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THE IDEALISTIC CONCEPT OF THE LAW[1]*

1. Introduction

The law is an extremely complex phenomenon which 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), *lex* (in the sense of the law, the law bill, the law provision, regulation, rules), or *mores* and *consuetudo* (in the sense of the commonality of the law).[2]

Through the mentioned linguistic terms are partially intersected the main meanings of the law: its idealistic and realistic meanings, as well as their

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[2] See: D. M. Mitrović, *An Introductuon to Law*, Beograd 2012, 118–120 (in Serbian).

▪ The idealistic concept of the law / Dragan M. Mitrović // Часопис Національного університету «Острозька академія». Серія «Право». – 2013. – № 2(8) : [Електронний ресурс]. – Режим доступу : http://lj.oa.edu.ua/articles/2013/n2/13mdmotl.pdf.

numerous derived meanings. However, it is clear that some of the mentioned linguistic meanings unambiguously refer to the idealistic concept of the law. Their use shows that behind the derived linguistic problems there exists the essential problem of cognition, determination and definition of the law, which cannot be wholly solved through the realistic theories and teachings. That problem stems from the crucial multiple meaning of the law as the legal theory in its total scope, which has at its disposal its ideal (beyond experience) and realistic (based on experience) side and meaning. Because of that, it is conventionally said that the law has its *naturally-legal meaning*, which is one of its main meanings. 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/*, fairness */aeuquitas, iustus/, etc.*), where the philosophy of the law, theory and science get in touch with political and moral philosophy.[3] 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. Yet, that diversity, which captivates, has not offered either a unique or a definitive answer to the question of what the law is[4]. 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.

[3] See: D. Vrban, *Sociology of Law*, Zagreb 2006, 7 (in Croatian).
[4] See: D. M. Mitrović, *Theory of State and Law*, Beograd 2010, 187–188 (in Serbian).

▪ The idealistic concept of the law / Dragan M. Mitrović // Часопис Національного університету «Острозька академія». Серія «Право». – 2013. – № 2(8) : [Електронний ресурс]. – Режим доступу : http://lj.oa.edu.ua/articles/2013/n2/13mdmotl.pdf.

2. The idealistic concept of the law in legal theory and doctrine

Idealistic theories of law are very old. They can be classified into naturally-legal, aprioristical-phenomenological, existentialistic, formal and culturalistical 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 realise the common 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.[5] 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*.[6] Following them is the *ecclesiastically natural-legal teaching* (with the Roman Catholic version: Aurelius Avgustinus and Thomasius Aquitanus,[7] and the protestant version: Martin Luther and Jean Calvin).[8] In the

[5] See: N. Visković, *Theory of State and Law*, Zagreb 2001, 91–96 (in Croatian).

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

[7] See: T. Aquitanus, *Summa theologiae* (transl.), Zagreb 1980.

[8] See: Lj. Tadić, *Philosophy of Law*, Beograd 1996, 66–68 (in Serbian).

▪ The idealistic concept of the law / Dragan M. Mitrović // Часопис Національного університету «Острозька академія». Серія «Право». – 2013. – № 2(8) : [Електронний ресурс]. – Режим доступу : http://lj.oa.edu.ua/articles/2013/n2/13mdmotl.pdf.

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 and 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).[9] 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)[10] or, less often, by creating more or less original naturally-legal teachings (Robert Nozick, Otfried Höffe). The best known is the contract theory of John B. Rawls based on the variant of the social contract, known as the *Justice as Fairness*.[11]

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

[9] Lj. Tadić, 116–129. See: *Philosophy of Law*, I. Kant, *Die Metaphysik der Sitten* (transl.), Beograd 1998.

[10] See: M. Villey, *Philosophie du droit*, Paris 2001.

[11] See: J. B. Rawls, *A Theory of Justice* (transl.), Beograd (Podgorica) 1998.

embodiment of the idea of justice, as the law represents reality that should serve the idea of the law as value;[12] John M. Finnis with his theory of substantive natural law based on the «requirement of practical reasonableness;[13] Lon L. Fuller with the procedural naturally-legal theory of the *internal morality of the law* that solely makes the law possible;[14] and Ronald Dworkin with his theory of judicial decision according to which justice is determined as the principle relating to the distribution of «goods, opportunities and assets».[15]

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[16] to Aleksander Peczenik and Robert Alexy.

In contrast to formal theories of the law, the *culturalist legal theories* study and determine the law as a first rate cultural phenomenon (Wilhelm Dilthay, Heinrich Rickert, Emill Lask, Gustav Radbruch, Carlos Cossio, and others). What they have in common is the fact that they study the law as a value,

[12] See: G. Radbruch, *Rechtsphilosophie* (transl.), Beograd 1980 (1999), 38–39, 94–101, 230–238, 287–289.

[13] See: J. M. Finnis, *Natural Law and Natural Rights*, Oxford Un. Press 1982, 276–277.

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

[15] See: R. Dworkin, *Taking Rights Seriously* (transl.), Beograd (Podgorica) 2001.

[16] See: Th. Viehweg, *Topik und Jurisprudenz* (transl.), Beograd 1982; Chaim Perelman, *Droit, morale et philosophie* (transl.), Beograd 1983.

especially as the value of justice, and that they try to free the legal science from formalism.[17] At the heart of interest of those theories lies the belief of the value as the essence of cultural phenomena, among which the law represents a first rate cultural phenomenon. Since the law is being determined as «the external regulation of human behaviour for the purpose of establishing the content state of value» (Emil Lask), i.e. as «the concept of culture which is linked with values or as reality, the idea of which is *to serve justice*»[18], it is thus claimed: the concept of the law is the cultural concept (Gustav Radbruch).[19] The best-known attempt to answer the questions relating to the law as the cultural phenomenon was made by the *egological legal theory* of Carlos Cossio.[20] Under the influence of Cossio, the egologists Antonio Luis Machado Neto and Fernando Garcia Olano y José Manuel Vilanova[21] worked further on.

The naturally-legal theories can also include some of the most recent *multidisciplinary legal theories*.[22] A characteristic attempt has been made by Michael Walzer («liberal communitarian»), who relativises the concept of the natural law almost to the point of its being indiscernible, making it completely dependent on and changeable as to the concrete circumstances and cultural milieu of a society. For example, according to Walzer, «the field of justice is the society in which not one social good serves as a means of domination».[23] This means that the field of justice is indeed found there where it is insignificant or unreachable. But then, does it have to do anything with justice at all?

[17] See: N. Visković, *The Concept of Law*, Split 1980, 17 (in Croatian).

[18] See: G. Vukadinović, R. Stepanov, *Theory of State and Law I*, Petrovaradin 2001, 219 (in Serbian).

[19] Lj. Tadić, 149–151, 155–157.

[20] G. Vukadinović, R. Stepanov, 223.

[21] See: J. Vilanova, *Al Concepto De Derecho. Estudios Iuspositivistas*, 1993. и *Introduction Al Derecho*, 1994.

[22] See: M. Sandel, *Liberalism and Limits of Justice*, Cambridge Un. Press 1982; A. MacIntyre, *A short history of ethics: a history of moral philosophy from the Homeric ege to twentieth century* (transl.), Beograd 2000; A. Etizioni, *The Third Way to a Good Society*, London 2000; M. Walzer, *Spheres of Justice* (transl.), Beograd 2000.

[23] M. Walzer, *Spheres of Justice*, 16, etc.

▪ The idealistic concept of the law / Dragan M. Mitrović // Часопис Національного університету «Острозька академія». Серія «Право». – 2013. – № 2(8) : [Електронний ресурс]. – Режим доступу : http://lj.oa.edu.ua/articles/2013/n2/13mdmotl.pdf.

A number of important things can be noticed: first, that the «pure» idealistic concept of the law does not exist otherwise but as the virtual content of the conscience of their creators; second, that in the inspired legal theory and doctrine there exist an incredible number of very different answers to the question of what the law is; third, that most of the answers were given by the naturally-legal theories and teachings of the natural law and its relationship with the positive law; fourth, that not only a satisfactory, but also a reliable answer to that ultimate question has not been found as yet; and fifth, that the natural law can be linked with the positive law in a way which brings their dualism to an end. There can exist only a unique, holistically created, concept of the law that has its idealistic side and realistic side, in addition to other numerous aspects that philosophy and theory of law deal with.

From the foregoing follows that the idealistic legal theories, and especially the naturally-legal ones, cannot be ruled out as the incorrect and unuseful, as is usually pointed out (that one can’t see the forest for the trees). Their correctness can be argued about, as can the correctness of the realistic theories. Therefore, both these big groups of theories are equally correct, i.e. incorrect, only for different reasons. When it has to do with the correctness of the idealistic theories, it is apparent that they are useful. It is only that their purposiveness regarding a society is not directly perceivable despite the fact that they also show that the law always relates to the people and that it is being brought for the people. The idealistic theories show yet another more important thing: that the law can be freely determined and defined. This reminds one of the divine creativity. Still, such freedom is not arbitrariness as arbitrariness is inconsistent and unreliable. That this is so is confirmed by the development of the law that is

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nothing but the result of the competition of the many different idealistic and realistic legal theories and beliefs.[24]

3. Planes for the idealistic concept of the law to spread over in contrast to the realistic

One of the possible answers to the question of why the idealistic concept of the law is inoperative, the idealised concept of the law is incorrect, and the ideal concept of the law is out of human reach, can be found in the teaching of the world which is spread over the three planes or three holistically created realities: physical, actual and virtual.[25] Since the law is a part of the world, („Of one world», but is itself also «of one world», that is, the world of the law), within it thus 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. This means that the law overcomes the real world, creating a wholly new legal world which surpasses the world of physical reality. This is rendered possible since the legal world relies on yet another, metalegal world of ideas, expressions, theories, problems, critical statements, institutions, etc.[26]

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

[24] D. M. Mitrović, *Legal Theory*, Beograd 2007, 93, 120 (in Serbian).
[25] See: D. M. Mitrović, *Path of the law. Holistic paradigm of the world and the law, in the light of chaos theory and legal theory*, Beograd 2000, 63, 65, 115–116, 179, 221, 228–229 (in Serbian).
[26] *Ibid*., 229–245, etc.

▪ The idealistic concept of the law / Dragan M. Mitrović // Часопис Національного університету «Острозька академія». Серія «Право». – 2013. – № 2(8) : [Електронний ресурс]. – Режим доступу : http://lj.oa.edu.ua/articles/2013/n2/13mdmotl.pdf.

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».[27] It has to do with the original world of all possibilities, but without people and the law. In this dynamic, processionalised 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 realised). In this physical world, the law exists as something that «is». It is being recognised according to the previously included conditions of the determined physical reality while formulating commands of the law, as well as according to the subsequent consequences resulting from human behaviour pursuant to the proclaimed commands of the law. As this law is realistically created, it represents something «that is» (*de lege lata*) and is realised in the form of human positive law. Such realistically created law is nothing other than the final result of the previously idealistically conceived law that resides within the metalegal world and out of which it acts upon the legal world, and through the legal world upon the world of physical reality. At one moment which slips away from the memory of the mankind, that idealistically conceived law has (out of that metalegal world) «required» to assume, through the world of legal commands, material form in the world of physical reality. This has been achieved through the creation of the realistic concept of the law, and then through its operationalisation and materialisation in the world of physical reality.

The second, «the legal world» (*the world of legal reality*) comprises the world of the thought processes and subjective experiences which, in the

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

normative form, surpass the world of physical reality. 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 comes into being purposefully and acts expediently upon the physical reality as a well-thought out combination of desires and possibilities in order to act within that reality. That combination is expressed in the form of purposeful commands, which shows that such physical reality has been previously accepted as the object of human interest. Because of that, the legal world surpasses and overcomes the physical reality with its special legal 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 consummated.)

Inside the legal world there exist two of its subworlds: *the legal world of the rules* (the world of the material rules) and *the legal world of metarules* (the world of procedural rules determining how the material rules are applied). The former is used to organise the content of legal communication while the latter is used to determine the order of the proper application of legal rules and human behavior following them. About the rules of that legal world almost the same thing says Herbert Hart, a prominent representative of the English analytical jurisprudence. According to him, procedural norms are «sui generis» operative norms by way of which «transactions» are carried out between the subjects of law. (Only, nothing that exists, exists «sui generis».) The mentioned differentiation has served as an inspiration to the contemporary idealistic legal theories to link the idea of the legal world of rules with the material concept of the natural law, and the legal world of the metarules with the procedural concept of the natural law (John Finnis, Lon Fuller).

▪ The idealistic concept of the law / Dragan M. Mitrović // Часопис Національного університету «Острозька академія». Серія «Право». – 2013. – № 2(8) : [Електронний ресурс]. – Режим доступу : http://lj.oa.edu.ua/articles/2013/n2/13mdmotl.pdf.

On the basis of what has been said it is possible to conclude that in the legal world the law exists simultaneously as something «that is» (*de lege lata*) and something «that ought to be» (*de lege ferenda*). The legal world is something «that is» since the meaning can also be regarded as a type of existence. (Other types of the existence of the law are characteristic of the world of physical reality and have been mentioned.) But, in that world, the law is also something «that ought to be», because it has to do with a determined meaning expressed in the form of a purposeful command that ought to be materialised.

In the legal world, apparently, the idealistic side comes upon and intertwines with the realistic side of the law; the natural law comes upon and intertwines with the positive law. Their relationship is thus quite appropriately viewed as dualistic. However, it is possible to link and harmonise those two sides, somewhat similarly to the relationship of the legal world of rules and the legal world of metarules. It only needs to be shown how this occurs. And the answer referring to the legal world is simple: *it is the command of the law that inside itself melds the idealistic with the realistic into one*. It is only the legal command that can simultaneously exist as something «that is» and as something «that ought to be» because the meaning in its actual form is also a kind of being or existence.

The statement that the command of the law is simultaneously a kind of being (and not only of «that ought to be») cannot be corroborated only by arguments of legal philosophy and theory. One needs to look back at the results of other disciplines. A suitable example is the question that David Bohm has asked himself at one time.[28] The question is as follows: *Is meaning being*? To that question Bohm has answered affirmatively. As he says, «we make the distinction between meaning and being in order to express our thoughts. But this

[28] D. Bohm, *Wholeness and the Implicate Order*, London & New York, 2002, 87. See: *On Creativity*, London & New York, 2004; *On Dialogue*, London & New York, 2004.

distinction does not imply a real difference - it is the way by which we understand an ultimately undivided whole after all. At the stage where meaning and being reflect each other, we can consider them divided. But at a deeper stage, meaning and being have to be viewed as a whole in its essence: meaning becomes being (and *vice versa*). Through this process, meaning and being begin to *reflect* each other».[29] In this interaction, meaning ceases to exist exclusively as something «that ought to be» (*Sollen* or *de lege ferenda*). It transforms and becomes a part of the reality, something «that is» (*Sein* or *de lege lata*). Moreover, meaning becomes the major quality of reality as the reality is indirectly contained in the meanings and not only the meanings in reality. Finally, «meaning *is* being»(!)[30] It is necessary as all that is known about the reality has to be in some kind of relationship with that what it means to us. And that shows that meaning is always a whole. The essence of the matter is that there is no division, although the meaning need not always be fixed. For example, when a theory is interpreted, then one arrives at its meaning. And

[29] D. Bohm, *Wholeness and the Implicate Order*, 87–89.

[30] Bohm further explains the afore-mentioned statement by linking meaning and sense with the concept of information. The operative concept in relation to the information is the concept of form. In order for the information to become form, it needs to have at its disposal a meaning. "To inform" means "to put into form", "to shape" a meaning. This is the reason why the change of meaning leads to the change of form. The change of the form of information leads to the change of its content, and thereby – through a feedback – also to the change of its meaning! In other words, any form that has a meaning can create potential or actual information which is equally important for the real, actual and purely virtual world of the law. (*Ibidem*). However, it is not as important what is directly recognised between those three worlds of the law in physical reality. It is more important that all the three worlds are felt as common and unique ("rational-intuitive") life experience as all the three worlds intertwine and supplement one another continually. When all the three holistically created worlds are thus viewed, then dualism of the natural law and the positive law does not seem so unsurmountable.

theories, as a rule, always have many meanings. It shows that the structure of the meaning is of such kind that finding a definitive, ultimate meaning can never be achieved. Still, the meaning is inexhaustible despite its above-mentioned important limitation. It has no limits because it is infinite and in any individual case dependent on the context within which it is used. As the context changes, so does meaning, and along with it being, too. It seems that this idea is also a reliable support, the support of which renders possible the drawing out of corresponding conclusions relating to the simultaneous existence and parallel acting of the idealistically and realistically conceived natural law and the positive law in the unique world of the law.

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. That 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».[31] 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 content, 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 ought to be» (*de lege ferenda*).

The metalegal world is a pure product of the human mind. It is the birthplace of all legal theories. We are the ones who create the objects in this

[31] K. Popper, *Unended Quest: An Intellectual Autobiography* (transl.), Beograd 1991, 93.

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: by «acting, we always, indirectly, act upon ourselves».[32]

The physical world is the world of the material sources of the law and of the materialised law. The legal world is the world of formal sources and systematised 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 exists 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.[33]

4. Dualism of the idealistically and realistically determined concept of the law: natural law and positive law

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.

[32] *Ibidem*, 93–94.
[33] D. M. Mitrović, *Theory of State and Law*, 189–194.

▪ The idealistic concept of the law / Dragan M. Mitrović // Часопис Національного університету «Острозька академія». Серія «Право». – 2013. – № 2(8) : [Електронний ресурс]. – Режим доступу : http://lj.oa.edu.ua/articles/2013/n2/13mdmotl.pdf.

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.

Above all, 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 legal science is markedly teleological, too, for it tries to explain the laws of movement and development of the law through meaning, sense and purpose. This fact is the pivotal point of the creators and advocates of the idealistic determination of the concept of the law.

The law, too, is an extremely dynamic creation in a constant movement (filled with meaning, sense and purpose) that tries to achieve balance and agreement, all the way up to the achievement of harmony. It appears as a *processualised dynamic metasystem* whose steady state is certainty and whose characteristic is predictability. Thanks to that, legal reality can be presented in its full complexity and movement as there exists a continual flow of and intertwining among the mentioned three main holistic worlds of the law. This can be viewed as the second pivotal point of the idealistic theories, under the condition that the supremacy of the ideal world over the real and the natural law over the positive law is accepted.

Such statements require one to look briefly on the «notorious dualism» of the natural and the positive law that has been cherished from the antique times of Greece and Rome. Positive law (*ius natura*) is independent of an external authority. According to one of the schools of the natural law, the cause or the creator of the natural law is the «biological (anthropological) human nature» (*biological natural law*); according to the second, it is the «mind, the intellectual nature of man» (*intellectual natural law*); according to the third, it is the «divine

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mind» (*divine natural law*) «whose messenger is the intellect of man»[34]. However, independently of its cause, natural law always precedes positive law and serves as its foundation and ideal. Otherwise, positive law would remain practical, concrete and devoid of its profound sense (that when one can't see the trees for the forest).

There are also some other important differences between the natural and the positive law. According to traditional belief, natural law is unchangeable and universal, while positive law is in different nations more or less subject to changes. Natural law is contained in the very nature of man «as are the creations of the natural rules given by nature», while positive law is made by man. Natural law is always just, while positive law can be just only, for example, as «an attempt to realise Justice».[35] With respect to the natural law the only question that can be asked is concerned with its explanation, while with respect to the positive law its justification has to be found. This justification can be offered only by the natural law. Also, natural law is a «perfect law», while positive law is «imperfect». Natural law is the law «based on ideas and values», while positive law is the law «based on the facts of reality», etc.[36]

The statement that natural law personifies justice while positive law knows only of fairness enables natural law to be operatively expressed, even as a separate source of positive law. In that particular sense, natural law can be regarded as a source independent of the positive law but only provided that a previous legal approval or judicial decision exists. For example, when there are gaps in the positive law, judges should look for norms in the natural law in order

[34] T. Živanović, *System of the Synthetic Philosophy of Law*, II, Beograd 1951, 144–145 (in Serbian).

[35] G. Gurvich, *L'idée du droit social*, Paris 1932, 96.

[36] T. Živanović, II, 147, 162. See: R. Tuck, *Natural Rights Theories*, Cambridge Un. Press, 1981; J. M. Finnis, *Natural Law and Natural Rights*, Oxford Un. Press, 1982; R. P. George, *In Defense of Natural Law*, Oxford Un. Press, 1999. and *Natural Law Liberalism and Morality*, Oxford Un. Press, 2001; M. Murphy, *Natural Law in Jurisprudence and Politics*, 2006; C. Wolfe, *Natural Law Liberalism*, 2006.

▪ The idealistic concept of the law / Dragan M. Mitrović // Часопис Національного університету «Острозька академія». Серія «Право». – 2013. – № 2(8) : [Електронний ресурс]. – Режим доступу : http://lj.oa.edu.ua/articles/2013/n2/13mdmotl.pdf.

to fill those gaps by appealing to the provisions of the legal regulations in effect (codes, laws, etc.).[37]

Some older legal writers (H. Ahrens, R. Stammler, G. W. Paton) have at the end of the 19th and at the beginning of the 20th century included into the natural rights «primitive rights», too. Those are the rights that «spring directly from the nature and purpose of man and which comprise the basis of all other rights». Those rights are «born with man» and everyone can exercise them. Being naturally-legal, they are «unconditional or absolute». Those are, above all, the rights of «every man to life, freedom, dignity, honour, etc».[38] The mentioned teachings are very similar to the teachings of the representatives of the *naturally-legal theories of the Social contract* (John Locke, Jean-Jacques Rousseau, etc.). It seems that the main difference is in that the rights which were at the time called «natural» by Locke, Rousseau and others are now called «primitive» by the mentioned writers.

As has already been mentioned, the concept of the natural law is even more relativised by some contemporary writers (for example, Michael Walzer), almost to the point of its being indiscernible, making it completely dependent on and changeable as to the concrete circumstances and culture of a society.[39] But then, can one speak at all about natural law as the personification of justice?

In contrast to natural law, there exists positive law (*ius positum*). It holds for and is applied in a society. Its «positivity» is determined according to its application, i.e. «efficiency», while the «positivity» of its every part is determined according to the fact whether it belongs to the positive law.

[37] Some older civil codes dating from the 19th century, for example, The Austrian General Civil Code (1811) or the Civil Code of the Principality of Serbia (1844), expressly gave supplementary force to the natural law by referring to the "rules of nature".

[38] See: T. Živanović, III, Beograd 1959, 143–144, 464.

[39] M. Walzer, *Spheres of Justice*, 16–19.

Although natural law is perfect and positive law is imperfect, there need not be conflict and disagreement between those two laws as is often accentuated in legal philosophy and theory. Since the idea of natural law is objectively based in human nature, that fact should at least make the creators of the positive law think of what kind of the law they are making and prompt them to try to make a better one. Especially the study of the natural law and its principles by legal science is a strong impetus for the advancement of the positive law.[40] That this is possible has been proven by famous Roman jurists, the knowledge of which has reached unrivalled heights because, to a great extent, it has become a constituent part of the Roman law.[41] In the face of it, the advocates of the realistic determination of the concept of the law, and especially the advocates of the positivistic legal beliefs, insist on the differentiation between the real and the ideal in the law, on the differentiation between the law as a fact and the law as a value, the law as «that is» and the law as «that ought to be» – in a word, on the differences between the positive law and the natural law, justice and purposiveness. Such approach could be called scientific rather than philosophical. It requires from the realists-positivists to take an objective, value-based and ethically neutral attitude with respect to the law as the norm is not linked with any one system of value. They refuse to include into the definition of the law elements such as the achievement of common good, the realisation of justice, the protection of human freedoms, etc. Instead, the measurement of being legal becomes the fact that the norm is derived from the established facts, i.e. that it has been posited by the specific organ pursuant to the specific procedure or that at least it has been respected effectively over a specific period of time by a group of persons. It is understandable if one bears in mind that

[40] T. Živanović, III, 631–632.

[41] W. Morrison, *Jurisprudence: from the Greeks to Post-Modernism*, 1997, 15.

positivists derive the law from «general to particular» and base it on the world of physical reality, which world they wrongly identify with the world of legal reality, while excluding the world of metalegal reality from their contemplations.

Such determinism produces substantial limitations. However, neither is «the devil quite as black as he is painted». Despite the fact that the realists-positivists jurists think that the only legally valid law is the one applied in a society, it still does not mean that they absolutely deny the existence of the ideal law. They just deny that this ideal law stands in the same plane with the positive law. Therefore, the point at issue is to link the two laws with each other and to surpass dualism of the natural and positive law. Although the values of the natural and positive law have their own order and role, it still does not show how the values from the natural law flow into the positive law, which, by the way, itself has at its disposal its own technical legal values.

5. Surpassing dualism in the law – examples of legal teachings of Gustav Radbruch and Ronald Dworkin

There are a number of interesting answers to the question of how the problem of dualism between the natural law and the positive law can be surpassed. One of the most interesting answers was given by Gustav Radbruch in his famous book «Philosophy of Law» (*Rechtsphilosophie*).[42] In that, as well as in his other works, Radbruch «overtops» the opposed positions of the natural and positive law and focuses on three main topics: «the concept of the law», «the idea of justice» and the teaching of the «statutory lawlessness and supra-statutory law».

[42] G. Radbruch, *Philosophy of Law*, 39, etc.

To Radbruch, the law is reality that ought to serve the idea of the law as a value, and that is the idea of justice. In line with this, the realistically created law ought to serve the idealistically created law. Radbruch further develops his belief by claiming that the idea of the law comprises three values: justice, purposiveness and legal security. Justice is reflected in the «equal treatment of equal persons», purposiveness in that «what benefits the people», and security in the positivity of the law and the exclusion of arbitrariness while making and applying it. Those three ideas are found in a changeable balance,[43] jointly creating the *approximate law* as an «open system».[44]

The second key theme in Radbruch's teaching relates to the content of justice, and is solved by means of the supra-empirical «idea of purpose». This is the theme intended to link the value of the idea of justice with the value of the idea of fairness as the kind of justice that is applied. Justice cannot be determined only by means of a single formal principle of equality, but needs the determination of both, the content value, which is relative (because while choosing it, at one's disposal there are only three highest values of the law: individualistic /human personalities, *individual values*/, supra-individualistic /collective personalities, *collective values*/ and transpersonal /human work, *work values*/). On the choice of one highest legal value depends how the principle of justice is going to be determined in terms of its content. Radbruch believes that this choice can be made only authoritatively, which is probably his weakest idea and the weakest answer.

[43] In his earlier works (until 1936), Radbruch gave preference to legal security only to, later on, upon learning of the horrors of National Socialism, and shortly before his death, in his perhaps most important written works (from 1945 to 1949), give preference to justice. (*Ibidem*, 38–39).

[44] In all likelihood, that Radbruch's idea of the law as an "open system" further prompted Karl Popper to expand his teaching to a society. See: K. Popper, *Open Society and Its Enemies*, I-II, Београд 1993 (in Serbian).

The third key Radbruch's theme has to do with the differentiation between the «statutory lawlessness» and «supra-statutory law». This is his belated idea by which he again stirred the interest in the values of justice and natural law. Radbruch explains this idea as follows: «statutory lawlessness» cannot be the basis of legitimacy for when the law is perverted, then the basis of the positive law becomes «supra-statutory law».[45]

Radbruch's solutions rendered it possible for him to be successful in avoiding the trap of dualism between the natural and the positive law by regarding the law as a «triad» and as an «open system», even when claiming that justice has precedence over security and purposiveness. The only problem is the unfinished part of his teaching relating to the content of justice, in the part of which he concludes that the choice between individual value and collective value or work value can be made only authoritatively. It was that part of Radbruch's teaching that Arthur Kaufmann continued to work on and provided an adequate solution in favour of individual values as the decisive authority. This is an example of desired consistency as justice is also of the same individual origin.[46] Collective justice is not original, and moreover the question is whether it can be justice at all (lynch is not the application of collective justice), nor does justice exist in work values. Justice can exist originally only as an individual value. It is a feeling that can never characterise biologically created human beings, except for the ones who have at their disposal spirituality as their generic human characteristic.

45 G. Radbruch, 287–289.

46 It was that unfinished part of Radbruch's teaching of the content of justice that Arthur Kaufmann continued to work on and allowed himself freedom to re-examine and further develop Radbruch's relativistic points of view relating to justice, claiming that the idea of the law as justice is essentially one and the same as human personality. This way was given the solution to Radbruch's problem of the authoratitive choice of values in favour of individual values. Whether justifiably or not, the term "Radbruch-Kaufmann theory" is used today. (A. Kaufmann, *The Law and Its Understanding* /transl./, Beograd /Valjevo/ 1998, 285–287). See: *The Philosophy of Law. An Encyclopedia*, vol. II, New York & London 1999, 475–476).

Another stimulating example and an attempt to find a solution regarding the relationship between natural law and positive law have been presented by Ronald Dworkin. In his teaching justice is praised as a principle, a separate form of «integrity», which – set forth in his original theory of court decision-making process – is nothing but a new naturally-legal teaching.[47] This teaching is based on the realisation that we «live in and by the law. It makes us what we are: citizens, employees, doctors, spouses and people who own things. It is sword, shield and menace»[48]. Those are not the only important ideas of Dworkin's. One should mention at least his ideas of righteousness, which have to do with the «structure that determines impact on political decision-making in the right manner»; fairness, which is concerned with the «procedure of applying rules of the involved system»;[49] «self-purification» of the law;[50] fiction of «judge Hercules», etc.

Dworkin's most important and most fruitful idea is concerned with the positive law which contains not only *legal rules*, but also *legal principles*. Legal principles have moral significance. They become part of the positive law owing to the operation of legislature and court decision-making process. For example, when deciding a case, judges do not appeal only to legal rules, but also to legal principles. And while legal rules are absolute («all-or-nothing»), legal principles are relative and may be in conflict. It follows that the application of legal rules depends on the previous choice of legal principles. On that choice depends whether justice as a discernible value of the metalegal world will flow into the legal world in the form of fairness and into the world of physical reality in the form of realised justice. However, all does not end up here for there still remains

[47] See: R. Dworkin, *A Matter of Principle* (transl.), Beograd (Podgorica) 2001, 193–257.
[48] See: R. Dworkin, *Law's Empire*. *Preface*, VII and VIII (transl.), Beograd 2003. See: *Taking Rights Seriously* (transl.), Beograd (Podgorica) 2001.
[49] See: R. Dworkin, "Law beyond the Law" (transl.), *Pravni život*, No. 12, Beograd 1998, 799–800.
[50] See: G. Vukadinović, R. Stepanov, 499.

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the problem of the choice of legal principles to be solved. Dworkin solves this problem by differentiating them from *legal policies*. Legal policies take precedence because on their previous choice depends the choice of legal principles. While principles describe the rights of individuals, legal policies describe goods, i.e. political goals of a community as a whole. Unfortunately, Dworkin failed to arrive at a concrete solution in relation to the choice of policies, even by equal valuation of legal policies to which he appeals when determining relative weight (or importance) of one against another («Elmer» case).[51] This is understandable because the choice of legal policies in his teaching also depends on yet another previous choice of a «political goal» which is at the moment thought to be the most desirable good of a society. Then it is justifiable for one to pose the question of what authority determines the political goal which is at the moment believed to be the most desirable political good. And this shatters the consistency of the entire Dworkin's construct and reduces it to arbitrary and changeable choice of a political goal as the policy on which depends the application of absolute legal rules. It is comforting that the choice of a political goal by an authority, which goal is at the moment believed to be the most desirable good in a society, Dworkin does not solve harshly as in the *Digest*: «Whatever pleases the prince has the force of law» (*Quod principi placuit, legis habet vigorem*), that is, «The sovereign is not bound by the laws» (*Princeps legibus solutus est*),[52] but less harshly, though the essence remains the same.

Not only Radbruch, but also Ronald Dworkin failed to solve completely the problem of dualism of the natural and the positive law as both of them appeal to the authority capable of imposing the choice of the value as a good (G. Radbruch) or to influence by means of its choice of policies the choice of

[51] *Ibid*., 501–504.
[52] Ulpianus, *Digesta*, 1, 4. 1.

▪ The idealistic concept of the law / Dragan M. Mitrović // Часопис Національного університету «Острозька академія». Серія «Право». – 2013. – № 2(8) : [Електронний ресурс]. – Режим доступу : http://lj.oa.edu.ua/articles/2013/n2/13mdmotl.pdf.

principles, and through principles the choice of legal rules in order to realise a good (Dworkin). Therefore, both of them softened the problem of dualism, but were unsuccessful in solving it completely. It seems as though they failed to keep in mind that there exist naturally-legal principles which are the supreme authority. Those principles are more forceful than any other authority in a way that not one rule which contradicts it is correct.[53] The most important one is the principle of justice. It is only after having chosen justice as the supreme authority and the decisive measurement for the choice of a good which is desirable for most members of a society, and after having been operationalised in the form of fairness, that it is rendered possible to say that the natural law has flown through general legal principles into the positive law. However, justice is not only the highest value. It is the measurement of all other values.

It should be pointed out that Dworkin has offered a clearer and rationally more tolerable *instruction* for linking the natural law with the positive law than Radbruch.[54] That important instruction of his can be used to explain how other naturally-legal values flow into the system of positive law: for example, legal security into legal certainty as the former in its pure form represents unreachable value, and the latter relates to the concrete state of a system of the law.[55] The most important thing is that justice and security can produce consequences in the positive law through its derived forms (fairness and certainty).

In order to show that dualism between the natural and the positive law is relative, perhaps this is the right time to make a digression and give a brief outline by looking back upon the teaching of a proven realist, Herbert Hart, the English representative of the analytical jurisprudence and Kelsen's pupil – and all this with the aim of viewing the same problem in a different perspective in

[53] Lj. Tadić, 129–130.

[54] See: R. Dworkin, *Taking Rights Seriously*, 193–257.

[55] See: D. M. Mitrović, *The Principle of Legality*, Beograd 1996, 41–56 (in Serbian).

the spirit of the rule *audiatur et altera pars*. Special attention is drawn by Hart's teaching of the «rule of recognition», which he has presented in his most famous book «The concept of law» published in 1961. It is comprised of one or more really existing norms. That rule exists both in the developed and primitive communities. The role it plays is not only in that it serves as a measurement of determining the legal character and «validity» of the norms in a system of law, but also as the basis of legitimacy and legality of state power. The problem is in that Hart does not quite specifically say which all those rules are that comprise the rule of recognition and serve as the measurement of validity of legal norms that are included within the scope of the given system of law as there are a number of such measurements that can mutually exclude one another. He only says that there is one «supreme measurement», as well as that the rule of recognition evades any evaluation of validity: it can only be accepted as such.[56]

Hart's problem is especially manifest when it has do with the rule of recognition in the under-developed and primitive societies in which that little amount of the written law is drowned in the sea of unwritten rules, the origin of which need not be even known exactly.[57] Is it possible that in such societies the rule of recognition belongs exclusively to the system of the written positive law? Is one rule or more which constitute the rule of recognition in such societies exclusively positive-legal? If so, are the naturally-legal rules deliberately excluded from the composition of the rule of recognition? If they are not, where are they? If they are, where does the positive rule of recognition spring from? Does it spring from the earlier, such one and the same rules? But, where do those earlier rules spring from? It seems that what his *Grundnorm* is to Kelsen, his rule of recognition is to Hart.[58] The difference is in that Kelsen admits that it

[56] See: H. L. A. Hart, *The Concept of Law* (transl.), Podgorica 1994, 102–106, 119, etc.
[57] *Ibid*., 9–18, 37–38, etc.
[58] See: H. Kelsen, *Theory of Law and State*, Beograd 1951 (1998, 2010), 116–117, 119–120, 127.

▪ The idealistic concept of the law / Dragan M. Mitrović // Часопис Національного університету «Острозька академія». Серія «Право». – 2013. – № 2(8) : [Електронний ресурс]. – Режим доступу : http://lj.oa.edu.ua/articles/2013/n2/13mdmotl.pdf.

has to do with the fictive basic norm, while Hart claims that it is concerned with the really existing norm.

One can ask: If the rule of recognition is comprised of one or more really existing norms, can it mean that the naturally-legal norms also really exist and are valid? Moreover, that the rule of recognition at least in primitive societies is comprised of really existing naturally-legal norms? Both questions are rightly posed as Hart himself concludes that positive law should contain at least a «minimum of the natural law». It remains unexplainable where that «minimum of the natural law» lies concentrated.[59] Is it in the rule of recognition? Obviously, Hart's rule of recognition could also serve as a suitable example for linking natural law with positive law. And it shows that dualism of natural law and positive law is illusionary, as well as that the flowing of the natural law into the positive law is rendered possible as it has to do with the same holistically created unique concept of the law.

6. Linking legal values with the usefulness of the positive law – an example of operationalisation of justice and fairness

Values in the law are a major stronghold of idealistic theories. It is understandable because the law as a purposeful construct is value-based. Its purposefulness is determined by the values of justice, fairness, freedom, human dignity, tolerance, security, equality, order and peace, etc. Neither are those values in the law just a sum, which is the case with a simple sum of elements, but a whole. They cannot even be explained otherwise unless they are linked with other phenomena or their ingredients. And that requires the irreplaceable value of human personality which is unexplainable solely on account of the facts

[59] H. L. A. Hart, 189.

based on experience through which a personality manifests and expresses itself. Additionally, it seems that in man and in all his creations there is a continual presence of something from the transcendental world out of which originates his inexhaustible labour to link the world of experience with the world of value. Such labour exists in all the actions and creations of man. That is also the case with the law as a typically teleologically devised and value-posited creation of human mind. To naturally-legal theories are added technical legal values, which are characteristic of the system of positive law (purposefulness, efficiency, clarity, preciseness, conciseness, etc.).

The most important is to consider how the values of justice are operationalised in the positive law. The easiest way to do it is to follow in the track of Dworkin's two important ideas. According to the first, it is exactly justice as a naturally-legal principle that flows into the positive law through its general legal principles. And second, the flowing of justice into the positive law in the form of fairness is rendered possible owing to the previous authoritative choice of a good, i.e. a political goal desirable for the whole social community. Does it perhaps mean as follows: «To be just on the throne means to be strong».[60]

Obviously, that «good» in the contemporary developed democratic societies based on the rule of law *cannot* be found out by means of any one of authorities (for example, Attila's), but only by means of justice as the highest authority and the decisive measurement, as was properly emphasised by the antique writers. Today it is specifically the task of a parliament, as a legitimate representative body of those it governs (M. Weber),[61] or a court with its «empire of judges» and understanding of the law as a «prediction as to how the courts are

[60] C. Tacitus, *The Annales* (transl.), Beograd 2006, 290.
[61] M. Weber, *Economy and Society* (transl.), II, Beograd 1976, 474–475.

really going to act» (O. W. Holmes).[62] Especially the parliament and the court because of their prominent role – resulting from such one and the same recognised authority – must be continually *inspired* by justice as the supreme principle and goal since the most just is that good which suits most of the citizens.[63] But what can be regarded as such desirable good?

Two answers can be given to this question. The first is concerned with content by its nature and is very simple: such good is impossible to determine *in abstracto*. It needs something special to happen in a community for such good to be recognised as a common one, i.e. in the interest of all or a majority. The second is formal by its nature. It is clear, but insufficient. It relates to three possible situations. In reference to the first, when a parliament or courts are inspired by justice, the necessary harmony should always be established with rules regulating the most important goods such as life, freedom, peace, legal principles, etc. It is there that the impact of justice and other legal values is most evident. The second possible situation is concerned with the question as follows: What about those positive rules which are neither contrary to justice nor adverse to a community as they do not impose a good which fails to meet the interests of a majority of citizens? One can only conclude that it has to do either with purely technical legal rules or with value neutral rules (with respect to justice or other values). However, those rules, too, are in a way supported by purely social (customary, moral, traditional and other) rules. Finally, it is not difficult to imagine the third situation either, which is concerned with the choice of a good which is as a political goal undesirable for a whole community, although

[62] See: G. Vukadinović, *Theory of State and Law II*, Novi Sad 2008, 73–74 (in Serbian).

[63] This is in complete conformity with Plato's idea that justice constitutes "human and political order which is in agreement with nature", while laws should protect common good of citizens. In that Plato found the sense of serving the idea of justice. Otherwise, laws which protect only the good of individuals or some parts of a society are not true but illusionary laws. (Plato, *Laws*, 146, 314; A. V. G. Sabine, *A History of Political Theory*, London 1938, 72, etc).

lawfully chosen. In that case, it would relate to a legal or judicial injustice, as Gustav Radbruch emphasised.

Obviously, it is not difficult to ask why justice (*iustitia*) has such most prominent role in the law, and not some other value in its stead. The answer is simple: because it is only justice that is a kind of proportionality and agreement (all the way up to the achievement of harmony, which is another name for absolute, divine justice). Apart from that *absolute*, divine or natural justice, there exists *social justice* with its derived types (moral, religious, legal), which is relative.[64] All other values make sense only when they rely on justice as a measurement.

For recollection's sake, *legal justice* is a synonym for that which is proportional or equal. Pursuant to those measurements are determined two of its *formal* models: *distributive* (*iustitia distributiva*: «proportional allocation among all»), which is original, position-based and prescribes that «the unequal be treated unequally», and *commutative* (*iustitia commutativa*: «equal allocation among all»), which relates to exchange and prescribes that «the equal be treated equally». Justice in the law in its narrowest meaning denotes adapting to law (*legal justice* /*iustitia legalis*/). It consists of generality, equality and impartial exercise of laws and the law. However, to the question of what the *material* justice consists of, one cannot answer with any one of the like models.[65]

Justice in the law being a type of social justice is not perfect. But neither is the law. As a result, between imperfect justice in the law and an even more imperfect positive law there is always to a lower or higher extent disagreement

[64] With Serbs, justice has always been determined on the basis of that what "is" because natural and truthful is only that what is. Justice is the "foundation of everything" (St. Sava). It is the truth "because only that what is truthful is just" (Dositej Obradović). Or else, one has to believe fiercely in an authority as truth, instead in truth as the only authority.

[65] The most recent attempts to determine *solidarity justice*, according to which more out of the common goods should be allocated to the weak and poor and less to the strong and rich, are not models of material justice as they are presented today, but of the Aristotle's formal distributive justice. For this reason, it is easier to feel than to realise justice.

and tension.[66] Bearing exactly this in mind, Cicero determined the purpose of the law as the skill of right measure when allocating goods among citizens (*Sit ergo in iure civili finis hic legitimae atque usitatae in rebus causisque civum aequabilitatis conservatio*). And that means that any «normal» law should contain at least a minimum of justice. How important justice is is also shown by this: not one court is called court of the law, but many are called courts of justice. What is the reason for the jurists practicing law to reach out for that what jurists realists-positivists contest or ignore in their teachings?

When it is specified what justice is, then it is rendered possible to determine its operative and applicable form in the positive law. Its existence confirms that the idealistic concept of the law does not float in some imaginable space, but that it is capable of being operationalised and of flowing into the positive law. This operative applicable form of justice in the positive law is called *fairness* (*aeuquitas, iustus*). Fairness is justice in a concrete case which cannot be decided only on the basis of the positive law. It was originally considered a virtue of legal justice only to become in the 19th and 20th centuries a means used to correct overly rigid laws, especially when mechanical, unlawful or unjust application of rules in concrete cases were to be prevented. The same is done today, when fairness is called constitutional or customary-based authorisation of judges or other authorised persons to flexibly apply legal norms in concrete cases in order to administer the law more successfully. For this reason it is felt that fairness is a corrective justice, a kind of righteousness which corrects the law when its creator cannot think of all possible cases in advance. This righteousness is especially remedial when a parliament enacting laws (*legal justice*) or judges deciding cases can appeal to justice and fairness (*judicial*

[66] See: R. Lukić, *Theory of State and Law*, Beograd 1976, 219–221 (in Serbian); T. Živanović, III, 675–679.

justice) if they are doubtful about the correctness of the positive law which they create or apply.[67]

That there exists a link between the natural and positive law furthermore confirms the fact that fairness can be determined in the naturally-legal and positively-legal sense. Fairness in the *naturally-legal* sense exists when a law directly refers to the natural law in cases relating to legal gaps (when there is absence of legal provisions referring to particular cases which provisions are not envisaged by a law or a judge could not appeal to them as they do not fall under any one of general norms). On the other hand, fairness in the *positively-legal* sense has at its disposal its legal (material) and judicial (formal) forms. Legal fairness as a value renders possible for the legal norm to be applied in such way that all characteristics of a case are going to be taken into account. Such norms fall under *justice in the law* (which requires that petty theft, embezzlement, fraud out of need, etc. are not punishable) in contrast to *rigid law* which does not allow for taking into account such characteristics. *Judicial fairness* exists when concrete cases which are embraced by law are decided «in the spirit» of the law, i.e. its idea, substance, and not in keeping with the letter of the law. This usually happens when a law does not embrace all characteristics of a concrete case (legal gap case). It is then that judicial fairness enables a judge to decide a concrete case according to the rule he himself determines. For example, acts concerned with endangerment of people by using atomic energy, wiretapping, producing shoddy goods, presenting mass culture, violence, gambling or debauchery are the acts which cannot be regarded as allowable under a law because they are not expressly forbidden by the law. And this for a very simple reason – there is no need to forbid by the law that which represents an apparent «pathological legal behaviour». Simply, it is understood that such self-evident

[67] See: B. S. Marković, *On Just Law*, Novi Sad 1993 (in Serbian).

things are by its nature absolutely forbidden. However, writers such as Norberto Bobbio dispute the declaratory character of a decision based on fairness and incorrectly think that the source of the law is the judicial decision itself, and not fairness expressed in the decision.[68] The acceptance of such point of view would give rise to inconsistent judicial practice which could be used to, without punishment, further endanger physically and mentally people by the mentioned acts. In any case, legal and judicial fairness should be realised for the benefit of those who suffer legal sanction. They should guarantee that individuals are not going to be unjustly prosecuted or punished. They are of such significance that in some places exist special organs which decide such cases (*equity courts*).

It follows that it is only through fairness that the law can serve the realisation of the idea of justice (Aristotle). A similar idea is found in Radbruch's teaching: the law is a reality which has its meaning in the fact that that it serves the idea of justice. This idea of Radbruch's can be summarised in a simple formula: when legal law negates equality as the «focus» of justice to an intolerable extent, then such law should be revoked by a judge for the benefit of justice. It was exactly in the judicial practice of the post-war Germany that it used to happen that courts appealed to the natural law when pronouncing a judgment. And not only did jurists reach out for the values independent of the state, but they also searched out for such proper values that would additionally limit the power of the state.

As they are today inseparable from the protection of human rights, legal and judicial fairness are linked with the *right to a fair trial*. This law relates to the protection of human rights through all stages of procedure before judicial or other state organs. It is based on the following idea: when human rights are not

[68] T. Živanović, III, 679–680.

respected in a police station, hearing room, pre-trial confinement, court or a cell, it is evident that authorities do not fulfill their obligations.[69]

To show that the linking of the natural law with the positive law is rendered possible, here is given a brief account of a case in which a judge splendidly linked in his decision the requirement to follow the law with the requirement of judicial fairness and the right to fair trial. Namely, a tipsy driver was brought before a judge. The driver promptly confessed his guilt. When the judge asked him why he had driven under the influence of alcohol, the driver answered that he was the father of three minor children whom he supported together with his unemployed wife and that the other day he was laid off without prior notice despite being a good worker. In distress, after receiving the notice of dismissal on account of which he and his family were left without any means of subsistence he dropped by a pub to pull himself together. However he had one too many a drink of beer. Seeing double he got into his car and drove off. The policeman stopped him and seeing him glazed asked him to take a Brethalyzer test and, of course, took him to jail to sober up. The judge, upon hearing the whole story, replied, roughly paraphrasing: I have to sentence you to jail not only because your guilt is evident, but also because you confessed to your guilt. However, given the fact that you have never before violated law and that you are without work and means to support your family, the court will recommend that you are to get a new job, while over the next three months you serve your prison sentence each weekend starting on Friday at 18.00 hours and ending on Monday at 08.00 hours, during which period you are going to work all working days at a

[69] The right to a fair trial is the fundamental human right and is one of the generally valid principles. It is contained in The Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights of the UN General Assembly, The European Convention on Human Rights and other similar international agreements, and even in the norms of the customary international law. In all documents, and particularly in article 6 of The European Convention on Human Rights, international standards pertaining to the right to a fair trial are determined. (N. Mole, C. Harby, *Pravo na pravično suđenje. Vodič za primenu člana 6 Evropske konvencije o ljudskim pravima* /transl./, Beograd 2003, 34–65).

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new job. And there we have an example showing how judges can bring decisions based on justice and laws, which elevate the values of justice and the law.

7. **Conclusion**

The law is an extremely complex phenomenon. It is very difficult to determine it precisely even in the conventional and operative sense, while the complete cognition and definitive definition of the law are out of reach of human capabilities. This substantial limitation: that it is rendered impossible to determine the law neither uniquely, completely nor definitively applies to all theories and teachings which are concerned with studying of the most in-depth or even the unreachable layers of the law. In spite of this, there exist numerous idealistically or realistically inspired legal theories which try to give the answer to this ultimate question. This especially applies to idealistic legal theories which study layers of the law beyond or above the discernible reality and instead of giving preference to usefulness they give preference to justice, common good or some other important values. They can be classified into naturally-legal, aprioristical-phenomenological, existentialistic, culturalistical theories or in some other way. Under them can also, for a special occasion, be classified few of the contemporary multidisciplinary theories.

From limitations stem flaws. They can be summarised as follows: not a single idealistic theory can provide either a reliable or a definitive answer to the question of what the law is. For this reason the differentiation should be made between the idealistic and the idealised and the ideal concept of the law. The problem is in that the idealistic concept of the law is inoperative, the idealised concept of the law is not correct, while the ideal concept of the law is out of

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human's reach. One may ask oneself is it possible at all to determine the law idealistically?

To the question whether it is possible to determine the idealistic concept of the law can be answered by saying that although it is impossible to determine a unique, complete and definitive idealistic concept of the law, it is possible to link it with justice or some other value. The problem concerned with that approach is as follows: as the mentioned values are determined differently, so is the idealistic concept of the law determined differently, too, with all the accompanying flaws resulting from the incorrectness caused by its idealisation or unreachability caused by its ideality.

Despite difficulties, that idealistic concept of the law can be determined, even be indirectly operationalised, by linking naturally-legal values with the positive law. This can be done in the spirit of the teaching of the three worlds of the law. By means of that teaching can be determined not only the spread of values in the world of the law, but also the spread of the law itself in the metalegal world, legal world and the world of physical reality. In the metalegal world the law exists virtually, in the legal world actually, and in the world of physical reality it exists really. Also, it should be noted that it is only in the legal world that the law exists simultaneously as something «that is» (*de lege lata*) and as something «that ought to be» (*de lege ferenda*). Something like that is possible for it is the command of the law that inside itself melds the idealistic with the realistic into one. It is only the command of the law that can exist simultaneously as something «that is» and as something «that ought to be» because meaning is a kind of being. It is only then that, through the flow of major legal values into the positive law: for example, justice into fairness (applicable justice), with the stimulating examples set forth by Gustav Radbruch and Ronald Dworkin, one can see the possible usefulness of the idealistic

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theories and teachings relating to the law which is not exclusively *de lege ferenda*.

It seems that it is easier to determine the idealistic concept of the law and the scope of its spread in the world of the law than to link it with the realistic concept of the law. The easiest is to link the idealistic concept of the law with one or more values and then out of comfortable metalegal reality make use of that same value to explain all the worlds of the law. The most difficult of all is to explain how the values of the natural law flow into the positive law. Following in the track of Dworkin's teaching it is rendered possible through the operative employment of one or more naturally-legal values as policies or decisive measurements for choosing general legal principles through which the natural law flows into the positive law and becomes its part. Justice is the most important of such principles. It is at the same time the measurement of all other values. Finally, justice and fairness can serve as an appropriate example showing how naturally-legal values flow into the positive law, by which it is at least hinted as to how dualism between the natural and positive law can be surpassed.

One thing is for certain: both the realistically determined law and the ideallistically determined law always exist for the people, and not the people for the law. This means that the natural law, too, can be useful, at least in the part in which it flows into the positive law. It did not come into being out of leisure time, but out of dire human need to protect the society from self-destruction. Out of leisure time came into being only the idealised, idealistic and realistic teachings of the law.

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Ідеалістична концепція закону

У статті відзначено складність точного визначення закону. Особливо це стосується ідеалістичних теорій права. Вони можуть бути класифіковані на природно-правові, апріорістичні-феноменологічні, екзистинціалістські, культуростичні теорії тощо. Відповідно до них можна також, в окремих випадках, класифікувати деякі з сучасних міждисциплінарних теорій.

Незважаючи на їх численність, жодна ідеалістична теорія не може дати переконливу або остаточну відповідь на питання про те, що є закон. З цієї причини має бути проведена диференціація між ідеалістичною та ідеалізованою і ідеальною концепціями закону. Проблема полягає в тому, що ідеалістична концепція закону не працює, ідеалізована концепція закону не є правильна, в той час як ідеальна концепція закону знаходиться поза досяжністю людини. Можна запитати себе, як це взагалі можливо, щоб визначити закон ідеалістично.

Відповідь на це питання можна знайти, пов’язавши її з правосуддям або іншою цінністю, а також за допомогою вчення про три світи закону за допомогою якого можна подолати дуалізм природного права і позитивного права. Найбільш складним для пояснення є те, як цінності природного права виявляються у позитивному праві. Тим не менш, це також можливо через використання однієї чи кількох природно-правових цінностей у формі правової політики чи переконливих вимірів, що можуть бути використані для вибору правових принципів, через які природний закон надходить у позитивне право і стає його частиною. Наприклад, справедливість виявляється в позитивному праві через відкритість (ченість), безпека через впевненість і т.д.

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Одне можна сказати напевно: обидва визначення закону – реалістичне та ідеалістичне – завжди існують для людей, а не навпаки. Це ж стосується і природного закону, який починає працювати, коли він знаходить свій вияв у позитивному праві.

Ключові слова: концепція закону, три світи закону, дуалізм природного і позитивного права, вияв правосуддя через справедливість у позитивному праві

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Идеалистическая концепция закона

В статье отмечена сложность точного определения закона. Особенно это касается идеалистических теорий права. Они могут быть классифицированы на естественно-правовые, априористично-феномено-логические, екзистинциалистические, культуростичные теории т.п. В соответствии с ними можно, в отдельных случаях, классифицировать некоторые из современных междисциплинарных теорий.

Несмотря на их многочисленность, ни одна идеалистическая теория не может дать убедительный или окончательный ответ на вопрос о том, что есть закон. По этой причине должна быть проведена дифференциация между идеалистической, а также идеализированной и идеальной концепциями закона. Проблема заключается в том, что идеалистическая концепция закона не работает, идеализированная концепция закона не правильная, в то время как идеальная концепция закона находится вне досягаемости человека. Можно спросить себя, как это вообще возможно, чтобы определить закон идеалистически.

Ответ на этот вопрос можно найти, связав ее с правосудием или другой ценностью, а также с помощью учения о трех мирах закона с

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помощью которого можно преодолеть дуализм естественного права и позитивного права. Наиболее сложным для объяснения является то, как ценности естественного права проявляются в позитивном праве. Тем не менее, это также возможно через использование одного или нескольких естественно-правовых ценностей в форме правовой политики или убедительных измерений, которые могут быть использованы для выбора правовых принципов, по которым природный закон поступает в позитивное право и становится его частью. Например, справедливость проявляется в позитивном праве через открытость (честность), безопасность через уверенность и т.д.

Одно можно сказать наверняка: оба определения закона – реалистическое и идеалистическое – всегда существуют для людей, а не наоборот. Это же касается и естественного закона, который начинает работать, когда он находит свое выражение в позитивном праве .

Ключевые слова: концепция закона, три мира закона, дуализм естественного и позитивного права, проявление правосудия через справедливость в позитивном праве.

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The idealistic concept of the law

It is very difficult to determine the law precisely. It especially applies to the idealistic theories of the law. They can be classified into naturally-legal, aprioristical-phenomenological, existentialistic, culturalistical theories or in some other way. Under them can also, for a special occasion, be classified few of the contemporary multidisciplinary theories.

Despite their numerousness, not a single idealistic theory can provide either a reliable or a definitive answer to the question of what the law is. For this

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reason the differentiation should be made between the idealistic and the idealised and the ideal concept of the law. The problem is in that the idealistic concept of the law is inoperative, the idealised concept of the law is not correct, while the ideal concept of the law is out of human's reach. One may ask oneself how it is possible at all to determine the law idealistically.

The answer to that question can be found by linking it with justice or some other value, as well as by using the teaching of the three worlds of the law through which it is possible to surpass dualism of the natural law and the positive law. The most difficult is to explain how the values of the natural law flow into the positive law. However, it is also attainable through the operative use of one or a number of naturally-legal values in the form of the legal policies or the decisive measurements which can be used for the choice of the legal priniciples through which the natural law flows into the positive law and becomes its part. For example, justice flows into the positive law through fairness, security through certainty, etc.

One thing is for certain: both the realistically determined law and the ideallistically determined law always exist for the people, and not the people for the law. It also apllies to the natural law which becomes operational whenever it flows into the positive law.

Key words: the concept of the law, three worlds of the law, dualism of the natural and positive law, flowing of justice through faireness into the positive law.

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