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The Realistic Concept of the Law

Abstract

The law is an extremely complex phenomenon. It is very difficult to determine it precisely as the complete comprehension and ultimate definition of the law are beyond human capabilities. Also, the law never coincides with its concept, nor does the concept of the law coincide with its definition. This fact shows that the real human capabilities for the comprehension, determination and definition of the law are very limited and the limits are unreliable. The concept of the law is relative as well, which is why all the definitions of the law are also relative. The concept and the definition of the law are also relative because they are of necessity subjective. It is for this reason that they are never truthful. However, even when they are not truthful, they are always useful. Because of these essential cognitive shortcomings and limitations, the law is determined and defined realistically – in a conventional and operative manner – whenever it is possible to do so. Additional difficulties are created by the fact that the number of conventional concepts and definitions of the law is almost limitless. Fortunately, only a number of them, considered operative, are used in the law. And all this because of a possible usefulness.

Should the law be useful, then its realistic concept can be determined by the establishment of its common characteristics. On the basis of having at its disposal the mentioned common characteristics, the concept of the law can be operationally determined in both the expanded sense and the restricted sense. Also, it is possible to tell the difference between the three main layers in the concept of the law: complete (perfect), incomplete (imperfect) and unfinished (illusionary or naked) law. Obviously, the realistically determined concept of the law is not one-sided, nor is it monolithic, but complex, detailed and as a whole composed of layers of different degrees of being legal. They are used to finely tune the ordering of the relationships between different importance and the degree of the conflict and, which is also important, to legally regulate even those social areas that would otherwise be exclusively regulated with the state or with the social norms. Otherwise, even the Ten Commandments alone would be insufficient to regulate all human relationships. However, the law did not come into being out of leisure time, but out of dire human need to protect the society from self-destruction.

Contrary to the realistic concept of the law, there also exist its idealistic, idealized and ideal concepts. However, the idealistic concept of the law is inoperative, the idealized concept of the law is not correct, while the ideal concept of the law is out of human reach.

Key words

concept of law, definitions of law, world of law, purpose of law, characteristics of law, multiple layers of law, types of law

Introduction

The law is an extremely complex phenomenon that is very difficult to determine precisely. This is confirmed by the expressions used to refer to it: Greek δίκη and δίκηονης (in the sense of justice and the law in general) or Latin *directum* (in the sense of an idea of space: "flat" or the manner of acting: "correct") and *ius* (from the Sanskrit word *yoh*, in the sense of the law in general,

fairness or justice, the power and authority stemming from the law, but also in the sense of the rights of the Roman citizens or the civil law, as *ius civile*). In addition to these two main expressions, for signifying the law in its narrower and more precise meaning – the positive legal source, the expressions νόμος (in the sense of the law, decree, provision, custom) and *lex* (in the sense of the law, the law bill, the law provision, regulation, rules), but also *mores* and *consuetudo* (in the sense of the commonality of the law).

Many derived words stem from these main expressions that are used to signify the law: δίκηιονηςώνέ (the law that comprises the total justice), νομουεσίά (passing the laws, legislation), νομουετίκί (the art of passing the laws), νομουέτης (legislator), νομουελετίκί (the science of maintaining and applying the law), νόμοφύλαξ (the guardian of the law, the person who sees to it that the law is properly applied), or *iustitia* (justice, fairness), *iustum* (fairness), *iurisdictio* (jurisdiction, legal system, the right to judge, courts competence, the district in the scope of the court), *iurisprudentia* (jurisprudence, legal competence, the manner of solving legal conflicts, courtroom practice), *iurist* (jurist, the legal expert, or, on the other hand, *legality* (constitutionality and legality), *legislator* (legislator), *legislative* (legislative), etc.

Today, as the basic expressions used to signify the law in general are: *diritto* in Italian, *droit* in French, *derecho* in Spanish, *dret* in Catalonian, *drech* in Romanian, *Rechts* in German, *law* in English, etc. – all of them the translations of the corresponding Greek and Latin words. The word *pravo* is also used as the basic expression (in Russian, Serbian, Croatian, Bulgarian), *prawo* in Polish, *právo* in Czech, etc. This is the word of Balto-Slavic, that is, Old Slavic origin, etymologically derived from the word *prav* (in the sense of directed forward, direction, as in the Latin word *directum*, where the words *pravci* /those having no fault/ and *krivci* /those being at fault/) stem from. Obviously, the oldest terms relating to the law are linked with geometry and the direction of the movement of people. The Old Slavic adjective *prav* in a nominalized feminine gender has become the word *pravo*, in the sense of δίκηονης and *ius*. The words *pravni* (legal), *pravnik* and *pravnički* (legalistic), etc. are derived from it.

Different terms for the law and their use clearly show that behind the derived linguistic problems there exist the essential problem of cognition, determination and definition of the law. This problem stems from the ambiguity of the law as a holistic legal phenomenon that, first of all, has at its disposal, the ideal (beyond experience) and realistic (based on experience) side and meaning. Also, the law is a social, political, economic, logical, linguistic or "purely" legal phenomenon, but also the knowledge and technique or the world view and the solution of a concrete case, in the sense of the art of good and fair (*ius est ars boni et aequi*). Because of that, it is said, not quite truly, that the law has three main meanings: *naturally legal, positively legal* and *sociologically* legal. This is a tribute to tradition according to which the law, in the sense of *ius*, is seen from the point of view of its value as social ideals (for instance, justice, *iustitia*), where the philosophy of the law, theory and science get in touch with political and moral philosophy. However, the law can be seen from a positively legal point of view, as a normative phenomenon. As the norms contain "socially accepted requirements and expectations" that are contained in legal provisions and other legal texts of which, today, the most important is the law (*lex*). In this positively legal sense, legal investigation consists of a "separation of the law and its linguistic and textual, that is, linguistic logical analysis" where the analysis itself may proceed in the direction of the "inves-

tigation of the text as an authoritative message the sense of which is discovered in the text itself (exegesis)" or is seen from a sociological point of view "in a broader social environment (the context)"[1] And, while legal axiology as a separate branch of legal philosophy studies values, and the legal dogma as a separate legal theory analyses normative contents, the legal sociology investigates social context and effectiveness of the normative creations. In addition to the values and norms, equally important for the law are the facts referring to the subjects of law and the objects of law (as suppositions of legal relations), and legal authorization and duties (as ingredients of legal relations). Thanks to legal facts the problems of legal relations approach the areas of legal reasoning of causality, legal technique, etc.

The consideration of these three big dimensions of the law which make up the basis of the legal experience and institutional legal knowledge of the law the total scope of the law is still uncovered. It is no wonder, then, that to this ultimate question, forever drawing on human curiosity, to the question of what the law is, a number of very different answers have been given and that different approaches and different schools of thought with almost innumerable finely drawn points of view and different definitions of the law have been formed.[2] Yet, that diversity, which captivates, has not offered either a unique or a definite answer to the question as to what the law is.

The above-mentioned difficulties in the determination of the concept of the law have, in its time, inspired Immanuel Kant to remark how the jurists are still in the search of the definition for their concept of the law, and later on Giorgio del Vecchio to conclude that everybody, more or less, knows what the law is, but that the precise definition of the law creates significant difficulties.[3] The same difficulties have made some more contemporary writers to claim that the problems with the definition of the law should not exist in the theory of the law (Alf Niels Christian Ross), that is, that one should give up on the search for the definition of the law which, like the task of Sisyphus, will never end (Herbert Lionel Adolphus Hart). However, if the law is difficult to determine and explain so as to fit one's desire, this still does not mean that it cannot be determined at all and that it is impossible to come by ever better definitions of the law that will appear ever so closer to its ideal, total and final definition. Such effort is quite to the purpose since the law influences both the individuals and the society. It allows the subjects to behave in a manner more regular than they would otherwise have behaved if they had behaved arbitrarily. This way the law brings into human relations so necessary certainty and predictability.

Determination of the concept of the law in legal theory and doctrine

Legal science has produced valuable results answering the question of not only what the state is, but also the question of what the law is. Owing to its continual interest, it has created numerous and diverse legal theories, schools

1 Duško Vrban, *Sociology of Law*, Zagreb 2006, 7 (in Croatian).

2 Dragan M. Mitrović, *Theory of State and Law*, Beograd 2010, 187–188 (in Serbian).

3 Giorgio Del Vecchio, *Philosophie du droit*, Paris 1953, 431; Immanuel Kant, *Kritik der reinen Vernunft* (transl.), Beograd 1958, 585.

of thought and trends together with their most prominent representatives. They can all be classified into idealistic and realistic theories of law.

Idealistic theories of law are very old as are idealistic theories of the state. Except for the Utopian theories of the law that complement the Utopian theories of the state, the idealistic theories of the law can be classified into naturally-legal, aprioristical-phenomenological, existentialistic, formal and culturalist theories of the law depending on whether they explain the law exclusively or mostly as an idealistic phenomenon.

Naturally-legal theories of the law see in the law a "higher", "true" law that serves to achieve the good and justice in a political community, as well as ethical development and the betterment of man. They all share a common belief that the law represents a double (dual) normative system consisting of the system of natural law and the system of positive law. The natural law is not created by the will of the people; it is rather objectively given and based in human nature. It is eternal, as it is valid for all times, or universal, as it is valid for all the peoples, or for all the members of a people, as it consists of perfect and absolutely just rules.[4] It is superior to the system of positive law that is positioned, transient and particular, as it is not composed of perfect and absolutely just rules.

Naturally, legal theory has existed and developed ever since antique beginnings to this day. The oldest are *antique naturally-legal theories* (they comprise the period from the mythical traditions of ancient Greeks to Justinian's *Corpus iuris civilis*).[5] Following them is the *ecclesiastically natural-legal teaching* (with the Roman Catholic version: Aurelius Augustinus and Thomasius Aquitanus,[6] and the protestant version: Martin Luther and Jean Calvin).[7] In the late Middle Ages a turnaround occurred owing to the *rationalistic naturally-legal theories* of the liberal or conservative direction (Hugo Grotius, Baruch Benedictus de Spinoza, Samuel von Puffendorf, Christian Thomasius, Christian Wolff). A separate version of the realistic naturally-legal theories represent *natural-legal theories of the Social contract* (Thomas Hobbes, John Locke, Jean-Jacques Rousseau). They are succeeded by the theories of *German legal idealism* (Immanuel Kant, Johann Gottlieb Fichte).[8] And then there comes the calm period. It lasts until the *renaissance of the natural law*, after the "dormant period" in the 19th century. The first to announce that renaissance in the 20th century, in 1910, was the Frenchman Joseph Charmont. Ever since the important common characteristic of the *contemporary naturally-legal theories* has been an emphasis placed on the relation of the form and the content on one side and the essence and goal of the law on the other. Also, in them, one can clearly differentiate between naturally-legal teaching as ideology and naturally-legal teaching as the general theory of the law. Finally, in all of them there exists a stressed, necessary connection of authority, freedom, the right to resist, the duty to obey, etc. with ethics. This has been done either as a repeated interpretation of earlier naturally-legal teachings (Rudolph Stammler, Ernst Bloch, Michel Villey)[9] or, less often, by creating more or less original naturally-legal teachings (Robert Nozick, Otfried Höffe). The best known is the theory of John B. Rawls based on the variant of the social contract, known as the *Justice as Fairness*.[10]

When it has to do with the creation of more or less original *contemporary naturally- legal teachings*, the most prominent representatives of this new naturally-legal teachings are Gustav Radbruch with his theory of the law as the embodiment of the idea of justice in which the main themes comprise the "concept of the law" and the "idea of justice", and the theory of the "statu-

tory non-law and suprastatutory law" as the law represents reality that should serve the idea of the law as value;[11] Ronald Dworkin with his theory of judicial decision according to which justice is determined as the principle relating to the distribution of the goods, opportunities and assets, honesty as a matter referring to the system which distributes the influence on political decision-making process in a proper manner and fairness as a matter of the procedures referring to the application of the rules of that system, along with the idea of *self-cleansing* of the law, the fiction of *judge Hercules* and, perhaps, the most important idea that the positive law contains not only *legal rights* but also *legal principles*;[12] John M. Finnis with his theory of substantive natural law based on *reasonableness*;[13] and Lon L. Fuller with the procedural natural law theory of the *internal morality of the law* that solely makes the law possible,[14] besides the already mentioned John Rawls. It seems that it was only Dworkin who offered the only rationally tolerable *instruction* for linking the natural law with the positive law, which law could really flow into the positive law via the general legal principles.

Aprioristic-phenomenological and existentialistic legal theories draw the attention to the substantive matter as something obvious in the "phenomenon of the law" and tend, with "intellectual intuition" to reach it (Edmund Husserl, Gerhart Husserl) or, on the other hand, in the law they see the tools in the function of a mere "saving" (Karl Jaspers, Maurice Merleau-Ponty, Martin Heidegger).

The problems of phenomenological processing and the application of the law are also dealt with various *formal theories of the law*: topica, new rhetoric and the legal logic with their numerous variants (theory of argumentation, deontic logic, hermeneutics or discourse ethics) and with the most prominent representatives, from Theodor Viehweg and Chaim Perelman[15] to Aleksander Peczenik and Robert Alexy.

The culturalist legal theories study the law as a value of justice and determine it as a first rate cultural phenomenon. What they have in common is the fact

4
Nikola Visković, *Theory of State and Law*, Zagreb 2001, 91–96 (in Croatian).

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See: Miloš Djurić, *Natural Law Idea of Greek sophists*, Beograd 1959 (in Serbian); Plato, *Laws* (transl.), Beograd 1990; Aristotle, *Metaphysics* (transl.), Beograd 1960; Radomir D. Lukić, *The History of Political and Legal Sciences*, Beograd 1973 (in Serbian).

6
See: Thomasius Aquitanus, *Summa theologiae* (transl.), Zagreb 1980.

7
Ljubomir Tadić, *Philosophy of Law*, Beograd 1996, 66–68 (in Serbian).

8
Immanuel Kant, *Die Metaphysik der Sitten* (transl.), Beograd 1998, 32 and 119.

9
Michel Villey, *Philosophie du droit*, Paris 2001, 8.

10
John Rawls, *A Theory of Justice* (transl.), Podgorica 1994, 221–226 and 227–229.

11
Gustav Radbruch, *Rechtsphilosophie* (transl.), Beograd 1980 (1999), 38–39, 94–101, 230–238, 287–289.

12
Ronald Dworkin, *Law's Empire* (transl.), Beograd 2003, 5–7, 102–124, 412–414, 435–443. See: *Taking Rights Seriously* (transl.), Beograd (Podgorica) 2001.

13
John M. Finnis, *Natural Law and Natural Rights*, Oxford Un. Press 1982, 276–277.

14
Lon L. Fuller, *Morality of Law* (transl.), Beograd 2001 (2011), 17–46, 50–55, 113–136, 172–174.

15
See: Theodor Viehweg, *Topik und Jurisprudenz* (transl.), Beograd 1982; Chaim Perelman, *Droit, morale et philosophie* (transl.), Beograd 1983.

that they try to free the legal science from formalism. The best known is the *egological legal theory* of Carlos Cossio.[16]

The realistic theories of the law, too, are at least as old as the idealistic theories. They can be classified into positivistic, sociological, integral and multidisciplinary.

The positivistic theories of the law reject the idea of natural law. There is no other law beside the value-based neutral positivistic law that exists in reality. Although all the positivists are agreed that the natural law does not exist, they disagree among themselves when it comes to the determination of the content of the positivistic law. This is how various variants of positivistic theories came into being: *the dogmatic legal theories* as the oldest, the simplest and the most widely spread form of legal positivism with the variants of the *French school of exegesis* (Jean Charles Florance Demolombe, Jean Joseph Bugnet), of the *German school of phenomenological jurisprudence* (Christian Freiherr Wolff), the *historical legal schools* (later: Friedrich Karl von Savigny,[17] Gustav Hugo and Georg Friedrich Puchta, Clemens Brentano), of the *normative legal theories* (Hans Kelsens die Reine Rechtslehre).[18] The second modern positivistic variant is represented by *analytical legal theories*, mostly of Anglo-American origin. Depending on whether, using analytical methods, they investigate the structural side of the law (legal concepts and the system of the law) or the historical and sociological sides of the law, one can differentiate the *English* and *American analytical jurisprudence* (Jeremy Bentham, John Austin, John Stuart Mill, Herbert L. A. Hart, etc.)[19] from *American* and *Scandinavian legal realism* (Oliver Wendell Holmes, Roscoe Paund, Karl N. Llewellyn, Jerome Frank, Axel Hägerström, Anders Vilhelm Lundstedt, Alf Niels Christian Ross, etc.).

Sociological legal theories of the law determine the law as a social phenomenon and interpret its substance through the activities of social factors. This idea is confirmed by the saying of the Roman jurists: "Where there is society, there is the law" (*Ubi societas, ibi ius*).

In the 19th century numerous *organic-biological theories* of the state and the law were created (Otto Gierke).[20] However, the first modern significant sociological theory, expressed in the statist form of *purpose-oriented jurisprudence,* was presented in the second part of his life by Rudolph von Ihering.[21] Ihering's teaching quickly grew up to become the school of the jurisprudence of interests (Philip von Heck, Max von Rümelin).[22] After Heck and Rümelin there develops the third trend known as the *value jurisprudence* (Heinrich Stoll, Rudolph Müller-Erzbach). The farthest distance was achieved by the *school of free creation of the law* (Eugen Ehrlich, Herman Kantorowicz),[23] thus giving the judges too great a freedom to decide cases by *praeter legem* or even *contra legem*.

There exist more moderate and well-balanced sociological theories of the law: solidarity theory of the law of Leon Duguit,[24] sociological-psychogical theory of the law of Leon Petrazycki,[25] or various pluralistic theories of the law of (Georges Gurvich, Robert Laun, etc.),[26] the *French legal modernism* of (Edgar Morin, François of Gény). The latest instance is the *social-anthropological legal pluralism* (William M. Evan, E. Adamson Hoebel, Max Herman Gluckman, Paul Bohannan, Jacques Vanderlinden, Jean Carbonnier, Norbert Rouland) who investigated the intertwining of the social and legal systems in historical and contemporary societies. Also, as the result of the "uprising against formalism" in the law there came into being *American sociological jurisprudence* (Roscoe Pound, John Dewey) in whose teaching are most easily

recognized pragmatism and anti-formalism.[27] A great contribution to sociological legal theories was given by Max Weber, who had developed *historicist sociological theory of the law*[28] as well as some Russian jurists of the first decades of the 20th century (Пётръ И. Стучка, Михаил А. Рейснер, Евгение Брониславович Пашуканис),[29] and following them, Karl Renner,[30] Umberto Cerroni, Ernst Bloch, Antonio Gramsi or Jürgen Habermas. Finally, in France, in nineteen seventies, there grew a whole legal *order* on sociological-political orientation called *Critique du droit* (Michel Mialle, Nicos Poulancas).

Integral (or integralistic) *theories of the law* strive to overcome exclusivity of the reductionism in legal science and determine the integral phenomenon of the law where the most important place belongs to the normative, sociological and axiological side of the law. In the proper sense of the word they came into being only in the 20th century as a reaction to the exaggerations of the naturally-legal and positively-legal theories. The best known is the integral "three-dimensional" theory of Wilhelm Sauer, who applied it not only to the law, but also to all the subjects of cognition. Following him, "The value-based element of the law (justice) becomes concrete in social life that represents the material part of the law by means of the norms that are its formal element".[31]

The latest *multidisciplinary legal theories* have, as their goals, to increase the interest of the legal science to comprise not only apparently different themes that, until recently, were at the fringes of legal interest or were not considered

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See: Carlos Cossio, *La theoria egologica del Derecho*, 1954; José Vilanova, *Introduction del Derecho*, 1994.

17
Karl von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (transl.), Beograd (Podgorica) 1998, 19, 80, 146–151.

18
Hans Kelsen, *General Theory of State and Law* (transl.), Beograd 1951 (2010), 11, 13–14, 17, 129.

19
See: A. J. Sebok: *Positivism in American Jurisprudence*, Cambridge Un. Press 1998; *American Jurisprudence of the 20th Century,* Sremski Karlovci, 2006.

20
Otto Gierke, *Deutsches Privatrecht*, Berlin 1895, 95–97.

21
Rudolph von Ihering, *Der Zweck im Recht* (transl.), Beograd 1894–1895, 78–79.

22
See: Philipp von Heck, *Gesetzesauslegung und Interessenjurisprudenz*, 1914.

23
Eugen Ehrlich, *Fundamental Principles of Sociology of Law*, Cambridge Un. Press 1936, 35–41; Herman Kantorowicz, *The Definition of Law*, Cambridge Un. Press 1958, 14–19, 38–39.

24
Leon Duguit, *Les transformation du droit public* (transl.), Beograd 1998, 19, 35–36, 40–65, 201–202.

25
Leon Petrazycki, *Теория права и государства в связи с теорией нравственности* (transl.), Beograd (Podgorica, Sremski Karlovci) 1999, 13–112.

26
Georges Gurvich, *L'idée du droit social*, Paris 1932, 15–16, 30, 42–43, 46–59, 80–81; Robert Laun, *L'autonomia del diritto*, II, Padova 1931, 58, etc.

27
John Dewey, *The Public and Its Problems*, New York 1927, 53, etc.

28
Max Weber, *Wirtschaft und Gesellschaft* (transl.), Beograd 1976, I, 18, 252–253, 264 and II, 537–614.

29
E. B. Pašukanis, *Общая теория и марксизам* (transl.), Sarajevo 1958, 247–271.

30
Karl Rener, *Die Rechtsinstitute des Privatrechts und ihre soziale Funktion* (transl.), Beograd, 1997, 25–45.

31
Guido Fasso, *Storia della filosofia del diritto* (transl.), Beograd (Podgorica) 2007, 658–659.

in the legal science.[32] Typically, they were the *Critical Legal Studies* (Roberto Mangabeira Unger, Catherine A. MacKinnon, Jacques Derrida); the feminist studies with its multi-branching feminist jurisprudence (Francis Elisabeth Olsen, Carol Gilligan, Catherine A. MacKinnon, Tove Stang Dhal);[33] the *Law and Economics Analysis* (Ronald H. Coase, Guido Calabresi, Richard Allen Posner);[34] the *constitutionalist theories of the law* (Robert Alexy, Carlos Santiago Nino); the *multiculturalist theories of the law* (Charles Taylor, Will Kymlicka, Christine M. Korsgaard, Ian Brownlie, Christian Tomuschat, Gerald Dworkin, Joseph Raz);[35] the *communitarist theories of the law* dealing with the political issues of the citizens, the organization of the society and the nation as a phenomenon;[36] the *systemic theories of the law* (Niklas Luhmann, Alfred Gierer);[37] the *political-cybernetic theories of the law* (Karl W. Deutsch); the *bioethical theories of the law* (Van Rensselaer Potter, Francesco d'Agostino); as well as the *Law and literature movement*.[38]

This brief and condensed overview clearly shows two important things: first, that in legal theory and doctrine there exist an incredible number of different answers to the question of what the law is, and second, that a satisfactory answer to that question has not been found as yet. But, if it is not possible to give an answer to the question of what the law is in the absolute sense or at least so that the answer will be generally accepted in science, it is possible to give to the same question quite a satisfactory conventional answer. It will not be generally accepted but it will, as useful, be accepted in the practice of the leading countries. So, it is still possible to determine reliably the realistic phenomenon of the concept of the law but in a conventional and operative manner.

An approach to the determination of the concept of the law and types of the definitions of the law

It is necessary to differentiate between the question of what the law is and the terminological dispute concerning the determination of the concept of the law.[39] From terminological disputes that are unnecessary and cannot be solved one should differentiate the disputes concerning the *scientific phenomenon of the law*. Their goal is to give answers to the question of how the law is to be comprehended, determined and defined.[40] Such disputes can be, at least partly, solved through the development of science. They are needed, but also unavoidable, as it is in the nature of man to pose questions that he can never provide final answers to.

The failure to ever provide a final answer to the question of what the law is, is due, first of all, to the human lack of perfection which makes the *overall comprehension and ultimate definition of the law stay forever beyond human capabilities*. The law exists as do the statements about what the law is. This imbalance clearly shows that the law never coincides with its concept and definition. Like when Aurelius Augustinus was asked what time was and he answered: "When you are not asking, I know; when you are asking, I do not know!" – just like with the law.[41]

The concept of the law never coincides with its definition either. Definitions are always poorer than the concept and phenomenon. When it comes to the determination of the concept of the law, one starts from the phenomenon, and when it comes to defining the law, one starts from its concept. And it never happens that these two things overlap completely. The main reason for this is the imperfection of the categorical mechanism and the language used.[42] Obvi-

ously, real human capabilities for comprehension, determination and definition of the law are limited and the limits are unreliable.

The failure to completely comprehend and determine the law points to some other important things concerning the limited human capabilities and unreliable limits of comprehension, determination and definition of the law.

First of all, *the concept of the law is relative, which is why all definitions of the law are relative.* The concept of the law is relative and changeable because our knowledge about the law is always insufficient and unreliable. And all the definitions of the law are relative and changeable because they make use of insufficient and unreliable concepts that depend on what is believed to be decisive in the legal phenomenon, which has an almost limitless number of characteristics that are constantly transforming it. However, as yet, this does not mean that the law, in general, cannot be determined and that it is impossible to provide ever better definitions of the law that would, ever more, in their appearance, look like its imagined, ideal, complete and final definitions. This is the reason why it is said that *the concept and the definitions of the law are always subjective*. They are our thought projections of what we believe the law is. This projection is confronted with the unavoidable – it is always subjective.

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Gordana Vukadinović, Dragan Mitrović, "Contemporary Multidisciplinary Legal Theories and the World State", Beijing (China) 2009. Paper was submitted to the 24th IVR World Congress, with the general topic *Global Harmony and Rule of Law*. See: *Annals FLB – Belgrade Law Review*, Year LVII, 2009, No 3, 135–161.

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See: C. Mackenzie Brown, *Toward a Feminist Theory of the State*, Harvard Un. Press 1989; John Christman, "Feminism, Autonomy and Self-Transformation", *Ethics*, No. 99, 1995. i *Feminism and Autonomy*, 1995; Marilyn Friedman, *Feminism, Autonomy and Emotion: Essay on the Work of Virginia Held*, 1998; Mark Fricker and Jennifer Hornsby, "Feminism in Ethics: Conceptions of Autonomy", *The Cambridge Companion to Feminism in Philosophy*, Cambridge Un. Press 2000.

34

Ronald Coase, *Essays on Economics and Economists*, 1994, 10–15, 12–58; Richard Posner, *The Problematics of Moral and Legal Theory*, Harvard Un. Press 2002, 227–228.

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Charles Taylor, *Modern Social Imeginaries* (transl.), Beograd 2004, 21–28, 59–98; Will Kymlicka *Multicultural Citizenship* (transl.), Novi Sad 2002, 9–76; Joseph Raz, *Ethics in the Public Domain* (transl.), Beograd (Podgorica) 2005, 14–59, 94–112. See: Ian Brownlie, *Rights of Peoples in International Law*, Oxford Un. Press 1988; Christian Tomuschat, *Self-Determination in a Post-Colonial World*, Dordrecht, 1993; Christine M. Korsgaard, *The Sources of Normativity*, New York 1996.

36

Michael Voltzer, *Spheres of Justice* (transl.), Beograd 2000, 16, etc. See: Mike Sandel, *Liberalism and Limits of Justice*, Cambridge Un. Press 1982; Alasdair MacIntyre, *A Short History of Ethics: A History of Moral Philosophy from the Homeric Age to the Twentieth Century* (transl.), Beograd 2000; Amitai Etizioni, *The Third Way to a Good Society*, London 2000.

37

Niklas Luhmann, *Soziale Systeme, Grundriss einer allgemeinen Theorie*, Frankfurt am Main 1984, 364, etc; Alfred Geirer, *Die Physik das Leben und Seele*, Munich & Zurich 1985, 233, etc.

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Elizabeth Villiers Gemmette, *Law in Literature: An Annotated Bibliography of Law Related Works*, 1998; R. Posner, *Law and Literature*, 1998; P. J. Heald, *Guide to Law and Literature for Teachers, Students and Researchers*, 1998; Michael Freeman, A. D. E. Lewis, *Law and Literature*, Oxford Un. Press 1999.

39

R. D. Lukić, *Theory of State and Law*, Beograd 1976, 111–113 (in Serbian).

40

J. Raz, *Ethics in the Public Domain* (transl.), 213–228.

41

Aurelius Augustinus, *Confessions* (transl.), Beograd 1989, I, 8.

42

Ludwig Wittgenstein, *Philosophische Untersuchungen* (transl.), Beograd 1980, 39, etc.

The phenomenon and the definitions of the law are never completely truthful. They are, only, more or less, persuasive and verifiable. When something is said to be truthful, all one has to do is say that that something is supposed to be truthful. Still, people find it easier to accept the fact that they are making use of the supposed personal truthfulness rather than the refutable degrees of objectified truthfulness.[43] For this reason, the basic leading principle of an investigator should be *suitability for work*, and not the truthfulness of the statements obtained. This is necessary because man has been "so happily constructed that there is no precise measurement of truthfulness", but for the same reason there are "a number of excellent measurements of incorrectness".[44]

The concept and the definitions of the law are suitable for work when they are correct and solid. The impossibility to truthfully and ultimately determine and define the law does not cancel the possibility for the law to be *truly* determined and defined. Correctness means to do something properly. Something is correctly done because it has been carried out in a proper, systematic and expert manner, and not because it is truthful. Besides, whatever is correct is, *ipso facto*, suitable to be used for work (the case of the so-called "applicable correctness"). There, then, truthfulness appears only as a possible goal or a desired result. And this is the "truthful" understanding of the things. It, too, is valid for the law, which is correct when it is solid, i.e. incorrect when it is not solid.[45]

Whenever they are solid, *the concept and the definitions of the law are useful*. The law exists because it is useful. The law that is not useful does not exist, as nobody needs it. Because of that, instead of striving toward truthfulness, one should tend toward what is humanly possible – toward usefulness strengthened with correctness and suitability for work.[46] The legal science believes that the *concept is useful and the definitions are suitable* if they render possible the acquirement of the new knowledge of the law. The largest usefulness is achieved through the most stringent examination of the law, or through the same type of examination of the idea of what the law is. In a word, all the theories and points of view, and all the concepts and definitions of the law are useful because they are solid and not because they are truthful.

Because it is useful, *the law can be conventionally determined and defined*. Since it is impossible to equally use an almost innumerable number of concepts and definitions, for purely practical reasons only several most useful concepts and definitions of the law are used, through the use of which the set objective – some good, is realized to the highest possible degree. Only such concepts and such definitions of the law grow to become precious conventions, that is, the result of reasonable agreement of the people about what it is customary to be considered and called the law. However, even such conventional concepts and definitions of the law are not permanent as they last as long as they are useful.

From the foregoing follows that the law can always be freely determined and defined. Moreover, in different situations it is possible to use different concepts and definitions of the law. This reminds one of the divine creativity. Still, such freedom is not arbitrariness as arbitrariness is inconsistent and unreliable. Even when there are many conventional concepts and definitions of the law, the economy directs the use of only one or several of them. This is confirmed by the development of the law that is nothing but the result of the competition of the many different legal theories and beliefs, including the definitions of the law.[47]

Conventional definitions of the law are usually given in the form of descriptive or prescriptive statements of the law. *Descriptive* (lexical, empirical, descriptive) *definitions* are a group of statements which state, describe and explain what the law is (for instance, when the law is described as consisting of legal norms, legal provisions, legal relations, subjects of law, objects of law, etc.), while the *prescriptive* (normative, stipulative, postulative) *definitions* of the law order performance or non-performance of an act, under the threat or without one of the state sanctions.[48]

Descriptive and prescriptive definitions of the law are very different in their objectives. The purpose of descriptive definitions is to provide information of the facts and thus, indirectly, influence the conduct of the people. The purpose of prescriptive definitions is to provide information on somebody's desires and will, and influence, indirectly, human behaviour, stimulating or directing the people in the desired direction. Also, prescriptive statements can be delivered in the form of descriptive statements, which does not change their character. For instance, when the law describes the appearance and the manner of the use of the state flag, this means that the flag cannot be different nor can it be used in a manner different from the one prescribed, as it would be a violation of the law. Moreover, the law can at the same be defined in the descriptive and prescriptive manner when it is stated what it consists of (description) and what its social function is (prescriptive). This is how the admixed, *descriptive-prescriptive definitions* of the law come into being.

There is yet another very important, the so-called "Aristotelian", "central" or "focal" type of the definition *per genus proximum et differentiam specificam*, based on the use of the "gender concept" and "individual difference". For instance, when it is said that "the house is a structure to live in" then in this definition *genus proximum* is that the house is the "object" while *differentia specifica* is that it is intended for "living in", as the house as an object may be intended for something else as well. Following the same rule, as a gender concept are customarily quoted the rules of human behavior, while for their individual difference, the possibility of forcible imposition or some other coercive force. Some authors, as the gender concept quote "the concept of good", while for an individual difference they take "the concept of equality". The first author to do so was the Roman jurist Paulus, to be followed by Ulpianus, etc.[49]

In addition to the afore-mentioned division of the definitions based on the corresponding linguistic practice, there exist their other divisions, too. The classic division is the division into nominal and conceptual definitions based on whether the object to be defined is a thing, expression or concept.

43
L. Wittgenstein, *Über Gewissheit* (transl.), Novi Sad 1988, 16, t. 61.

44
Blaise Pascale, *Penseés* (transl.), Beograd 1988, 72, t. 82.

45
Harold Jeffreys, *Theory of Probability*, Oxford 1948, 17–18.

46
Alf Ross, *Law and Justice* (transl.), Beograd (Podgorica) 1996, 57, etc.

47
See: D. M. Mitrović, *Legal Theory*, Beograd, 2007 (in Serbian).

48
R. D. Lukić, "The Notion of Law", *Zbornik za teoriju prava*, SANU, II sveska, Beograd 1982, 27–39 (in Serbian).

49
Sergei Viktorovič Troicki, *Eclessiastical Law*, Beograd (1938) 2011, 17–18 (in Serbian).

It seems that that definition of the concept of the law that from Aristotle to John M. Finnis has been based on the use of the definition *per genus et differentiam* is the closest to the nature of the law and thus the most convenient and the most useful. The logic itself implies that for the definition of a concept it is necessary first to show its *genus proximum* comprising the involved object and only then *differentia specifica* on the basis of which that object can be differentiated from other objects of the same type. Contrary to such approach, the renowned legal theoretician H. Hart emphasizes in his works that the definition *per genus et differentiam* of the law is impossible and advocates for the contextual method of the definition of the law.[50]

Three levels for the law to spread over

Externally viewed, the law is a complete, all-inclusive and whole, while internally it is a systemic well-ordered construct. At its disposal it has organic ability to be processed, that is, to be all-connected and all-persuasive at the macro- and micro-plane as its attributes, and the dynamics as its reliable state. Thanks to it, the law appears as a complex tissue where different interconnections exchange, overlap, combine and in this manner determine the texture of the whole. However, the law goes beyond the real world creating a whole separate legal metaworld. As such, it is a part of the world, "of one world", but is itself also "of one world", that is, the world of the law.

The world of law is spread over three levels, that is, three realities: physical, actual and virtual, which is why there exist three main worlds of the law: "the real one or the natural world", (the world of physical reality), "the world of the law" (the world of legal reality) and "metalegal world (the world of legal metareality). All the three worlds spread over like circles connected in such a manner that they cross one another. The central place of the law is in the legal world (metaworld) that acts as a mediator between the physical world and the metalegal world of ideas.

The first, "real world" (*the world of physical reality*) represents the physical world, the world of physical things and forces in the broadest sense of the word. This is the natural world "without the beginning and the end", "as a whole unchangeably big", "surrounded with that 'nothing' as if it were its border".[51] In this dynamic, processionalized physical world at a certain moment of its development there appears a man as "a being gifted with spirit", followed by the law as an integral part of that world (because in the endless time at a particular moment it could be – in fact, it must be! – rendered possible for every combination to be realized). The law is the first to appear out of this world in the form of material legal sources and then melds with it again in the form of materialized meaning as realized, embodied law. In this material world of the causes and effects, the law (due to its coming into being and the resulting effect) exists as something that "is".

The second, "the legal world" (the world of legal reality) is the metaworld of the thought processes and subjective experiences which, in the normative form, surpass the physical reality and create consequences that would not exist if there were no orders. This is the actual world where "a being gifted with spirit" resides, the being capable of comprehension, of creation, examination, and application of the law. Out of this world of thought processes and subjective legal experiences the law acts expediently upon the true reality. (The marriage, as factual cohabitation of a man and a woman, does not create the same consequences as the legally contracted marriage, but not consum-

mated.) Because of that, the legal world surpasses and overcomes the physical reality with its special legal reality out of which it affects physical reality. In this legal reality the law exists both as something "that is" and something "that should be". It "is" because meaning is also a type of existence. But, it is also something "that should be", because we are talking about a determined meaning expressed in the form of an expedient command that should be materialized.

The third, "the metalegal world" (the world of legal metareality) is the meta-metaworld of legal expressions, theories, problems and critical statements. It is a clean product of the human mind and human activities that surpass the physical and the legal world. However, this metalegal world in the broader sense of the word also comprises all the products of the human mind (legal concepts, institutions, procedures or legal provisions). Still, it does not influence its reality at all because it is real as all human products in general are – from the language codes to such social institutions as "university or police".[52] It has its history (the history of our ideas) and its values (created by the human mind). However, although purely virtual, it, too, is not self-sufficient, because nothing that exists is not devoid of meaning and purpose. And its contents, too, at least totally indirectly and only partly, refers to the law that spreads in the above-mentioned two worlds. This, then, is the world of legal metareality, the world where the law is always something "that should be".

The metalegal world is a pure product of the human mind. We are the ones who create the objects in this world. And the fact that those objects have their innate and autonomous laws which create unintentional and unpredictable consequences is only a single example (although extremely interesting) of a more general rule that all of our actions have such consequences. For this reason the metalegal world should be seen as the product of the human activity, the consequences of which are, for us, as big or bigger, than in the physical environment. There exists a type of feedback with all human activities: "acting, we always, indirectly, act upon ourselves".[53] This feedback applies, in the same degree, to the legal world that constantly emerges from the physical world into which it dives again.

The physical world is the world of the material sources of the law and of the materialized law. The legal world is the world of formal sources and systematized law. The metalegal world is the world of legal ideas (expressions, theories, problems and critical statements). And as the first world in itself is not legally active, and the third one effective, there exist the legal world as a mediator between the first and the third world, between pure matter and pure ideas, thus providing the necessary connections, sense and purpose of all the three holistically created worlds.[54]

The law as purposeful creation and processualized dynamic metasystem

The law is *a purposeful creation* completely filled with meaning and sense. In fact, the law is so filled with the meaning, sense and purpose that without them it is impossible to understand it. And this means that the legal science

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H. L. A. Hart, *The Concept of Law*, Podgorica 1994, 9–18, 37–38, etc.

51
Friedrich Nietzsche, *Aus dem Nachlass der achtziger Jahre* (transl.), Beograd 1976, 432. See: *Werke*, *Kritische Gesemtausgabe*, VII/3, ed. Berlin – New York 1968–1970.

52
Karl Popper, *Unended Quest: An Intellectual Autobiography* (transl.), Beograd 1991, 93.

53
Ibidem, 93–94.

54
D. M. Mitrović, *Theory of State and Law*, 189–194.

is markedly teleological, too, for it tries to explain the laws of movement and development of the law through meaning, sense and purpose.

In order for the law to fulfil its purpose, it must not, first of all, contradict the laws of nature. Should this still be done, and of the men required to do what nature does not allow to be done, such a requirement is unnatural, and the law purposeless or perverted. However, even if it is not so, when nature allows the legal requirement to be met, the lawmaker must take great care of the purposefulness, whether he would like the law to be, at the same time, correct and efficient. Because of that, at the very beginning of the procedure of creating the law, the lawmaker must first take care of the demands of nature and only then of his own requirements and expectations of the others. And, if he succeeds in bringing into agreement these two things, then he can count on thus created law to be active and effective. Should the lawmaker go into another extreme and equalize his requirements completely with the demands of nature (if, for instance, he requires the people to walk, breathe or eat), such a law is powerless as people do these things without the law. Still, such errors are possible at the time the law is being created because the created "composition of the law" is limited in that the lawmaker or we ourselves look on the law, that is, through us, as the human beings, the law looks on itself.

The law, too, is an extremely dynamic creation in a constant movement (filled with meaning, sense and purpose) that tries to achieve balance and harmony. It represents *a processualized dynamic metasystem* whose steady state is a certainty and whose characteristic is predictability. Thanks to that, legal certainty can be presented in its full complexity and movement as there exists an intertwining among the three main holistic worlds of the law. The movement takes place in cycles that show the law as an imperfect and ultimately incomprehensible phenomenon that is driven by constant instability. In the law there is a continual creation and cancellation of the corresponding norms by means of legal provisions, there come into being, change and are cancelled the corresponding relations, the position of the subjects of law that carry out various material actions and behave in the determined manner in accordance with the legal norms, etc. is changed. This perpetual movement, too, continues in the determined manner which is why it is called order, which means that in the very order itself, in the very law, there are contained the rules following which the flow and the movement are carried out. And this means that, inside the legal world there exist two more separate worlds, that is, its two separate templates: *the legal world of the rules* (the world of the rules themselves) and *the legal world of metarules* (the world of procedural rules of the rules). The first is used to organize the contents of legal communication while the second one is used to determine the order of the proper application of legal rules and human behaviour following them.

What is common in the conventional concept of the law

When discussing "the scientific phenomenon of the law",[55] it is necessary to determine the characteristics that are common to all concrete forms of the law because "all of them, consciously or subconsciously, find something essentially identical in the concept of the law".[56] There exist at least twelve common characteristics of the law. These characteristics make a clear distinction between the law and other similar social rules.

The first common legal characteristic is that *the law is used to regulate external physical behaviour* that is, acting or not acting. It stems from the very essence of the law as the means for the regulation, equalization and controlling human behaviour, under the condition that it is required of the people to do only what they can really do as it is only this that can be the *raison d'être* of the legal requirement.

The law is always, in essence, *heteronomous*. It is not only the norms of individual morality that are heteronomous. Heteronomy exists when the subject is submissive to the external norm passed by somebody else, under the condition that the heteronomous norm has been previously materialized, whereby its expression and cognition is possible. In a somewhat narrower sense heteronomy refers to an internal experience and the attitude of the subject toward the norm, while the externality refers to how the behaviour of the legally-bound subject is exhibited, who may either obey or disobey the norm.

The social character of the law is seen in that the legal norms are used exclusively to regulate the interaction of the people (*ubi societas, ibi ius*). In view of the fact that the law is composed of an innumerable number of norms, it could be said that there are no relations that could not be the subject of legal regulation. The social character of the law becomes particularly prominent when the rules of organizations and associations are concerned.

The regulative character of the law is the fourth common characteristic of the law. In order for the legal regulation to achieve its social task it must be "positioned" so that it is passed "in advance" (against its *causa finalis*), so that it is "systemic" and "legitimate". So, the regulative character of the law consists of "a systemic legitimate influence exerted upon the behaviour of the people".[57] It refers to the contents side of the law, its social task, because it is the law that regulates the relations where the conflicts of interest occur. If there were no conflicts of interest the legal norms would become purely technical or moral, which is not the case.

The conflict of interest as a constant subject of legal regulation is particularly prominent in the field of ownership relations, the relations between authority and social organization that are *the traditional subjects of legal regulations*. Because of that, those relations must precisely measure authorizations and obligations of the subjects of law thus preventing the eruption of greater conflicts in connection with ownership, authority and the manner in which a society is organized. There are also relations that require only the organization of a social process.

The law regulates human behaviour trying to measure it as precisely as possible. *The quantification of the law* should determine precisely the authorizations and obligations of the involved subjects because it is the law that is used to regulate and protect the most important goods (life, property, security, etc.). Because of that, in those fields, a procedure has been specified as the only way in which some human actions can be performed, particularly when it has to do with the manner of carrying out of the sanctions. This is achieved through the composition of such legal provisions that would make them as clear, precise and understandable as possible. However, there are fields where the law yields to interested subjects the task of measuring their authorities and obligations.

55
H. Kelsen, 18.

56
R. D. Lukić, "The Notion of Law", 27.

57
Eugen Pusić, *Social Regulation*, Zagreb 1989, 149–151 (in Croatian).

Cooperation and conflicts are the main motives, causes, forms and dimensions of the human actions in societies. The end of cooperation usually signals the beginning of the conflict and the appearance of a *dispute* which is the consequence of the fact that people have different interests that the law regulates and demarcates. In order for a dispute to be resolved, it is usually necessary for the third, the neutral party, to appear. This, third party, is most often the *court*, in the broadest sense (state, arbitration, mediation council, etc.). The court must be socially and legally recognized, that is, it must possess social authority and the trust of the parties involved, its operation must be public and its decisions unbiased and based on facts. It is less important whether the court is permanent or temporary (*ad hoc*), and whether the procedure before the court is formal or informal. Also, the role of the court can be performed by a common friend of the contending parties. Even public opinion can be some sort of a court.

The law has at its disposal *formal procedures* which determine precisely which persons or organs, in what form, at what time, at what place, etc. can make use of their legal authorizations or must carry out their legal obligations, and in which manner should the investigative, judicial, administrative, arbitrational procedure be performed should there arise a conflict. On the basis of the behaviour it is estimated whether a human behaviour is legally valid, owing to which the subjects of law can more easily bring into agreement their behaviour. They make up a whole legal field of formal (procedural) law, in contrast with the field of material (substantive) law, and thus provide the foundation of the normative principle of legality.

The application of the sanctions is a regular activity of the state and social organs.[58] This activity is carried out in the general or collective interest.[59] A sanction must be provided for by the law, must be social, external, measurable, predictable, commensurate, etc. Its implementation, too, must be precisely determined by the law, particularly when through the punishment (*negative sanction*, punishment) one is deprived of the most important goods (life, freedom, honour, respect or property), as contrary to the award (*positive* sanction, reward). The sanctions are carried out in accordance with legal provisions (their annulment).

The goal of the law is the realization of the values of order, peace and security. *Order* exists when every type of behaviour of importance for the survival of society is carried out in accordance with the determined social and legal provisions. This way a non-contradictory social and legal order is achieved, the order where everybody has his own "precisely determined" place.[60] *Peace* is linked with order. The moment peace loses stability, disorder appears which causes disturbance in the law. *Security* is linked with order and peace. Security that refers to a timely and complete implementation of the law r a reliable belief that the law will be implemented.[61]

The last but one common characteristic of the law is the requirement for *the realization of justice and human freedom*, in addition to some other social and legal values.

The afore-mentioned common characteristic of the law renders possible living together with the least possible discord, obstacles, conflicts and fights that weaken and disrupt the society and uselessly spend the energy of the people. This way the law brings into social relations the necessary predictability and certainty, frees the human creative energy, strengthens stability and speeds up the progress that enables *coexistence of the people in society*.[62]

The concept of the law in the expanded and restricted sense

The quoted common characteristics are not present in the law to the same degree. Some legal norms contain all the quoted characteristics, while others do not; some norms belong to the complete, while others belong to the incomplete law. This applies both to the norms of the state law and the norms of the autonomous law (*droit social*) autonomous law. Moreover, the norms of the state law "need not display all those characteristics in the same measure", like some social norms that are called law can have only "some of those characteristics, while some others can have them in a greater degree than those falling under the state law".[63] On the basis of what has been said it is possible to conclude that the concept of the law is very well developed and complex as it consists of a number of legal layers or types of the complete and incomplete state and autonomous law.

The complete state law "comprises only the norms that have all the characteristics" of the law. This is the case also with complete autonomous law. The most obvious difference between these two types of the law exists in relation to the subjects that create them, while some other differences may not be so expressed.

There exists, also, *the incomplete state law* that contains "the norms that do not have all those characteristics, but have at least most of them". As a result, inevitably arises the question whether it must have a state sanction. In view of the fact that both situations may come into being, it appears that there exist two types of incomplete state law. The first type consists of the state law containing most of the common characteristics including the state sanction, while the second type has at its disposal most of common legal characteristics without the state sanction.

About the first type of incomplete state law it is said that it is "less perfect" than the complete state law, while about the second type of the incomplete state law even this cannot be said. Still, the law recognizes the norms without sanctions (*leges imperfectae*) as is the case referring to the constitutional principles concerning the right of the people to work, happiness, etc. In view of the fact that such state norms do not contain provisions on somebody's duty to support them with sanctions, or for the sanctions to be carried out; here, it is rather the case of the illusion of the law or at least something like the "naked" law (*nudum ius*).[64]

All this is also applicable to *the incomplete autonomous law* which has, at its disposal, most of the common characteristics of the law with the state sanction or without it. On the basis of this there also exist two types of the incomplete autonomous law: "the less perfect" autonomous law and the unfinished ("unrealized") autonomous law.

58
J. Raz, 234–240.

59
Toma Živanović, *The System of Synthetic Philosophy of Law*, I–III, Beograd 1959, 338–340 (in Serbian).

60
R. D. Lukić, *The System of Philosophy of Law*, Beograd 1992, 462 (in Serbian).

61
Djordje Tasić, *An Introduction to Legal Sciences*, Beograd 1941, 24 (in Serbian).

62
R. D. Lukić, "The Notion of Law", 27.

63
Ibid., 31.

64
Ibid.

The afore-mentioned difference concerning common characteristics of the afore-said types of the law is explained by the fact that the complete state and autonomous law represent "a higher degree of development of one in many ways the same social phenomenon".[65]

Thus the concept of the law in *the expanded* sense contains, in layers, three types of the state and three types of the autonomous law. The first layer consists of *complete* laws – the state law and the autonomous law that have all the common characteristics of the law. The second layer consists of "imperfect" laws (John Austin), or the laws with "decreased value" (Ronald Dworkin, John Finnis) – the state law and the autonomous law that have the majority of common characteristics, including the state sanction. Finally, the third layer consists of the illusions of the law, *unfinished* or unrealized laws – "the naked" state law and the autonomous law that, among the majority of its common characteristics, do not have the state sanction. However, neither are such norms meaningless from the point of view of political culture and social life because it could happen that they subsequently receive the state sanction, for example, by passing a legal provision concerning their sanction or, by a decision of a constitutional or some other court, when subsequently they become complete legal norms (*leges perfectae*).[66] This shows that the concept of the law is not monolithic or one-sided, as might appear, but is complex, shaded and totally made of layers of different degrees of being legal.

The norms that do not have at their disposal the majority of the common legal characteristics fall under purely social rules.[67] When thus is found the solution to the questions of which norms are legal and which are not, it is possible to approach their classification according to the degree of their being legal. The most important and the most stringent is the complete state law. There follow the incomplete state law, the complete autonomous law, the incomplete autonomous law. At the very end there are the unfinished state law and the autonomous law.

Such multilayeredness – resembling a series of coverings of an onion bulb – is not random. It exists in all scientific systems, from the structure of the universe to the structure of an atom. (The theory of multilayeredness of the law *resembling an onion bulb* is quite a felicitous comparison as it has to do with the same universal rules of ordering.) In the law is thus carried out the fine tuning of the ordering of relations of different importance and degrees of conflict and, which is also important, in the proper manner are legally regulated the social areas which, in the absence of the autonomous law, would have been regulated either with the state law or with social norms. It comes to light that between the state law and the social norms there exists a vast social area that is filled with the autonomous law.

On the basis of the distinction made between the complete, incomplete and unfinished autonomous law and their links with the state law it is possible to make yet another division – into *dependent and independent autonomous laws*. Under the dependent autonomous law would fall all types of the complete autonomous law and the incomplete autonomous law that are under the influence of the state law, particularly as to the possibility of applying the state sanctions, while under the independent autonomous law would fall only those types of unfinished or unrealized autonomous law which are not under the influence of the state law, nor do they rely on the application of the state sanction.

The concept of the law can be determined even in the *restricted sense*, when, as the most important, only one of its characteristics is made prominent at the

expense of the others. Such is the case with all the definitions of the law where the law, as "an essential normative phenomenon", is determined in relation to the state sanction as its most obvious external characteristic. In view of the fact that the law is determined as "a group of norms sanctioned by the state",[68] only the complete and those incomplete state and social norms having the state sanction at their disposal are legal. All other incomplete and unfinished state and social norms would fall under purely social rules independent of its having at its disposal other common characteristic of the law.

The mentioned concepts of the law in the expanded sense and the restricted sense can be used at the same time without being contradictory as they are not substantially different. They have the same *genus proximum* as it is always the matter of the rules of human behaviour. It is only the scope of the *differentia specifica* that is different. In the case of the expanded determination, those are all common characteristics of the law, or at least most of them, while in the case of the restricted determination only one, the most obvious legal determination – the state sanction. Such an approach is useful, too, in view of the fact that the concept of the law in legal theory must be usable and effective.[69] But, the statist-positivistic statement stemming from it that jurists should not try to determine whether the norms are good or bad, nor what their goal is, but should limit themselves to faithfully interpret or correctly apply them – cannot be accepted. This applies, to the same degree, to idealistic or idealized definitions of the law that might be fine or useful for the education of jurists, but, to put it mildly, are inapplicable in real life.

Operative meanings of the realistically determined concept of the law show that the law does not exist because people are just, good, diligent, sincere or careful, nor because their actions are honourable, inspired by love and proof of their mutual respect. Then the *Ten Commandments* would have been enough to regulate all of their relations. The law exists because people and their behaviour most often are not like that. The law did not come into being out of leisure time, but out of dire human need to preserve the self-destruction of the society. It is thus leisure time that gave birth to the idealized teachings of the law.

Conclusion

Taken in its totality the law is a holistic world that covers three levels, that is, three realities; the world of the physical reality (physical things and forces), the world of legal reality (the metaworld of thought processes and subjective experiences in the normative forms: the world of legal rules and the world of legal metareality), and the world of metareality (meta-metaworld of legal experiences, theories, problems and critical statements). The law is, at the same time, an expedient creation completely filled with meaning and sense. It is also a process governed by dynamic system whose steadfast state is certainty and the basic characteristic predictability. And all this because of a possible usefulness.

65
Ibid., 29.

66
N. Visković, 169.

67
R. D. Lukić, 29–30.

68
N. Visković, 30.

69
A. Ross, *Law and Justice*, 25, 57.

Should the law be useful, then its realistic concept – contrary to its idealistic concept, can be determined by the establishment of its common characteristics: externality (corporality), heteronomy, social character, regularity (demarcation of interests), the object to be regulated (in particular the three separate types of social relationship: property-related relationships, the relationship of the government and the organization of a society), measurability and precision, the existence of a dispute and the coming into existence of the court, special formalization procedure, social (external) sanctions, the realization of social and legal values (of the order, security, peace, justice, freedom, etc.) and enabling the coexistence of the people in a society. Otherwise, even the *Ten Commandments* alone would be sufficient to regulate all human relationships. However, the law did not come into being out of leisure time, but out of dire human need to protect the society from self-destruction.

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Realistički pojam prava

Sažetak

Pravo predstavlja izuzetno složenu pojavu. Njega je veoma teško točno odrediti, jer su potpuna spoznaja i konačno definiranje prava izvan ljudskih mogućnosti. Također, pravo se nikada ne podudara sa svojim pojmom, niti se pojam prava podudara sa svojom definicijom. Ta činjenica pokazuje da su stvarne ljudske mogućnosti za spoznavanje, određivanje i definiranje prava veoma ograničene, a granice nepouzdane. Pojam prava je i relativan, zbog čega su relativne i sve definicije prava. Pojam i definicija prava su relativni i zbog toga što su nužno subjektivni. Zbog toga oni nikada nisu istiniti. Ali, i kada nisu istiniti, oni su uvijek korisni. Zbog tih bitnih spoznajnih nedostataka i ograničenja, pravo se određuje i definira realistički – na konvencionalan i operativan način – kad god je to moguće. Dodatnu teškoću predstavlja činjenica da konvencionalnih pojmova i definicija prava ima gotovo beskonačno. Srećom, u pravu se koristi samo nekoliko njih koje se smatraju operativnima. I sve to zbog moguće korisnosti.

Ako pravo treba biti korisno, tada se njegov realistički pojam može odrediti utvrđivanjem njegovih zajedničkih svojstava. Na osnovu raspoloživosti navedenih zajedničkih svojstava, pojam prava može se operativno odrediti u proširenom i suženom smislu. Također, mogu se razlikovati tri glavna sloja u pojmu prava: potpuno (savršeno), nepotpuno (nesavršeno) i nedovršeno (prividno ili golo) pravo. Očigledno, realistički određen pojam prava nije jednoobrazan ni monolitan, već složen, iznijansiran i u cijelosti satkan od slojeva različitih stupnjeva pravnosti. Njima se fino podešava uređivanje odnosa različitog značaja i stupnja konfliktnosti i, što je također važno, na odgovarajući način se pravno reguliraju i ona društvena područja koja bi isključivo bila regulirana državnim ili društvenim normama. Da nije tako, i Deset božjih zapovijedi bi bilo dovoljno za uređivanje svih ljudskih odnosa. Ali, pravo nije nastalo iz dokolice, već iz prijeke ljudske potrebe za očuvanjem društva od samouništenja.

Nasuprot realističkom pojmu prava postoji njegov idealistički, idealizirani i idealni pojam. Ali, idealistički pojam prava nije operativan, idealizirani pojam prava nije točan, dok je idealni pojam prava ljudski nedostižan.

Ključne riječi

pojam prava, definicija prava, svijet prava, svrha prava, obilježja prava, slojevitost prava, vrste prava

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Der realistische Begriff des Rechts

Zusammenfassung

Das Recht stellt ein immens vielfältiges Phänomen dar. Ihn präzise festzulegen entpuppt sich als unsäglich schwierig, denn eine lückenlose Erkenntnis sowie endgültige Definition des Rechts liegt jenseits des menschlichen Vermögens. Zudem geht weder das Recht mit dessen Begriff kon-

form, noch tut es der Begriff des Rechts mit eigener Bestimmung. Dieser Tatbestand lässt durchblicken, die wahre menschliche Befähigung zum Erkennen, Determinieren sowie Definieren des Rechts sei höchst begrenzt, wobei sich ebendiese Schranken als unzuverlässig erzeigen. Die Notion des Rechts ist ebenso relativ, weswegen hiernach sämtliche Begriffsbestimmungen des Rechts relativ sind. Der Begriff einschließlich der Definition des Rechts ist auch aufgrund der ihnen notwendigerweise innewohnenden Subjektivität relativ. Aus diesem Grund sind sie niemals wahrheitsgetreu. Allerdings, auch wenn sie der Wahrheit nicht entsprechen, sind sie stets von Nützlichkeit. Wegen der angebrachten essenziellen erkenntnismäßigen Unzulänglichkeiten und Limitierungen wird das Recht realistisch bestimmt und definiert – in einer konventionellen bzw. operativen Manier – wann immer dies durchführbar ist. Zusätzliche Erschwernisse werden von der Tatsache geschaffen, dass die Zahl der gebräuchlichen Begriffe und Definitionen des Rechts schier unermesslich ist. Glücklicherweise werden lediglich etliche, als operativ angesehene, im Bereich von Recht eingesetzt. Und all dies der denkbaren Nützlichkeit halber.

Sollte das Recht nützlich sein, dann lässt sich dessen realistischer Begriff per Gründung seiner gemeinsamen Wesenszüge festsetzen. Auf der Basis der vorhin angeschnittenen, ihm zu Gebote stehenden angehörigen Merkmale, kann der Begriff des Rechts operational determiniert werden, sowohl im erweiterten als auch im engeren Sinne. Ebenfalls ist der Unterschied erkennbar zwischen drei Hauptschichten in dem Begriff des Rechts: vollständiges Recht (vollkommen), unvollständiges Recht (unvollkommen) und unvollendetes Recht (scheinbar oder nackt). Augenscheinlich ist der realistischerweise bestimmte Begriff des Rechts weder einseitig noch monolithisch, stattdessen ist er komplex, detailliert und als Ganzes aus Schichten von ungleichem Rechtlichkeitsgrad zusammengestellt. Man gebraucht sie zur Feinabstimmung der Beziehungsordnung zwischen der unterschiedlichen Wichtigkeit und dem Grad des Konflikts, und, was genauso Gewicht hat, um sogar jene Gesellschaftszonen rechtmäßig zu regeln, die anderenfalls ausschließlich seitens der staatlichen bzw. gesellschaftlichen Normen geregelt würden. Ansonsten würden selbst die Zehn Gebote nicht genügen, um menschliche Verhältnisse in ihrer Gänze zu ordnen. Jedoch ist das Recht nicht als Freizeitaktivität entstanden, sondern im Gegenteil als unentbehrliches menschliches Bedürfnis nach Bewahrung der Menschheit vor Selbstauflösung.

Der realistischen Notion des Rechts entgegengesetzt existieren parallel dessen idealistische, idealisierte und ideale Begriffe. Dabei gilt der idealistische Begriff als inoperativ, der idealisierte als inkorrekt, während der ideale Begriff außerhalb der menschlichen Reichweite liegt.

Schlüsselwörter

Begriff des Rechts, Definition des Rechts, Welt des Rechts, Zweck des Rechts, Eigenschaften des Rechts, Mehrschichtigkeit des Rechts, Arten des Rechts

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Le concept réaliste du droit

Résumé

Le droit est un phénomène particulièrement complexe. Il est très difficile à déterminer avec précision puisqu'une pleine compréhension et la définition ultime du droit sont au-delà des capacités humaines. Également, le droit ne coïncide jamais avec son concept ni le concept de droit ne coïncide avec sa définition. Ce fait montre que les capacités réelles de l'homme de connaître, déterminer et définir le droit sont très limitées et que les limites sont peu fiables. Le concept de droit est en outre relatif ; c'est pourquoi toute définition du droit est relative aussi. Le concept et la définition du droit sont également relatifs parce que nécessairement subjectifs. C'est pourquoi ils ne sont jamais fidèles. Néanmoins, même quand ils ne sont pas fidèles, ils sont utiles. En raison des ces défauts et limites cognitives essentielles, le droit est déterminé et défini réalistement – de façon conventionnelle et opérationnelle – à chaque fois que cela est possible. Une difficulté supplémentaire réside dans le fait qu'il existe un nombre quasiment illimité de concepts et de définitions conventionnels du droit. Heureusement, seulement quelques-unes, considérées comme opérationnelles, sont utilisées dans le droit. Et tout ceci à cause d'une potentielle utilité.

Si le droit doit être utile, alors son concept réaliste peut être déterminé en établissant ses caractéristiques communes. S'appuyant sur la disponibilité des caractéristiques communes mentionnées, le concept du droit peut être déterminé opérationnellement dans un sens élargi et un sens étroit. Egalement, il est possible de distinguer trois couches principales dans le concept de droit : complet (parfait), incomplet (imparfait) et inachevé (apparent ou nu). A l'évidence, le concept de droit déterminé de manière réaliste n'est ni unilatéral ni monolithique mais com-

plexe, nuancé et dans l'ensemble tissé de couches à différents degrés de légalité. Elles servent à accorder les rapports de signification et de degré de conflictualité différents et, ce qui est également important, à réguler légalement même les domaines sociaux qui autrement seraient régulés exclusivement par le biais des normes d'État ou sociales. Sinon, même les Dix Commandements suffiraient à réguler tous les rapports humains. Cependant, le droit n'est pas né du loisir, mais d'un besoin terrible de protéger la société de l'auto-destruction.

Contrairement au concept réaliste de droit, il existe également son concept idéaliste, idéalisé et idéal. Cependant, le concept idéaliste du droit n'est pas opérationnel, le concept idéalisé n'est pas correct, tandis que le concept idéal du droit est hors de la portée de l'homme.

Mots-clés

concept de droit, définition du droit, monde du droit, finalité du droit, caractéristiques du droit, couches multiples du droit, type de loi