin directly addressed the issues of civil law in his fundamental work titled "Ownership and the State", as well as when forming his final summarizing doctrine set forth in The Philosophy of Law.

The underlying ideological premises of Chicherin's philosophical conclusions on civil law issues are his liberal-conservative individualism, Hegelian convictions, and his disagreement with socialism, utilitarianism, and Ihering's jurisprudence of interests (Zorkin, 1984). Of course, he does not question the positive (legislative) aspect of the right of ownership. However, the normative consolidation of this right itself only proves its existence, but does not explain why it emerges and upon what it forms. Chicherin admits and recognizes human material needs, which, in their turn, imply appropriation and use of objects of the outside world for their satisfaction. However, this substantiation of the right of ownership would be materialistic in nature, and Chicherin decisively rejects it.

The reason is that the nature of ownership, according to him, is not material at all:

> "Those who associate ownership with satisfaction of physical needs, have no idea what the right is. The latter is not a physical but mental principle" (Chicherin, 1900).

We should note this categorical wording, since after we will find significantly different provisions. Therefore, the author not only draws the line between "physical" and "mental" phenomena but also evidently rejects their mutual influence, since, on the basis of the fact that the right belongs to the mental field, he draws the conclusion that it can have no material sources.

Not human needs but human purpose appears to be the real source of ownership. According to Chicherin, it consists in "being the master of impersonal nature" (Chicherin, 1900). Chicherin expresses Hegel's idea almost with the same words in his course of the history of political doctrines:

> "In the name of the right the free person puts his hand on nature, and this right must be respected by others" (Chicherin, 2010).

Therefore, ownership is based on the idea of human superiority over nature. In its turn, this superiority is observed in the fact that people possess some qualities that nature does not have, in particular, reason and personality.

With this regard, Chicherin, is undoubtedly a direct successor of the Enlightenment era with its cult of human reason; from a modern perspective, the idea of natural human domination over nature is unjustified and unsafe, which is reflected in environmental imperatives, including the relevant legislative restrictions of the right of ownership. Having stated in the most definite and radical form that the right of ownership, like the right in general, is purely nonmaterial in nature, Chicherin actually rejects this idea and suggests another one further in his study:

> "the right of ownership includes an ambivalent element: conceivable and real, the legal principle and its implementation in real possession" (Chicherin, 2010).

Therefore, we observe a completely different view on the nature of the right of ownership: after the right is freed from human material needs, another "real" element is found in it, and it is neither an object nor an interest, but exercise of the right; in other words, *the exercise of the right of ownership is not a process that is carried out with an already complete right but an integral part of that right itself.*

From the further text, it is clear that the author admits the discrepancy between the right and actual possession, however, this exception itself only proves his general attitude that, as a rule, they coincide under normal circumstances.

In this way, B.N. Chicherin poses (and solves in his own manner) a fundamental philosophical question: does the right of ownership belong to the field of the possible or to the field of the actual?

If we turn to the Russian legal order, on the one hand, the concept of the right of ownership as well as of civil legal right in general is not described in detail, though, used in the legislation, and, in the civil doctrine, the right of ownership is usually defined as a possibility or a set of authorities (powers) (Andreev, 1993; Mattei and Sukhanov, 1999).

Therefore, the exercise of the right of ownership is not an element of this right. On the other hand, the framework of "violation of the right" can speak in favor of the theory proposed by B.N. Chicherin. Article 304 of the Civil Code of the Russian Federation reads as follows: "Owners may require elimination of any violations of their rights, even if these violations are not connected with dispossession". Interpretation of this Article makes it

possible to conclude that dispossession is a case of violation of the right of ownership, even if it is not the only one.

However, in case of dispossession the right of ownership itself, or the owner's title, are not affected – only its actual exercise is limited. "Violations" of rights are usually understood as not only the cases where the existence of the right is illegally rejected but also actions which deprive the holder of the right of the possibility to use it. Hence it follows that the content of the right of ownership, one way or another, includes not only statutory possibilities of the owner but also their actual realization.

In his Philosophy of Law, B.N. Chicherin takes as an axiom that agreements are the only possible form of regulation of relations between free people:

> "There can be no other way to bring the free wills to a mutual or reciprocal action, except a voluntary agreement. This is quite clear" (Chicherin, 1900).

It should be mentioned that this provision, introduced by the author as a matter of course, raises some doubts. In particular, it is not clear why the possibility of any external subject establishing persons' rights and duties is rejected. Admitting the parties mutually bound by their own agreement, Chicherin, for some reason, rejects that it can be done by a third party. The most fundamental question posed by Chicherin in relation to agreements is as follows: by virtue of what can the free will bind itself so that it can no longer change its decision? In other words: on what is the binding force of agreements based? (Chicherin, 1900).

We should note here that the binding nature of the agreement is already implied and beyond doubt in this formulation of the question. However, it is quite possible and even necessary to ask other questions before it: are agreements binding? If so, what does the binding nature of the agreement mean?

In this case, as well as in other ones, Chicherin excludes those explanations that are built on the ideas of interest and benefit. He believes that it is impossible to form the binding nature of the agreement upon the interests of the parties, at least because one of them may be much more interested in non-fulfillment of the agreement than the other one – in its fulfillment, but this does not affect the legal force of the agreement (Chicherin, 1900). Chicherin suggests the model of "rational will" as his own substantiation of the binding nature of the agreement. It proceeds from the fact that people are capable of controlling not only the present but also the future, planning to perform some actions. However, having bound their will with the will of someone else, people lose the possibility of the right to change it at their own discretion and this requires obtaining a consent: