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How the law is perceived in the 20th century

Dispute between natural and positive law has been persisting for millenniums and it is vivid even nowadays.

In the past, most of the jural theorists accepted and realized the importance of both natural as well as positive law.

If we have a look into past we can see that a confrontation between IUS-naturalism and IUS-positivism had a sinusoid tendency, nevertheless since 19th century and most of all since 20th century there has been a tendency towards the positive law.

Discussion between positive and natural law

Twentieth century can be called a period during which the IUS-Naturalism has been shifted towards more positivism within the natural law. Jural Positivism can be understood as a doctrine based on the Bentham's utilitarianism which did not accept other normative systems to be involved into the concept of law. Prominent representatives of this theory have completely excluded moral content of the legal standards and they consider these to be irrelevant for the validity of the law. According to them evaluating standards through moral criteria is not appropriate because this brings chaos into the jural thinking..

Due to the common circumstances which had occurred after the World War II we have been facing a reminiscence of the natural law by Gustav Radbruch, namely the state of so called "unjust/unlawful law" (unrichtiges Recht). Because in the 19th century there had been the jural positivism which prevailed, this period brought formally valid law, however this was insufficient in its content. Nazi legislation misinterpreted natural law in order this to reflect their purposes. Therefore the issue of necessary minimum moral content of the law was vivified[Hrdina, Masopoust 2001]. Similarly, also German constitutional judges adopted a Decree of so called "emanation" of super-positive principles of the democratic constitutionalism and fundamental rights into

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the system of the positive law. Certainly it must be noted that after Germany became unified the judges has again reanimated Radbruch's formula in the case of shooting on the East German borders[Přibáň2010].

At the end of the World War II the most compromised German jural philosophers had to stay interim silent within the Western occupation zones whereby others needed more time to cope with the past. This led to more tensions between experts within official garniture, team of the German jural philosophy after the WWII. Only **Gustav Radbruch** had represented and kept continuity with the pre-Hitler period in the West Germany. Inhumanity of positive law and legislation of Germany during the WWII had affected Radbruch to incline to the IUS-Naturalism concept though he had preferred jural positivism before. Radbruch came to the outcome upon which he confirmed an existence of legal principles which prevails the positive law. He calls them positive eventually sensible law and any law contradicting to this sensible law becomes null and void, invalid. Conflict between positive law and justice is resolved in „Radbruch formula“, derived from the article Legal injustice and super-law which states: *„Should the injustice of the positive law reach such a level that by the positive law guaranteed legal certainty has no relevance compared with this injustice, in such a case the wrongful, unjust law must retreat in favour of justice“* [Valent, Chovancová 2006]. This situation occurs only in the case if the contradiction between positive law and injustice is unbearable. Radbruch accepts validity though this positive law is „wrongful, unlawful and purposeless in its content“ [Höllender 2006]. According to him the positive law is to be preferred nevertheless if *„laws knowingly and advisedly deny the will of justice for example they arbitrarily assign and/or refuse human rights then these laws lack validity, then people are not obliged to obey them and then also lawyers must find a courage to deny their jural character“* [RADBRUCH 2011, s. 332]. He herewith express that in the case of maximum unjust law we cannot refer this to law.

Radbruch's Post-War philosophy he formed hurriedly and only fragmentarily had minor effect on next major systems of natural law. Thesis on „*matter nature*“ Radbruch tried to restore has had more significant effect later when Post-War war of natural law was reduced and law theoreticians shifted their attention from high philosophy towards issues related with the executing law in practice. However it is undeniable it was Radbruch who during the post-war disintegration restored major jural and legal thinking in Germany and helped to direct that towards the IUS-naturalism [KLABOUCH 1989].

An Oxford Professor of the Theory of Law **Herbert Lionel Adolphus Hart** was a remarkable proponent of Positivism and according to him the system of valid laws had been established on the statements of exact sciences. Obviously, he did not prefer natural law by positive law creation and in addition he deemed that to be irreconcilable with positive law. Hart was a proponent of a Theory of minimum content of natural law in the laws. He

explained reasons for creating this Theory in his work “the Concept of Law” as follows: „*General argument simply will be that without such a content the law and morality could not support minimum goal of surviving people have by associating with other people. Should such a content be missing people would have no reason to willingly adhere to any rules*“.[HART 2004]He referred to reasons of minimal common content of morality and law for example in the case of human vulnerability. That is a basis for legal standards and norms restricting use of violence or limitation of sources which are the basis for the legal regulations of various forms of ownership. According to Hart there is not a rule within a natural law according to which it would be possible e.g. to make decision whether we should put ban on selling knives to juveniles or whether certain resources should be solely owned by the State. Weight of such decision is solely in hands of legislators and/or judge courts. Hart in his works attempted to analyze law and legal system. For Hart the relation between morality and law had been based on interpretation of importance of law existence.

In the second half of the twentieth century an Anglo-Saxon philosopher **Lon Luvois Fuller** had significantly contributed to the development of the IUS-Naturalism. Apart from Hart he does not define law independently on reasons due to which people accept and obey laws. Each social system must, according to Fuller, contain Eight key moral principles representing requirements of legality. In his “Morality of Law” Fuller states that a function of law is human behaviour to be subordinated to rules and that law must respect certain general criteria and principles. Morality of law is not a metaphysical base of the law but its internal issue enabling law’s functionality within the society. Such issues are for example universality and stability of rights, clear and non-contradictory laws, their promulgating, ban on their retroactivity. However creating and applying law is a practical skill and therefore these issues are not absolute dogmas but there are most of all matter of compromise and choice of least harmful solution. From this reason it is sometimes better to change bad law rather than forcing its permanency. Not all laws can be completely universal and in some cases it is even inevitable to accept an retroactive law in order to eliminate flagrant injustice e.g. racial confiscations of property[PRIBÁŇ 2010].

Fuller in his Morality of Law describes a story of an imaginary ruler – Rex who annuls and voids all laws with the objective to provide his nation with good law. However step by step he made eight mistakes which are to be avoided by Fuller’s requirements. These eight mistakes refer to:

- Inability to come to rules, i.e. each case is resolved ad hoc,
- Inaccessibility of rules for an aggrieved party,
- Misusing of retroactive legislation,
- Incomprehensible rules,
- Contradictory rules,

- ❑ Inability to fulfil the rules,
- ❑ Frequent changes in rules,
- ❑ Inability to achieve consent between promulgated rules and their application in practice.

Under Inner Morality Fuller understands aforementioned eight principles based on natural law upon which human behaviour is subordinated to rules. He refers to them as to procedural natural law in wider perspective and based on this principle he wants to create a system of rules regulating human behaviour.

Those eight mistakes can be solved, eliminated by eight requirements according to which legislation is to be established. These are: universality, promulgating of laws, minimum of retroactive laws, clarity of laws, eliminating contradictions in laws, laws cannot require impossible, stability, compliance between official procedure and proclaimed rule. Should these criteria be met we can speak about aspiration for perfection in legality.

In his work Fuller justifies IUS-Naturalism in connection with creating laws and with legality. According to him the Law is „*purposeful activity subordinating human behaviour to rules*“. Fuller introduced terms like morality of duty, morality of aspiration or inner and outer morality. Morality of duties is where subject of law must behave somehow because he must adhere to rules and morality of aspiration is where “forcing to duties ends and where the challenge for nobility begins“. Ergo morality of aspiration includes morality of duties too.

Inner Morality is Morality of Aspiration and there are eight desiderates related with good legislation. It is a prerequisite for rules to be set up either righteous or unrighteous. Difference between righteous and unrighteous can be recognized according to what is ethical and moral in the situation we are just in. Inner Morality is present when whole moral life of the individual has not been depleted. There is also so called “Joint Zone” for both Moralities in which Man applies Marginal Use Principle represented by the economical calculation whether it is worth to struggle for nobility or he will be satisfied with meeting his own obligations.

According to Fuller law can be understood as an activity upon which human behaviour is subordinated to rules. He was convinced that where there is no law there is no justice in spite of the fact that he knew that inner Morality of the legislator himself does not guarantee the justice. Hart refuted this by statement that Act of Law itself cannot protect anybody against heavy injustice.

R. M. Dworkin – legal philosophy

Ronald Myles Dworkin is nowadays deemed to be the greatest legal philosopher alive. He is an author of some works which affected legal philosophy such as *Taking Rights Seriously*, *A Matter of Principle* and *Law’s Empire*.

In his work *Taking Rights Seriously* he deals with the theory of law principles in which he states a new argument for discussion about IUS-positivism and IUS-Naturalism. Dworkin divides constitutional standards standing behind the authority into rules, principles and policies whereby principle is more universal than a rule and it serves for Justice. Another difference we can see in a different role by the legal argumentation. Policy is aimed at objectives that are to be achieved and it is never legal, jural but usually economical, social or political. According to Hart the Law can be recognized thanks to the *rule of recognition*, through which it bypasses other standards. According to Hart the Law is everything that passes all tests and meets all criteria of the *rule of recognition*, which must be accepted as a postulate. Dworkin defines this as „*Jurisprudence behind a law*“ and he refuses this stating that from this point of view the Jurisprudence/Law is viewed as a set of rules. Hart gives an example – a simple test: „Law is anything promulgated by the Queen in the Parliament“. However, test can be more complex and criteria are then ranked in hierarchy. An US Constitution can then be an example of such a more complex test. Nevertheless, Dworkin protests against this positivistic method because this test justifies separation of law and morality. He casts doubts upon this since by such test it is always possible to get morality separated from the law. He also casts doubts upon common admitting of principles as Joseph Raz does. He states that by solving difficult cases it is inevitable to consider principles as being a part of the law.

In his work Dworkin distinguishes between principles and rules by the means of judicial cases. At the end of his statement he presents their dissimilarity:

„Both sets of standards relate to particular resolutions on legal duties under certain circumstances, however they differ in the character of the Directive they provide. Rules shall be applied in the form All or Nothing. If there are circumstances the rule deals with than the rule is either valid and then must be accepted an answer given by this rule or it is invalid and it provides nothing for decision to be made. However this is not how Principles work... neither those which are alike the rules don't bring legal consequences which occur automatically should they meet the determined conditions“ [Dworkin 2001].

Difference is in the application of rules when standard is either valid or invalid in the particular situation but this cannot be applied for principles. Principles are certain directions which shall be taken into consideration if they are important for legal, jural conclusion to be made. Dworkin therefore states the second difference resulting from the importance of principles. Should there be contradiction between principles the more important principle shall prevail the less important one which however will still keep its importance. This cannot be applied by the conflict of rules which ought not to be based on the importance factor because only one standard, norm can be valid.

By Dworkin we can see that his theories of rights concentrate on individual rights. Purpose of the *Taking Rights Seriously* is also to explain an origin of

these rights and their place in the legal system. His “idea of individual rights” is not purely abstract and this is what makes it different from older, traditional theories of natural rights.

According to Dworkin in so called hard cases lawyers use standards which are not serving like rules but function in different manner. Suitable cases are principles, policies and other types of standards. Principle is a standard that is to be adhered not because it helps to achieve or ensure some economical, political or social situations as being considered eligible, but because it is required by Justice, Virtue or other dimension of Morality [Osina 2004].

Dworkin advocates an opinion that even by „hard cases“ there is only one correct answer to disputable issue construed by the case and that the judge is obliged to discover, detect it by following the legal standards. His decision can be considered to be legally righteous depending on whether the judge discovers and reveals rights existing under legal system principles whereby these principles shall include requirements of justice and virtue. There is an implicit Dworkin’s emphasizing that inherent part of judicial cogitation by complicated cases are moral principles. There is not a rule by the means of which it would be possible to separate legal principles from moral ones and Dworkin therefore refuses law to be separated from morality.

By hard cases an ideal judge must determine whether predicated law exists in the legal system or not. Forasmuch as a judge is obliged to find out the Parties’ rights also if there is no clear legal rule for the specific case the judge must then refer to argumentation of principles not having form of the legal rules which are not expressing subjective preferences of the judge. Revealing these principles is therefore the issue requested by moral background.

Dworkin states that courts should decide upon principles and not upon their own procedure. This applies to standards forming thesis concerning what judge courts should do as well as descriptive thesis about what courts really do. Principles mostly differ from courts own procedures. Principle defines and protects individual’s rights whereby own procedure of the court determines collective objectives. Objectives are preferred areas the society tends to take care of e.g. clean environment, active trade balance, effective transportation system etc.

Rights are individual’s claims functioning as triumphs over the collective objectives. If for example we state that everybody has right to freedom of speech then according to Dworkin we consider freedom of speech cannot be breached even if such a breach would be in favour of collective objectives that are to be applied or in favour of society’s general wealth.

However this does not mean that these are absolute rights. Rights same as principles which define them are considered to be a weight determining the rate in which trumps prevail the judge’s own considerations [Osina 2004].

Among current IUS-Naturalists we shall take note of Roberta Alexy.

Robert Alexy was inspired first of all by Radbruch. His most famous work was published in 1992 under the name: *Begriff und Geltung des Rechts* (Term and Validity of Law), in which he advocates non-Positivism. Although Alexy is a legal philosopher he emphasizes law shall not remain only philosophers' contemplating but law shall be also executed in practice, i.e. except legal philosophy he also deals with public law, especially constitutional one [Wintr 2006].

Alexy in his work confirms Radbruch's theory and goes into its depth; he makes it a centre of his theory of according to which law which is extremely unjust/unrighteous is not a law and judge should not apply it. This can be recognized by considering the rightness which depends on relation between morality and law because requirement of rightness „breaches positivistic term of law and opens it to morality“. Alexy does herewith confirm that natural law prevails the positive one. He agrees with Dworkin who advocates opinion that judge should always apply natural law, so called one right answer. Alexy however stated that this theory can be applied only for few cases.

Alexy also deals with profound logic character of legal principles and he uses adjusted Dworkin's theory to explain legal system of current continental constitutionalism. According to Alexy there is only either content or qualitative difference which results from different logical structure. Alexy presents some samples of weak distinguishing according to:

1. Their origin,
2. Explicitness of value content,
3. Moral content or relation to the idea of law,
4. Relation to the highest law,
5. Importance for legislation,
6. Certainties of their knowing,
7. Universal validity or presence in various legislations.

As a sample of significant difference he states following:

- Whether there are reasons for standards or whether standards are standards themselves,
- According to the subject of matter – whether there are rules of argumentation or rules of behaviour [Wintr 2002].

Alexy also deals with theory of legal principles that he then uses to defend constitutionalism as a legal system based on value order given by the constitution guaranteed human rights and freedoms and their protecting by constitutional judicature. Both by Alexy as well as by Dworkin the key issue of critics is their strict legalism. Alexy constructs model of legal system based both on legal standards as well as legal principles. This system is based on three structure components. The first components expresses so called collision law (*Terms and Conditions under which principle which prevails other principle, create factual base of the standard which declares legal consequences of the prevailing principle,*). Second component is the principle of proportionality

by the means of which certain collisions between principles are solved (*The higher rate of not-fulfilling or limitations of the principle, the more important must be the fulfilment of other principle*). Additional component are prima-facie preferences among particular principles. System must also include procedure ensuring rationality.

Alexy's theory draws most of all from decision-making practice of Federal Constitutional Court and therefore he considers the balancing of principle of decision-making rights assigned to the democratically legitimated legislator with material constitutional principles to be the key issue. Alexy comes to a conclusion that constitutionalism as a legal system enables the highest rate of common sense application. Alexy's credit is in the fact that he transferred Dworkin's theory into the continental legal system as he had deeper analyzed matters of legal principles and used these matters for theoretical issues of legal principles in protecting human rights and decisions made by constitutional courts.

Natural law can be considered from two points of view, namely in objective perspective as a law independent from the State. In this view it represents sum total of legal principles and/or general legal standards with significant value importance. From subjective perspective the natural law is deemed to be mostly as requirement on possible behaviour that is justified on the value basis. Under the Natural law we also understand one universal, invariable and eternal law that is common for all people. Its content and form have changed during time nevertheless basic ideas such as justice, virtue and morality remained their significant part.

Conclusion

Discussion between Hart and Fuller lasted a whole decade and it has been mentioned in every English textbook of legal theory. Later Hart presented an opinion that era of classic positivism has ended and in the legal theory it has been replaced by on value based explanation of law referring to revolutionary heritage of civil and human rights. The most important issue within his polemic with Fuller however is the universal knowledge that in current time neither positivistic legalism with its idea of law as political order or will nor metaphysical natural law theories according to which each law must be subordinated to eternal truths of natural law. Dispute between natural and positive law can be only led by the means of social sciences and not by speculative philosophy or moral dogmatists.

In present time we are aware that law is neither political will nor set of moral commandments but it is a system of universal rules regulating social behaviour.¹ Though positive law of constitutional democracies is based on

¹ for more details see: Juda, Vierošlav: *Teória práva*. Banská Bystrica, 2011, s. 43.

sanctity and inalienability of fundamental rights, but on the other side these super-positive rights and legal principles can be enforced by the valid law and appropriate legal process.

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Abstract

In this essay the author reflects connection between iusnaturalism and positivism. Dominant discussion is understanding law and morality which represents neverending story. The article analyzes positive law in 20th century represented by H.L. A Hart and natural law development by L.L. Fuller and R. Alexy. Twentieth century can be called

a period during which natural law has been shifted towards more positivism within the natural law. Jural positivism can be understood as a doctrine based on the Bentham's utilitarianism which didn't accept other normative systems to be involved into concept of law. Prominent representatives of this theory have completely excluded moral content of the legal standards and they consider these to be irrelevant for the validity of the law. According to them evaluating standards through moral criteria is not appropriate because this brings chaos into the jural thinking.

Methodology: This essay using from methodology methods of comparison, especially positive law represented by H.L.A. Hart and natural law represented by L.L.Fuller, R. Alexy in the 20th century and also analyzing connection between law and morality.

Keywords: iusnaturalism, iuspositivism, utilitarianism, legal standards, morality, law, justice, norms, rule, inner morality, morality of aspiration

Jak postrzegane jest prawo w XX wieku

Streszczenie

W niniejszym eseju autor rozważa związki między iusnaturalizmem i pozytywizmem. Dominantą tej dyskusji jest zrozumienie prawa i moralności, które reprezentują niekończącą się opowieść. Artykuł analizuje prawa pozytywne w wieku XX reprezentowane przez H.L.A. Hart'a naturalny rozwój prawa według L.L. Fuller'a i R. Alexy. Wiek dwudziesty może być nazwany okresem, w którym prawa naturalne zostały przesunięte w kierunku bardziej pozytywistycznym w obrębie praw naturalnych. Pozytywizm prawny może być rozumiany, jako doktryna oparta na utylitaryzmie Bentham'a który nie akceptował angażowania innych systemów normatywnych w koncepcji prawa. Prominentni reprezentanci tej teorii całkowicie wykluczali moralne treści standardów prawa i uważali je za nieistotne dla jego słuszności. Według nich ocena standardów poprzez kryteria moralne nie jest właściwa, ponieważ wprowadza to chaos do rozważań jurydycznych. **Metodologia:** Niniejszy esej używa metod komparatywnych w szczególności prawa pozytywistycznego reprezentowanego przez H.L.A. Hart'a oraz prawa naturalnego reprezentowanego przez L.L.Fuller'a, R. Alexy w wieku XX analizuje również zależności między prawem i moralnością.

Słowa kluczowe: iusnaturalizm, iuspozytywizm, utylitaryzm, standardy prawne, moralność, prawo, sprawiedliwość, normy, zasada, wewnętrzna moralność, moralność aspiracji

Как воспринимается право в XX веке

Краткое содержание

В этом очерке автор рассматривает связь между юснатурализмом и позитивизмом. Доминантой этой дискуссии является понимание понятий права и моральности, которые представляют собой бесконечное повествование. Статья анализирует позитивные законы XX века, репрезентируемые Х.Л.А. Хартом, естественное развитие права по Л.Л. Фуллеру и Г. Алексы. Двадцатый век может быть назван

периодом, в котором естественные права были передвинуты понаправлению, более близкому позитивистскому в границах естественных прав. Юридический позитивизм может пониматься, как доктрина, основанная на утилитаризме Бентама, который не акцептировал ангажировки других, нормативных систем в концепции права. Известные представители этой теории полностью исключали моральное содержание стандартов права и считали их слишком несущественными для его основательности. По их мнению, оценка стандартов с помощью моральных критериев не является соответствующей, потому что это ведет к хаосу в юридических рассуждениях.

Методология: В этой статье использовались компаративные методы, а в особенности позитивистского права, репрезентируемого Х.Л.А. Хартом, а также естественного права, репрезентируемого Л.Л.Фуллером, Г. Алексы в XX веке и анализируется зависимость между правом и моральностью.

Ключевые слова: юснатурализм, юспозитивизм, утилитаризм, юридические нормы, мораль, право, справедливость, нормы, основа, внутренняя мораль, моральность аспирации.

JEL: K10, K20, K40