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THE PLACE OF THEORY OF LAW WITHIN THE SYSTEM OF JURISPRUDENCE

The article has been written by a teacher of administrative law and administrative science at Masaryk University, Brno, Czech Republic. It focuses on the position of theory of law within the system of jurisprudence. Theory of law may be seen as the most general legal discipline dealing with what is beyond the scope of partial legal disciplines. A radical opponent could protest against the existence of legal theory, referring to a higher degree of effectiveness and rationality of jurisprudence, and argue that a number of tasks and technical problems could be solved by individual disciplines of law. The author, however, disagrees with such a view.

Key words: jurisprudence; theory of law; effectiveness; rationality

Theory of law.

Theory of law may be briefly described as a systematically developed branch of (modern, post-modern, post-industrial¹) jurisprudence. The development of theory of law as a relatively independent discipline can be traced back to the early 19th century.² Until then the general thought of law was part of philosophy. The main force behind the origin of this new independent discipline was

¹ What period we are living in is a subject-matter of lengthy and complicated disputes among philosophers, legal theorists and sociologists (and not only among them, of course). In my view, regarding the old principle of *ubi societa ibi ius* this disputed discourse has direct influence on the choice of the adjective used for designating the current jurisprudence.

² Cf. for example Boghuszak, J. – Čapek, J. – Gerloch, A. : *Teorie práva*. [Theory of law] Praha, ASPI Publishing, 2004, p. 14.

undoubtedly *legal positivism*. Positivism³ does not look for an answer to the question what is the very essence of things but it strives to search for and understand (analyze) empirical facts, i.e. data that are verifiable on the basis of human knowledge (practice, experience). Thus, it is an examination of legal reality facts gained by empirical research. When mentioning the beginnings of **legal theory** it is worth adding for the sake of information completeness that the appearance of legal theory is connected with the so-called General Legal Studies (Allgemeine Rechtslehre) which made the legal positivism their methodological basis⁴.

Jurisprudence may be characterized as an aggregate of scholarly disciplines striving to get from phenomenal aspects to the heart of law as a normative system⁵. An erudite reader need not be told that jurisprudence has been engaged in that task very long as roots of this “research” can be found as early as the Antiquity. In the ancient Greece, jurisprudence was part of the so-called universal philosophy and talking largely about the importance of Roman law would only mean “bringing owls to Athens”.

In line with M. Večeřa, among others, we may characterize and categorize jurisprudence as a social science included in humanities in their broader sense. Distinguishing social and natural sciences, which surpasses the ancient conception of a universal science, has certain methodological consequences⁶. Besides that conception of jurisprudence history has known a number of specific conceptual and methodological approaches ranking a legal normative system among natural phenomena and jurisprudence among natural sciences⁷.

³ Something provable and therefore real or, to put it more nobly, true.

⁴ Harvánek, J. et al: Právní teorie [Legal theory], Iuridica Brunensia, Brno, 1995, p. 28.

⁵ Cf. for example Madar, Z.: Slovník českého práva. 2. rozšířené a doplněné vydání [Dictionary of Czech law. 2nd extended and complemented edition], Linde, Praha, 1999, p. 1050.

⁶ Večeřa, M. in Gerloch, A., Maršálek, P. (eds): *Problémy interpretace a argumentace v soudobé právní teorii a právní praxi* [Problems of interpretation and reasoning in current legal theory and legal practice], Sborník příspěvků z vědeckého kolokvia kateder teorie práva, Eurolex Bohemia, Praha 2003, p. 33.

⁷ See for example Boutroux, E.: *Natural Law in Science and Philosophy*, Macmillan Company, New York, 1914.

On the horizontal level, jurisprudence is divided, according to the system of law, into particular scholarly disciplines (e.g. administrative law studies or criminal law studies).

In other words, according to the degree of generality legal studies may be classified into:

- 1) general and
- 2) special ones.

Ad 1) general ones – **Theory of law** may be understood as the most general discipline of jurisprudence which deals with anything that goes beyond the framework of individual partial areas of law.

Ad 2) special ones – They deal with individual areas of law such as the above mentioned disciplines of administrative law studies, criminal law studies, or commercial law studies.

If we were asked – in accord with the title of our paper – what is the position of legal theory in jurisprudence then the answer would certainly be that it is a crucial one, which is of course closely connected with the above mentioned feature of legal theory, namely, its maximum generality when compared to other legal disciplines. To a certain degree it shares this cardinal position with legal philosophy (or philosophy of law). However, this division of labor does not mean, in my opinion, that legal philosophy “is confined” to dealing with a partial segment of the dominant legal theory within jurisprudence but it is rather a relation of mutual complementation and enrichment. The principal task of legal philosophy is to examine the origin, the essence and the meaning of law in society⁸. V. Veverka says that the relationship between legal philosophy and legal theory has always been, save for minor exceptions, *very close*, especially if we take into consideration the fact that the main topic of legal philosophy as an independent legal discipline has always been the sense and the function of *positive law* even within the context of the contemporary ius naturalism justifying a certain convergence with positive law⁹.

Remanent principle – within the context of this article and especially when considering the relationship between legal philosophy

⁸ Since Plato’s time it has developed within general philosophy and together with philosophy of state it has become part of ethics.

⁹ See Veverka, V. et al.: *Základy teorie práva a právní filozofie* [Foundations of theory of law and legal philosophy], Codex Praha, 1996, p. 264.

and legal theory the “remanent”¹⁰ (residual) principle should be mentioned. It is based on a hypothesis that theory of law is meant primarily for an *empirical* research of law; hence legal philosophy includes all questions and considerations about law minus theoretical conclusions, argumentation, and sets of data from the empirical research of law¹¹.

The place of theory of law in the system of jurisprudence – the basic theses:

A teleological approach:

First, we will mention (in short) assumptions (or areas of problems) and then we will discuss tasks and goals of legal theory.

A) – **assumptions**:¹²

1) Ubi societas, ibi ius.
2) Law is not an exact but argumentative discipline (Knapp¹³ or B. H. Levy¹⁴).

3) We are not able to discover the reality but only its manifestations (Kant¹⁵).

4) Dealing with law occurs at several levels – making, interpreting, applying and reasoning.

5) Law is subject to research of other scholarly disciplines, such as legal philosophy, administrative law science or civil law science. It is necessary to take them into consideration, too. These disciplines exchange pieces of knowledge with legal theory enriching one another.

Tasks of legal theory:

1) Defining the concept of law and reasons for its binding character (grundnorm - Kelsen¹⁶, social contract - Rousseau¹⁷, God's

¹⁰ The above mentioned jurist V. Veverka uses the term “residual”.

¹¹ Cf. Veverka, op. cit., p. 265.

¹² Here I would like to express my thanks for consultation and inspiration to JUDr. R. Polčák, Ph.D., assistant professor at Law Faculty, Department of Legal Theory, Masaryk University. Since 2010 he has been the head of the Institute for Law and Technologies, Law Faculty, Masaryk University.

¹³ Kanpp, V. Theory of Law, Praha, C. H. Beck, 1995.

¹⁴ Beryl Harold Levy, Anglo-American philosophy of law: an introduction to its development and outcome, Transaction Publishers, 1991, ISBN 0887383440, p. 96.

¹⁵ Kant, I. Kritik der praktischen Vernunft. Erlangen: Harald Fischer, 1986.

¹⁶ Kelsen, H., Všeobecná teorie norem [General theory of norms], Brno, Masarykova univerzita, 2000.

¹⁷ Rousseau, J. J., Cranston, N.V. The Social Contract. Penguin Books, London, 1968.

will – Thomas Aquinas¹⁸, natural character – Seto¹⁹, goal – K. Engliš²⁰, and others).

2) Defining legal concepts and methods – together for all the other legal disciplines. The goal: to enable a systematic research, application and development of law plus a description of methodological and conceptual differences (e.g. between positivist and natural-law methodologies – Weyr²¹, Kelsen²², Rawls²³).

3) The definition of procedures, methods and techniques of law-making and forms in which law is created (NPA, normative contract, precedent, etc.) – Habermas²⁴.

4) The development of methods for using law in difficult situations²⁵.

5) A presumption of the future development of the existence and effectiveness of law and suggested solutions for maintaining its function – postmodernity, Derrida²⁶, Benjamin²⁷, Pascal²⁸.

6) The development of modern and perspective methods of legal education (critical legal theory – Tushnet²⁹, Přibán³⁰).

¹⁸ An Introduction to the Metaphysics of St. Thomas Aquinas, Gateway Editions, 1997.

¹⁹ Seto, T. P.: General Theory of Normativity. Los Angeles: Loyola Law School, 2003.

²⁰ Engliš, K.: Kritika normativní teorie [A Critique of Normative Theory] p. 203 and further, in Brněnská škola právní teorie. Praha, Karolinum, 2003.

²¹ Weyr, F.: Pojem normy [The concept of norm]. p. 55 and further, in Brněnská škola právní teorie. Praha, Karolinum, 2003.

²² Kelsen, H., Všeobecná teorie norem [General theory of norms], Brno, Masarykova univerzita, 2000.

²³ Rawls, J.: Teorie spravedlnosti [A Theory of Justice]. Praha, Victoria Publishing, 1995.

²⁴ Habermas, J.: Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (Studies in Contemporary German Social Thought), The MIT Press, 1998.

²⁵ “When solving difficult practical law issues we nearly always use doctrinal knowledge and scholarly publications thus become an important recourse of parties when arguing before the court,” Polčák, R. in Harvánek, J. et al.: Teorie práva [Theory of law]. 1. vydání, Plzeň, Vydavatelství a nakladatelství Aleš Čeněk, s.r.o., 2008, p. 271.

²⁶ Derrida, J.: Síla zákona [Force of law]. Praha, OIKOYMENH, 2002.

²⁷ Benjamin, W.: Zur Kritik der Gewalt und andere Aufsätze. Frankfurt a.M.: Suhrkamp Verlag, 1965.

²⁸ Pascal, B.: Myšlenky [Thoughts]. Praha: Mladá fronta, 2000.

²⁹ Tushnet, M. A.: Court divided, W. W. Norton & Company, 2005.

Conclusion:

The plan of the above mentioned tasks evidences an enormous significance of legal theory as such important tasks may be achieved (solved) only by a scholarly discipline of key importance. A radical opponent could protest against the existence of legal theory (or against its essential significance), referring to a higher degree of effectiveness and rationality of jurisprudence and arguing that a number of tasks and technical problems could be solved by individual “partial” disciplines of law that might then exchange their knowledge more intensively among one another. I disagree with that seeing the main *raison d’être* of legal theory nowadays in a general (or the most general) conception of legal theory, apart from the above mentioned tasks and goals, i.e. that legal theory is a certain theoretical wall preventing one scholarly shortcoming that sometimes you cannot see the whole wood (i.e. law in this case) because of individual trees.

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³⁰ Přibáň, J.: *Sharing the Paradigms? Critical Legal Studies and the Sociology of Law*, in *An Introduction to Law and Social Theory*, Hart Publishing, Oxford, 2002.

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MESTO TEORIJE PRAVA U SISTEMU ZAKONODAVSTVA

Ovaj članak se fokusira na poziciju teorije prava u opštem sistemu zakonodavstva. Teorija prava se može sagledavati kao najopštija pravna disciplina. U tom smislu mnogi smatraju da je teorija prava kao naučna disciplina potpuno nepotrebna, tj. Nekorisna u sistemu pozitivnopravnog zakonodavstva. Autor ovog članka se međutim ne slaže sa takvim stanovištima i smatra da teorija prava može biti vrlo korisna i dobrodošla kada je reč o donošenju zakona, o zakonodavnim procesima.

Ključne reči: zakonodavstvo; teorija prava; efektivnost; racionalnost