Dragan M. Mitrović

ON THE LAW

Selected Essays

SELECTED LEGAL WORKS
Book X

DOSIJE
STUDIO

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CONTENTS

AUTHOR'S NOTE

As the years have passed by and the end of active university career has neared, so has gradually grown the need to collect, round off and deliver to the coming generations of jurists the author's latest results on and thoughts about the law translated into the newest and most recent works scattered in numerous professional journals.

As the thematically different works came into being one after another over the past decade, the author decided to highly simplify the content of this book and arrange the selected works in the simplest way – according to the year the work was written or published. This is rendered possible because all seven selected translated works are concerned with the ultimate question of legal science: What is the law?

These are not the only author's works. There are many more of them and the most important ones are set forth at the end of the book. They have been written from the very start of the author's university career. However, the author thinks that it is exactly these selected translated and untranslated latest and the most recent works that are most befitting to be included into the strict selection made in the preparation of this book.

Also, it should be mentioned that the book *On the Law. Selected Essays* is a necessary continuation, elaboration of and thematic supplement to the author's previous three books of similar meaning and purpose: *Principles, forms, ideas and heritage. From legal theory* (1997), *On the rule of law and other legal themes* (1998), and *State, law, justice, jurists* (2009), in which books are collected and set forth in one place the works that the author had written earlier on. By this new, in a way the fourth book of its kind, the author wishes to mark the end of his active professional university career and say farewell to his readers. Life is short and so very interesting that thus long dealing with the law seems to be an exaggeration.

The author hopes that the book On the Law. Selected Essays will be a good opportunity for the curious reader to reflect on the selected themes of legal theory, at least in as much as it was interesting for the author to think them over while writing his selected works.

Belgrade, 2017. and 2022. *Author*

I

ON CONTEMPORARITY OF MULTIDISCIPLINARY LEGAL THEORIES AND WORLD STATE

At the end of the 20th and the beginning of the 21st century, the state and the law have been increasingly studied in a more multidisciplinary manner. Conditions have thus been created for a "big dissolution" of consolidated schools and directions and a significant thematic expansion of legal interest in topics and areas which have usually remained outside the interests of jurists. In addition to traditional topics ranging from the theory of justice to the legal science, and from the theory of norm to the theory of organisation, there is an ever-increasing affirmation of the studies of constitutionalism as a distinctive theory of the law, feminist studies and the studies of so-called "female law," critical legal studies, new institutional theories, multiculturalism, communitarianism, sociological-anthropological legal pluralism, functionalist, legal cybernetics and legal informatics theories, all the way up to bioethics with biojurisprudence or the movement of law and literature.[1]

1. Presentation of the latest multidisciplinary legal theories

*Critical Legal Studies Movement***.** During the 1980s, the Critical Legal Studies Movement was founded in America with the aim to fully critically examine legal phenomenon. The criticism of the members of this movement was particularly directed towards legal practice that relies on liberalism, acts formalistically, shows strong tendency towards objectification, strives towards inadmissible universalisation and applies the law as a form of economics.

1 D. Mitrović, Legal Theory, Belgrade 2007.

Unlike American realism, which today one is more likely to come across in a museum than in real life, the members of this movement considered the law to be a multiplicity of social rules. For this reason, they focused their interest on finding a new way for their interpretation and application. According to them, "the law is a political means" which exists so as to achieve interests of a group, party or class that create it. For this reason "the rich and powerful use the law as a coercion instrument with the aim to maintain their existing position within social hierarchy"[2].

That it has to do with a legal movement and not a legal school is shown by its members Roberto Magabeira Unger, Duncan Kennedy, Robert J. Gordon, Morton Horwitz, Catherine A. MacKinnon, Jacques Derrida and others, who otherwise belong to different currents of thinking within American realism, Marxism and their "post-culturalist criticism". Some members of this movement consider the law to be an ideology, others the result of class struggle, while the third group apply "deconstruction" as a method in order to analyse the law and justice, justice and force, force and the law.

Deconstruction method is a recognisable feature of Jacques Derrida's study. This essentially psychological-respective method has quickly been accepted as useful. Derrida believes that the re-examination of the subject of research enables the removal of one's own confusion which enfold newly-emerging forms of domination over the people. The point of support lies in Derrida's position that "violence is not outside legal order, it stands in the foundations of the law"[3]. By further application of deconstruction method, Derrida shows that the law is no longer a logical and coherent system, but the product of a game of meaning ("the glass bead game") that is not determined in terms of time.

The main representative of this movement is, nevertheless, Roberto Magabeira Unger, who in his book "Knowledge and Politics" first developed a rounded-off "personality theory," wanting then also to develop "positive theory" that would influence the change of the existing society. In this book Unger formulates "the ideal of the community with *organic groups* that will overcome the system of domination. The management of activities of these groups and the prevention of imposing one upon another will be done by the *state* that should be at the world level."[4]

2 G. Vukadinović, Theory of State and Law II, Novi Sad 2007 (2008), p. 85.

3 J. Derrida, The Force of Law, Novi Sad 1995, p. 54.

4 G. Vukadinović, p. 88.

Feminist jurisprudence. Within the Critical Legal Studies Movement, but also outside it, there have been feminist studies created and developed, too, with their *feminist jurisprudence* and different directions (Francis Elisabeth Olsen, Carol Gilligan, Catherine A. MacKinnon, Tove Stang Dhal, etc.).[5] On the legal plane, this direction first had as its goal the achievement of an equal social treatment for women, which was done through reformist demands to formally eliminate discrimination against women in comparison with men. The next goal was the achievement of a special social treatment for women aimed at establishing essential equality among men and women through mutual respect of their respective differences. On the purely theoretic plane, however, feminist studies widely vary in their themes and range from "the recognition of the role of law as an instrument capable of bringing benefits to women to the critic of the gender-based character of legal norms built upon predominantly male models, categories and values, and as a result unable to be the reflection of the vision and interests of women."[6] On this basis have been made numerous feminist analyses of the society in order to show the groundlessness of the liberal idea of universality and neutrality of the law and to point at the understanding of gender and functional character of women from man's perspective. Moreover, numerous so-called "feminist theories of the state and law" have been created, although the contemporary most developed countries with their laws have never considered themselves gender-neutral or gender-committed, but have not given up pretensions towards some kind of the universality of the law. Why would it be the case with the theory of the state and law, which certainly has not been created for any gender reasons?[7] Perhaps, because it commits their authors less.

The Law and Economics Analysis School. The Law and Economics Analysis school, also known as the new *Chicago Law School* (in contrast to the old one which developed during the period prior to the World War II with the aim to rebuild trust in the power of market forces: Paul H. Douglas, Frank H. Knight, Henry Schultz, Jacob Viner, Milton Friedman and others) is focused on methodological issues. Its goal is to point at the close relationship between economics and

5 C. Mackenzie, Toward a Feminist Theory of the State, "Harvard University Press", 1989; J. Christman, "Feminism, Autonomy and Self-Transformation" Ethics, No. 99, 1995, and Feminism and Autonomy, 1995; M. Friedman, Feminism, Autonomy and Emotion: Essay on the Work of Virginia Held, 1998; M. Fricker and J. Hornsby, "Feminism in Ethics: Conceptions of Autonomy," in: The Cambridge Companion to Feminism in Philosophy, "Cambridge University Press", New York 2000.

6 G. Fassò, History of the philosophy of law, Belgrade – Podgorica 2007, p. 685.

7 D. Mitrović, pp. 15–18.

the law, and particularly to show to legislative and judiciary organs the significance of their legal solutions in the light of possible economic consequences thus produced.

Starting from the assumption that the law expresses the logic of economics, i.e. that it rests on economic principles, this school analyses legal norms in regulations and court decisions by making use of economic reasoning. It "particularly examines whether legal solutions contained in regulations and individual decisions are such that they enable optimal distribution (allocation) of economic sources and means (resources)" by way of which is increased the level of social well-being and, finally, proposes that legal institutes should be adapted to that goal. These should be created so as to instigate economic optimum. The Economics Analysis School also explains coercion models in different systems of law or in different parts of the same system of law (legal, case law, etc.). As it refers to Anglo-Saxon school, its interest is primarily focused on the judge as the creator of law.[8]

The ideological instigators of the Law and Economics Analysis School are Ronald Coase, Richard Posner and Guido Calabresi. Ronald H. Coase, one of the founders of the school and the Nobel Prize laureate for his economic researches, has pointed out that the judge must be ready to seriously analyse economic consequences of their decisions on economics at large, and not only necessary costs of conducting the court proceeding. Coase's basic theory is that economic activity should be the ultimate arbitrator in the court decision-making procedure.[9]

The most important representative of this school is Richard Allen Posner. By taking as his point of departure that "economics-laden law is the basis of positivist theory on the legal domain which is most promising", Posner is trying to subject the law in its entirety to economic analysis, setting up as the first task of the law "the maximum increasing of wealth and not the creation of a support for a welfare state." According to him, the assistance to social security programmes is nothing else but "robbery".[10]

Posner's teaching is even more painted by pure pragmatism devoid of ethicism, for he refuses to accept "any one more significant role of morality theory in legal research".[11] On the other hand, by indulging them-

8 K. Jones, Law and Economy, 1983; Hausman and M. S. McPherson, Economic Analysis, Moral Philosophy and Public Policy, 2006.

9 R. Coase, Essays on Economics and Economists, 1994.

10 R. Posner, The Problematics of Moral and Legal Theory, "Harvard University Press", 2002, pp. 227–228.

11 G. Vukadinović, p. 83.

selves in the exaggerations of economism, some other representatives of this school have even claimed that the law and legal science as a whole can be reduced to economics and economic science, thus approaching nearer to the version of Marxism of the Soviet early period theory.

The Law and Economics Analysis School, based on the principles of behaviourism, normativism, descriptivism and evolutionism, has approached the law pragmatically, justifiably pointing at frequently neglected economic consequences produced through the creation and application of legal rules. But, just like any other exaggeration, it has also fallen into reductionism through the instrumentalisation of the law, by reducing it to economics or, even by putting it on an equal footing with economics. With such unnatural one-sidedness, it has completely buried from its sight other numerous sides, and particularly the value-based, ethical and humanism goals of the law, reducing everything to rationality and efficiency ("economic machine", "economics violence") for the purpose of "maximizing benefit" or at least "Pareto improvements" in the name of possible prosperity of the projected "post-industrial societies".

That what is for the interested citizens a daily concern, the Economic Analysis School has raised to the level of science in a provocative and humanly unacceptable manner. It seems that the "results" of such teaching are the enactment of obviously "unjust" laws (for instance, the latest law on employment in France which places /"redistributes"/ the burden of costs to the poorer or unemployed layers of citizens), "surprising" judgments for the "powerful," building private prisons or, even, "the spirit of the text" of the Bologna Declaration.[12]

Constitutionalist legal theories. The crisis of legal positivism has not lead only to the creation of new naturally-legal theories of the law of Radbruch, Dworkin, Finnis, Fuller and others or completely new feminist theories, but also to new constitutionalist theories (so-called new constitutionalism) as distinctive legal theories different from legalistic theories. Their best known representatives are Robert Alexy and

12 It is possible that the application of such teaching has lead to current monetary and financial crisis in the most developed countries as it is impossible that governmental authorities have not monitored activities of respective financial institutions and have failed to notice a clear danger of short– and long-term consequences. Could it be concluded from this that there is currently yet another large redistribution of social wealth (in fact, an international robbery) over all insufficiently protected social strata of contemporary states in line with Shakespeare's thought from "Titus Andronicus": "Suum quique is our Roman justice". ("The Prince takes indeed what is his.") W. Shakespeare, Collective Works, Act I, Scene I, book III, Belgrade 1978, p. 268.

Carlos Santiago Niño. While legalistic theories are allegedly reduced to traditional iuspositivism, constitutionalist theories are directed more towards the study of an ever more complex normative composition of contemporary constitutional systems. Because of this, they put in the first place, almost at the very heart of its research, the problem of moral correctness of the law, believing that thus they sufficiently confirm its irreducebility to positivist law in its positivistically determined formal frameworks. Their recognisable feature is linked to the inclusion of morally relative contents into the law which express legally established principles and inalienable rights of individuals. At the level of constitutional-political system, on the other hand, constitutionalist theories advocate for the establishment of a decisive role of the legislator in the area of the implementation of constitutional principles and the same such role of judges in the course of their realisation. In effect, the role of legislators and judges in these theories is so much accentuated that judges can, for instance, reach decisions which are contrary to laws, according to which the teaching of these theories remind of the teachings of the German Free Law School (*Freirechtsschule*).[13] But, their fundamental goal is different, because numerous variants of these theories ardently advocate for the justification of voluntary constitutionalisation of secession as an agreed (consensus-based) form of separation which (resulting from the agreement of the mother state) should be distinguished from unilateral secession.

Although of small scientific value, they are not of small political value as they serve as a convenient "scientific" base for new globalist political doctrines and ideologies.

Multiculturalist legal theories. Among new teachings or the latest interpretations of the existing teachings of human liberties and rights, ranging in scope from individual and ethical[14] to the postmodern social and political ones,[15] a special place is held by multiculturalist theories. When factually and descriptively studying a certain type of society in which different cultural groups live, these theories are primarily the

13 G. Fassò, p. 669–676.

14 D. Gauthier, Morals by Agreement, London 1986; L. Howorth, Autonomy: An Essay in Philosophical Psychology and Ethics, New Haven 1989; T. Hill, Autonomy and Self-Respect, New York 1991.

15 R. Young, Autonomy: Beyond Negative and Positive Liberty, New York 1986; T. Christiano, The Rule of Many: Fundamental Issues in Democratic Theory, 1988; S. White, "Political Theory and Post Modernism", Political Theory, Vol. 18, No. 1, 1991; J. Crittenden, Beyond Individualism: Reconstructing to Liberal Self, New York 1992; J. Christman, "Liberalism, Autonomy and Self-Transformation", in: Social Theory and Practice, Vol. 27, No. 2, New York 2001.

subject of study of sociologists and legal sociologists. When they normativistically signify a legally-political ideal to whose realisation the state should be committed through the use of the law and education as its instruments, then they become the subject of interest of political-social and legal philosophers.[16]

Multiculturalist theories examine relationships regarding an individual or a collective identity of a person and most diverse social groups that manifest their characteristics ever more openly by referring to an established "third" or an even newer generation of human liberties and rights. This came about due to the influence of social and political philosophy in the West, where autonomy and the law were first linked with new interpretations of older teachings of "the self" (*Identity and Conceptions of the Self*), and then also with completely new teachings of so-called "collective identity". Thereupon, collective identity is commonly derived from individual identity and put into broader moral and political frameworks. Owing to such approach, the law has also begun to be understood as a means of regulation of the relationships concerning a broadely understood right to individual and collective (autonomous) identity (Gerald Dworkin).[17]

The basis for individual and collective identity constitute new liberal teachings of "neutral state" and "the politics of difference," joined together with teachings of lasting, inherent, collective ("group differentiated") rights which – once they have been recognised – become acquired, which means that they cannot be limited or abolished in the future. A special problem is how to solve the relationship between tasks of liberal state and the application of teaching of collective rights, since liberalism rests on liberty and individualism, while this is not the case with collective rights which are based on the idea of equality.[18] For this reason, in these theories is pointed out that man is an autonomous being in relation to others, who is not interested in some metaphysics-based law, but only in that which enables him to present himself in the light of his essentially individual, racial, gender, religious and other differences. And these differences are seen as his autonomous individual or collective identity.

16 G. Fassò, p. 707.

17 G. Dworkin, *The Theory and Practice of Autonomy*, "Cambridge University Press", New York, 1988.

18 R. Dahl, *Democracy and Its Critics*, New Haven-London 1989; A. Lijphart, *Democracy in pluralistic societies* (translation), Zagreb 1992; J. Rawls, *On Liberalism and Justice* (translation), Rijeka 1993; S. Holmes, *Passions and Constraint: On the Theory of Liberal Democracy*, Chicago 1995; J. Christman, *States and Citizens*, Cambridge 2003 and *Autonomy and the Challenges to Liberalism*, 2005; T. Iversen, *Capitalism, Democracy and Welfare*, Harvard 2005; C. Wolfe, *Natural Law Liberalism*, 2006.

When it has to do only with collective autonomous identity, multiculturalist theories cleraly differentiate between the collective (joint) exercising of individual rights (for instance, labour rights in case of a strike of employees) and the exercising of collective rights whose legal bearer is some collective(ity), the essence of which as an "autochthonic population" comprises distinctive features of social groups established on the basis of racial, gender, ethnical, homosexual or even handicap characteristics. These collective rights differ from common rights of associated individuals primarily because they are "given" as such, because they are not created through association of individuals, but by the very existence of separate collectives which are gradually granted "the right to exist" and "the right to (internal and external) self-determination".[19] And while most of the countries even today exercise caution when recognizing the right of existence to so-called "ascriptive groups," yet there are a small number of countries (in which there is protection stemming from the right to such self-determination) where it is considered that such value is becoming the basis for the development of "alternative constitutional contexts," where "those who have the right to self-determination are granted autonomy to a considerable extent".[20] These groups also have the right to declare what kind of state protection they require, after the state has previously asserted its position with regard to that issue. And it is precisely within this context that new possibilities have been found for the expansion of the multiculturally recognised law to the sphere of the autonomous collective identity.

The best known representatives are Charles Taylor, who is considered to be one of the founders of this theoretically heterogeneous direction, Will Kymlicka, Christine M. Korsgaard, Ian Brownlie and Christian Tomuschat.[21] Still, a special place belongs to Joseph Raz,[22]

19 M. Jovanović, Collective Rights in Multicultural Communities, Belgrade 2004, pp. 141–151.

20 A. Cassese, A Self-Determination of Peoples – A Legal reappraisal, "Cambridge University Press", New York 1995, pp. 351–352. Quoted according to: M. A. Jovanović, Collective Rights in Multicultural Communities, p. 150.

21 I. Brownlie, Rights of Peoples in International Law, "Oxford University Press", 1988; C. Tomuschat, Self-Determination in a Post-Colonial World, Dordrecht 1993; Ch. M. Korsgaard, The Sources of Normativity, New York 1996; C. Taylor, Invoking Civil Society (translation), Belgrade 2000; V. Kymlicka, Multicultural Citizenship: A Liberal Theory of Minorities Rights, "Oxford University Press", 1995 (Multicultural Citizenship: A Liberal Theory of Minorities Rights –translation, Novi Sad 2002).

22 J. Raz, Practical Reason and Norms, London 1975; The Morality of Freedom, "Oxford University Press", 1986. and Ethics in the Public Domain. Essays on the Morality of Law and Politics, "Oxford University Press", 1994 (Ethics in the Public Domain. Essays on the Morality of Law and Politics – translation, Belgrade – Podgorica 2005).

Hart's student and heir. His thinking which moves within the scope ranging from philosophy of morality, through philosophy of law, and all the way up to political philosophy, finds its unity in the concept of "philosophy of practical mind" or "practical philosophy" which opposes neutralism of liberal tradition and affirms a special version of so-called "multicultural liberalism" understood as "normative regulation" which "justifies promotion, encourages progress of cultural minorities and demands respect of their identity." Such Raz's "multicultural choice" is based on values of the "idea of freedom" (according to which "freedom and development of an individual depend on their full belonging to cultural, living and respected group") and the "idea of value pluralism" (which consists of the recognition of values of different cultures created on any basis whatsoever, even if they are mutually in discord).[23]

Communitarian legal theories. Multiculturalist theories are closely related to communitarian theories which particularly stress community, identity and freedom as values, that is, a society as community joined together through the same values. Such approach has necessarily lead to criticism of multiculturalist theories which, according to the view of communitarists, emphasise primarily the ideas of liberalism and individualism supported by the "atomised" vision of a civil society. The best known representatives of the communitarian direction (Michael Walzer, Alasdair MacItyre, Mike Sandel, Amitai Etizioni) deal with political issues related to citizens, organisation of a society and nation as a phenomenon.[24] For instance, according to Walzer ("liberal communitarist"), "the area of justice is a society in which not one social good serves as a means of domination".[25] This means that the area of justice is surely to be found there where it is either unimportant or unreachable. Perceiving the contradiction, Walzer relativises social justice by making it dependent on social circumstances or cultural milieu of a society. But, can we talk about justice then at all?

Socio-anthropological legal pluralism. In the early sixties of the 20th century, after two decades of calm, there was a revival of interest in *legal pluralism* among the representatives of contemporary sociology of law, especially among those of its American followers who had studied soci-

23 G. Fassò, p. 710.

24 M. Sandel, Liberalism and Limits of Justice, "Cambridge University Press", New York 1982; A. McIntyre, Critics of the history of ethics (translation), Belgrade 2000; A. Etizioni, The Third Way to a Good Society, London 2000; M. Walzer, Area of Justice (translation), Belgrade 2000.

25 M. Walzer, p. 16.

ology of organisation and anthropology of law. Among them, a special place is held by William Evan, Karl Llewellyn and Adamson Hoebel.

According to William Evan,[26] a well-known American sociologist of the law and organisation, in order to understand a distinctive social composition of the law which is derived from the concept of legal system, one should renounce statist approach according to which the law is linked to the state and its coercion. According to him, the composition of a legal system includes two necessary and sufficient requirements: multiplicity of legal norms and the role of major organs of state authorities adapted to them. These requirements for the determination of pluralism of a legal system are supplemented by measurements of jurisdiction and democraticity. Through their combination is rendered possible to differentiate between the democratic systems of public and private law and the undemocratic ones. However, their differentiation is relative, because the undemocratic systems can become democratic and vice versa. Evan's teaching explains modern needs of the interventionism-oriented state, but at the same time it criticises extremes in the way of its functioning, embodied in exaggerated statism or individualism.[27]

According to Karl N. Llewellyn[28] and E. Adamson Hoebel, American legal sociologists-anthropologists who were especially engaged in studies related to social authority without the state (anthropology and anatomy of social conflicts), i.e. pluralist authority (freed from statism of positivist legal theories), it is wrong to reduce the entire primitive law to so-called "group law". Likewise, it is also wrong to reduce modern law to individualistically understood state law, when in contemporary law is ever more pronounced new social pluralism, in line with requirements of contemporary and ever more globalised society.

Other contemporary legal writers, too, determine new legal pluralism in different ways. For some (Max Gluckman and Paul Bohannan)[29] it is characteristic to point out the idea on the existence of a multiplicity of different legal orders within the same order, i.e. "co-existence of different norms or legal systems in the same or complementary political and legal fields". Such sociologically painted legal pluralism is seen and determined as "legal medley" created by steadfast

26 W. M. Evan, Public and Private Legal System, Law and Sociology. Exploratory Essays, New York 1962.

27 G. Vukadinović, pp. 159–160.

28 K. Llewellyn; E. A. Hoebel, The Cheyeenne way. Conflict and case law in primitive jurisprudence, Oklahoma 1941.

29 M. Gluckman, The judicial process among the Borotse of Northern Rhodesia, Manchester 1955; P. Bohannan, Justice and Judgment among the TIV, London 1957.

intersecting and complementing, as a phenomenon of "supralegality", as "a dynamic process of irregular and unstable combination of legal systems", which can be conveniently used to explain supranational development of the system of law of the European Union. Others (such as Jean Wanderlinden) determine pluralism as the application of different legal mechanisms within the framework of the same order and in the same situations. Such legal pluralism relates to constituent parts of the system of law: legal institutions, branches or areas, in accordance with which are differentiated numerous types of legal systems (parallel and integrated, cumulative and isolated, desired and binding, imposed and consensual, etc.). According to him, the system of law is always aimed at establishing "unity of law" and "material and psychological homogenisation of social groups".[30] Yet, this unity is "unjustified and unjust", because a unique system of law "does not provide justice or the efficiency of law either", but supremacy of the ruling group or balance of equated social groups. The third simplify and reduce legal pluralism to non-statist dualism between so-called "infra-law" (founded on beliefs, folklore or even vulgar models of behaviour) and an ever more globalised contemporary state law. According to Jean Carbonnier, legal pluralism shows that the system of infra-law (rules of subculture, including therein even the rights of children) exists not only outside, but also inside the general system of state law, even when old legal rules have been formally abolished by state.[31] Following in the tracks of Carbonnier's anthropological observations and hints, Norbert Rouland, the most significant contemporary French sociologist-anthropologist, has developed his idea of legal pluralism (through the research of early Roman and early autochthonic laws in the eastern provinces of the Roman state) with the aim to explain political and legal goals of former colonial states and incredibly diverse pluralism found in the then colonised societies. The most important result of his research is the conclusion that Roman ius gentium was created in order to solve the pluralistic problem of the multiplicity of legal systems applied among subjugated nations.[32] This conclusion is particularly in favour of proponents of contemporary supranational and international integrations, because it is obvious that today all societies are constituently and essentially pluralistic, as is the case with their laws, too.[33]

30 G. Vukadinović, pp. 161–162.

31 J. Carbonnier, Legal Sociology (translation), Sremski Karlovci – Podgorica 1992.

32 G. Vukadinović, pp. 162–163.

33 B. Dupret, "What is plural in the law? A praxiological answer," Égypte/Monde arabe, No 1, 2005, pp. 159–172; M. Sharifi, "Justice in many rooms since galanter: de-romanticizing legal pluralism through the cultural defence," http://www.law.duke.edu/journals/lcp, 2008.

2. A look back at the presented multidisciplinary legal theories and their scientific results

Briefly presented multidisciplinary theories with critic commentaries are directed at three topics: law, justice and state. Their goal is to prove that it is through deconstruction that a society should be brought to the final phase of world state with a civil society,[34] which is (for example) openly advocated by Roberto Magabeira Unger when he claims that the law and world state are means for preventing the establishment of domination among so-called "organic" social groups.

Law. When it comes to *the law*, special attention should be drawn to four novelties and objections. One of the novelties refers to the consideration of a possibility of constitutionalisation of so-called secessionist clause in liberal-democratic states. However, in this work it cannot be regarded as the establishment of the legitimate scientific interest, but as its criticism, because the acceptance of this novelty and its possible introduction into constitutions would require the creation of completely new concepts of the state and state system. And if such reconstruction were to be carried out, it would only be in place to put a question whether it is then state at all.[35] It is not accidental in the least that contemporary constitutional and political sciences worldwide designate such "states" – as "unfinished". Therefore, constitutionalist theories contain the danger of legitimisation of secession clause, despite the fact that civilised splitting is always better than uncivilised joint life or uncivilised splitting. It is by no coincidence that even in the most developed liberal-democratic states of the federal-based type there is neither the right to *nullify* (yielding to nullification of an act, and that *via* vetoing by a member state), nor the right of *secession*. The prohibition of these rights is not accidental.

The prohibition of nullification (usually defined in the form of so-called protective clause) is a measure against splitting apart from complex unique states which are, as a rule, formed by the merger. It consists of the prohibition from vetoing decisions of federation organs by member states. The prohibition of secession is an additional protec-

34 D. Mitrović, "Law in the light of the theory of chaos and the theory of law," Anali PFB, No. 1–3, 1997, pp. 139–149.

35 M. Jovanović, Constitutionalizing Secession in Federalized States: A Procedural Approach, Utrecht 2007 and M. Jovanović and S. Samardzić (eds.) Transition and Federalism – East European Record, Federalism and Decentralisation in Eastern Europe: Between Transition and Secession, Zurich and Vienna 2007.

tion of state against arbitrary separation, i.e. unilateral disintegration of any part of federal state by its member states.

The next novelty and objection is that in the presented theories the content of the state under the rule of law (Rechsstaat) is increasingly "diluted" by linking it to the broadest existence and respect for human freedoms and rights in multiculturalist or communitarian sense of the meaning (Charles Taylor, Joseph Raz, Mike Sandel, Michael Walzer and others), or that the existence of the state of law (Rechsstaat) is ever more openly disputed and considered superfluous as from long ago it cannot meet new technological, informatics, legal and social challenges,[36] because of which is resorted to the introduction of emergency state, which at some moment in time could grow into a regular state of a possible world state.[37]

To these theories are conveniently added the most recent sociological-anthropological theories, which through the study of ancient societies and laws or legal pluralism in contemporary laws try to find out a common denominator which would serve as a scientific solution or the basis for explaining and justifying the supranational organising currently underway,[38] as has been the case with the European Union since 1992 or with the newly-formed North American Union since 2005.

To the aforesaid should be added the fourth novelty, too, i.e. the objection of a purely methodological character, which objection consists in intellectual focusing on the imagined goal according to which these theories are shaped up, and not vice versa. A characteristic example is Posner's teaching void of ethics and ethicism, feminist teaching because of unnecessary exaggeration: can there be a feminist theory of state and law at all (?) since the determination of the concept of the state and law, as it has been said, is outside and above gender-determined understandings and teachings, or the exaggeration of some multiculturalist teachings of the right of ascriptive groups to enter into contracts with the state, as with Christian Tomuschat, which would, as the final consequence, also include the right to federal organisation (territorial-political autonomy) on the basis of gender or sexual orientation of the members of such groups (which is at least insulting for

36 D. Mitrović, "Rule of law as a legal thought and as a legal experience," Anali PFB, double issue dedicated to Prof. Dr Božidar S. Marković, no. 1–2, 1993, pp. 173–183; See: Rule of law – the origin and future of an idea, collection of works, Belgrade 1991.

37 J. Lynch, Age in the Welfare State, 2006; M. Deflem, Sociology of Law, "Cambridge University Press", 2008.

38 D. Mitrović, Autonomous law, Belgrade 2007, pp. 51–55.

national minorities or religious confessions as traditional heirs of such right). Moreover, entering into such hypothetical collective agreement would additionally make the concept of state organisation more complex, which could easily turn into a means of destruction of current or future states. If external and internal borders of states should be redrawn, a broadly applied teaching of collective rights in a liberal state, supported by constitutionalist teaching referring to secessionist clause in a federal state even if only of a liberal-democratic type, would be an exceptionally powerful means to achieve the prediction of the former UN Secretary General (Butros Butros-Ghali), who announced in the last decade of the previous century that this organisation would have around 400 member states by the year 2050.

Justice. It is characteristic for the presented theories that they relativise justice, all the way to distortion of the idea of natural law.

For example, Michael Walzer, first the one maintaining and thereafter also criticizing Rawls's [39] and Dworkin's ideas, starts from social pluralism as the basic area of social justice and appropriately challenges Rowls's claims by pointing out that individuals are not just isolated primary subjects, because understanding of justice depends on the history and culture of each society.[40] But, Walzer's understanding of justice cannot be accepted either, because in his teaching justice is relativised

39 In his famous work "A Theory of Justice", John Rowls determines "contractualism" as a convenient method for determining the principles of justice. Justice, Rowls points out, can be established only through contract. This contract is relative and hypothetical because it stems from the "original position of justice." It is the result of a unanimous acceptance by "uninterested rational individuals," provided that they "consciously choose from the position of justice." And "as soon as the original contract is entered into and the veil of ignorance is removed, people are no longer in the position of mutual lack of interest. The reason why they are allowed to follow their selfish interests, and nothing else beyond the veil of ignorance, is that this veil imposes individual choices in such a way that it ensures the meeting of the basic requirements of justice, no matter what the decisions are like of those who choose provided they are rational". In a social state created in such a manner, Rowls maintains, entering into some new contract among people can be achieved only through their "negotiations" and "consensus", provided that they adhere to "three separate norms" used to regulate the institutions of a just society: "biggest possible equal liberties" norms, "fair equality of opportunity" norms and "giving priority to the least well-off" norm (the difference principle)". Rowls thinks that in this way "justice becomes the first virtue of social institutions" of a just society. When these rules are just, they establish the basis for legitimate expectations". But, when the "bases of these requirements are uncertain, so are the borders of the liberties of people". See: J. Rowls, The Theory of Justice, (including also the preface by J. Kisch, pp. 11, 14) Belgrade – Podgorica 1998, pp. 134, 221, 224–225, 227, 228 and on.

40 M. Walzer, Area of Justice, Belgrade 2002, pp. 16–19 and on.

and diluted to the point of being undistinguishable, which opens up an appropriate question: what is justice in his teaching, and what is the law? This, of course, is no coincidence, since by making justice relative it provides a false halo of justice for the existing law.

The most serious critic of Rowls's naturally-legal teaching was Amartya Sen. In his work "Development as Freedom," not only did he criticise Rowls's way of looking at distributive social justice, for such justice is necessarily directed at balanced distribution of resources and goods, but also his neglect of ethical dimension of man that does not come down only to interests and their purpose. In this way – Sen points out – Rowls does not pay attention to circumstances in which an individual lives (it is one thing, for instance, to have a bicycle in China, and quite another to have it in one of the countries with a high standard of living, etc.).[41]

State. When it has to do with *the state*, especially prominent is steady criticism of the concept of sovereignty.

The change regarding the concept of sovereignty as an absolute feature of state authority occurred only in the 19th century, partly due to an ever-increasing affirmation of modern teaching of national sovereignty and the state under the rule of law. Also, by the end of the 19th century a question was raised relating to sovereignty in a complex state. This question was answered in such a way that today, too, it is the federal state that is considered sovereign and not its members. Yet, as of the first half of the 20th century, sovereignty has begun to be openly disputed or relativised as a decisive feature of the state. It was particularly Leon Duguit who negated sovereignty, establishing in its stead the notion of public function and service. After him, this was done by other French authors (for example, Edgar Morin and Georges Gurvich). Today, too, some authors think that sovereignty should be discarded for it does not correspond to new social reality, because it has shown great perniciousness through history as the cause of many wars. A characteristic example is that of Neil MekCormick who, departing from contemporary European integrations as a model field for his research, concludes that Europe has entered "post-sovereignty" environment.[42] However, to discard the concept of sovereignty means to

41 A. Sen, Development as Freedom, Belgrade 2002, pp. 521–524 and on.

42 Neil MekCormick particularly insists on truly percievable changes that have led to the weakening of sovereignty of the European Union members and in connection with this he refers to the fact that through the founding treaties member-states have transferred much of their sovereign authority to the European Union (because of which they cannot autonomously regulate a number of issues that used to fall under their exclusive competence), that former state borders

neglect its central role in legal and political sciences. This has prompted other authors to examine possibilities for reshaping the concept of sovereignty so as to respond to new challenges (instead of discarding or abolishing it in science). On this basis has been created *the theory of constitutional pluralism*, according to which states are not the only places in which we can find sovereignty. The relationship among states should be *heterarchical*, and not hierarchical, because modern circumstances require abandonment of unique and absolute sovereignty, as something like a "zero-sum game" in favour of a dialogue and adjustment among constitutional authorities of different states (Neil Walker). Out of this, other authors, such as David Held, conclude that states will not weaken due to the loss of their external sovereignty. On the contrary, this way they will strengthen their internal sovereignty!,[43] because there are always matters which are exclusively of internal character, i.e. that fall under exclusive competence of the state (which is in keeping with yet another compromise teaching of *domaine réservé*). For this reason, nobody, not even international community, is allowed to interfere in these purely internal state affairs.[44] Such Held's teaching of sovereignty, together with similar teachings of other authors, is a kind of theoretical preparation for a situation in which standpoints on the imminence of the loss of national sovereignty and the necessity of renouncing national interests could easily turn into claims on the need to transform former national sovereignties into new "cosmopolitan sovereignty" whose titular would be the World Federal State with a universal ruler as some kind of a Hellenistic version of "spiritualised law".[45]

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have physically disappeared (despite precisely determined territories of the present member-states), that a unique European citizenship has been created, that the creation of a unique European system of law is underway, etc. Yet, the fact that sovereignty does not belong to history is confirmed by the recent example of England which, on the occasion of the enactment of the first Constitution of the European Union, did not even want to hear that there would be something that would interfere in its national sovereignty. And, since the Constitution was adopted in March 2005, the citizens of the two European Union member-states through referendum refused to accept it. This made other member-states postpone the organisation of their respective referenda, which led to the adoption of the Constitutional Treaty (Berlin Declaration) of the European Union in June 2007, instead of the European Union Constitution.

43 D. Held, "Changing Contours of Political Community", in: Global Democracy, London 2006, p. 26.

44 V. C. de Visscher, Théories et realités en droit international public, Paris 1960, p. 281 and on.

45 G. Poggi, "Cosmopolitism and Sovereignty", in: Political Restructuring in Europe: Ethical Perspectives, London 1994, p. 89 and on. See: R. Glossop, World Federation? A Critical Analysis of Federal World Government, Jefferson 1993.

When it comes to world state, it should be pointed out that the idea of world state is just a little younger than the idea of the state, for first it was necessary to come to the idea of the state to thereafter embark upon thinking about world state as an idea which embodies all mankind arranged under one common political authority. This idea has been continualy spreading from the ancient cosmopolitan beginnings (starting with the Cynics school and Stoic school) to present day.

Already according to Marcus Aurelius, world state represents a "holistic vision of the universe and mankind in it, in which the universe, God, nature, truth, law, ratio and man are closely linked in cosmic order".[46] Eighteen centuries after this most famous Roman emperor-stoic, Bertrand Russell also advocates for the same idea, but he explains the establishment of world state with practical reasons, finding in it "the only ultimate cure against wars" and "the primary world interest linked with the survival of human race". World state or "Super-State" should be, according to Russell, sufficiently strong "to be able to settle under law all disputes among nations", because it is only such state that "is conceivable after the different parts of the world have become so intimately related that no part can be indifferent to what happens in any other part of the world".[47] And while antique and medieval teachings determined world state as a universal monarchy modelled after the Roman Empire, the presented multidisciplinary theories, on the other hand, determine world state as a modern republican and democratic world state with federal state system, i.e. as *world federation of states*. But, remembering a several-thousand-year long tradition, and especially the model of the Roman Empire, one can wonder: If a small world Leviathan is created once, will it not grow up and develop to the proportion that surpasses the gloomy anticipations of George Orwell in his novel "1984"?

The idea of world state, as it may be observed, is a favourite topic of the presented multidisciplinary theories, only developed to ultimate limits, which requires the examination of its permanent elements: territory, population and government. And as it still has to do with the state, only this time with world state, it should thus have all elements of statehood. It means that only the specificities of these elements should be perceived and examined with respect to current typical states.

46 A. Gajić, The Idea of the World State – Legal, Political, and Philosophical-Legal Aspect, PhD work, Novi Sad 2008, 60. See: M. Aurelius Antoninus, The Communings With Himself, London 1961, VII, p. 9.

47 B. Russell, The Prospect for Industrial Civilisation, London 1923, p. 16; A. Gajić, p. 98.

First of all, world state would have for its realm the entire three-dimensional world space. It would, therefore, change its shape from the upside-down cone with an irregular base into a regular sphere with the centre in the geometrical middle of the Earth. As such, world state would not have its external state borders. Instead of them, there would be only internal administrative borders between members of the world federation. And this means that spatial reach of such world government would spread to factual borders of its power. World state would encompass all humankind, i.e. entire population of the planet which would be subjected to its governance and hence would be obliged to respect world legal order. All its citizens would have world citizenship, and in the case of its federal organisation, also "quasi-citizenship" of federal members (dual citizenship). Thus, for instance, would cease the need for current differentiation between citizens on one side and foreigners and apatrides on the other, but not the need to determine requirements for the acquisition and termination of citizenship (including therein a possible appearance of so-called "global apatrides"). Most interestingly, the establishment of world state would re-affirm the idea of state government and state sovereignty that would be exercised over entire population and in the entire state space. This would, for instance, make institutes of asylum, extradition, etc. superfluous, if not even impossible. Moreover, world state would have at its disposal all attributes of sovereignty in their purest form. It would be fully independent, for there would not be any one competitive authority of another state. Also, it would be superior, for it would have at its disposal same such state authority supported by world federal armed forces, which means that in Earth proportions it would be absolutely factually and legally unlimited, as some kind of Hobbs's "Mortal God" or, like with Hegel, at least something as "earthly divinity". It could without any legal limitations enact universally binding regulations, while legally it would not be liable to any one, thus becoming "dominus et deus" in the purest sense. And this means that the law it is creating would also become something that looks like a "less perfect divine law" ("lex divine"). Also, such state could no more be internationally recognised by anybody, nor would it be necessary any longer, which means that in the course of its creation pursuant to the model of social agreement, all states would voluntarily (or the few disobedient ones through coercion) transfer to it all of their external state competencies. Its governance would be limited only by physical and social reasons, though physical limitations would not relate to state borders which would be non-existent. Although unique, the sovereignty of world state would

not be monolithic, but, like in modern federations, split between itself and federal members which would to a certain degree keep the given internal sovereignty. Also, by using a thousand-year-old state and legal tradition, the federalised world state would be ready to be separated from civil society which would "with its outside-of-the-state position, the existence of free public opinion and other extra-institutional forms of association, be not only an autonomous sphere of social life outside the reach of state authority, but also an essential dam against the comprehensiveness of such sovereign state and totalitarian tendencies that could in time appear in it",[48] by way of which contemporary autonomous views would gain a new impetus. Such optimistic picture, as it has been mentioned, has been developed by Roberto Megabeira Unger in his book "Knowledge and Politics" when he determines "the ideal of a community with organic groups which will overcome the system of dominance. The management of activities of these groups and the prevention of imposing one to another will be done by the state which should be at the world level", which in his opinion means that the task of the modern doctrine of the state is "to examine the sense through which could be resolved the conflict between the idea of a small group and the idea of universal republic".[49]

Although since long ago exertions for the creation of world state have been underway,[50] it still has to do with social Utopia, but this time with a possibility to be indeed realised owing to *globalisation*, which instrument has cropped up "out of nowhere" and has become almost "omnipresent in less than a decade".[51] This clearly shows that

48 A. Gajić, p. 17.

49 R. Unger, Knowledge and politics (translation), Zagreb 1989, p. 324 and on.

50 For instance, on the occasion of the fiftieth anniversary of the foundation of the United Nations in 1995, the proposal of the special UN Committee on Global Management entitled "Our Global Management" was adopted, which proposal is a direct reason for the review of the UN Charter in this direction. A. Gajic, p. 122.

51 As a reminder, the terms "globalism," "globalisation" or "mondialism," along with other derived or similar terms, have been created and used in academic discussions during the last two decades of the 20th century in order to designate an increasingly stronger action of the unifying factors in modern world. Shortly after, they have become an integral part of the vocabulary of numerous doctrines and ideological positions. Also, different positions concerning globalisation as a social process have led to further divisions into the so-called "sceptics" (who deny the existence of globalisation as a social process), "globalists" (who in globalisation see a desirable change that leads to the spread of the ideology of neoliberalism and market economy), "superglobalists" (who consider globalisation to be an objectively planetary process), "antiglobalists" (who focus only on the

many experts and laypersons see in the strengthening of globalistic aspirations a serious or the greatest threat to democracy in modern liberal societies.[52] Many others, however, see in globalisation a road towards the establishment of world state which should be advocated for by all means available. Between these extremes lies simple truth: today's development of the most developed societies has not been rendered possible either by the church, or the politics, or the authority of contemporary states or corporations, but by *technology* in the broadest possible sense of meaning: from the wheel, to the pencil, all the way up to the computer and virtual engineering of every possibly conceivable system. But, its possibilities have been tempered today and only partially utilised. Therefore, it is no longer reasonable to ask whether to get to world state, which imposes itself technologically (whenever it does get created), but rather to what kind of world state: whether to get to a state where *needs* will rule (since technology is already making that possible now) or to a state where *profit* will rule, as is the case now (since current monopolistic exploitation and distribution of goods allow it).

It seems that in the near future state laws, too, will increasingly act within the frameworks of supranational state orders, because "legal pluralism of international type wears away statist law, as equally as sovereign authority",[53] all until one possible moment in which supranational orders would melt into a universal order of world state, no matter how the world state is envisaged.

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undesirable consequences of the globalisation process) and "transformationists" (who study globalisation in a comprehensive and balanced manner). See: D. Ronald, *National Diversity and Global Capitalism*, Ithaca 1996; A. Gidens, *The Third Way. The Renewal of Social Democracy*, London 1998; N. Chomsky, *Profit above People: Neoliberalizm and Global Order* (translation), Novi Sad 1999; C. Boggs, *The End of Politics*, New York 1999.

52 In addition to the present example of the European Union, the existence of the same globalistic intents is confirmed by the treaty (which is not of trading nature, as one may think) signed in 2005 (but not publicised to the American people and unratified by US Congress) on the foundation of the North American Union (*Security and Prosperity Partnership of North America /NAU/*) with the future unique monetary unit "Amero". This treaty has put its signatory members (the USA, Canada and Mexico) under the obligation to renounce their state sovereignty. Thus, for instance, the current US Constitution of 1787 will become superfluous in the foreseeable future, as well as the constitutions of Canada and Mexico. Also, it is planned to set up similar supranational creations (African Union and Asian Union). All of them should at one moment, jointly, unify under One World Government, i.e. under World State, which Saint John the Theologian speaks of in an apocalyptic way in the final writing of the Scriptures entitled "The Revelation." See: D. Simić, *The World Order*, Belgrade 1999.

53 N. Visković, Theory of State and Law, Zagreb 2001 (2006), p. 129.

3. Presentation of Other Multidisciplinary Legal Theories

Other modern multidisciplinary legal theories are no less interesting either. A special place is held by systems, cybernetic and bioethical theories, including the Law and Literature Movement, which will not be particularly commented upon here.

Systems super-theory and cybernetic jurisprudence. Among modern theories, a special place is taken by systems "super-theory" by *Niklas Luhmann*, who created his well-known systems theory of law starting from the notion of "normative expectation". For Luhmann it represents a "form of orientation by which system 'feels' the contingency of its environment with respect to itself and takes it over as its own, as uncertainty, in the process of its own renewal".[54] It is particularly physical force of the state that represents an undoubtable reason for the establishment of "normative expectation", the increasing of which (thanks to the role of the state) "acquires shape of the law".[55] Luhmann determines it in the following way: "Law is a system no matter what variant of the multilayered definition of the system we choose. It is a whole composed of elements, legal regulations, bound by the requirement of mutual non-contradiction. As a whole, the law is separated from its environment, clearly delineated by systemic boundaries, with proportionately high degree of autonomy. This autonomy rests on the foundations of the rule of law, i.e. on the condition that each legal regulation derives its legality from another legal regulation and thus, in that logical sequence, all the way up to the basic norm – the valid constitution. The law is also self-referent, because legal system refers to its own self and particularly to its unity through the postulate of proportionate permanence, i.e. legal security, economy condition, ideal of justice".[56]

Luhmann also examines reflexivity of the law, which consists of the procedural part and legally-moral part. The aim of the first part is to give answer to the question of what procedure is used against which

54 N. Luhmann, Soziale Systeme, Grundriss einer allgemeninen Theorie, Frankfurt am Main 1984, p. 364 and G. Vukadinović – Luhmann's "supertheory" of the systems, in: The Theory of Law I, Petrovaradin 2001, pp. 487–495.

55 J. Habermas, Theorie des kommunikativen Handels, Bd. II, Frankfurt am Main, 1981, p. 263.

56 E. Pusić, Social Regulation, Zagreb 1989, pp. 11–12 and 16.

legal norms are created, while the second part is to give answer to the question of what kind of legal norms can be created at all.[57]

To the law expressed in the form of legal norms is added "reaction to the disappointment of norm expectations" in case of its violation. It includes the application of physical force which is the result of reaction of the state because of an individual's "disappointment" caused by failed normative expectation. This reaction takes place in two ways: by interpreting deviant action, and then through demand for sanction and its application. However, force is not applied always in the same way, which means that the rationalisation of the law is not carried out in a uniformed manner either. In the early phases of its development, the law had to affirm itself in each newly-emerged case through the demonstration of force. Eventually, force has been centralised in the form of state monopoly on violence, and the law in the form of decisions supported by state violence as the ultimate means of coercion.

The second best known representative of systems theory, Alfred Gierer by virtue of the concept of expectation also explains the creation of social and legal regulation, which is a necessary consequence of scarcity and human interdependence which at the level of consciousness get the form of uncertainty (*metus et indigentia*) because of "existential insecurity in scarcity" or "powerlessness of consciousness with regard to information which is necessary for survival". For this reason, according to Gierer, the basic features of consciousness are "integration of the past, present and future, self-reference, and disposition of behaviour". The mentioned elements of consciousness determine man with regard to the world and to his own self, bringing into connection interest-inspired motives and behaviour of each individual". These elements are manifested as "complex subsystems of consciousness". Such is also the "normative subsystem of consciousness", which from the very beginning serves to neutralise uncertainty "which is one of the major problems in transition to consciousness at all".[58]

To systems theories of the law of Luhmann and Gierer are added even more modern theories whose goal is to create and examine cybernetic models of the law, taking into account the effect of social factors on the behaviour of legal models. For this reason, in science they are also called *political-cybernetic legal theories* or *cybernetic models of jurisprudence*, under which is meant "*an arranged whole* /structure/,

57 N. Luhman, Rechtssoziologie, Part I, Hamburg 1972, pp. 99 and 188.

58 A. Gierer, Die Physik das Leben und Seele, Munich & Zurich 1985, p. 233. See: E. Pusic, Social Regulation, pp. 109, 139, 149 and 156.

which is *built on the basis of certain criteria* /functions/ and which *is not subject to certain disturbances* /influences or challenges of the environment/ which come from social surroundings". According to their best known proponent Karl W. Deutsch, "law provides, that is, ensures that social system accepts political system". This acceptance and adherence to laws (legality) in a political system depend on to which extent "there are ways along which an individual can get expedient and correct orders".[59]

Bioethical legal theory. The abandonment of meta-ethical researches in the middle of the previous century has not ended interest in moral models and problems, but has first lead to transition "from meta-ethics to normative ethics", and shortly thereafter also to researches in "applied ethics" (environmental ethics, business ethics, and bioethics).

The term "bioethics" ("the ethics of life" or "the ethics of everything living") was first used in 1971 by the American Van Ransselaer Potter in his book "Bioethics. A Bridge to the Future", designating by it a science whose goal is to improve quality of living. As such, it is rather "a cluster of multidisciplinary researches, discussions and procedures" whose goal is "to explain or resolve issues of ethical character", the emergence of which is the result of application of technological innovations, rather than some new ethics or cultural movement. Bioethics deals with questions such as: "When does life begin? When and until when can we talk about 'personality' or 'human life'? How much autonomy has an individual got in determining their own life and death? When to continue with life care, and when to end it? When should mother be protected, when foetus or, even, embryo in the tube? Where are the limits of medical treatment and what are the limits of human and inhumane experimentation?"[60]

The best known representative of bioethical teaching in legal science and philosophy is the Italian Francesco D'Agostino. Inspired by Roman-Catholic teachings, he criticises the separation of man into components, which separation in science has eliminated his substantial core (turning him into a "medley of phenomena" and "the being on the other side of phenomenon").[61] These inalienable prerogatives, according to D'Agostino, rest on four basic bioethical principles. The first one is the principle of defence of physical life which sanctions its inviolability (for corporal life is the "basic value of personality"). To this is further added

59 G. Vukadinović, pp. 250–251.

60 G. Fassò, p. 705.

61 Ibid, p. 706 and on.

the principle of freedom and responsibility which requires, for instance, that a sick person is treated as personality, as well as moral responsibility of a physician to refuse all morally unacceptable procedures (the issue of euthanasia, etc.). The third is the principle of wholeness which, for instance, allows intervention into physical life of persons if it is indeed necessary to save the composite of "body-soul-spirit". Finally, the fourth is the principle of sociability and assistance which obliges all to live by acting for the benefit of life of others. With the aforementioned principles, D'Agostino set the foundations of "biojuristics" whose goal is to set limits of man's freedom to interfere with life processes.

Law and Literature Movement. We should also mention an interesting relationship between the law and literature which has, particularly in the USA, acquired the outline of an entire multidisciplinary-based movement called precisely like that: *law and literature movement*. The goal of this movement is to research in a multidisciplinary way the relationships between literary works and legal theory and practice, because the law, as cultural property and social fact, has since long ago been undoubtedly present in literature.[62] And the law itself feels the need to view itself in spiritual creations coming from the pen of the most talented thinkers who have chosen literary instead of legal creativity, but could not help observing the significance of the law and leaving their inscriptions about it.[63]

62 D. Vrban, Sociology of Law, Zagreb 2006, p. 16. See: V. D. Schwanitz, The Theory of System and Literature; New Paradigm (translation), Zagreb 2000, pp. 222–228.

63 The law as a literary theme first appeared in the antique texts of Sophokles (497/6–406/5 B.C.), Petronius Gaius Arbiter Titus (1st century) and others. This is also the case in the Middle Ages, particularly in plays of William Shakespeare (1564–1616: The Merchant of Venice, Titus Andronicus, Coriolanus, Hamlet, Macbeth, in his historic dramas, etc.) as well as in the 19th and 20th centuries in the realistically inspired literature, from Honoré de Balzac, Charles John Huffam Dickens, Fyodor Mikhaylovich Dostoyevsky or Gustave Flaubert to Jules Verne: Paris in 20th century, Albert Camus: The Stranger, Franz Kafka: The Trial, The Castle, Aldous Leonard Huxley: Brave New World, Yevgeny Ivanovich Zamyatin: We, George Orwell: 1984 and others. All of them are dominated by the themes related to human destiny and judiciary, justice and altruism, political repression, identity, social conformism, gender, sex and others, which makes them a valuable material for looking at the law from a completely different angle of rationality. D. Mitrović, "William Shakespeare on the State and Law", Annals of the Law Faculty in Belgrade (Anali PFB), no. 1–2, 1990, pp. 95–118 and "Law, Justice and Mercy in the Plays of William Shakespeare", in the collection of works On Justice and Righteousness, compiled by M. Knezevic, Belgrade 1995, pp, 243–253; E. V. 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; V. M. Feeman, A. Lewis, Law and Literature, "Oxford University Press", 1999.

4. General Conclusions

Different novelties which are contained in the latest presented multidisciplinary theories with selectively laid down objections, are not the only novelties, or the objections either, but common to all these theories is the same methodological deficiency which consists of the arbitrarily selected number of elements (such as, for example, in the teaching of Michael Walzer) or assumptions (for example, in the teachings of the Chicago Law School, multiculturalist or feminist jurisprudence). To each such selection can be added at least the same number of other equally important assumptions, elements or goods, which is also the objection to some contemporary naturally-legal teachings (for example, teachings of Lon L. Fuller or John M. Finnis, who will not be the subject of this work). As if it has been forgotten that a right scientific assumption must start from what has already been scientifically proven or at least objectified, and not from that what is the result of one's own perception of the permanent or unavoidable in human nature and society, because the perception is extremely volatile, and hence, relative, and by virtue of this fact scientifically unimportant therefore. And only when the unimportant has been discarded, can arguments be derived and judgements brought, and they show that the presented teachings can hardly stand the test of their scientific claims in the methodological and epistemological sense, as has been righteously observed by Karl Popper when he claims that behind universal words and their meanings there stands a much more important problem: "the problem of universal laws and their truthfulness; i.e. the problem of regularity". And that also determines quite different "intellectually important goals" such as the formulation of problem, the attempt to set up theories which would solve set up problems and the critical consideration itself of mutually opposed theories. These goals enable the researcher to take as the scientific position only such critical position "which does not search for verification, but for key tests which could refute a theory that is being tested, without ever being able to definitively confirm it".[64]

From the mentioned basic methodological and epistemological objection stem other significant objections, such as: relativity with regard to the value-based sense or justification (for example, justice

64 K. Popper, Searching without End (translation), Belgrade 1991, pp. 26, 29–30 и 48. See: D. Mitrović, "Can Law be Comprehended: What is Law?," Anali PFB, no. 1–2, Belgrade 2002, pp. 85–108.

and role of the law-maker and supreme court when legitimizing secessionist clause); obvious unacceptability of definitive scientific claims because of their untruthfulness (in Popper's sense of the most stringent scrutiny of scientific positions): for instance, the creation of some forms of territorial autonomy on the basis of racial, gender or sexual characteristics or the determination of the state and its organisation contrary to their nature and purpose; or unethicallity and exaggeration (as in the case of the Chicago School of Economics or different feminist theories and teachings) which lead to one-sidedness when scientific positions are developed consistently and completely. But, political benefit arising from the claims by way of which in these theories are proposed, proclaimed as final or justified socially dubious projects about which members of a society have not even had been adequately informed, is more than obvious. It is easily observable that the latest sociological-anthropological teachings, and only partially or indirectly systems-cybernetics and bioethical theories, conveniantly complement and support other presented theories which in a somewhat self-proclaimed and Utopian manner deal with resolving contemporary legal and social issues. However, the most interesting is the inconsistent position of the most important multidisciplinary theories with regard to ethical problems which are either excluded, there where positivist-oriented scientific apparatus has been developed and reliable within its own limits, or over-exaggerated, in the lack and absence of such scientific apparatus, or relativised, when results do not coincide with goals set in advance. This way are revealed two faces of Janus of the presented multidisciplinary theories, which have obtained a strong impetus at the very end of the "dispersed" 20th century and the like kind at the beginning of the 21st century. One side of this face represents damage inflicted on science and society by well-paid "academic scribblers" and "hired publicists," as persons engaged in such work were called by Charles Right Mills.[65] The other side, however, represents encouragement that not all representatives of these theories have opted for such kind of "bread-winning," but are truly engaged in an ongoing great legal and social experiment. The idea was not given up, however, that that what is natural is separated according to gender characteristics, that what is unnatural or ascriptive is with regard to sexual or some other orientation joined and equated with natural or traditional characteristics or orientations, that the state is renounced the right to its own existence, that individuals or social groups are reduced to subjects who should strictly behave according to economic models, etc.

65 Ch. R. Mills, The Power Elite, New York 1960, pp. 284–285.

Such dissolution of traditional concepts, values and models can serve as an important foundation for political doctrines and practice, the ultimate goal of which is a new redistribution of power which in the future would be controlled by one world government supported by global system of law. Perhaps because of their value neutrality or practical ethically directedness, systems-cybernetics and bioethical theories are more valuable for the achievement of global harmony and the rule of law as a desirable goal in the foreseeable future as they take into account that what is common for all (existence of organisation and system, application of information technologies, right to dignified life and death, human medical treatment, etc.) without imposing self-proclaimed "most important" social values and models.

Contemporary multidisciplinary theories are interesting and challenging. They are also useful, at least because they make today's jurists wake up and break out of daily routine created by content with the already achieved. However, for rendering some more serious scientific results of these theories we still have to wait unless they (together with the presented theories) shall have become forgotten in the meantime like any other demoded thing.

* (With Prof. Dr. G. Vukadinović, "Annals of the Faculty of Law in Belgrade". Belgrade Law Review. Journal of Legal and Social Sciences. University of Belgrade. Year LVII, 2009, No. 3, pp. 136–160)

II

THE NEW PATH OF THE LAW. FROM THE THEORY OF CHAOS TO THE THEORY OF LAW

1. Chaos theory is quite new and modern discipline

The theory of chaos is quite young and modern discipline aimed at studying and explaining irregular behaviour, i.e. discovering order in disorder. Moreover, chaos theory is suspicious of the firmly established belief and scientific assumption that order alone rules the world. However, chaos theory does not reject order due to disorder, but studies order in its inherent way by means of special, basically, mathematical methods and computing techniques which request philosophical and theoretical justification. Such goal of chaos theory can be easily recognised in the law, because in the law as well, along with regular behaviour and process, also exist notably irregular behaviour and irregular processes. For this reason the law is a particularly befitting phenomenon and a system both for the study and for the application of chaos theory.

Chaos theory denotes the establishment of a different view of the world and a different methodological apparatus, as well as an increasingly broader application of the already achieved results in new and entirely different scientific fields, rendering possible the study of social and legal phenomena in a quite distinctive way and with completely new possibilities. Chaos theory is thus shown as a universal general theory of complex dynamical systems, which is equally successful in pointing both to the general orderliness of phenomena and systems, behaving randomly and chaotically on a local plan and to the general disorderliness and chaoticity of phenomena and systems, displaying orderliness and regularity on a local plan, i.e. as a modern theory initi-

ating in a radical way the re-examination of the existing knowledge of phenomena and their principles and connecting in a new way organisation with chance, purposiveness with spontaneity, order with chaos. In the very foundation of this new approach there stands: world is a perpetual instability.[66]

2. The appropriate index of terms available to chaos theory and theoreticians of chaos enables them to present their results

Owing to the appropriate index of terms available to the theory of chaos and to the theoreticians of chaos, the conduct of their research work and the presentation of the obtained results is possible. Index of terms means the existence of appropriate terminology on which theoreticians of chaos explicitly or implicitly count. Index of terms should include, conform and systematically present old and new meanings as more or less accomplished corpus of knowledge available to the theory of chaos. Its existence shows that theoreticians of chaos have a need to be philosophers as much as philosophers in a way have a need to be theoreticians of chaos. Chaos theory is thus provided with the strong potential while philosophy is given the possibility to resolve its traditional problems by means of an unconventional approach.

In conventional terminology of philosophers, the word world signifies everything that exists, the overall existence, no matter how the world has come into being and however we explain its origin.[67] In the terminology and in the index of terms of theoreticians of chaos, the world represents a statistical case of chaos, while natural and social principles represent the sum of statistical condensations of chances with the proclivity towards an ever-increasing approximation.[68] Also, theoreticians of chaos do not use terms actuality and reality, which denote either entirety of everything there is or entirety of all things. Instead, they use the term concreteness, although they are aware, epistemologi-

66 See: D. Mitrović, Theory of Chaos and Theory of Law, ed. Visio mundi academic press, Novi Sad 1993, pp. 19–24.

67 V. Filipović – B. Bošnjak, Dictionary of Philosophy, ed. Matica hrvatska, Zagreb 1965, pp. 190–191, 381, 431. See: M. Merleau-Ponti, The World of Perception, ed. Routledge, London – New York, 2002.

68 See: V. Fluser, A Spoon of Creativity from the Soup of Chaos (translation), in: Treći program, ed. RTV Beograd, vol. I, No. 84, 1990, pp. 276–277.

cally viewed, that it also represents just another unreachable value like truth in lieu of which they use the term probability.[69] This is why numerous theoreticians claim that the discussion about truth should be replaced with the discussion about degrees of truthfulness, degrees of rational belief or degrees of probability. In other words, truthfulness is an unattainable bordering value on whose other end lies falseness, out of which ensues that the discussion about truth should be replaced with the discussion about number, probability and weight of the used arguments. Consequently, the main governing principle of the researcher must be fitness for carrying out work rather than truthfulness of the obtained statements, which in the long run belong to our referential system. This, of course, applies to any theory which should strive towards an ever-increasing approximation. As a result, Copernican theory is not closer to truth – it is only more fit for work. This should equally apply to social and legal theories, in which fitness for work and research should also constitute the main governing principle.[70]

In the index of terms of theoreticians of chaos, a special place is dedicated to the *concept of certainty* by means of which it is possible to link the theory of chaos with social and legal philosophy and theory, opening thus new epistemological and practical possibilities for research work. Namely, certainty as a measure of probability (*degree of rational belief*) can be expressed by a number which lies between extreme degrees of probability: security (*secure rational belief, knowledge*) and impossibility (*complete rational implausibility, ignorance*), which is the characteristic regular state of the law. In other words, certainty denotes the state of any system in between the conceived extremes which can be adequately mathematically expressed. This new reliability in philosophy has become notably evident since the possibility of autonomous mathematical thinking about the world had become strongly affirmed. Behind such possibility stands belief that universal laws can be mathematically determined and certainty is, consequently, a mathematically verified measure for the determination of the degree of probability, predictability and reliability in all natural, social, spiritual and artificial phenomena and systems in which along with regular exist irregular processes as well. This holds especially true for the *law*, which is also an *incompletely harmonious system*, particularly suitable for research work in the light of the theory of chaos.

69 V. Fluser (note 3), p. 277.

70 See: J. M. Keynees, A Treatise of Probability, ed. Macmillan and co., London 1957, p. 71; H. Jeffreys, Theory of Probability, ed. Oxford Un. Press, 1948, p. 341; H. Reichenbach, The Rise of Scientific Philosophy, ed. Barkley Un. Press, 1968, p. 69; L. Wittgenstein, Philosophical Research (translation), Belgrade 1980, pp. 38, 55.

Owing to this fact, concepts of law, principles of legality and state can be determined in a somewhat different way. Namely, the law is a spontaneously or consciously and deliberately created system of certainty which should provide for predictability in behaviour of the subjects of law and reliability in functioning of institutions, while the principle of legality is a rule or a set of rules dealing with the way in which the law is to be exercised. State, on the other hand, on which the law relies, is consequently the main stabiliser and regulator of the accumulated controversies, which should eliminate insecurity and neutralise uncertainty.[71]

3. The possibility for the application of chaos theory in the law

Bringing into connection the theory of chaos with the theory of law by means of the concept of certainty found in both theories, opens new practical possibilities for the application of the theory of chaos in legal techniques.

The possibility for the application of the theory of chaos in the law is fully expressed only when it is understood that chaos is not one and the same as instability and that chaos implies the existence of organisation and order. Moreover, chaos alone enables emergence of order and system where they are non-existent. Chaos, therefore, does not mean only the disruption of a phenomenon, a system or an organisation, but also the establishment of a system-organisation through randomness (spontaneity) and disorder.

It is not order alone that originates from chaos. Within chaos itself also lies a special type of order, because it has been shown that unpredictability, chaoticity, spontaneity and instability have certain universal characteristics that can be mathematically represented by attractors and fractals. This needs special emphasising, because attractors of fractal composition in chaotic systems show that order and symmetry exist in disorder as well. Consequently, a fractal is the measure of orderliness of chaos. In this self-organising way chaos alone arranges itself from within by establishing fractal forms as a distinctive way of orderliness.[72]

71 See: D. Mitrović, Theory of State and Law, ed. Dosije studio, Belgrade 2010, pp. 359–361; G. Vukadinović, Theory of State and Law I-II, ed. Futura publikacije, Novi Sad 2008, pp. 64–88.

72 M. Gaspari, Holism, Purposiveness and Harmony: Return of the Meaning in Nature?), in: Kulture Istoka, Vol. VIII, No. 27, Belgrade 1991, p. 33.

The possibility of chaos to cause emergence of order and alone generates order within itself, which can be mathematically expressed, shows chaos also as a chance to create new out of old. Owing to this, chaos also has its own creative power. It originates from spontaneity which provides chaos with the power to create order by itself. This creative power of chaos enables philosophers and scientists to understand more easily and to explain better the overall complexity and versatility of the social regulation which is so strongly present in the law, even when it looks like arbitrariness and spontaneity. If the blind force of chance is excluded, this impression represents the result of the effect of chaos which shows the law as a globally stable, as well as a locally unstable system what, in effect, the law is.[73] Yet, this system rests on simple principles, because the vast complexity of phenomena does not request complicated fundamental principles. In other words, the practical goal of chaos is aimed at discerning a shorter path, idea or thought in a complex system which will reliably lead us further on.[74]

4. Practical application of chaos theory

Practical application of the theory of chaos understands availability and the application of appropriate distinctive means used by theoreticians of chaos. Means applied by theoreticians of chaos include not only appropriate theoretical and technical methods used for the construction of models, but also proper utilisation of computers as the basic tools of theoreticians of chaos and computing of the constructed models. It puts on the agenda an issue of radical research and re-examination of the law in which probability replaces truth, and certainty takes the place of security. This practical goal can be achieved by examining the law as a determined and as an undetermined system.

Even when the law has been established as a determined system, the conventional application of computing techniques must be distinguished from its creative application. The law in the mentioned sense represents a determined system when, for instance, we establish it as a set of rules which exist in the form of legal norms in various

73 See: D. Bohm, Wholeness and the Implicite Order, ed. Routledge, New York 2008.

74 M. Feighenbaum, Chaos Mystery (translation); ed. The New York Times Company, in: Pregled, Belgrade 1984, p. 61.

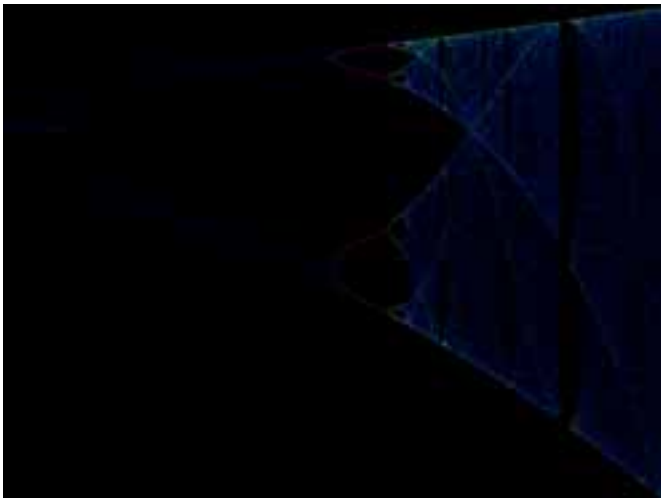
legal acts. However, the law is an undetermined system when it is exercised, because only a part of what has been prescribed is actually applied. Of course, these are not the only examples of that kind in the law. In both mentioned examples, briefly referring to how the law can look like as a determined and an undetermined system, chaos theory and theory of law are confronted with the problem of dualism within the same phenomena, which in view of the application of the theory of chaos in the law, requests a selective methodological approach which separates legal creativity problems from the law application problems. Because of this, the apparatus and methodology of theoreticians of chaos should be adjusted to the apparatus and methodology used by jurists themselves when creating and applying law. However, whether it is a question of the creation or application of the law or the methods of theoreticians of chaos or legal methods, as well as whether it is a question of establishing the law as a determined or an undetermined system, a valid research of the law cannot be carried out in the mentioned sense without construction of legal models and computing.

If chaos theory is a new conceptual framework, computing in the law can be conceived and determined as a method used for the examination of a model of some theory, the law, part of the law, laws or some other legal acts, as well as for perceiving and studying consequences which in reality can indeed arise by the application of such models.

The application of the computing process itself can be described as follows. Data which are transformed into algorithms are being first studied. Out of algorithms is created software which is thereafter put into a computer "prepared" for that purpose. It is thus possible to obtain an appropriate legal model on a monitor which is to be examined in accordance with relevant principles and facts that exist in the real, true world, while letting the model develop by itself. Out of the obtained material, i.e. a large number of offered possibilities, we can, according to our interest, select some characteristic part or some characteristic case which we thereafter vary and animate. When it is achieved that such model, for example law model, resembles law that exists in reality, the interface is being designed enabling the creation of hologram. The formation of hologram in plane and in space enables the beginning of true animation. The law model thus begins to live in the computer world, although it has not been applied in reality.

5. Law is an exceptionally complex, multilayered and multidimensional dynamical phenomenon

By computing three characteristic legal models we have shown that the application of the theory of chaos in the law is not a Utopian project. We have thus demonstrated that chaos theory can be successfully linked with results of the theory of law, science and technique. Owing to that, one quite young and quite modern interdisciplinary theory universal in its character has been applied in one of the oldest and most developed general theories.[75]

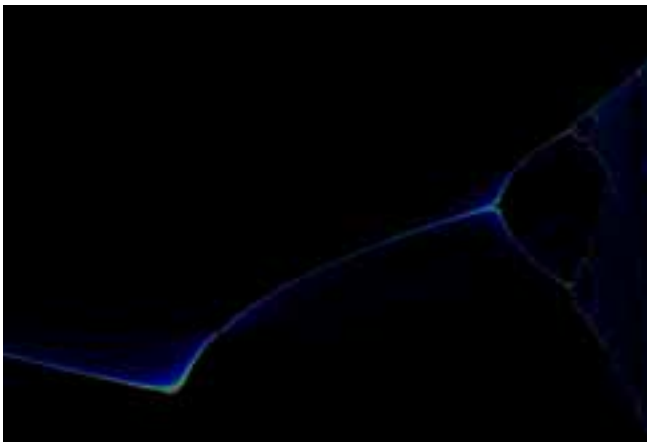


Bifurcation in Kelsen's model of the concept of law

By computing Kelsen's model of the concept of law,[76] which is quite consistently determined and developed in his well-known "pure theory of law", the first principal idea of chaos theory has been set forth: that complete order does not exist, that within order itself exists tendency towards disorder, that disorder exists even when it is not observable, that the transition from order to disorder is not a leap into the unknown but that even then there exist regularities owing to which it is possible to explain gradual transformation of order into an ever-increasing disorder, to the complete disappearance of the law.

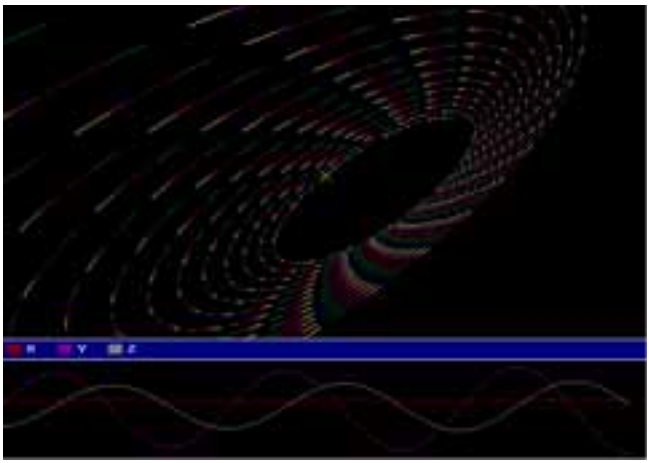
75 Cited according to F. Capra, The Tao of Physics. An Exploration of Parallels Between Modern Physics and Eastern Mysticism (translation), ed. Opus, Belgrade 1989, p. 9.

76 H. Kelsen, General Theory of Law and State (translation), ed. Faculty of Law, Belgrade 1951 (1998, 2010), pp. 17, 116–117, 119–120, 127, 129.



Bifurcation in custom model

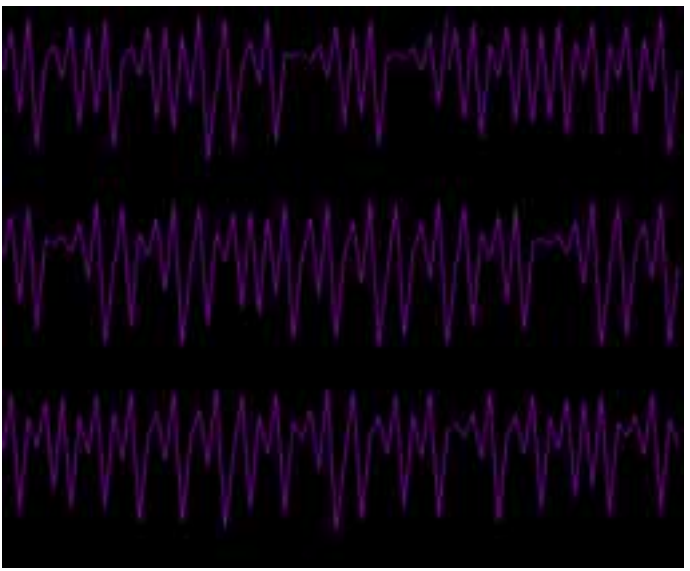
By computing the custom model,[77] showing spontaneous emergence of order out of disorder, the second important idea of chaos theory has been presented: that complete disorder does not exist, that within disorder itself exists tendency towards order, that order exists even when it is not observable, i.e. that chaos is spontaneously organising itself, that spontaneous self-organisation does not occur suddenly, but that even then there exist regularities owing to which it is possible to explain the transformation of disorder into an ever-increasing order, to the emergence of a custom norm which is one of the patterns of order.



Legal system model

77 R. Lukić, Introduction to Law), ed. Naučna knjiga, Belgrade 1978, pp. 26–28. See: D. Mitrović, Introduction to Law, ed. Faculty of Law in Belgrade, 2010.

By computing the legal system model,[78] the third important idea of chaos theory has been presented: that order and disorder do not exclude one another, but simultaneously exist, complement and permeate each other in a dynamical balance. On the type and degree of that balance depend state and quality of the law. If, on the other hand, sudden disturbances take place in a system, law is being disrupted, i.e. formal-legal revolution occurs, constituting the foundation for emergence of a new legal system resting on completely different grounds. Furthermore, were the values of variables determined on the basis of statistical data, computing of a legal system model could be used for the construction of reliable prognoses concerning the future state, quality and developments of any concrete social and legal system.

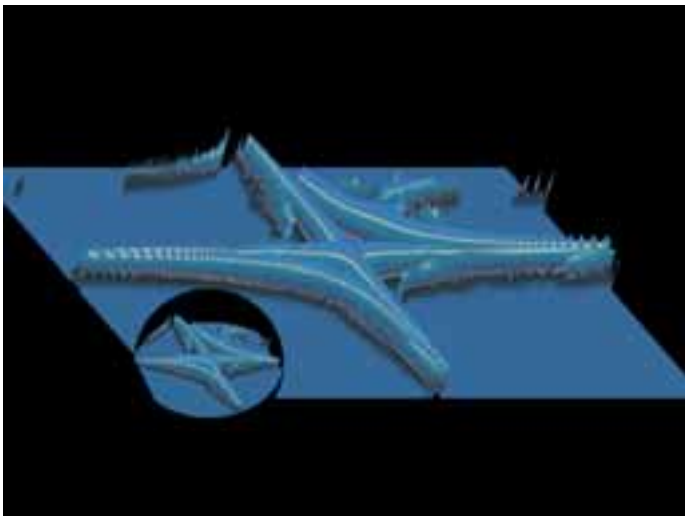


The rhythm of order and chaos

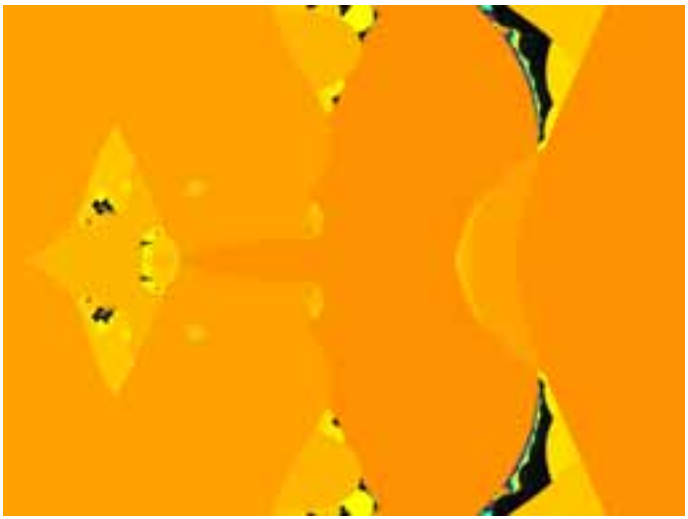
All three characteristic legal models, the computing of which shows three important ideas of chaos theory, support the principal idea: that chaos theory can be used for researching the law as a social phenomenon. Owing to that, it is also possible to construct other legal models of any level and type, which can also be examined by computing. The constructed characteristic legal models, their computing and the obtained results confirm the initial idea: that bringing into connection chaos theory with legal theory is not a Utopian project, but a new

78 See: R. Lukić (note 12), pp. 199–200; D. Mitrović (note 12), pp. 205–209.

path revealing entirely new prospects in researching the law. This new path must alter our implanted perceptions and pictures of the world of law and of the law as a part of the world, because *law pulsates in the universal rhythm of order and disorder!*[79]



Frozen fractal picture of Kelsen's model of law



Frozen fractal picture of custom model

79 D. Mitrović – Lj. Stanojević, Chaos theory and Theory of law. Modeling and computing in law, ed. Službeni list, Belgrade, 1996, pp. 65–77, 147–153.

Frozen fractal picture of legal system model

6. Computing is not omnipotent

However valuable it can be for the research of the law, computing is not omnipotent. For this reason, one has to bear in mind limitations and risks that can arise when computing is being carried out, particularly when its results are being interpreted.

First and foremost, computing provides probable and most probable rather than exact and true results, because our theories are our inventions, our mere conjectures, as well as our bold assumptions out of which we create our "own nets by which we try to capture the real world". It is the case with all models that are theoretical and technical in their character. Nevertheless, owing to our theories and models we can acquire new knowledge that so far has been only plain guesswork lacking valid possibilities for testing and verification. By applying computing in this way we can obtain results with a high degree of probability (certainty) and verifiability, which is quite sufficient for the accomplishment of the set out goal. Hence, when examining some social or legal model, we do not expect the obtained results to be true, but rather that they would be the results with a high degree of probability, verifiability and supportability.[80]

80 K. Popper, Unended Quest. Intellectual Autobiography (translation), ed. Nolit, Belgrade 1977, p. 283.

Mentioned limitations and risks display the role of the researcher in a completely different light. Namely, the researcher has to take care, before and during computing, whether the formalisation of a model has been carried out correctly, and especially whether the essential has been separated from the non-essential in a model, as well as whether the selected data are sufficient for the creation of the so-called set, short of which formation and computing of models are not possible at all.[81] The first problem is being resolved by the utilisation of paradigms, which enable the researcher to distinguish the essential from the non-essential. The second problem is being solved by fractal structuralising.[82]

The researcher has to take special care when interpreting obtained results and must always bear in mind that beyond the formalised model there can stand the real phenomenon with consequences which are distant from the plain formal and theoretical research work. Thus are modeling and computing displayed in a completely different light – as a means to examine the world and the law at all by using one of the possible ways, with freedom that has not existed heretofore. Sometimes this freedom may remind of divine creativity.[83] However, even then the researcher must remember that man cannot be replaced by computer in the same way as God cannot be replaced by man. And in the same way as God has his last say in human affairs, man has his last say in computer matters. Computer therefore only enhances capabilities of human mind, but does not replace human intelligence.

The application of computers and computing request human adaptation, quite often resulting in utterly wrong and unnecessary comparing of man with computer. It induced many writers to indicate, and quite to the point, actual and potential risks brought about by the utilisation of computers.[84] But, all the same, human adaptation to computers is necessary – though only to the extent needed to provide for a desired benefit. Human adaptation is, therefore, both understandable and justifiable because within given limits of a programme computers are more powerful than humans.[85] However, computers are not omnipotent whatsoever, because it is only man who is capable and able to distinguish the

81 H. L. Dreyfus, What Computers Cannot Do (translation), ed. Nolit, Belgrade 1977, p. 283.

82 Z. Bijelić, Beyond Order and Disorder, in: Kulture Istoka, Vol. VIII, No. 27, Belgrade 1991, p. 18.

83 See: D. Bohm, On creativity, ed. Routledge, London–New York 2004.

84 H. L. Dreyfus (note 16), p. 285.

85 See: J. Weizenbaum, Power of Computers and Human Mind (translation), ed. Nolit, Belgrade 1980.

essential from the non-essential. Man, who is in no way a rational being only, can often do it intuitively or completely unconsciously, which computer cannot do in any way. Owing to this precious human source, to this "unconscious" or "superconscious" within himself, man draws from his emanative creative force that doubtlessly makes him superior to the computer as a product of his knowledge and faculties.[86]

Also, in no way can a computer overpower its creator because man has also incorporated, consciously or unconsciously, his overall deficiencies into the computer. In addition, the more computer preciseness is being improved, the more its limitation is being enhanced. (The unknown limitation of human mind and spirit with less preciseness is always better.) For this reason the risk to produce superintelligent computers and sub-intelligent beings is justifiable only to the extent to which man is prepared to relinquish his role, causing thus harm to himself. However, it has nothing to do with computers but with human nature. It is clear, therefore, that the comparison of man with computer is as appropriate as the comparison of an owner of a tool with a tool itself. Computers are these new accomplished tools that can be used according to our own ideas and needs. Definitely, even today they are bringing about so great changes that they can hardly be compared with the changes caused by usage of plow and appearance of agriculture in human civilisation at the time.

Mentioned limitations and risks, encountered by anyone using computers and appropriate computer techniques (or merely thinking about them), and especially by researchers, should be timely observed and separated. The researcher should especially take care to make the distinction between epistemological and scientific sides of the computing problem, its validity and justifiability on the one hand, and ethical, social and political consequences that can be produced by the application of computing on the other hand. The former is concerned with knowledge and imagination, and the latter with ethical views and intentions of those who are able to use computers and results of computing. Let us recall the previously mentioned plow that can be equally used for tilling soil, as well as for forging weapons and waging war. It equally holds for utilisation of computers and for carrying out computing.

7. Conclusion

That the link between the theory of chaos and the theory of law is not a Utopian project, but a new approach towards researching the

86 V. Fluser (note 3, 4), pp. 279–280.

law in both epistemological sense and practical sense, is confirmed by modeling and computing of characteristic legal models in the light of chaos theory, nevertheless the subject of modeling and computing can comprise any aspect or any part of the law. Knowledge, imagination and prejudices of the researcher constitute the only true limitation.

However, computing is not omnipotent regardless of its contribution to the research of the law in the light of chaos theory. Currently, a decisive pointing to the route towards which we should concentrate our efforts seems to be the greatest value of computing of legal models – and not offering of experience – and this is the factor of the outmost significance, because it accentuates the freedom of human will. Owing to this, we need not ask ourselves any more "What awaits us in the future?" Namely, it seems that for the first time we can put to ourselves a more appropriate question "What can we do in the future?", and get a reliable scientific answer to the question.

On the other hand, the application of computing in the presented sense shows in a completely different light some perpetual questions, to which an answer has not been given yet, nor will ever be given it seems (What is reality? What is the world at all? What is man? [especially Bodriar's telematic virtual man] What is the place of man in reality and in the world? Until when can the world and man as a part of it go on developing? Does virtual reality release or capture human will? etc.). However, answers that reality is concreteness, that principles are the sum of statistical condensations of chances with the proclivity towards an ever-increasing approximation, that truth is a degree of probability, that the world is "of such kind" that it pulsates and develops until it can receive no more from the outside and alike answers, which need not be accepted as true, are certainly interesting answers and attempts to perceive and explain from a different perspective problems occupying human curiosity from the time immemorial. Those precious attempts, supported by new computer capabilities and information science technologies suggest a possible new approach towards the law. That approach is not "Tao" of the law; it is not the path of true and the only possible law, but the approach towards researching the law in a multidisciplinary way as a dynamical phenomenon with the most significant consequences for its actual existence.

* (With Prof. Dr. G. Vukadinović, 25th IVR Congress Law, Science and Technology, Frankfurt am Main 15–20. August 2011. Paper Series, No. 010–2012, Series A. Methodology, Logics, Hermeneutics, Law and Finance, pp. 1–16)

III

ECCLESIASTICAL LAW AND STATE LAW

Ecclesiastical law in the ecclesiastical-legal literature[87] is usually defined as "statutable" law as it is based on the customary practices or ordinances and canons, which regulates position, organisation and activities within the framework of the church itself and society. Today, it is thought that ecclesiastical law is the law "in the area of one or several (as the Roman Catholic Church) states, within which exist (legally recognised) autonomous communities or institutions".[88] Ecclesiastical law also denotes "canon law (body of legislation of the church) which determines specific spiritual and social activities of the church and its members, or ecclesiastical law created by the state as the system of state legal regulations within the province of the church (organisation of the church, its legal position as to the state and inter-confessional relationships)".[89] When the concept of ecclesiastical law is determined in its broadest possible extended meaning, it can also include rules "created by religious authority", i.e. religious rules.[90] In spite of the similar de-

87 Dr Sergey Viktorovich Troicki (1878–1972) was a professor at the Faculty of Law, University of Belgrade, a lecturer of cannon law in the capacity of a pofessor at the Theological Faculty; an expert of the Holy Synod of Bishops of the Serbian Orthodox Church; an excellent jurist; a famous expert in canon law; a polyglot and a writer of many works in the field of ecclesiastical law. See: S. V. Troicki, Ecclesiastical Law, published by the Publishing and Information Center of the University of Belgrade 2011, p. 521. Also see: B. Gardašević, "Dr Sergije Viktorovič Troicki", Bogoslovlje, vol. 1 & 2, XXIV (XXXIX), Belgrade 1980, pp. 175–188, and D. Perić, "Sergije Viktorovič Troicki and his Ecclesiastical Law", Anali Pravnog fakulteta, No. 1–2, Belgrade 2002, pp. 177–183.

88 T. Živanović, The System of Synthetic Philosophy of Law, III, Belgrade 1959, p. 15.

89 See: D. Perić, Ecclesiastical Law, Belgrade 1997, p. 21; Nikodim Milaš, Ortodox Ecclesiastical Law, Belgrade 1926; Č. Mitrović, Ecclesiastical Law, Belgrade 1929; A. Crnica, Kanonsko pravo Katoličke crkve, 1937; S. V. Troicki, Ecclesiastical Law (skript files), I-III, Belgrade 1937–1938.

90 See: T. Živanović, II, Belgrade 1951, pp. 14–15, 56–57 and III, p. 141.

termination of the concept, there are few laws the meaning of which is being thus argued over. This is not surprising though, as in the history of mankind the influence of ecclesiastical law has always been dependent on the reach and effects of the church in society. On this intersection depends contemporary place of ecclesiastical law and its relationship with state law.[91]

1. Characteristic viewpoints on the place of ecclesiastical law

There are at least five specific viewpoints on the place ecclesiastical law holds among other legal sciences.[92] They came into being depending on the priorities given by legal and church scholars in ecclesiastical law: secular over spiritual or spiritual over secular, that which makes it dependent on or independent from state law, their individual or traditional classifications and typologies of scientific disciplines, etc.

Ecclesiastical law as a type of public law. – According to this monistic-statist viewpoint, ecclesiastical law belongs to public law. The viewpoint that *ius sacrum* belongs to public law existed in ancient Rome. It was recorded in *The Digest* (I, I, 2). It reads: "Publicum ius in sacris. In sacredotibus in magistratibus consistit".[93] Such viewpoint was defended by many protestant legal authorities (Varkoening),[94] and sometimes by the Eastern Orthodox jurists and canonists who believed that state is the only source of the law (N. Suvorov, A. G. Rozenkampf, A. Djordjević).[95] According to them, there is no need to make the distinction between public law and private law in ecclesiastical law since the overall ecclesiastical law is public in its character, as a kind of emanation of the state sovereignty. In favour of this viewpoint stands the fact that the state usually enacts laws on the church organisation or confirms some ecclesiastical regulations which due to the confirmation become legal

91 See: D. Mitrović, Theory of State and Law, Belgrade 2010, pp. 187–209, and Autonomous pravo, Belgrade 2010, pp. 43–63.

92 See: S. Troicki, pp. 41–50.

93 Ibid., p. 45.

94 See: S. Troicki, p. 45; Taube, "La situation internationale actuelle du Pape", Archiv fur Rechts und Wirtschaftphilosopie, 1907, pp. 360–369, 510–518.

95 See: S. Troicki, ibidem; Н. Суворов, Учебник церковного права, 3rd edition, Москва 1908, 7; G. A. Rozenkampf, Обозрение Кормчей книги в историческом виде, 2 изд., 1839.

in their character. That was particularly the case in the Byzantine state where the so-called "theory of symphony" was applied for centuries to regulate the relationship between the church and the state. Its essence is as follows: in the interrelationship between the church and the state there are two extremely unnatural situations. These are *Caesaropapism*, when the ruler is the supreme head of the church and the state, and *Papal-caesirsm*, when the spiritual head is vested with authority both over the church and over the state. Since both situations are unnatural for the church and the state and inflict damage on community, the existence of two authorities is the best: the ecclesiastic and the state, like two interweaving circles producing three areas: a purely ecclesiastical area, a purely state area, and a common area. For this reason – it was thought – the best form of state is the one in which exists "symphony".[96] In modern times, state legislation referring to internal church organisation emerged from the Lutheran concept of state authority as the bearer of episcopal church authority.[97] However, at the time it was also thought that the idea of the confirmation of ecclesiastical laws by state authorities was important only to the state – ecclesiastical regulations have become legally valid because of the confirmation by the state, but for the church, those regulations can be legally valid before they are being confirmed by the state.

Ecclesiastical law as a type of private law. – According to this viewpoint, ecclesiastical law belongs to private law. The idea underlying this viewpoint is found in Jean-Jacques Rousseau's teaching. According to Rousseau, religion is needed as a personal feeling, though any religious organisation damages state. (Since logic requires consistency, the opposite can also be claimed: any state organisation damages the church, though it is not always so.) This Rousseau's idea was later repeated in the Gothic and Erfurt programmes in the words as follows: "Religion is a private matter" (*Religion ist Privatsache*).[98]

Such system, usually called the system of separation of church and state, does not in the least help bring about the solution to the problem of determining the nature of legal regulations which govern internal church life. These regulations *per se* or independently of the stand that the state takes on them cannot be classified within private law. Also, this system confuses the nature of ecclesiastical regulations with the state's stand on them. Already in *The Digest* (38, 2, 14) it was written: "Public law cannot be altered by agreements made by private individu-

96 See: D. Perić, pp. 165–167.

97 See: R. Sohm, Kirchenrecht, Leipzig 1892.

98 See: S. V. Troicki, p. 47.

als" (*Ius publicum pactis privatorum non potest*). The will of state with the authority to command stands above the will of private individuals. In Germany, this viewpoint was most consistently advocated by Adalbert Falck despite reasons disputing relevance of the viewpoint on ecclesiastical law as private law.[99]

The next question which may be posed reads: "Can private individuals by their own will alter regulations of ecclesiastical law?" And, the answer is yet again the same: "They cannot!"[100] For the church membership these regulations are of an even more superior authority and unalterability than state laws. Such answer renders possible the conclusion that ecclesiastical law is public in its character, although that character is not the one of the state but is *sui generis*, i.e. ecclesiastical. Ecclesiastical regulations may become "public law of the state", this being but an option which depends on the will of state authorities, which determines position of the church.

The admixture of public and private nature of ecclesiastical law. – According to this compromising viewpoint (dualistic-statist), ecclesiastical law is an admixture. Its one part belongs to private law and the other to public law. This viewpoint is advocated by earlier ecclesiastical-legal authors, including Schulte, Niels, Schteckart, Schilling or Maretzoll.[101]

The viewpoint of Maretzoll is characteristic. According to him: "Any man by his faith joins a religious community; hence the appearance of more or less particular religious relationships, which fully coincide with state relationships almost everywhere and without exception where there is a purely national religion. For example, the Romans had it that *ius sacrum* belonged to *ius publicum*. Where there is no coinciding between state and religious interests, as is the case in all Christian states, there the relationships between the body of the faithful and their religious community – the church, constitute ecclesiastical law. If it has to do with the relationships of the church with respect to the state, ecclesiastical law belongs to state law as its constituent part. However, as it touches individual interests and gives them another form, it thus comes under private law as well. All other matters in ecclesiastical law are found on the above-mentioned border between private law and public law".[102] Maretzoll explains his viewpoint by the fact that every man by his own free will and faith joins the church as a religious com-

99 Ibidem.

100 Ibidem.

101 Ibidem.

102 Maretzoll, Lehrbuch der Institutionen, 1886, 5. 7. See: S. Troicki, pp. 47–48.

munity. These relationships belong to ecclesiastical law because they are private in character. However, when it has to do with public relationships of the church with respect to the state, ecclesiastical law at large belongs to state law.

The mentioned Maretzoll's viewpoint is not acceptable, because on the basis of it even the opposite can be concluded: that ecclesiastical law at large falls under state law since public law (*ius publicum*) and private law (*ius privatum*) are two traditional types of state law, and not an area of state law and an area of *droit social*, as it might be thought.[103] Most often they differ in subjects, contents or procedures of enactment, but not in its original character or the capability of state to impose its sanctions. For this reason Maretzoll's viewpoint is seemingly admixed. In effect, it is only formally dual and essentially statist-monistic.

There are still a number of important reasons challenging the viewpoint on admixed character of ecclesiastical law. First of all, such viewpoint would be truthful if the church were a state institution. However, the church, as well as the state, is a perfect, fully free and sovereign society, *societas perfecta et plane libera*. Also, although it is true that ecclesiastical law touches interests of private individuals, it still does not follow therefrom that any part of ecclesiastical law should be considered private law in the same sense in which it is done in reference to secular civil law. While secular civil law moves within a space bounded by laws created by the state for individuals, ecclesiastical law, which is concerned with interests of individuals (e.g. matrimonial law, right to private prayer or private study), moves within a space bounded by regulations created by the church itself. Moreover, in addition to regulations governing personal lives of the church membership, ecclesiastical law also includes provisions regulating the organisation and relationships of a society as a whole. For example, ecclesiastical-administrative law and ecclesiastical-judicial law are similar to public state law, while matrimonial and ecclesiastical-property laws are similar to private state law. However, "this is but a similarity, just an analogy, because the mentioned branches of ecclesiastical law in terms of their substance do not fall under either public law or private law".[104]

103 The first systematic classification of the law, for the sake of calling to mind, is usually associated with the Roman dual (bipartite) division of the law into ius publicum and ius privatum. As the classical Roman dual division has remained prevalent all the time, so it has also been in the 19th and 20th centuries – at the time when a more comprehensive teaching of legal sciences was much more paid attention to.

104 See: S. Troicki, p. 49.

Ecclesiastical law as a type of "droit social". – According to this sociological-pluralistic viewpoint, ecclesiastical law falls under a special type of *droit social*. Especially insistent upon this viewpoint are jurists who advocate trichotomy in the law, claiming that the law at large should be dived into public, private and *droit social*. In the last mentioned they include also ecclesiastical law.[105] An interesting trichotomous division of the law was made by Rudolph von Mohl. According to it, in addition to public law and private law, there also exists *droit social*. It is created on the basis of the original social authority, rather than on the derivative state authority. As a result, ecclesiastical law cannot be classified either into public law or into private law, and makes a third separate group of the law "beyond state law". An interesting trichotomous division of the law was also made by Fridrich Karl von Savigny and Georg Fridrich Puchta. They, too, classified ecclesiastical law into a third, separate group, in addition to public law and private law as ecclesiastical law is the most voluminous and developed among all types of the laws.

The farthest in the matter at hand acted Georges Gurvitch, who classified the law at large – therefore, ecclesiastical law as well – into one single law – *droit social*. According to Gurvitch, the object of social regulation is internal life of community, while its externality, the manifestation of *droit social*, consists of *social power* which is not linked with the power of the state. *Droit social* can be "pure", i.e. completely independent from the state, and can (remaining "pure" nevertheless) be subjected to the protection of the state. It stems from collective sense which Gurvitch calls "We". This is *droit social* of community, which includes in an objective way, every active real entity and which embodies a beyond-time positive value... no mater whether it is organised or unorganised with the aim to organise social life, which means that it derives its binding force from a social group within which it was created and integrated".[106] Because of this, *droit social* is integrative, spontaneous, the law of collaboration and co-operation. It "in its organised form addresses specific subjects of law – complex collective persons – that should be equally distinguished from isolated individual subjects, as well as from legal persons... These different *droit social* centres may be superior to the state (international bodies and organisations) or subordinated to the state (trade unions, co-operatives, trusts, factories, churches, decentralised public services, international organi-

105 See: T. Živanović, III, pp. 351, 354–355.

106 See: G. Gurvich, L' idée du droit social, Paris 1932, p. 15.

sations, etc.)".[107] On this basis Gurvitch creates his famous typology of the law, in which concurrently with state law exist three main types of *droit social*.[108]

If the social-pluralistic viewpoint were to accentuate only the thought that ecclesiastical law does not depend on the will of the state and private individuals, it would be acceptable. However, it equates the church with other associations (trade, scientific, charity, economics, etc.), which is why it is wrong. Although the mentioned associations are established by the will of their members, they are nevertheless formed within the state and granted the approval for their existence by the state, they are subordinated to the state sovereignty and can be terminated by the will of their members or the state. Thus is shown that *droit social* is not quite an independent branch of the law, but that it is comprised of the elements of public law and private law. This is also the case with the secular part of ecclesiastical law.

The first four presented viewpoints classify ecclesiastical law into secular law. In particular the first three viewpoints which take as their point of departure the idea that the state is the only source of the law (*kein Recht ohne Staat*). Ecclesiastical norms become legal only upon being approved by the state. More modern, the fourth viewpoint determines ecclesiastical law as a type of pluralistic *droit social*: the state is like "a small, deep lake which is lost in vastness of the sea of the law, surrounded from all sides by it... ".[109]

In favour of the opinion that the state is the only source of the law yet two more important reasons are given. Firstly, the church itself cannot create the law for the law exists only where there is a threat of imposing sanctions upon law-breakers; and sanctions always need coercion which in turn requires external forcible imposition. Since the church does not have at its disposal its own external force, i.e. it does not have "its own police or army to enforce its sanctions", it can be concluded that the church cannot have its law. Thus, the only source of the law is the state. It can to a varying extent authorise other subjects to themselves create and to implement their law in its stead. However, in that case, it is the sanction of the state that is needed to punish violators of such autonomous social regulations. And secondly, in the same territory only one sovereign body can exist, and it is the state.[110]

107 Ibid., pp. 46–95.
108 Id., pp. 80–81.
109 Id., p. 30.
110 Id., pp. 42–43.

It follows therefrom that provisions of ecclesiastical law also stem from state sovereignty, i.e. that ecclesiastical law is a type of the law dependent on the state and its law, which is not in agreement with all ecclesiastical-legal writers.[111]

Sergey Viktorovich Troicki on the original nature of ecclesiastical law, its original place and its relationship with respect to state law. – In the opinion upheld by Troicki, ecclesiastical law does not fall under any of the existing groups of legal or ecclesiastical disciplines, but differs from all of them by its original nature. As a result, it establishes an original relationship of the co-ordination with secular law, and not of the subordination. It brings to mind social-pluralistic teachings of Leon Petrazycki, Georges Gurvitch and other followers of social pluralism in legal science.

In support of his viewpoint Troicki mentions a number of important reasons. In the first place, the church in terms of its origin, nature, objective and resources has at its disposal a significant distinguishing feature which makes it distinct from all other societies. It came into existence independently from the will of state. Christian church was established by Jesus Christ and his disciples, completely independently from the state.[112] And not only did the church come into existence independently from the state, but also despite the will of the state. In the first three centuries the state considered the church an illicit collegium – *collegium illicitum*.[113] This historical fact is in agreement with the claims of the mentioned advocates of social pluralism, who in their teachings also point out that social organisations and the law have come into being before or independently from the state and its law. However, Troicki obviously differs from the advocates of social pluralism when he claims that the church has not been instituted by the will of its members, but, according to its doctrine, "from up there, by the will of God himself". The church reflects human nature itself, and not the will of individual persons or collective groups. The church is not only a society, but an institution. It cannot be abrogated by the will of its members or the will of the state. According to its doctrine, it must exist forever. And while all other associations may belong to the public law or private law branch, this is not the case with ecclesiastical law.[114]

111 See: R. Sohm, Krchenrecht die geschichilichen Grundlagen, 1892. See: S. V. Troicki, pp. 35–40.

112 See: S. V. Troicki, p. 49.

113 Ibid., pp. 42–43.

114 Id., pp. 44, 49.

Departing from the mentioned points, Troicki further claims that ecclesiastical law besides being not secular is moreover completely independent from the state. The law precedes the state. The state does not create the law, but the law, i.e. "natural legal sense" creates the state. Before him, that claim was emphasised by Leon Petrazycki, according to whom the law is a product of consciousness, an individual-psychological experience. It exists as a multitude of legal experiences, i.e. as a product of emotions and intuition. Petrazycki calls this law an "individual experience" or "intuitive law". It appears spontaneously, comes into being directly from the consciousness of an individual and manifests itself outside the state in the minds of individuals and collective experience. Petrazycki was among the first who thus opposed the opinions which point out the unity of the law based on state coercion. He emphasised spontaneity and intuition as the elements decisive for coming into existance, the explanation and the determination of the law.[115] Exactly the same also does Troicki when he claims that there is no state without the law, but that the law can exist and, in effect, it does exist outside the state (for example, when it has to do with children, families or indigenous peoples who are incognisant of the state organisation).[116] If the law can exist without the state, it follows therefrom that the church, too, can create its law on its own and independently from the state.

Neither is the third reason, which suggests that state sanctions are important in the law, defendable. According to Troicki, the law exists even when there are no state sanctions. Moreover, outside the church, too, there is a whole series of sanctions which are not coercive in their character (e.g. public disgrace, infamia in Roman law). This even more so being the reason for the church to have sanctions which do not have the character of coercive force, but are nevertheless more efficient than any other coercive force (e.g. ecclesiastical ex-communication).

Trocki therefrom concludes that the change in legal consciousness, and not external coercion, determines the fate of legal institutions. If that were true, legal would only be those norms which are voluntarily obeyed by morally motivated individuals, while it would not be the case with norms which are disobeyed by unmotivated individuals. The aforementioned contradiction in which Troicki becomes entangled by overly expanding the concept of the law can easily be removed by way of which ecclesiastical norms, which are based on the probability of

115 See: L. Petrazycki, Law and Morality, Cambridge 1955, and Theory of State and Law (translation) Belgrade – Podgorica – Sremski Karlovci 1999.

116 See: S. Troicki, p. 41.

imposition of mental punishment upon the wrongdoer, will be considered a type of "naked law" (nudum ius), whilst all other ecclesiastical norms, which are based on the probability of imposition of coercive force upon the wrongdoer, will be considered complete or incomplete legal norms. Such solution is not incorrect since even without the mentioned expansion it is possible to reliably determine the concept of the law in its expanded meaning, which will be hereinafter shown.

Finally, Troicki points out, one cannot accept as true even the reason referring to territoriality according to which the church cannot have its own – from the state – independent law, for then it would be the state (*statu*), whilist the interrelationships between the church and the state would fall under international law (*ius inter civitates*). Although the church is found in the same territory as the state is found, it is still not found within the state area, thus rendering the possibility of the conflict between the church and the state lesser than that between states. The truth of the matter is that sovereignty is essentially indivisible. On the other hand, it is divisible as to its jurisdictions. (*Kompetenz-Kompetenz theory*). This means that jurisdiction of the church sovereignty differs from jurisdiction of the state sovereignty. In view of this important difference, Troicki concludes that sovereignty of the church and sovereignty of the state can exist in the same territory. And furthermore – it is possible to consider the subjects of international law, without being contradictory though, all churches which conclude international agreements. The most famous are concordats, i.e. international agreements which regulate international relationships between the church and the state. For instance, by concordats have long since been regulated the relationships between the Roman Catholic Church and the states, which is also the case with the Protestant Church and the Orthodox Church.[117] The most recent example is the concordat concluded between the Vatican and Montenegro in June 2011.

Troicki supports the above-mentioned claim by referring to the fact that in modern state law and international law exist teachings of the individual rights of citizens which are, in principle, outside the area of state jurisdiction. This claim is very similar to Jean-Jacques Rousseau's teaching refering to the inherent natural rights of the people which precede the society and the state. It follows therefrom that the state depends on the people, and not the people on the state. Within these rights have long since been included the freedom of speech, the freedom of assembly, the freedom of association, and, above all, the

117 See: S. Troicki, p. 45.

freedom of religion and conscience. In this field, it is not the state that is sovereign, but an individual, i.e. sovereign are their religious and moral conscience and will. If an individual is sovereign in the area of the mentioned individual rights, the fuller is the exercise of the "sovereignty of assembly" right of individuals united by their common religious beliefs in the church which by its provisions and on its own regulates the areas of the freedom of religion and conscience. And exactly here resides the answer to the objection according to which there cannot exist "status in statu", i.e. state within a state. It is true that state within a state cannot exist, but the church is not state but "the kingdom which is not of this world". As a result, it "is not in the area of a state, but has its separate area at its disposal".[118]

A few more important ideas characteristic for the teaching of S. V. Troicki should be pointed out. First of all, he defended the right of the science of ecclesiastical law to exist independently. He regarded as unnecessary the "purity" stands of ecclesiastical-legal writers, who contested the concept of ecclesiastical law, considering it a type of *contradictio in adiecto*. Of a stimulating effect is also his other idea – that the conflict between ethics and the law does not hold. This idea of his is based on the claim that the church is not only a spiritual society, but also a secular one since ecclesiastical law exists wherever the church exists. Otherwise, the church "turns into and moves to either the anarchic sects or the part of state apparatus".[119] Neither does the formal factor of the law "contradict the substance of the church since external forms are required by religion, too, and even by ethics. Hence, coercion and its force are not the choice of the law".[120] The choice is concerned with freedom and love. Their promotion should not be only the task of the church, but of the state, too. In their absence, we must content ourselves with its being at least "decent" (civilised), i.e. to contain at least the "minimum of morality".[121]

The controversies between the first four viewpoints and the fifth viewpoint of Sergey Viktorovich Troicki on the place of ecclesiastical law may be softened by showing multiple layers of the concept of ecclesiastical law, its different types, chracteristics and its contemporary relationship with state law.

118 Ibid., p. 40.

119 Id., pp. 39–40.

120 Id., p. 37.

121 See: L. Fuller, Morality of Law, ed. Yale Universiti Press, New Haven and London 1964, and Moralnost prava, Belgrade 2003 (translation).

2. The multilayerdness of the ecclesiastical law concept and its place in the system of law

Secular and sacral ecclesiastical law. – In Roman law, Marcus Tullius Cicero and Marcus Fabius Quintilian made a clear distinction between ius publicum and ius sacrum.[122] The former at large related to secular law, and the latter to ecclesiastical law. Today, this distinction is softened in favour of secular law. It looks like ecclesiastical law is a somewhat "softened" derivative of state law.

Something like that is only partially acceptable on condition that within ecclesiastical law itself an additional distinction is made between its secular part (e.g. its ius publicum and ius privatum, which refer to the organisation and the functioning of the church, its relationship with the state and society, how the decisions and other regulations are brought, property-related relationships, matrimonial relationships, etc.) and purely sacral part (ius sacrum) which contains the earliest religious norms. Such additional division, which suits better contemporary relationship between the church and the state, deviates from the original Roman division, but not to the detriment of the independent existence of ecclesiastical law. It also exists independently even today, when it is concerned with its other, purely sacral part, when one can really speak of the original ecclesiastical law, which is not even a softened derivative of state law. Also, under certain conditions, one can speak of the original nature and the original place of ecclesiastical law at large, based on the prior assessment as to what is more prevailing in it. One can only ask whether all ecclesiastical norms are really the legal ones.

The answer to the question of the ecclesiastical law norms being legal depends on how the general concept of the law will have been determined in anticipation. Thus is at the same time solved the question referring to the determination of the derived concept of ecclesiastical law. Only then is it possible to embark upon the determination of the areas over which ecclesiastical law and state law spread, which depends on the historically changeable relationship between the church and the state. Therefore, on the answer to this question depends what place ecclesiastical law in the system of legal and ecclesiastical sciences will hold.

The concept and types of ecclesiastical law: complete, incomplete and unfinished. – When it has to do with the determination of the concept of the law, it should be emphasised that this concept is not one-sided.

122 See: Cicero, Pro domo, 49; Quintilianus, Institutiones, II, 4, § 33.

In fact, the law at large is composed of a number of basic layers, i.e. types of the law of different degrees of being legal. Such understanding of the law – resembling "a series of coverings of an onion bulb",[123] renders possible the determination of ecclesiastical law conventionally in the expanded and restricted meanings, and thereafter the determination of its relationship with state law, too.

In determining the expanded concept of the (ecclesiastical and state) law, notice should be taken that the law at large has at its disposal a certain number of common characteristics. They are externality (corporality), heteronomy, social character, regularity (demarcation of interests), the object to be regulated (the three separate types of social relationship: property-related relationships, the relationship of government and organisation of society), measurability and precision, the existence of a dispute and the coming into existence of the court, special formalisation procedure, social (external) sanction, the realisation of social and legal values: order, security, peace, justice, freedom and the enabling of the "co-existence" of the people in a society.[124] Only by having these characteristics do the social rules acquire legal character. However, the mentioned legal characteristics are not present in the same amount in all legal norms. Some legal norms have at its disposal all the mentioned common characteristics, and others do not. The former are complete, and the latter are incomplete. On this basis, it is possible to determine different types of ecclesiastical law and state law.

Complete ecclesiastical law includes only norms which have all the characteristics of the law. This is also the case with *complete state law*. The most obvious difference between these two types of law exists in reference to the subjects which create them and the types of their "legal sense", while other differences need not be so clearly expressed.

There is also incomplete ecclesiastical law. It contains norms which do not have all these legal characteristics, but have a majority of them at least. For this reason, it necessitates the posing of the question whether incomplete ecclesiastical law should have state sanction. Since both these two situations can be encountered, i.e. that norms of ecclesiastical law have or do not have at their disposal state sanction, it follows that there are two types of incomplete ecclesiastical law. The first type comprises ecclesiastical law which contains the majority of

123 See: D. Mitrović, Theory od State and Law, Belgrade 2010, pp. 205–209, and Autonomous Law, Belgrade 2010, pp. 62–63.

124 See: R. Lukić, "The Concept of Law", Zbornik za teoriju prava, sv. II, published by the Srbian Academy of Sciences and Arts, Belgrade 1982, p. 28.

common legal characteristics, among which is included state sanction, too, and the second type is ecclesiastical law with the majority of common legal characteristics, among which is not included state sanction. For the first type of incomplete ecclesiastical law one can say that it is "less perfect" than complete ecclesiastical law, while for the second type of incomplete ecclesiastical law one cannot say even that. Yet, the law knows of the norms without sanctions (leges imperfectae), which is the case with constitutional principles on the right of the citizens to work, the right to inviolability of privacy, the right to the conclusion of contracts in good faith, the right to freedom of conscience, etc. In view of the fact that such norms do not contain provisions as to someone's obligation to legally support them through sanctions, nor the enforcement of sanctions either, it has rather to do with an illusion of the law or at least with something like "naked law" (nudum ius).

All the aforesaid about incomplete ecclesiastical law also applies to *incomplete state law*, which also has at its disposal the majority of common legal characteristics with or without state sanction. On this basis, *two types of incomplete state law* can also be determined: "less perfect" or "incomplete" state law and "unfinished" or "unrealised" (*nudum ius*) state law. In comparison with them, complete state and ecclesiastical law should represent a "higher degree of development of one in many ways the same social phenomenon" – the law in its entirety and at large.[125]

The determination of the law in its expanded meaning enables the determination of at least three types of ecclesiastical laws and three types of state laws, respectively. Each type of the law in its expanded meaning can be classified into three layers. The first layer consists of *complete* ecclesiastical or state law. The second layer consists of so-called *incomplete*, "imperfect" laws (John Austin) or the laws of "decreased value" (Ronald M. Dworkin and John M. Finnis), which is exactly what ecclesiastical law and state law are. The third layer consists of illusions of the law – *unfinished* or unrealised ("naked") ecclesiastical or state law. Neither are such norms, as already mentioned, insignificant from the position of political culture and social life. Besides, it may chance that they subsequently gain the support of the state sanction (for instance, by the enactment of a legal or an ecclesiastical provision on imposing sanction upon them, or by the decision of constitutional or some other state and ecclesiastical court), whereupon they subsequently (*ex post*) become complete or perfect (*leges perfectae*).

125 Ibid., p. 29.

Obviously, the concept of the law is not one-sided, nor is it monlithic, but complex, detailed and as a whole composed of layers of different degrees of being legal. This at large applies to both ecclesiastical law and state law. The most important and stringent are complete ecclesiastical law and state law. Afterwards follow incomplete ecclesiastical law and state law. In the end is found incomplete ecclesiastical or state law. Norms of ecclesiastical or state law which do not have at its disposal the majority of common legal characteristics do not come under the law at all, but under social rules.

Also, within each of the mentioned layers can be determined "sublayers" of ecclesiastical and state law, and within the sublayers their "sub-sublayers". It reflects the reality for within each type of ecclesiastical or state law there exist its special subbranches, and within each one of them there exist numerous institutions, subinstitutions and sub-subinstitutions, etc. all the way up to the norms which belong to the precisely determined type of ecclesiastical or state law.[126]

In addition to the parallel, there exist the interwoven subbranches, institutions, subinstitutions, etc. of ecclesiastical law and state law, which makes the whole picture an unprecedentedly much more complex than the one shown. Perhaps, it is to the best to talk about ecclesiastical law as a special sub-subsystem within the area of the autonomous subsystem of the law. It exists concurrently with other sub-subsystems of autonomous law and the subsystem of state law, and comprises unique law of the involved state.

Such determination does not diminish the importance of ecclesiastical law, but makes contemporary both its place and its relationship with state law. In contrast to other similar autonomous sub-subsystems of the law (corporate, guild, employer, trade union law or the rules of other social subjects), it is only ecclesiastical law that has, in an undoubtedly recognised way, at its disposal – though only in one of its parts – independence from the state. This being due to a particular role of the ecclesiastical teaching and the mission of the church in society, in contrast to all other social organisations.

The aforementioned multilayerdness of ecclesiastical law and state law cannot be ascribed to chance. As suggested, it is used to finely tune the order of the relationships between the different importance and the degree of conflict, and, which is also important, to adequately legally regulate also those social areas which would, in the absence of ecclesiastical law, be regulated by state law or with social norms. It is thus

126 See: D. Mitrović, Theory of State and Law, pp. 545–551.

shown how between state law and social norms there exists a vast social area which is occupied by ecclesiastical law. Also, it is readily observeable that all types of state law belong to secular law, while it is not the case with ecclesiastical law.

The restricted concept of the law (ecclesiastical and state) can be determined when only one of its legal characteristics is chosen as the most important. This is the case when the law as "a substantial normative phenomenon" is determined with respect to state sanction as its most discerning external characteristic. According to this measure, legal norms would be only the complete and only those incomplete ecclesiastical and state norms which have at their disposal state sanction. Other incomplete ecclesiastical and state norms, which do not contain state sanction, would fall under social rules, independently of the degree to which they have at their disposal other common legal characteristics. This statist viewpoint clearly points out that the law is always based on force. It is only force that is to a varying extent applied in ecclesiastical law and state law. By such approach is modified the way in which the relationship between state and ecclesiastical law is determined. In that case, *ius sacrum* would also become a derivative of state law.

3. The relationship between ecclesiastical law and state law

Dependent and independent ecclesiastical law. – By making the distinction between the secular and the sacral part of ecclesiastical law, the *division of ecclesiastical law into state-dependant law* and *state-independent law* is pointed out. It is even possible to create a whole typology of ecclesiastical law based on mutual influences that state law and ecclesiastical law have on each other. In one such typology, in addition to purely state law on the church, i.e. "state-ecclesiastical law" (*ius inter civitates et ecclesias*), there would also exist a few types of autonomous ecclesiastical law. The first would be *ecclesiastical law in a purely dependent relationship on the state*. It would be integrated within the framework of a given order and realised by relying on state coercion. The second would be *ecclesiastical law as a kind of an admixture – decentralised public* or *associated droit social*. The third would be *ecclesiastical law in a pure and independent relationship with respect to the state*. It would realise its integrative role without relying on the state, its coercion and the law. The first two types of dependent ecclesiastical

law would fall under secular law and the third independent type under sacral ecclesiastical law.

Independent ecclesiastical law is particularly interesting, which complete independence from the state is being unnecessarily disputed on different grounds. It exists whenever commands and sanctions against wrongdoers can independently from the state be passed and enforced by various church organs and bodies (e.g. Holy Synod of Bishops or the Holy Synod of Bishops of the Serbian Orthodox Church on the grounds of legal or moral assessment whether there is a wrongdoing or a transgression). Some writers think that this type of ecclesiastical law is a pure manifestation of contemporary legal pluralism, but of a secular type. Such claim is not quite correct for it is through independent ecclesiastical law that is simultaneously being regulated the relationships between man and the church, the church and the divinity or between the very ecclesiastical bodies within the church. It is even less correct if within independent ecclesiastical law are listed purely religious norms, the particular characteristic of which is the focusing on issues referring to moral and legal determination. They always contain the judgment as to whether something has or does not have a religious value, the judgment of approval or disapproval, and it is quite distant from contemporary legal pluralism of secular type.

A few more important things pertinent to the relationship between ecclesiastical law and state law. – The division of ecclesiastical law into state-dependent law and state-independent law enables the discernment of a number of important things pertinent to the relationship between ecclesiastical law and state law:

- Firstly, that ecclesiastical law at the same time consists of one type of state law and of the three types of autonomous law to a varying degree independent with respect to state law;
- Secondly, that the first of the three mentioned types of autonomous ecclesiastical law at large falls under dependent law, the second only partially, while the third type is independent, i.e. out of the reach of state law;
- Thirdly, that it is rendered possible to include within dependent ecclesiastical law all types of complete and incomplete ecclesiastical law which are under the influence of state law, especially in terms of the possibility to impose state sanction, and within independent ecclesiastical law only those types of unfinished ecclesiastical law which are not under the

influence of state law and do not rely on the imposition of state sanction;

- Fourthly, that independent ecclesiastical law is also composed of the secular and sacral parts, which thus makes its concept even more complex. Before all, under the secular part of independent ecclesiastical law can fall decisions made by supreme and all other subordinated church bodies, as well as their activities in the area of social community work, and under the purely sacral part of ecclesiastical law fall the decisions of a stringently religious character (for example, how to observe the Lent, when and how to perform liturgy, etc.);
- And fifthly, that not even the secular part of independent ecclesiastical law can be a kind of the law "competitive" with state law – especially not today for it is exactly the state with its law that determines ("apportions") it indirectly and informally. Normative independence of the church is, out of necessity, limited in this area, too, by the requirement that the involved ecclesiastical regulations, at least in general, be harmonised with the constitution, the law and other state provisions.

Such obvious – though not a full supremacy, enables the state itself to directly organise ecclesiastical relationships which are otherwise already regulated by the norms of sacral ecclesiastical law. In this case, there is an interweaving of the state part and the sacral part of dependant and independent ecclesiastical law. However, the interweaving is not to the full because there exists a purely sacral part of independent ecclesiastical law, which belongs to the purely ecclesiastical area. Its existence on its own and independently from the state does not challenge the full supremacy of state law over ecclesiastical law since the church by its own law cannot organise state relationships. It can seldom affect even the content and the way of their regulation. As a result, in states with democratic constitutions the scope and content of ecclesiastical law are not determined quite precisely. Thus is left room for the regulation of social relationships through ecclesiastical legal provisions, though only within the framework determined by the state through its legislation.

The relationship between state law and ecclesiastical law can also be viewed quite differently. When ecclesiastical law is considered in its entirety, it follows that the supremacy of state law over ecclesiastical law is only quantitative and illusionary: it looks like ecclesiastical law is inundated by state law. When these deposits are removed from the substance, and the concept of ecclesiastical law is reduced to its purely

sacral part – suddenly surfaces the brilliance of its original quality of independence which depicts it as historically older and more original than state law, normally, to the extent to which human exertions towards high spiritual worth is separate from similar endeavours of the state and its law. And, not even today is this a small enterprise as it has to do with substance, and not with quantity. Troicki was not wrong, but went too far when he expanded substantial characteristics of the church to ecclesiastical law at large. It did not exist even at the time whose contemporary he was.

The influence of state law on ecclesiastical law and ecclesiastical law on state law. – Although the church is an extraordinarily important factor in the life of society and the state, the same does not always apply to the relationship between ecclesiastical law and state law.[127] Until recently, there have existed or exist still today societies (for example, at the time of the Roman Empire, the early European capitalism or real-socialism) in which ecclesiastical law was significantly reduced or restricted due to the overly powerful legal statism. Such churches have on various historical grounds become the state churches (the Christian Church following the Edict of Milan in the Roman Empire, the Anglican Church as of Henry VIII or the Protestant Church as of Martin Luther) or were abrogated (as in the USSR and the members states of the socialist block /in most cases today's members of the European Union/).[128] Also, there existed such societies in which statism was destroyed for the reason of which the church had to assume the role of the state: somewhere, the church became the state (papal state), and elsewhere, it only acted in the stead of the state (the Serbian Orthodox Church during the occupation by the Ottoman Empire). Today, there exist various types of permeation and complementing between ecclesiastical law and state law, parallel to the supremacy of state law, the existence of which types is in a dynamic balance which provides the law at large with a necessary measure of viability.[129]

The influence of state law on ecclesiastical law is obvious in the area of the *creation* of regulations. Three characteristic situations should be distinguished. In reference to the first, state authorities beforehand and in ordinary legislative way through the constitution or the law *author-*

127 See: D. Perić, p. 21.

128 See: Ch. Taylor, A Secular Age, Cambridge 2007.

129 See: W. Cole Durham Jr., "The Rights of Religious Communities to Acquire Legal Entity: A Summary of Recent Developments", A paper presented at the scientific conference "Religion and Law", Belgrade, May 2011.

ise ecclesiastical subjects to create their law. Upon the adoption of their acts on the basis of authority vested by the state, the subsequent confirmation by the state is no more required (the case of the so-called "ascertained consent", when the church enjoys more freedom). In relation to the second, the state subsequently *confirms* any general ecclesiastical act, the adoption of which does not require its prior explicit legal approval (the case of the so-called "convalidated consent", when the church enjoys less freedom). In regard to the third, the combined situation, when the church enjoys least freedom, the state first vests authority in ecclesiastical subjects through general provision, and thereupon subsequently *confirms* their acts. Without that confirmation, ecclesiastical regulations cannot be valid before the law. Having the possibility to exert such double influence, state authority finds additional security in that that the most important ecclesiastical acts and regulations are going to be in compliance with the most significant acts and regulations of state law.[130]

The influence of state law is even more obvious in the area of the *application* of regulations of sacral ecclesiastical law, as mentioned while determining the concept and the layers of ecclesiastical law. Yet, there still exists a part of ecclesiastical law outside the influence of the state and its state-ecclesiastical law. It is the independent, i.e. pure sacral ecclesiastical law, within which framework the church can and should independently regulate and exercise its relationships without the interference of the state. That area, in conformity with the theory of symphony, traditionally belongs to pure ecclesiastical legal area.

The *influence of ecclesiastical law on state law* is comprised of the ties of integration, collaboration, co-operation, co-ordination, correlation, etc. short of the domination though. Only now and then can the church through its authority and the credibility of its arguments directly influence the content of state regulations pertaining to the church. However, the credibility is a matter of choice, and not the basis of being legally binding.

Although the church cannot directly influence the creation and implementation of state regulations pertaining to the church, it can sometimes achieve that goal by exerting influence on its body of the faithful, who are at the same time citizens of the involved state. And the more widely the church is spread over, the stronger is its influence on the state through its body of the faithful. Obviously, contemporary

130 See: G. Del Vecchio, Philosophie du droit, Paris 1953; L. Zucca, "Law v. Religion", Law, State and Religion in the New Europe, Cambridge University Press, 2010.

influence of ecclesiastical law is not the same in comparison with the influence it exerted when the undeveloped state law relied on ecclesiastical law and overtook it directly, or when the medieval state authority was so weak that it was unable to provide for the coercive force of ecclesiastical regulations which it explicitly issued or implicitly accepted.

4. Conclusion

It seems that closest to the truth is the fact that contemporary ecclesiastical law cannot with complete reliability be classified into a separate branch or area of the law as it is in its one part public, in its second part it is private, in its third part it is international, in its fourth part it is internal, in its fifth part it is objective, in its sixth part it is subjective, etc. Thus, it can be claimed that ecclesiastical law is a separate sub-subsystem of the law within the framework of the subsystem of autonomous law.

Leaving aside state law pertaining to the church, today it can be said with reliability that the sacral and secular parts of the ecclesiastical law are unique parts of ecclesiastical law as being one complex type of autonomous law with the oldest living tradition. And while the sacral part of ecclesiastical law has a rather staying power, it cannot be said of its secular part which has been continually developing.

Also, ecclesiastical law is not being spread over on its own within its secular part, while it is being spread over on its own within its sacral part, within which the influence of the state and its law is neither possible nor desirable as it has to do with quite original and from the very start quite independent ecclesiastical law. It can be said that it is the only type of the law which indeed does not depend on state law.

Although almost the entire ecclesiastical law is today concerned with purely organisational regulation of the church matters, and primarily with the organisation of authority-related relationships (church hierarchy and organisation) and religious activities, it can also refer to the regulation of family, educational, social-humanitarian, health and other aspects of life. In that part, ecclesiastical law is similar to the norms of other social organisations. However, that area of ecclesiastical law is not one-sided either, for at the same time its one part falls under secular (public and private), and its other part under purely sacral ecclesiastical law. This area reminds one mostly of the ideas upheld by those speaking in favour of ecclesiastical law as being a type

of *droit social*. However, it is still not so because charity and profit are not one and the same in terms of the motivation for carrying out social community work. If it were different, the overall secular activities of the church would have to come under exactly the same provisions by which are regulated the activities of all profitable and other like social organisations.

It is characteristic of ecclesiastical law that through it is primarily regulated the realisation of mutual interests. However, when a dispute arises, primarily in the area of religious rules, the contending parties refer to the permanent Church Court which, according to the precisely prescribed procedure, decides a dispute and pronounces sanctions which are executed in an organised way, etc.

In short, the place of ecclesiastical law and its relationship with state law do not genuinely reflect the contemporary influence of the church on the state and society, which is much more powerful and more comprehensive than the influence of its ecclesiastical law.

Today in the world there exist at least three formal-legal regimes for the regulation of the relationship between the church and the state in a society. The oldest *regime of the state church* exists when only one church is proclaimed the state church. Other churches are not abrogated, though only the state church has privileges at its disposal. In a somewhat more contemporary *regime of the recognised churches*, all churches enjoy freedom, but only some among them are recognised and as a result maintain a certain relationship with respect to the state. The state exercises control over such recognised churches, provides financial support to them in proportion to their needs, the number of their believers, etc. On the other hand, the churches are forbidden to put to use religious feelings of their members for political purposes. In the latest *regime of the separation of state and church*, churches are considered private institutions with the work of which the state does not interfere, but only regulates it through its legislation. At the same time, churches are forbidden to interfere with state affairs.[131] There also exist different classifications.[132] Such relationship of the state with respect to the church is eristically explained by the need to ensure the freedom of religion. Despite this simulacrum,[133] history shows that it is impossible to fully separate neither politics from religion nor the state from the church.

131 See: Enciclopaedia of Law, Belgrade 1979, p. 562.

132 See: G. Robbers, "Constitution and Religion", Constitutions et religions, Tunis 1994; N. Đurđević, Ostvarivanje slobode veroispovesti i pravni položaj crkava i verskih zajednica u Republici Srbiji, Beograd 2008.

133 See: J. Baudrillard, Simulacra and simulation, Novi Sad 1991 (translation).

That the connection between the church and the state, and ecclesiastical law and state law, has almost never been broken is also shown by the fact that, starting from the Middle Ages, jurists have been awarded the degree (and title) of the doctor of the ecclesiastical and secular law (doctorus iuris utrisque).

* ("Annals of the Faculty of Law in Belgrade. Belgrade Law Review. Journal of Legal and Social Sciences. University of Belgrade". Year LX, 2012, No. 3, pp. 243–264)

IV

VIRTUAL REALITY AND VIRTUAL SUBJECTS OF LAW

1. The origin and meaning of the term "virtual reality"

The term *virtual reality (VR)* in the sense used today was first coined and used in 1984 by William Gibson, the writer of the novel "Neuromancer". However, the pioneer experiments that allowed the creation of the technology for specific development of virtual reality were performed in the U.S.A. somewhat earlier, in the mid-sixties of the 20th century. Since that time, the technology required for creating and testing the capabilities of this newly-discovered virtual reality has been developed in the laboratories of several leading American universities. In the early seventies, it was already understood that an entirely new "imagination world" could be created with the use of computers that was additionally capable of self-development in the memories of the most powerful computers.

However, this new and extremely challenging opportunity was not created by artists, but by mathematicians, who further developed and advanced theories of virtual reality, pursuant to their scientific intentions. Shortly thereafter, due to the increased reliability of computer simulation, complete new systems were developed. They were supported by suitable "intelligent" software, actually suitable "expert systems", whose task was to develop a special kind of "computer intelligence" based on "common sense algorithm". Thereby, expert systems in the area of computing became the basis for establishing the relationship between the computer virtual world and the world of true, "objectified"

or physical reality, and not only for developing virtual reality.[134] Exactly these kinds of relationships enabled scientific development to move in a new direction and take a new course due to the use of computer simulation. That development could not bypass the law. On the other hand, *computer simulation (CS),* the use of which proves that there is virtual reality, represents a numerical technique for creating synthetic symbolic or realistic images and characters uniting informatics, telecommunications and the audiovisual. Moreover, the development of numerical techniques, relying on new numerical technologies, allows the creation of an entire parallel universe – synthetic and ever more probable, wherein one does not have to ask any more what can be done — since in that universe everything can be done – but instead, what we would have to do. Such an opportunity casts a new light on the task of computer simulation – its task is no more to provide data and estimates, but to provide experience! And this completely changes the ingrained idea of what reality is.

A somewhat unusual answer to the question *what reality is can be* found in Buddhism, and it is given by Ashvagosha, who says that "*All phenomena* in the world are nothing but the *illusory* manifestation of the mind and have no reality on their own".[135] According to another well-known school of Yogacara, the reason for that is the following: "Out of mind spring innumerable things, conditioned by discrimination. These things people accept as an external world. What appears to be external does not exist in reality; it is indeed mind that is seen as *multiplicity*; the body, property, and above-all these, I say, are nothing but mind."[136] All forms we perceive are the "mind only", the "projections", or the "shadows of the mind". Similar thoughts and the answer to the question what reality is can also be encountered in modern science, since it is no longer capable of answering the questions that can be asked by using traditional apparatus. And the answer to the question what virtual reality is depends on the answer to those questions.

134 K. Popper, Unended Quest. An Intellectual Authobiography (translation), Belgrade 1991, pp. 236–237. See: K. Popper, Conjectures and Refutations, London and New York 2002; M. Merleau-Ponty, The World of Perception, London & New York 2004; D. Mitrović, The Path of Law. Holistic paradigm of the world and law in the light of chaos theory and legal theory, Belgrade 2000, pp. 62–68 and pp. 115–116; Theory of State and Law, Belgrade 2010, pp. 196–198.

135 Ashvaghosha, The Awakening of Faith, Chicago 1900, p. 79. Quoted according to: F. Capra, The Tao of Physics. An Exploration of Parallels Between Modern Physics and Eastern Mysticism (translation), Belgrade 1989, p. 330.

136 D. T. Suzuki, Studies in the Lankavatara Sutra, London 1952, p. 242.

2. Virtual reality and meaning as being

So, what is reality, or is meaning the same as being, as emphasised by David Bohm, Rupert Sheldrake and other writers holding similar belief and orientation, and is the virtual world also real as the true world, if meaning is the same as being?[137]

The aforementioned writers give the affirmative answer to this question. According to them, meaning or meaningfulness represents the basic qualities of reality. Reality is indirectly held within meanings, since everything that is known about reality has to be somehow related to the meaning it has to us. And this says that meaning is always a whole! The essence is that there is no separation, although meaning cannot always be fixed. For example, when we interpret a theory, we arrive at its meaning. And as a rule, theories are always ambiguous, which in the end shows that the composition of meaning is such that the highest, ultimate meaning can never be reached. Even so, meaning is inexhaustible, despite its significant limitation. It has no boundaries, since it is endless, depending in each individual instance on the context where it is used. As context changes, so does meaning, along with being. It seems as though that the idea presents a reliable base for performing computer simulation, when the same or different meanings are examined in the virtual computer world to establish potential virtual or real being of the phenomena or systems. This meaning can be a virtual social character (person), but also the subject of law (law avatar).

The aforementioned writer David Bohm says the following about the relationship of meaning and being: "meaning becomes being (and vice-versa). Through this process, meaning and being come to reflect each other. But ultimately, meaning is being. As with form and content, we make the distinction between meaning and being in order to express our thought. But this distinction does not imply a real difference – it is the way by which we understand one ultimately undivided whole. At the stage in which meaning and being reflect each other, they may be treated as separate. But in a deeper stage, meaning and being have to be seen as essentially one."[138]

137 See: D. Bohm, Wholeness and the Implicate Order, London & New York 2002; On Creativity, London & New York 2004; On Dialogue, London & New York 2004.

138 D. Bohm, Wholeness and the Implicate Order, pp. 87–89.

Bohm explains the aforementioned assertion by linking meaning and sense with the notiton of information. According to Bohm, operative notion in relation to information is the notion of form. To constitute the form, the information has to have some meaning. Literally "to inform" means "to put form into", "to shape" some meaning. Therefore, 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 the feedback – to the change of its meaning! In other words, any form that has meaning can create a potential or actual information being equally significant for the real world and the virtual world.

3. Virtual reality as "natural" environment for performing computer simulation

Bohm's linking of meaning, information and being opens a possibility for the successful simulation of diverse models, ranging from the natural to social and cultural ones, since every meaning can be transformed into information that can be given an appropriate form. For this reason, computer simulation of models in virtual reality, to the same extent represents the examination of meaning with the form and through the form. Such meaning in the virtual world is the same as being. However, while meaning and being in the virtual world are always directly one and the same, in the real world they are so only indirectly. Fortunately, this has not the slightest effect either on the possibility of successful use of computer simulation, or on the reliability and verifiability of obtained results, which can be pretty much valuable in true reality. It appears that the *ability of rational mind* to differentiate between true reality and virtual reality is a very essential measure for differentiating between those two realities. Because of this, the explanation of the concept of reality, "in one area of research, wherein it is more and more clearly perceived that the patterns of matter and the patterns of mind reflect each other, promises that fascinating areas of knowledge will be opened".[139]

The aforesaid link is confirmed by new virtual reality computer techniques. These are already immense at the present moment, particularly when under specified conditions the simulation of non-deterministic models of social or legal phenomena and systems is per-

139 F. Capra, p. 381.

formed. The aforementioned techniques and their capabilities show that the power of the virtual is limited only by our imagination.

Computer simulation and new virtual reality techniques have yet to find their place in legal science and the law. Even though the law has always existed as virtual phenomenon (usually as personal or collective conventional conception), not until now this aspect of the law could have been used for creating a synthetic realistic, virtual world of the law (legal concepts, phenomena and systems), wherein also we can immerse, move within, act and evolve. The only limits are our imagination, intentions and prejudices.

With regard to possibilities offered by computer simulation and virtual reality, while linking the law with the art of imagination, other cognitive and practical possibilities are even more captivating for the application in the law – for example, if the course of some specific judicial investigation or legal proceeding would be numerically recorded from the first to the last moment. This way, it would be possible to reconstruct the entire course of the proceeding to truly recover it, along with the possibility to participate in it or change it according to the desires and needs. This would provide extraordinary opportunities for the training of lawyers, who also could elaborate potential courses and outcomes of legal or some other actions, in three-dimensional virtual space and specified time, in their virtual law classroom. Such virtual revival has yet another precious feature, since the entire course of the proceeding can be slowed down or accelerated, as desired, to completely change testimonies and arguments of the parties, and thereby the very course of the proceeding at any time, or to examine the course of the proceeding by setting conditions otherwise not present in numerically recorded actual judicial investigation or legal procedure.[140] The same results could also be achieved in some other legal action (legislative, administrative, arbitration, etc.).

This could also be applied to test the results of other legal disciplines. For example, in criminology, the character traits of a person could be reliably reconstructed based on a person's handwriting, or, vice versa, a person's handwriting based on their character traits (for example, on the foundations of Lombroso's graphological findings on the links between classified handwriting types and the characteristics of personality types). An expert could also do this directly, but not in such comprehensive manner, and not in such short time as when using

140 See: V. Flusser – L. Bec, Vampiroteutis infernalis. See:V. Flusser, "A Spoon of Creativity from the Soup of Chaos" (translation), Treći program, Belgrade, winter 1990, Vol. I, No. 84, pp. 266–287.

computer simulation. The same method could be used in criminology and penology, for example, when examining the effect of punishment on the behaviour of convicts under specified conditions. This could be done even if there is no culprit, guilt and punishment, i.e. when virtually examining an imagined situation. In addition, in civil law, a buyer and a seller could sign a purchase and sales agreement based on virtually viewing a flat or on examining the quality of a realty, in a manner that none of them is present in the flat or at the location of a realty. Capabilities of the virtual could be used for examining the work of any other governmental body or some international institution. This way, lawyers could attain reliable legal knowledge and additional legal skills by moving only in this virtual reality.

The advantages of the virtual could be used in other branches of science as well. Such extraordinary opportunities make virtual reality and computer simulation the most up-to-date and ever more important means of research, decision-making and management. Of course, this does not mean that such virtual reality has replaced or completely pushed out true reality, but that it has just become a new powerful means of modern technology that will help in familiarising and understanding the law, as an important part of reality, as well as possible. Still, these will not be the only such opportunities for using the world of the virtual in the law, since these are unknown and almost endless. There is no reason not to use such opportunities to examine some more interesting things: whether a virtual character can also be the subject of law, and not only whether virtual social characters (*virtual personalities*) can exist, as they were the first to appear in virtual reality.

4. Legal reality and the three worlds of the law

And now, a brief summary of the same subject from the perspective of the law. First of all, *what legal reality is* and what it consists of, and then, what the legal personality is, and what the subject of law is. Obviously, legal reality appeared first, and later on its subjects, or entities. As the oldest virtual creations, the subjects represent *conditio sine qua non* of the law.

It is more than obvious that legal reality exists. For example, legal marriage exists until it is dissolved, even if it has never been consu-

mated, whereas true matrimony between persons who have never been legally married usually is not considered marriage. This way, the law not only reflects, but goes beyond the true world, creating the entire legal metaworld of its own that overhangs the world of physical reality.

This world of law spreads in three planes, i.e. in three realities: physical, true and virtual, and for this reason there are also three main worlds of the law: "true or natural world" (the world of physical reality), "legal world" (the world of legal reality) and "metalegal world" (the world of legal metareality). All the three worlds spread like circles crossing each other. The central place of the law is located in the legal world (metaworld), as an intermediary between the physical world and the metalegal world of ideas.

The first, "true world" (the world of physical reality) represents the physical world, the world of physical objects and forces in the broadest sense of the word. That is the natural world which "has no beginning and no end", "as a whole, of unalterable size", "enclosed by 'nothingness' as by a boundary".[141] In that dynamic, processed physical world, at a certain time of its development, man appears as a "being endowed with spirit", and also the law appears as an integral part of that world (since "in infinite time, at some time or another, every possible combination could be – actually must be! – realised"). The law first emerges from that world in the form of material legal sources, and then re-emerges into it in the form of materialised meaning as the realised, objectified law. In that physical world of causes and consequences, the law exists as something that "is".

The second, "legal world" (the world of legal reality) is the metaworld of thought processes and subjective experiences, which in the normative form overhang the physical reality, producing consequences that would not exist if there were no commands. Therefore, this is the true world wherein the "being endowed with spirit" resides, capable to learn, create, examine and apply the law. From that world of thought processes and subjective legal experiences, the law appropriately acts upon true reality. (It has already been mentioned that marriage as actual co-existence of man and woman does not produce the same consequences as a non-consumed legal marriage.) Because of this, the legal world overhangs and goes beyond physical reality by its special legal reality from which it acts upon physical reality. In that legal world, the law at the same time exists as something that "is", and as something that "needs to be". It "is", since the meaning is one type of the existence.

141 F. Nietzsche, Aus dem Nachlass der achtziger Jahre (translation), Belgrade 1976, p. 432.

However, it is also something that "needs to be", since the question is about the determined meaning issued in the form of the appropriate command that is to be materialised.

The third, "metalegal world" (the world of legal metareality) is the meta-metaworld of legal statements, theories, problems and (critical) assertions. It is the pure product of human mind and human activity, which overhangs the physical world and the legal world. However, that metalegal world, in a broader sense, also includes all the products of human mind (legal concepts, institutions, procedures or legal works). Even so, this has not the slightest effect on its reality, since it is real as are all human products in general – from language codes to such social institutions as "university or police".[142] It has its history (the history of our ideas) and its values (created by human mind). But, although purely virtual, it is not self-sufficient, since nothing that exists is deprived of the meaning and purpose. In addition, its content, if only indirectly and only partially, is related to the law spreading in the two previous worlds. Therefore, that is the world of legal metareality, the world wherein the law is always something that "needs to be".

The metalegal world is a pure product of human mind. We are the ones who create the objects of that world. And the fact that these objects have their inherent and autonomous laws, which create the unintentional and unpredictable consequences, is a mere example (although extremely interesting) of a more general rule that all our acts have such consequences. For this reason, the metalegal world should be viewed as the product of human activity with consequences to us as great – or greater – than that in physical environment. There is a kind of the feedback in every human activity: "in acting *we always* act, *indirectly*, upon *ourselves* also".[143] This feedback to the same extent also applies to the legal world, which is constantly emerging from the physical world and into which it is constantly re-emerging.

The physical world is the world of the material sources of the law and materialised law. The legal world is the world of formal sources and systematised law. The metalegal world is the world of legal concepts (statements, theories, problems and critical claims). Since the first world by itself is not legally active, and the third one is not legally effective, there is the legal world as an intermediary between the first and the third world, between the pure matter and the pure ideas. That legal world provides the necessary link, meaningfulness and expediency for all the three holistically created worlds of the law.

142 K. Popper, p. 93.

143 Ibid., pp. 93–94.

Among the aforementioned worlds of the law, there is a constant intertwining. It is performed in cycles representing the law as the imperfect phenomenon that cannot be fully understood, and that is driven by the permanent instability. In the law, the appropriate norms are continuously created and cancelled by legal acts; the appropriate relations appear, change and cease; the position of the subjects of law performing various material actions and acting in a certain way according to legal norms is changed, etc. And this constant motion takes place in certain order, meaning that the law itself includes rules according to which this motion is performed. This allows us to conclude that there are two more sub-worlds within the virtual world of the law: *the legal world of rules* (the world of rules themselves) and the *legal world of metarules* (the world of procedural rules on rules). The first one determines the content of legal communications, whereas the second one determines the order of the correct functioning of the rules of law and human behaviour according to those rules.

Obviously, virtual legal reality not only exists, but it effectively influences the world of physical reality. If such legal reality has existed since the time of the appearance of the law, it follows that the only novelty is the appearance of a new, computer legal virtual reality. It already exists, which is indicated by its virtual characters that are allowed to possess the characteristics of the subjects of law.

5. Legal personality and the subject of law as virtual creations

The following important question is: what is legal personality, and what is the subject of law? Are these not virtual creations of human spirit, too? First, a biologically created human being had existed, and only thereafter personality appeared, i.e. a character, an individual, a person (from Latin word *persona* in the sense of "personality", as "person", or "character", as a "mask"). It represents an upgrade, i.e. the social concept, which concept in the law transforms into legal personality, natural or legal person, who is acknowledged to have the property of the subject of law. Due to this, the personality and the subject are the same concepts in the law. Only the social concept of the personality is broader than the legal concept of the subject, which is a special type of the social personality.[144]

144 D. Mitrović, Theory of State and Law, pp. 437–147. See: Introducton to Law, Belgrade 2011, pp. 236–246; Autonomous Law, Belgrade 2010, pp. 63–65, 83–99, 106–113, 102, 172–173.

The law cannot exist without persons, for it was created because of them. Nowadays, in civilised countries all the people are the subjects of law. Yet, there were orders wherein all the people were not the subjects, but some of them were the objects of the law. But, even if a person is individually considered the subject of law, it can be noticed that some subjects of law have developed consciousness and will, while others have no such consciousness and will, and therefore can neither understand legal norms nor behave accordingly. Nevertheless, even such persons are considered to be the subjects of law, since the law can do something for their benefit or charge them with something, irrespective of their consciousness and will. In addition, since Roman law until today, there have been organisations (institutions, associations, foundations, etc.) which are considered to be the subjects of law. Although not being natural persons, they are composed of natural persons, showing that a person by himself/herself is not the only subject of law. Finally, in one hypothetical and quite limited sense, the idea emerges again that, under certain conditions and to a limited extent, animals can also be the subjects of law, i.e. the holders of passive legal capacity.[145] Obviously, the objects of law cannot be the subjects of law, but the subjects of law can become the objects of law.[146]

The subject of law in a narrower meaning represents only the individual that is subjected to positive law of the state, but provided that it has three important features: the capacity to own (property), the capacity or power to create legal acts (formation of law) and the capacity to be responsible for its illegal actions (legal liability). All the three properties together make the unique concept of the subject of law as the owner, the creator of the law and the legally responsible person.[147] The subject of law is, therefore, *the holder of passive and active legal capacity,* i.e. specific powers and liabilities. Both capacities are not its natural, but virtual legal features, acknowledged to the people and their creations by legal order.[148]

By passive legal capacity, the subject is linked with the powers and responsibilities determined by the law (for example, of spouse, heir, owner, creditor, debtor, etc.). This type of capacity is acquired by birth of a natural person or by establishing and registering a legal person. And *vice versa*, it is lost by physical death or by closing or removing a legal person from the register.

145 M. Paunović, The Rights of Animals, Belgrade 2005, p. 131; N. Visković, Theory of State and Law, Zagreb 2006, p. 134.

146 J. Melvinger, Introduction to Law, Novi Sad 1965, p. 392.

147 A. Gams, Introduction to Civil Law, Belgrade 1988, p. 99 and further; O. Stanković, Introduction to Civil Law, Belgrade 1996, p. 51 and futher.

148 G. Vukadinović, Theory of State and Law II, Novi Sad 2007, pp. 148–149.

The subject of law, who is always the holder of passive legal capacity, is to be differentiated from the person that, as the holder of active legal capacity (for example, business capacity) can consciously and wilfully act according to legal norms. Such an actively (and passively) capable person is called *legal agent.* Acting in line with legal norms, a person can act for their own benefit or for another's benefit. In the first case, it has to do with an owner, whereas in the second case, it has to do with a representative. In case of a representative, there needs to be legal representation as some kind of "replacement" with other subjects of law. For this reason, it is said that a *representative* is an independent and a special type of legal agent, who performs certain activities in the interest of other natural and legal persons. They always act on behalf of a represented person (representee), and consequently that person (and not legal agent as representative) is the subject of legal activity.[149] For example, in the law it is considered that a person incapable to work has signed a purchase and sale agreement through a representative, i.e. that a person, and not one's representative, has become the subject of the property right over a purchased thing.[150] The relationship between a representative of a person capable to work and a represented person is similar to the relationship between a representative and a person incapable to work.

The case is somewhat more complex when determining the nature of a legal (moral) person. It also represents a virtual social creation to which the property of the subject of law is acknowledged, since it is an "adequately organised and formed" whole, which is clearly distinguished from other similar human creations. Although a legal person has no separate consciousness and will of its own, it is nevertheless acknowledged as the subject of law, as well as the natural person that has this consciousness and will. This is done because legal person also represents the "centre of interests and activities of the people",[151] i.e. has the powers and liabilities in accordance with its character and goal for which it has been established. It is only that these powers and liabilities cannot be related to a person's capacity to be a parent, spouse or to have certain civil rights. Hence, the principle of freedom applies to natural persons, whereas the principle of restricting freedom applies to legal persons. Natural persons are permitted to do or not to do something, as long as their behaviour is not expressly forbidden by legal

149 T. Živanović, The System of Synthetic Philosophy of Law, Vol. III, Belgrade 1959, p. 285.

150 See: D. Stojanović, O. Antić, Introduction to Civil Law, Belgrade 2004; O. Antić, Law of contracts and torts, Belgrade 2007.

151 R. Lukić, Introduction to Law, Belgrade 1994, pp. 284–285.

norms. This is in keeping with the understanding according to which everything that is not legally forbidden is free, i.e. legally allowed. Legal persons may freely do or not do something only if that is expressly allowed by legal norms, where this is in accordance with the understanding that only what is legally permitted is free. The aforementioned difference between natural and legal persons with regard to their active and passive capacities is justified by the nature of legal persons and their specialised activities, whereby it is indicated that there is some preliminary notion about their legal nature.

Today, in legal science, there are at least three main theories explaining the *nature of legal person.* According to the first and the oldest *theory of fiction,* a legal person is considered to be a fictional, artificial subject of the law. According to the second theory – *the theory of negation*, the subjectivity of a legal person as such is contested, i.e. it is considered to be a mere set of natural persons, who are the only holders of powers and liabilities. Finally, according to the third theory – *the theory of reality,* the subjectivity is acknowledged to a legal person that is considered as one centre of activity and interest. Besides the aforementioned, there are other theories explaining the essence of a legal person, for example, the concession theory, the organism theory, the group personality theory, Ihering's "bracket theory", the theory of ownership, Kelsen's theory, etc.[152]

Only owing to the theory of reality, a legal person can appear as a special social and legal creation having all the powers and liabilities as the natural person, or even to a greater extent than the natural person. Its essence is that the legal person is considered to be a social organisation composed of as many people as possible, performing certain powers and duties on behalf of that organisation. This means that legal consequences of their actions are not attributed directly to them, but to the whole organisation. A legal person is, therefore, the *subject of law without the capacity to independently and directly perform its powers and liabilities*. Instead by a legal person, this is performed by its bodies as representatives. However, a legal person as a whole also has powers and liabilities towards the members of which it is composed. The same situation exists in the case of virtual characters as the new subjects of law. These also represent the "centre of interest and activities of people" and "do not have the capacity to independently and directly perform their powers and liabilities", the same as legal persons.

152 R. Pound, Jurisprudence (translation), Vol. II, Belgrade – Podgorica 2000, pp. 493–529.

6. Virtual computer character as the subject of law

The law exists not only as the real and ideal, but also as the virtual computer phenomenon uniting in itself in an unusual way the real and the ideal. This took place when the real and the ideal in the law intertwined for the first time in the virtual computer world owing to the rapid development of information technologies which imperceptibly but quickly changed the world of our notions to the same extent as our physical environment. This way, besides the real subjects of law, natural and legal persons existing in true reality, new virtual entities appeared, i.e. the virtual characters or avatars, as they are also called. They exist only in computer virtual reality, while they do not exist in true reality. These are completely new and autonomous subjects of law. They are new, since they have never existed before, and autonomous, since they exist only in computer virtual reality, wherein and wherefrom they can legally act.

Since virtual characters (avatars) can produce legal consequences in both realities, i.e. can act only in virtual reality or from virtual reality upon real physical and moral subjects of rights in true reality, an important question of their legal nature is posed.

The nature of virtual characters can be explained in various ways – for example, by the theory of representation, especially when it is about virtual natural persons. Its main drawback is the difficulty of explaining how the real subject of law can represent itself in the virtual computer world (for example, how a true, real person can be a guardian to its avatar or, maybe vice versa, an avatar to a real person). The answer that it is about a simultaneous double legal subjectivity of the same real subject does not appear to be either correct or acceptable, since virtual and real subjectivities of one person are not identical. This is not the result of attributing legal actions to the same entity in the virtual world and the real world. Thereby it seems that the essence of the problem of determining virtual characters is touched upon once more.

It appears that the closest to the essence of virtual characters is the fact that one can consider them as though they explain the essence of a legal person, which in relation to natural person is actually an illusion, but the illusion that produces extremely significant legal and social consequences. Having in mind that in legal science there are at least three main theories explaining the essence of a legal person, according to the first, the oldest theory of fiction, a virtual character still

would be the subject of law, only an artificial one and therefore illusory. According to the second theory – the theory of negation, a virtual character could not be the subject of law. This is reserved exclusively for natural and legal persons being the only holders of powers and liabilities. Finally, according to the third theory – the theory of reality, complete subjectivity could be acknowledged to a virtual character as one more centre of activity and interest, as though it is about a natural or legal person, which in some laws is already being done today.

By comparing a legal person with virtual characters, it can be noticed that virtual characters, as well as legal (moral) persons, have the capacity of ownership (property), the capacity or power of creating legal documents (formation of law) and the capacity to be responsible for their illegal acts (legal liability), as well as their identity, therefore, all that together makes a unique concept of the subject of law as the owner, the creator of law and the legally responsible person, only in virtual reality. As has already been said, they only "do not possess the capacity to independently and directly perform their powers and liabilities", the same as legal persons.

It seems that for the explanation of their essence at this time the theory of fiction is more acceptable than the theory of reality, which could prevail sometime, as formerly happened with the subjectivity of a legal person.

7. Conclusions

The law cannot exist without the subjects. They have always existed as conditio sine qua non of the law. First natural persons had become the subjects of law, and thereafter also their creations – legal (moral) persons.

Information and technological developments could not have bypassed contemporary law. As a result, more often and considerably more is being thought about a new, third type of the subjects of law – virtual characters (avatars). This is being done for the purpose of advancing and organising business communication, which is increasingly being translated from the traditional true world into the new virtual computer world.

This change requires the re-examination of traditional beliefs and theories concerned with what the subject of law is at all. It also requires at this moment to at least make an attempt to determine the le-

gal nature of virtual characters. When it has to do with the explanation of their essence, it seems that at this moment fiction theory is more acceptable than reality theory, which can sometime prevail, as it had happened with the subjectivity of a legal person at some point in time in the 17th century.

In addition to purely practical reasons, the appearance of virtual characters displays in a completely different light some of the incessant questions to which a valid answer has not yet been given, nor, it seems, will ever be: What is reality? What is the world at all? What is man (especially the telematic virtual man)? What is the place of man in reality and in the world? For how long can the world and man, as its constituent part, go on developing? Does virtual reality free or capture human will? An acceptable answer to those numerous questions, which are primarily ethical and biojuristical, has not been found as yet. Apparently, the essence is not in the conclusiveness of such answers, but rather in their usefulness. Behind every mask of the subject of law there is a real human face.

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V
THE REALISTIC CONCEPT OF THE LAW

1. 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), *νομουεσιά* (passing the laws, legislation), *νομουετίκί* (the art of passing the laws), *νομούέτης* (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 this, 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 "investigation 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)".[153] And, while legal axiology as a separate branch of legal philosophy studies values, and

153 D. Vrban, Sociology of Law, Zagreb 2006, p. 7.

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 authorisation 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.[154] 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.[155] 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.

154 D. Mitrović, Theory of State and Law, Beograd 2010, pp. 187–188.

155 G. Del Vecchio, Philosophie du droit, Paris 1953, p. 431; I. Kant, Kritik der reiner Vemunft (translation), Beograd 1958, p. 585.

2. 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 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, existentialism, 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. 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.[156] 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*).[157] Following them is the *ecclesiastically natural-legal teaching* (with the Roman Catholic version: Aurelius Avgustinus and Thomasius Aquitanus,[158] and the protestant

156 N. Visković, Theory of State and Law, Zagreb 2001, pp. 91–96.

157 See: M. Djurić, Natural Law Idea of Greek Sophists, Beograd 1959; Plato, Laws (translation), Beograd 1990; Aristotle, Metaphysics (translation), Beograd 1960; R. Lukić, The History of Political and Legal Sciences, Beograd 1973.

158 See: T. Aquitanus, Summa theologiae (translation), Zagreb 1980.

version: Martin Luther and Jean Calvin).[159] 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).[160] And then there comes the calm period. It lasts until the renaissance of 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)[161] 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*.[162]

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 "statutory non-law and suprastatutory law" as the law represents reality that should serve the idea of the law as value;[163] 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

159 Lj. Tadić, Philosophy of Law, Beograd 1996, pp. 66–68.

160 I. Kant, Die Metaphysik der Sitten (translation), Beograd 1998, pp. 32, 119.

161 M. Villey, Philosophie du droit, Paris 2001, p. 8.

162 J. Rawls, A Theory of Justice (translation), Podgorica 1994, pp. 221–229.

163 G. Radbruch, Rechtsphilosophie (translation), Beograd 1980 (1999), pp. 38–39, 94–101, 230–238, 287–289.

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 positive law contains not only *legal rights* but also *legal principles*;[164] John M. Finnis with his theory of substantive natural law based on *reasonableness*;[165] and Lon L. Fuller with the procedural natural law theory of the *internal morality of the law* that solely makes the law possible,[166] besides the already mentioned John Rawls. It seems that it was only Dworkin who offered the only rationally tolerable *instruction* for linking natural law with positive law, which law could really flow into positive law via the general legal principles.

Aprioristic-phenomenological and existentialism 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[167] to Aleksander Peczenik and Robert Alexy.

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 that they try to free legal science from formalism. The best known is the *egological legal theory* of Carlos Cossio.[168]

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164 R. Dworkin, Law's Empire (translation), Beograd 2003, pp. 5–7, 102–124, 412–414, 435–443. See: Taking Rights Seriously (translation), Beograd – Podgorica 2001.

165 J. M. Finnis, Natural Law and Natural Rights, Oxford Un. Press, 1982, pp. 276–277.

166 L. Fuller, Morality of Law (translation), Beograd 2001 (2011), pp. 17–46, 50–55, 113–136, 172–174.

167 See: T. Viehweg, Topik und Jurisprudenz (translation), Beograd 1982; C. Perelman, Droit, morale et philosophie (translation), Beograd 1983.

168 See: C. Cossio, La theoria egologica del Derecho, 1954; J. Vilanova, Introduction del Derecho, 1994.

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.

Positivistic theories of the law reject the idea of natural law. There is no other law beside the value-based neutral positivist law that exists in reality. Although all the positivists are agreed that natural law does not exist, they disagree among themselves when it comes to the determination of the content of positivist 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,[169] Gustav Hugo and Georg Friedrich Puchta, Clemens Brentano), of the *normative legal theories* (Hans Kelsens die Reine Rechtslehre).[170] 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 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.)[171] 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 a society, there is law" (*Ubi societas, ibi ius*).

In the 19th century numerous organic-biological theories of the state and the law were created (Otto Gierke).[172] However, the first modern significant sociological theory, expressed in the statist form

169 K. von Savigny, Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft (translation), Beograd – Podgorica 1998, pp. 19, 80, 146–151.

170 H. Kelsen, General Theory of State and Law (translation), Beograd 1951 (2010), pp. 11, 13–14, 17, 129.

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

172 O. Gierke, Deutsches Privatrecht, Berlin 1895, pp. 95–97.

of purpose-oriented jurisprudence, was presented in the second part of his life by Rudolph von Ihering.[173] Ihering's teaching quickly grew up to become the school of the jurisprudence of interests (Philip von Heck, Max von Rümelin).[174] 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),[175] 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,[176] sociological-psychogical theory of the law of Leon Petrazycki[177], or various pluralistic theories of the law of (Georges Gurvich, Robert Laun, etc.),[178] French legal modernism of (Edgar Morin, François Gény). The latest instance is 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 recognised pragmatism and anti-formalism.[179] A great contribution to sociological legal theories was given by Max Weber, who had developed historicist sociological theory of the law[180] as well as some Russian jurists of the first decades of the 20th century (Пётръ И. Стучка, Михаил А. Рейснер, Евгение Брониславович Пашуканис),[181] and

173 R. von Ihering, Der zweck im recht (translation), Beograd 1894–1895, pp. 78–79.

174 See: Ph. von Heck, Gesetzauslegung und Interessenjurisprudenz, Berlin 1914.

175 E. Ehrlich, Fundamental Principles of Sociology of Law, Cambridge Un. Press, 1936, pp. 35–41; H. Kantorowicz, The Definition of Law, Cambridge Un. Press, 1958, pp. 14–19, 38–39.

176 L. Duguit, Les transformation du droit public (translation), Beograd 1998, pp. 19, 35–36, 40–65, 201–202.

177 L. Petrazycki, Теория права и государства в связи с теорией нравсдтвенности (translation), Beograd – Podgorica – Sremski Karlovci 1999, pp. 13–112.

178 G. Gurvich, L'idée du droit social, Paris 1932, pp. 15–16, 30, 42–43, 46–59, 80–81; R. Laun, L'autonomia del diritto, II, Padova 1931, p. 58, etc.

179 J. Dewey, The Public and Its Problems, New York 1927, p. 53, etc.

180 M. Veber, Virtschaft und Gesellschaft (translation), Beograd 1976, I, pp. 18, 252–253, 264 and II, pp. 537–614.

181 E. B. Pašukanis, Общая теория и марксизам (translation), Sarajevo 1958, pp. 247–271.

following them, Karl Renner,[182] 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".[183]

The latest *multidisciplinary legal theories* have, as their goals, to increase the interest of legal science to comprise not only apparently different themes that, until recently, were at the fringes of legal interest or were not considered in legal science.[184] Typically, they were *Critical Legal Studies* (Roberto Magabeira Unger, Catherine A. MacKinnon, Jacques Derrida); feminist studies with its multi-branching feminist jurisprudence (Francis Elisabeth Olsen, Carol Gilligan, Catherine A. MacKinnon, Tove Stang Dhal);[185] *Law and Economics Analysis* (Ronald H. Coase, Guido Calabresi, Richard Allen Posner);[186] *constitutionalist theories of the law* (Robert Alexy, Carlos Santiago Nino); *multiculturalist theories of the law* (Charles Tylor, Will Kymlicka, Christine M.

182 K. Rener, Die Rechtsinstitute des Privatrechts und ihre soziale Funktion (translation), Beograd, 1997, pp. 25–45.

183 G. Fassò, Storia della filosofia del diritto (translation), Beograd (Podgorica) 2007, pp. 658–659.

184 G. Vukadinović – D. 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, pp. 135–161.

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

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

Korsgaard, Ian Brownlie, Christian Tomuschat, Gerald Dworkin, Joseph Raz);[187] *communitarist theories of the law* dealing with the political issues of the citizens, the organisation of society and the nation as a phenomenon;[188] *systems theories of the law* (Niklas Luhmann, Alfred Gierer);[189] *political-cybernetic theories of the law* (Karl W. Deutsch); *bioethical theories of the law* (Van Ransselaer Potter, Francesco d'Agostino); as well as the *Law and literature movement*.[190]

This brief and condensed overview clearly shows two important things: first, that in the 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.

3. An approach to the determination of the concept of the law and the 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

187 Ch. Taylor, Modern Social Imaginaries (translation), Beograd 2004, pp. 21–28, 59–98; W. Kymlicka Multicultural Citizenship (translation), Novi Sad 2002, pp. 9–76; J. Raz, Ethics in the Public Domain (translation), Beograd – Podgorica 2005, pp. 14–59, 94–112. See: I. Brownlie, Rights of Peoples in International Law, Oxford Un. Press, 1988; Ch. Tomuschat, Self-Determination in a Post-Colonial World, Dordrecht, 1993; Ch. M. Korsgaard, The Sources of Normativity, New York 1996.

188 M. Walzer, Spheres of Justice (translation), Beograd 2000, p. 16, etc. 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 age to twentieth century (translation), Beograd 2000; A. Etizioni, The Third Way to a Good Society, London 2000.

189 N. Luhmann, Soziale Systeme, Grundriss einer allgemeinen Theorie, Frankfurt am Main 1984, p. 364, etc.; A. Gierer, Die Physik das Leben und Seele, Munich & Zurich 1985, p. 233, etc.

190 E. V. 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.

the concept of the law.[191] 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.[192] 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 definitive 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.[193]

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.[194] Obviously, 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 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

191 R. Lukić, Theory of State and Law, Beograd 1976, pp. 111–113.

192 J. Raz, Ethics in the Public Domain (translation), pp. 213–228.

193 A. Augustinus, Confessions (translation), Beograd 1989, I, p. 8.

194 L. Vittgenstein, Philosophische untersuchungen (translation), Beograd 1980, p. 39, etc.

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.

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.[195] 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 fortunately shaped that there is no precise measurement of truthfulness", but for the same reason there are "a number of excellent measurements of incorrectness".[196]

The concept and the definitions of the law are suitable for work when they are right 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. Rightness means to do something properly. Something is righteously done because it has been carried out in a proper, systematic and expert manner, and not because it is truthful. Besides, whatever is right is, *ipso facto*, suitable to be used for work (the case of the so-called "applicable rightness"). 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 right when it is solid, i.e. unrighteous when it is not solid.[197]

Whenever they are solid, *the concept and 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 this, instead of striving towards truthfulness, one should tend towards what is humanly possible – toward usefulness strengthened with righteousness and suitability

195 L. Vittgenstein, Über Gewissheit (translation), Novi Sad 1988, p. 16, t. 61.

196 B. Pascale, Penseés (translation), Beograd 1988, p. 72, t. 82.

197 H. Jeffreys, Theory of Probability, Oxford 1948, pp. 17–18.

for work.[198] 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 scrutiny 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 realised 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.[199]

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 state sanctions.[200]

198 A. Ross, Law and Justice (translation), Beograd – Podgorica 1996, p. 57, etc.

199 See: D. Mitrović, Legal Theory, Beograd, 2007.

200 R. Lukić, "The Notion of Law", Zbornik za teoriju prava, SANU, II sveska, Beograd 1982, pp. 27–39.

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 behavior, 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 time 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.[201]

In addition to the aforementioned 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.

It seems that that the 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

201 S. Troicki, Eclessiastical Law, Beograd (1938) 2011, pp. 17–18.

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 emphasises 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.[202]

4. 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 the 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".[203] In this dynamic, processionalised physical world at a certain moment of its development there appears man

202 H. Hart, The Concept of Law (translation), Podgorica 1994, 9–18, pp. 37–38, etc.

203 F. Nietzsche, Aus dem Nachlass der achtziger Jahre (translation), Beograd 1976, p. 432. See: Werke, Kritische Gesemtausgabe, VII/3, ed. Berlin – New York 1968–1970.

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). 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 materialised meaning as realised, 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 consummated.) Because of this, 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 materialised.

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".[204] 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

204 K. Popper, Unended Quest: An Intellectual Autobiography (translation), Beograd 1991, p. 93.

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".[205] 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 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 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.[206]

5. The law as purposeful creation and processualised dynamic metasystem

The law is *a purposeful creation* completely filled with meaning and sense. In fact, the law is so filled with 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.

In order for the law to fulfill its purpose, it must not, first of all, contradict the laws of nature. Should this still be done, and of the man required to do what nature does not allow to be done, such a require-

205 Ibid., pp. 93–94.

206 D. Mitrović, Theory of State and Law, pp. 189–194.

ment 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/she would like the law to be, at the same time, correct and efficient. Because of this, 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/her own requirements and expectations of the others. And, if they succeed in bringing into agreement these two things, then they can count on thus created law to be active and effective. Should the lawmaker go into another extreme and equalise their requirements completely with the demands of nature (if, for instance, they require 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 processualised 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 which 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 legal norms, etc. is changed. This perpetual movement, too, continues in a 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 organise the contents of legal communication while the second one is used to determine the order of the proper application of legal rules and human behavior following them.

6. What is common in the conventional concept of the law

When discussing "the scientific phenomenon of the law",[207] 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".[208] 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 behavior* that is, acting or not acting. It stems from the very essence of the law as the means for the regulation, equalisation and controlling human behavior, 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 materialised, whereby its expression and cognition is possible. In a somewhat narrower sense heteronomy refers to an internal experience and the attitude of the subject towards the norm, while the externality refers to how the behavior 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 organisations 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

207 H. Kelsen, p. 18.

208 R. Lukić, "The Notion of Law", p. 27.

character of the law consists of "a systemic legitimate influence exerted upon the behavior of the people".[209] 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 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 organisation that are the traditional subjects of legal regulations. Because of this, those relations must precisely measure authorisations 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 organised. There are also relations that require only the organisation of a social process.

The law regulates human behavior trying to measure it as precisely as possible. *The quantification of the law* should determine precisely the authorisations 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 this, 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 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.

Co-operation and conflicts are the main motives, causes, forms and dimensions of human actions in societies. The end of co-operation 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 recognised, 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.

209 E. Pusić, Social Regulation, Zagreb 1989, pp. 149–151.

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 authorisations 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 behavior it is estimated whether a human behavior is legally valid, owing to which the subjects of law can more easily bring into agreement their behavior. 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 sanctions is a regular activity of the state and social organs.[210] This activity is carried out in general or collective interest.[211] 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). Sanctions are carried out in accordance with legal provisions (their annulment).

The goal of the law is the realisation of the values of order, peace and security. *Order* exists when every type of behavior 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 their own "precisely determined" place.[212] *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 or a reliable belief that the law will be implemented.[213]

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

The aforementioned common characteristic of the law renders possible living together with the least possible discord, obstacles, con-

210 J. Raz, pp. 234–240.

211 T. Živanović, The System of Synthetic Philosophy of Law, III, Beograd 1959, pp. 338–340.

212 R. Lukić, The System of Philosophy of Law, Beograd 1992, p. 462.

213 Dj. Tasić, An Introduction in Legal sciences, Beograd 1941, p. 24.

flicts and fights that weaken and disrupt a society and uselessly spend energy of the people. This way the law brings into social relations the necessary predictability and certainty, frees human creative energy, strengthens stability and speeds up the progress that enables co-existence of the people in society.[214]

7. 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 complete law, while others belong to incomplete law. This applies both to the norms of state law and the norms of autonomous law (*droit social*). Moreover, the norms of 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 state law".[215] 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 complete and incomplete state and autonomous law.

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, 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 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 complete state law, while about the second type of in-

214 R. Lukić, "The Notion of Law", p. 27.

215 Ibid., p. 31.

complete state law even this cannot be said. Still, the law recognises 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 "naked" law (nudum ius).[216]

All this is also applicable to *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 incomplete autonomous law: "less perfect" autonomous law and unfinished ("unrealised") autonomous law.

The aforementioned difference concerning common characteristics of the aforesaid types of the law is explained by the fact that complete state law and autonomous law represent "a higher degree of development of one in many ways the same social phenomenon".[217]

Thus the concept of the law in *the expanded* sense contains, in layers, three types of state law and three types of autonomous law. The first layer consists of *complete* laws – state law and 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) – state law and 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 unrealised laws – "naked" state law and 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*).[218] 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 common legal characteristics fall under purely social rules.[219]

216 Id.

217 Id., p. 29.

218 N. Visković, pp. 169.

219 R. Lukić, pp. 29–30.

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 complete state law. There follow incomplete state law, complete autonomous law, incomplete autonomous law. At the very end there are unfinished state law and 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 autonomous law, would have been regulated either with state law or with social norms. It comes to light that between state law and social norms there exists a vast social area that is filled with autonomous law.

On the basis of the distinction made between complete, incomplete and unfinished autonomous law and their links with state law it is possible to make yet another division – into *dependent and independent autonomous laws*. Under dependent autonomous law would fall all types of complete autonomous law and incomplete autonomous law that are under the influence of state law, particularly as to the possibility of applying state sanctions, while under independent autonomous law would fall only those types of unfinished or unrealised autonomous law which are not under the influence of state law, nor do they rely on the application of 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 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",[220] 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.

220 N. Visković, p. 30.

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 behavior. 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.[221] But, the statist-positivistic statement stemming from it that jurists should not try to determine whether 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 idealised 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 honorable, inspired by love and proof of their mutual respect. Then only *The Ten Commandments* would have been enough to regulate all of their relations. The law exists because people and their behavior 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 idealised teachings of the law.

8. 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.

221 A. Ross, Law and Justice (translation), pp. 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 organisation of a society), measurability and precision, the existence of a dispute and the coming into existence of the court, special formalisation procedure, social (external) sanctions, the realisation of social and legal values (of the order, security, peace, justice, freedom, etc.) and enabling the co-existence of the people in a society. 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.

* (With Prof. Dr. M. Trajković, "Synthesis Filosofica", 53 [1/2012], Zagreb 2012, pp. 157–178)

VI
THE IDEALISTIC CONCEPT OF THE LAW

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 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).[222]

Through the mentioned linguistic terms are partially intersected the main meanings of the law: its idealistic and realistic meanings, as well as their 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 realistic theories and teachings. This 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 this, it is conventionally said that the law has its *naturally-legal meaning*, which is one

222 See: D. Mitrović, An Introductuon to Law, Beograd 2012, pp. 118–120.

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, the theory and science get in touch with political and moral philosophy.[223] It is not surprising, 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, this diversity, which captivates, has not offered either a unique or a definitive answer to the question of what the law is.[224] 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.

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, existentialism, 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 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 and positive law. 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.[225] 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.

223 See: D. Vrban, Sociology of Law, Zagreb 2006, p. 7.

224 See: D. Mitrović, Theory of State and Law, Beograd 2010, pp. 187–188.

225 See: N. Visković, Theory of State and Law, Zagreb 2001, pp. 91–96.

The oldest are *antique naturally-legal theories*. They comprise the period from the mythical traditions of ancient Greeks to Justinian's *Corpus iuris civilis*.[226] Following them is the *ecclesiastically natural-legal teaching* (with the Roman Catholic version: Aurelius Avgustinus and Thomasius Aquitanus,[227] and the protestant version: Martin Luther and Jean Calvin).[228] 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 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).[229] And then there comes the calm period. It lasts until the *renaissance of 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)[230] 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*.[231]

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

226 See: M. Djurić, Natural Law Idea of Greek Sophists, Beograd 1959; Plato, Laws (translation), Beograd 1990; Aristotle, Metaphysics (translation), Beograd 1960; R. D. Lukić, The History of Political and Legal Sciences, Beograd 1973.

227 See: T. Aquitanus, Summa theologiae (translation), Zagreb 1980.

228 See: Lj. Tadić, Philosophy of Law, Beograd 1996, pp. 66–68.

229 See: I. Kant, Die Metaphysik der Sitten (translation), Beograd 1998.

230 See: M. Villey, Philosophie du droit, Paris 2001.

231 See: J. B. Rawls, A Theory of Justice (translation), Beograd – Podgorica 1998.

of the law as the embodiment of the idea of justice, as the law represents reality that should serve the idea of the law as value;[232] John M. Finnis with his theory of substantive natural law based on the "requirement of practical reasonableness;[233] Lon L. Fuller with procedural naturally-legal theory of the *internal morality of the law* that solely makes the law possible;[234] and 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".[235]

Aprioristic-phenomenological and existentialism 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[236] to Aleksander Peczenik and Robert Alexy.

In contrast to the 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, especially as the value of justice, and that they try to free legal science from formalism.[237] At the heart of interest of those theories is found 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's

232 See: G. Radbruch, Rechtsphilosophie (translation), Beograd 1980 (1999), pp. 38–39, 94–101, 230–238, 287–289.

233 See: J. M. Finnis, Natural Law and Natural Rights, Oxford Un. Press, 1982, pp. 276–277.

234 See: L. L. Fuller, Morality of Law (translation), Beograd 2001 (2011), pp. 17–46, 50–55, 113–136, 172–174.

235 See: R. Dworkin, Taking Rights Seriously (translation), Beograd – Podgorica 2001.

236 See: Th. Viehweg, Topik und Jurisprudenz (translation), Beograd 1982; Chaim Perelman, Droit, morale et philosophie (translation), Beograd 1983.

237 See: N. Visković, The Concept of Law, Split 1980, p. 17.

state of value" (Emill Lask), i.e. as "the concept of culture which is linked with values or as reality, the idea of which is *to serve justice*"[238], it is thus claimed: the concept of the law is the cultural concept (Gustav Radbruch).[239] The best-known attempt to answer the questions relating to the law as cultural phenomenon was made by *egological legal theory* of Carlos Cossio.[240] Under the influence of Cossio, the egologists Antonio Luis Machado Neto and Fernando Garcia Olano y José Manuel Vilanova[241] worked further on.

Naturally-legal theories can also include some of the most recent multidisciplinary legal theories.[242] A characteristic attempt was made by Michael Walzer ("liberal communitarian"), who relativises the concept of 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 a society in which not one social good serves as a means of domination".[243] 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?

A number of important things can be noticed: first, that the "pure" idealistic concept of the law does not exist otherwise but as a virtual content of the consciousness 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 naturally-legal theories and teachings of natural law and its relationship with positive law; fourth, that not only a satisfactory, but neither a reliable answer to that ultimate question has been found as yet; and fifth, that natural law can be linked with 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

238 See: G. Vukadinović, R. Stepanov, Theory of State and Law I, Petrovaradin 2001, p. 219.

239 See: Lj. Tadić, pp. 149–151, 155–157.

240 See: G. Vukadinović, R. Stepanov, p. 223.

241 See: J. Vilanova, Al Concepto De Derecho. Estudios Iuspositivistas, 1993. and Introduction Al Derecho, 1994.

242 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 age to twentieth century (translation), Beograd 2000; A. Etizioni, The Third Way to a Good Society, London 2000; M. Walzer, Spheres of Justice (translation), Beograd 2000.

243 See: M. Walzer, Spheres of Justice, p. 16, etc.

has its idealistic side and realistic side, in addition to other numerous aspects that philosophy and theory of the law deal with.

From the foregoing follows that 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 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. 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 nothing but the result of the competition of the many different idealistic and realistic legal theories and beliefs.[244]

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 the three holistically created realities: physical, actual and virtual.[245] 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 manner that they cross one another. The central place of the law is in the legal world (metaworld) that acts as the mediator between the

244 See: D. Mitrović, Legal Theory, Beograd 2007.

245 See: D. Mitrović, Path of Law. Holistic Paradigm of the World and Law, in the light of Chaos Theory and Legal Theory, Beograd 2000.

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, the metalegal world of ideas, expressions, theories, problems, critical statements, institutions, etc.[246]

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".[247] It has to do with the original world of all possibilities, but without the people and the law. In this dynamic, processionalised physical world at a certain moment of its development there appears 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 mankind, this idealistically conceived law has (out of that metalegal world) "required" to assume, through the world of legal commands, the 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 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, creation, examination, and application of the

246 Ibid., pp. 189–245, etc.

247 See: F. Nietzsche, Aus dem Nachlass der achtziger Jahre (translation), Beograd 1976, p. 432. See: Werke, Kritische Gesemtausgabe, VII/3, Berlin – New York 1968–1970.

law. Out of this world of thought processes and subjective legal experiences the law comes into being purposefully and acts expediently upon physical reality as a well-thought out combination of desires and possibilities in order to act within that reality. This 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 this, the legal world surpasses and overcomes physical reality with its special legal reality. (Marriage, as a factual cohabitation of man and 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 proper application of legal rules and human behavior following them. About the rules of this legal world almost the same thing says Herbert Hart, a prominent representative of 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 contemporary idealistic legal theories to link the idea of the legal world of rules with the material concept of natural law, and the legal world of the metarules with the procedural concept of natural law (John Finnis, Lon Fuller).

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 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 this world, the law is also something "that ought to be", because it has to do with the determined meaning expressed in the form of the 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; natural law comes upon and intertwines with 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 legal command that can simultaneously exist as something "that is" and as something "that ought to be" because meaning in its actual form is also a kind of being or existence.

The statement that legal command is simultaneously a kind of being (and not only of "that ought to be"), cannot be corroborated only by the arguments of legal philosophy and theory. One needs to look back at the results of other disciplines. A befitting example is the question that David Bohm has asked himself at one time.[248] 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 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".[249] 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 meanings and not only meanings in reality. Finally, "meaning is being"(!)[250] It is necessary as all that is known about reality has to

248 See: D. Bohm, Wholeness and the Implicate Order, London & New York, 2002; On Creativity, London & New York 2004; On Dialogue, London & New York 2004.

249 See: D. Bohm, Wholeness and the Implicate Order, pp. 87–89.

250 Bohm further explains the aforementioned statement by linking meaning and sense with the concept of information. The operative concept in relation to information is the concept of form. In order for information to become form, it needs to have at its disposal 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 the feedback – also to the change of its meaning! In other words, any form that has a meaning can create a 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 among these 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 natural law and positive law does not seem so unsurmountable.

be in some kind of relationship with that what it means to us. And this shows that meaning is always wholeness. The essence of the matter is that there is no division, although meaning need not always be fixed. For example, when a theory is interpreted, then one arrives at its meaning. And theories, as a rule, always have many meanings. It shows that the structure of meaning is of such kind that finding a definitive, ultimate meaning can never be achieved. Still, 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 and 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 human mind and human activities that surpass the physical and legal world. This metalegal world in a broader sense of the word also comprises all products of 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 language codes to such social institutions as "university or police".[251] It has its history (the history of our ideas) and its values (created by human mind). However, although purely virtual, it, too, is not self-sufficient, because nothing that exists is void of the 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 human mind. It is the birthplace of all legal theories. We are the ones who create the objects in this world. And the fact that these objects have their innate and autonomous laws which create the 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 human activities, the consequences of which are, for us, as big or bigger, than in physical environment. There exists the type of feedback

251 See: K. Popper, Unended Quest: An Intellectual Autobiography (translation), Beograd 1991, p. 93.

with all human activities: by "acting, we always, indirectly, act upon ourselves".[252]

The physical world is the world of 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 the 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.[253]

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

Externally viewed, the law is 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. Owing 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 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) which 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

252 Ibid., pp. 93–94.

253 See: D. Mitrović, Theory of State and Law, pp. 189–194.

there exists the 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 world and natural law over positive law is accepted.

Such statements require one to look briefly on the "notorious dualism" of natural law and positive law that has been cherished from the antique times of Greece and Rome. Positive law (*ius natura*) is independent of external authority. According to one of the schools of natural law, the cause or the creator of natural law is "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 mind" (*divine natural law*) "whose messenger is the intellect of man"[254]. 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 void of its profound sense (that when one can't see the trees for the forest).

There are also some other important differences between natural law and 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 achieve Justice".[255] With respect to natural law the only question which can be asked is concerned with its explanation, while with respect to positive law its justification has to be found. This justification can be offered only by natural law. Also, natural law is "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.[256]

The statement that natural law personifies justice while positive law knows only of fairness enables natural law to be operatively ex-

254 See: T. Živanović, System of the Syntetic Philosophy of Law, II, Beograd 1951, pp. 144–145.

255 See: G. Gurvich, L'idée du droit social, Paris 1932, p. 96.

256 See: 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.

pressed, even as a separate source of positive law. In this particular sense, natural law can be regarded as the source independent from positive law but only provided that the previous legal approval or judicial decision exists. For example, when there are gaps in positive law, judges should look for norms in natural law in order to fill these gaps by appealing to the provisions of legal regulations in effect (codes, laws, etc.).[257]

Some older legal writers (H. Ahrens, R. Stammler, G. W. Paton) have at the end of the 19th century and at the beginning of the 20th century included into 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". These rights are "born with man" and everyone can exercise them. Being naturally-legal, they are "unconditional or absolute". These are, above all, the rights of "every man to life, freedom, dignity, honour, etc".[258] The mentioned teachings are very similar to the teachings of the representatives of *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 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.[259] 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 positive law.

Although natural law is perfect and positive law is imperfect, there need not be conflict and disagreement between these two laws as is often accentuated in legal philosophy and theory. Since the idea

257 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), have explicitly given supplementary force to natural law by referring to the "rules of nature".

258 See: T. Živanović, III, Beograd 1959, pp. 143–144, 464.

259 See: M. Walzer, Spheres of Justice (translation), pp. 16–19.

of natural law is objectively based in human nature, this fact should at least make the creators of positive law think what kind of the law they are making and prompt them to try to make a better one. Especially the study of natural law and its principles by legal science is a strong impetus for the advancement of positive law.[260] That this is possible has been proved by famous Roman jurists, the knowledge of which has reached unrivalled heights because, to a great extent, it has become a constituent part of Roman law.[261] In the face of it, the advocates of the realistic determination of the concept of the law, and especially the advocates of positivist 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 positive law and natural law, justice and purposiveness. Such approach could be called scientific rather than philosophical. It requires from realists-positivists to take the 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 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 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 ideal law. They just deny that this ideal law stands in the same plane with positive law. Therefore, the point at issue is to link the two laws with each other and to overcome dualism of natural law and positive law. Although the values of natural law and positive law have their own order and role, it still does not show

260 See: T. Živanović, III, pp. 631–632.

261 See: W. Morrison, Jurisprudence: from the Greeks to Post-Modernism, 1997.

how the values from natural law flow into positive law, which, by the way, itself has at its disposal its own technical legal values.

5. Overcoming 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 natural law and positive law can be overcome. One of the most interesting answers was given by Gustav Radbruch in his famous book "Philosophy of Law" (*Rechtsphilosophie*).[262] In this, as well as in his other works, Radbruch "overtops" the opposed positions of natural law 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".

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. These three ideas are found in a changeable balance,[263] jointly creating *approximate law* as an "open system".[264]

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's

262 See: G. Radbruch, Philosophy of Law (translation), p. 39, etc.

263 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, pp. 38–39).

264 In all likelihood, this Radbruch's idea of the law as an "open system" further prompted Karl Popper to expand his teaching to society. See: K. Popper, Open Society and Its Enemies, I-II, Beograd 1993.

value, which is relative (because while choosing it, at one's disposal there are only the 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.

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 positive law becomes "supra-statutory law".[265]

Radbruch's solutions rendered it possible for him to be successful in avoiding the trap of dualism between natural law and 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.[266] 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 the feeling that can never characterise biologically created human beings, except for the ones who have at their disposal spirituality as their generic human characteristic.

265 Ibid., 287–289.

266 It was that unfinished part of Radbruch's teaching of the content of justice that Arthur Kaufmann continued to work on and allowed himself the 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 /translation/, Beograd – Valjevo 1998, pp. 285–287/. See: The Philosophy of Law. An Encyclopedia, vol. II, New York & London 1999, pp. 475–476).

Another stimulating example and an attempt to find the 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 naturally-legal teaching.[267] 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"[268]. These are not the only important ideas of Dworkin's. One should mention at least his ideas of rightness, 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";[269] "self-purification" of the law;[270] fiction of "judge Hercules", etc.

Dworkin's most important and most fruitful idea is concerned with positive law which contains not only *legal rules*, but also *legal principles*. Legal principles have moral significance. They become part of positive law owing to the operation of the legislature and the court decision-making process. For example, when deciding the 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 can be in conflict. It follows that the application of legal rules depends on the previous choice of legal principles. On this choice depends whether justice as the 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 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 rights of individuals, legal policies describe goods, i.e. political goals of the community as a whole. Unfortunately, Dworkin failed to arrive at the concrete solution in relation to the choice of policies, even by equal valuation of legal policies to which he appeals

267 See: R. Dworkin, A Matter of Principle (translation), Beograd – Podgorica 2001, pp. 193–257.

268 See: R. Dworkin, Law's Empire. Preface, VII and VIII (translation), Beograd 2003. See: Taking Rights Seriously (translation), Beograd – Podgorica 2001.

269 See: R. Dworkin, "Law beyond the Law" (translation), Pravni život, No. 12, Beograd 1998, pp. 799–800.

270 See: G. Vukadinović, R. Stepanov, p. 499.

when determining relative weight (or importance) of one against another ("Elmer" case).[271] This is understandable because the choice of legal policies in his teaching also depends on yet another previous choice of the "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 destroys the consistency of the entire Dworkin's construct and reduces it to arbitrary and changeable choice of the political goal as the policy on which depends the application of the absolute legal rules. It is comforting that the choice of a political goal by then 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*),[272] 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 natural law and positive law as both of them appealed to the authority capable of imposing the choice of a value as the good (G. Radbruch) or to influence by means of its choice of policies the choice of principles, and through principles the choice of legal rules in order to realise the good (R. 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. These principles are more forceful than any other authority in a way that not one rule which contradicts it is righteous.[273] 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 the good which is desirable for most members of a society, and after having been made operative in the form of fairness, that it is rendered possible to say that natural law has flown through general legal principles into 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 natural law with positive

271 Ibid., pp. 501–504.

272 See: Ulpianus, Digesta, 1, 4. 1.

273 See: Lj. Tadić, Philosophy of Law, pp. 129–130.

law than Radbruch.[274] 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 the unreachable value, and the latter relates to the concrete state of the system of law.[275] The most important thing is that justice and security can produce consequences in positive law through its derived forms (fairness and certainty).

In order to show that dualism between natural law and 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 analytical jurisprudence and Kelsen's pupil – and all this with the aim of viewing the same problem in a different perspective in 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 set forth in his most famous book "The concept of law" published in 1961. It is comprised of one or more really existing norms. This rule exists both in the developed and in the primitive communities. The role it plays is not only in that it serves as the measurement of determining the legal character and "validity" of the norms in the system of law, but also as the basis of legitimacy and legality of the state power. The problem is in that Hart does not quite specifically say which all these 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.[276]

Hart's problem is especially manifest when it has do with the rule of recognition in 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.[277] 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 naturally-legal rules deliberately excluded from the composition of the rule of recognition? If they are not, where are they? If

274 See: R. Dworkin, Taking Right Seriously (translation), pp. 193–257.

275 See: D. Mitrović, The Principle of Legality, Beograd 1996.

276 See: H. L. A. Hart, The Concept of Law (translation), Podgorica 1994, pp. 102–106, 119, etc.

277 Ibid., pp. 9–18, 37–38, etc.

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 these earlier rules spring from? It seems that what his *Grundnorm* is to Kelsen, his rule of recognition is to Hart.[278] The difference is in that Kelsen admits that it 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 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 the "minimum of natural law". It remains unexplainable where this "minimum of natural law" is found.[279] 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 natural law into 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 positive law – an example of the 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 these 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 based on the experience through which 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

278 See: H. Kelsen, Theory of Law and State (translation), Beograd 1951 (1998, 2010), pp. 116–117, 119–120 and 127.

279 Ibid., p. 189.

out of which originates his inexhaustible labour to link the world of experience with the world of value. Such labour exists in all actions and creations of man. This 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 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 positive law through its general legal principles. And second, the flowing of justice into positive law in the form of fairness is rendered possible owing to the previous authoritative choice of the good, i.e. the political goal desirable for the whole social community. Does it perhaps mean as follows: "To be just on the throne means to be strong".[280]

Obviously, this "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 antique writers. Today it is specifically the task of the parliament, as the legitimate representative body of those it governs (M. Weber),[281] or the court with its "empire of judges" and understanding of the law as the "prediction as to how the courts are really going to act" (O. W. Holmes).[282] 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.[283] But what can be regarded as such desirable good?

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280 See: C. Tacitus, The Annales (translation), Beograd 2006, p. 290.

281 See: M. Weber, Economy and Society (translation), II, Beograd 1976, pp. 474–475.

282 See: G. Vukadinović, Theory of State and Law II, Novi Sad 2008, pp. 73–74.

283 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 /translation/, Beograd 1960, pp. 146 and 314. See: A. V. G. Sabine, A History of Political Theory, London 1938, p. 72 and further.

Two answers can be given to this question. The first is concerned with the 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 the 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 the parliament or courts are inspired by justice, a 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 community as they do not impose the good which fails to meet the interests of the majority of citizens? One can only conclude that it has to do either with the purely technical legal rules or with the value neutral rules (with respect to justice or other values). However, these 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 the good which is as the political goal undesirable for the whole community, although lawfully chosen. In that case, it would relate to 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 this *absolute*, divine or natural justice, there exists *social justice* with its derived types (moral, religious, legal), which is relative.[284] All other values make sense only when they rely on justice as the measurement.

For recollection's sake, legal justice is a synonym for that which is proportionate or equal. Pursuant to these measurements are determined two of its formal models: the distributive (iustitia distributiva: "proportional allocation among all"), which is original, position-based and prescribes that "the unequal be treated unequally", and the commutative (iustitia commutativa: "equal allocation among all"), which

284 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" (Dositije Obradović). Or else, one has to believe fiercely in an authority as truth, instead in truth as the only authority.

relates to exchange and prescribes that "the equal be treated equally". Justice in the law in its narrowest meaning signifies 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 material justice consists of, one cannot answer with any one of the like models.[285]

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 even more imperfect positive law there is always to a lower or higher extent disagreement and tension.[286] 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 this means that any "normal" law should contain at least the minimum of justice. How important justice is, is also shown by this: not one court is called the court of the law, but many are called the 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 positive law. Its existence confirms that the idealistic concept of the law does not float in some imaginable space, but that it is capable to be operationalised and to flow into positive law. This operative applicable form of justice in positive law is called fairness (aeuquitas, iustus). Fairness is justice in a concrete case which cannot be decided only on the basis of positive law. It was originally considered the virtue of legal justice only to become in the 19th and 20th centuries a means used to correct overly rigid laws, especially when the mechanical, unlawful or unjust application of the 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 corrective justice, a kind of rightness

285 The most recent attempts to determine solidarity justice, according to which more 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.

286 See: R. Lukić, Theory of State and Law, Beograd 1976, pp. 219–221; T. Živanović, III, pp. 675–679.

which corrects the law when its creator cannot think of all possible cases beforehand. This rightness is especially remedial when the parliament enacting laws (legal justice) or the judges deciding cases can appeal to justice and fairness (judicial justice) if they are doubtful about the correctness of positive law which they create or apply.[287]

That there exists a link between natural law and positive law furthermore confirms the fact that fairness can be determined in a naturally-legal and positively-legal sense. Fairness in a naturally-legal sense exists when law directly refers to natural law in cases relating to legal gaps (when there is the absence of legal provisions referring to particular cases, which provisions are not envisaged by law or the judge could not appeal to them as they do not fall under any one of general norms). On the other hand, fairness in a positively-legal sense has at its disposal its legal (material) and judicial (formal) forms. Legal fairness as the value renders possible for the legal norm to be applied in such way that all characteristics of the 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 the judge to decide the concrete case according to the rule they themselves determine. For example, acts concerned with endangerment of people by using atomic energy, wiretapping, producing shoddy goods, manufacturing wholesale 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 things are by its nature absolutely forbidden. However, writers such as Norberto Bobbio dispute the declaratory character of the 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.[288] The acceptance of such point of view would give rise to the inconsistent judicial practice which could be used to, without

287 See: B. S. Marković, On Justice and Law, Novi Sad 1993.

288 T. Živanović, III, pp. 679–680.

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 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 the 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 natural law when pronouncing the judgment. And not only did jurists reach out for the values independent from 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 the stages of procedure before judicial or other state organs. It is based on the following idea: when human rights are not respected in a police station, hearing room, pre-trial confinement, court or a cell, it is evident that authorities do not fulfill their duties.[289]

To show that the linking of natural law with positive law is rendered possible, here is given a brief account of the case in which the judge splendidly linked in his decision the requirement to follow the law with the requirement of judicial fairness and the right to a fair trial. Namely, a tipsy driver was brought before the 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

289 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 /translation/, Beograd 2003, pp. 34–65).

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 despair, 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 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 08.00 hours, during which period you are going to work all working days at a 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, existentialism, culturalist 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 deficiencies. 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 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 this 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, this idealistic concept of the law can be determined, even be indirectly operationalised, by linking naturally-legal values with positive law. This can be done in the spirit of the teaching of the three worlds of the law. By means of this 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, the 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 positive law: for example, justice into fairness (applicable justice), with the stimulating examples set forth by Gustav Radbruch and Ronald Dworkin, one can see a possible usefulness of the idealistic 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 comfort-

able 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 natural law flow into 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 natural law flows into positive law and becomes its part. Justice is the most important such principle. 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 positive law, by which it is at least hinted as to how dualism between natural law and positive law can be overcome.

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 natural law, too, can be useful, at least in the part in which it flows into 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.

* ("Матеріали II Міжнародної науково-практичної конференції. Малиновські чітання", 15–16 листопада 2013 року, м. Острог, 52–68)

VII
WHY PROCEDURAL JUSTICE DOES NOT EXIST

1. In brief about justice

Justice (*iustitia*) is the ultimate social and legal value. It has value because it is a kind of proportionality and harmony, all the way up to the achievement of harmony, which is another name for absolute justice. Apart from this absolute, divine or natural justice, there exists social justice, too, with its derived types (moral, religious, legal), which is relative viewed in human proportions.[290]

A special type is legal justice. It is an important type of social justice because it is considered synonymous either with the proportionate or with the equal. It is determined pursuant to two formal legal models, because of which we speak about two types of legal justice. The first is distributive justice (iustitia distributiva: "proportional allocation among all"), which is original, position-based and prescribes that "the unequal be treated unequally". The second is the commutative (iustitia commutativa: "equal allocation among all"), which relates to the exchange and prescribes that "the equal be treated equally". In its narrowest meaning, legal justice denotes adapting to law (legal justice /iustitia legalis/). We can also speak about court justice (and not only about fairness) as a special type of the manifestation of justice there where court judgments are the sources of the law. However, the question what substantive justice is comprised of cannot be answered with any one of the like models, but with the oldest one, the antique, that it is just to serve the common good.[291] For example, the most recent attempts to

290 See: P. Holbach, The System of Nature(translation), Belgrade 1950; Aristotle (translation), Nicomachean Ethics, Belgrade 1970.

291 H. Kelsen, Elements of the theory of legal norms. Late selected files (translation), Beograd – Podgorica 2003, p. 122.

determine solidarity justice, according to which more of the common goods should be allocated to the weak and poor and less to the strong and rich (the justice of Robin Hood), are not models of substantive justice as they are presented, but of the Aristotle's distributive justice. And it is formal.

Legal justice, as it is the type of social justice is not perfect. But neither is the law. As a result, between the imperfect legal justice and the even more imperfect law there always exists a higher or lower tension.[292] Justice is easier to feel than to determine or achieve, because the law can never become justice itself. For this reason, any law is unjust to a certain extent. But it must not become perverted and achieve *injustice*. Bearing exactly this in mind, Cicero determined the purpose of the law as the skill of the right measure in the distribution of the goods among citizens (*Sit ergo in iure civilians hic finis legitimae atque usitatae in rebus causisque civium aequabilitatis conservatio*). This way he refreshed the older Plato's and Aristotle's idea of achieving the common good as the greatest accomplishment of substantive justice. This means that "normal law" must contain at least "minimum of justice", which through general legal principles flows into the law (as proposed by R. Dworkin). But, such justice is not procedural either.[293]

2. Rawls's and Höffe's understandings of procedural justice

When as of the middle of the last century the interest in the naturally-legal research has been restored, and then intensified,[294] ever more have grown the contemplations on the types of justice: international, political, corporate, solidarity, organisational, transactional, compensational, etc.[295], differing from traditional forms of religious,

292 T. Živanović, System of synthetic philosophy of law, III, Belgrade 1959, pp. 675–679.

293 Since the main theme is not justice, but its derivative, so-called procedural justice, for further reference about numerous conceptions of justice see their review in Encyclopaedia Britannica. Ultimate 2014 Free Download.

294 This happened thanks to the philosophical and scientific impact of Gustav Radbruch, presented primarily in his famous work The Philosophy of Law, and then expanded in German legal philosophy and Anglo-American jurisprudence. See: G. Radbruch, Philosophy of Law (translation), Belgrade 1980 (2016).

295 See: R. T. Di George, Business Ethics (translation), Belgrade 2003; R. Nozick, Anarchy, State, Utopia, Zagreb 2003; B. Sovilj, The Path through the law to justice,

moral and legal justice. Moreover, increasingly has grown the support for the existence of procedural justice envisaged as considerably broader than legal and court justice.

Such support has been accepted with certain relief in the positivist-oriented jurisprudence in the West. It can be considered its belated response to the renaissance of naturally-legal teachings in the second half of the 20th century. It is odd that procedural justice is advocated for also by the writers belonging to the opposite orientation. Such support can be regarded as the exaggerated response of the members of the naturally-legal jurisprudence. But the relief of the former and the support of the latter are neither appropriate nor useful because procedural justice is non-existent. They are just the thought constructs and the experiment in legal philosophy and theory.

The most famous advocates of the teachings of the existence of procedural justice are John Rawls and Otfried Hëffe. In addition to these, other writers, too, mostly the Anglo-Saxon (L. Fuller, H. Hart, R. Dworkin, F. Hayek or M. Van den Bos) argue in favour of the like teaching.

When it has to do with John Rawls' teaching of procedural justice, "the principle of the openness of position", set forth in his famous work "A Theory of Justice",[296] contains the idea of the ideal initial social condition or social position, as well as the belief that "all positions" of individuals in society are not "open" (while some are though). The latter, Rawls's belief, shows that individuals are not even equal when it comes to the access to opportunities. After all, it is well-known that social competition has never been impartial and just, because it is rigged before its very start. Not even in Rousseau's idealised description of the natural state of man "without competition" is there such a completely "fair" equality between the "noble savages" – people are different and therefore unequal. This fact, which Jean-Jacques Rousseau had already pointed out, Rawls accepted as evident, but in spite of it, he still considered as decisive his idealised vision of the necessary impartiality with regard to the "equality of opportunity", and thus the necessary rightness of individuals in society. It is only normal that such impartiality and rightness in individuals with self-awareness can produce but the sense of personal frustration and injustice.[297]

Petrovaradin 2004; Ž. Vučković, Business and morale, 2006; I. Kant, Foundations of the Metaphysics of Morals, Belgrade 2008.

296 J. Rawls, A Theory of Justice (translation), Belgrade – Podgorica 1998, p. 91.

297 Ibid., p. 93.

Such "openness of position", which Rawls departs from when he speaks about procedural justice, relates and is further transmitted to all purely procedural situations in which individuals can find themselves (starting from the type and the way of using procedural rules in the determination of the original position of an individual in a society or an employee in an enterprise, all the way up to the position of an accused or a witness in a proceeding before judicial authorities). Moreover, the absence of the necessary impartiality in social and legal sense, as well as the resulting rightness as to social behaviour and the application of legal rules[298] (words which Rawls mentions as a kind of mantra) not only deprive individuals of the results of their exertions, but take away from them the opportunity to undergo personal "experience of self-realisation" which is one of the few "basic forms of human good" in general. This way Rawls confirms, perhaps unconsciously, the general theodicean tragedy of the human being, because all that he claims is in favour of the conclusion opposite to his original premises. This world is really changing due to the impact of stimulating and acceptable ideas, but for this world the ideas and conceptions alone are not enough.

In considering Rawls's conception of procedural justice, it can be perceived that the major flaw in his teaching consists in that that social and legal rules through which are determined the criteria and measurements for the establishment of the concept of procedural justice, are declared procedural in advance although they are not. These are, first and foremost, the rules through which is determined "the principle of the openness of position", as well as the rules which establish the way of the impartial and righteous execution of procedural norms, whereas they are substantive although referring to the way of the conduct of the procedure. Already this fact shows that Rawls's main premise, contained in his "principle of the openness of position", is virtual and fictional, as well as Kelsen's "pranorm". This premise is non-existent and cannot be used as the starting point for the determination of procedural justice. As has been mentioned, the reason is evident: "the principle of the openness of position" and "the principle of fair equality of opportunity" (as a means to achieve) "equality", is substantive and not procedural in its nature. It has to do with substantive rules which determine the way in which purely procedural social and legal rules will be executed.

The same can be said of Rawls's "independent criteria", i.e. measurements or standards which ought to establish procedural justice.[299]

298 Id., p. 92 etc.

299 Id., 93.

Nor are they procedural, but substantive in their character. They can even be just, but not as the ingredient of procedural justice. It should be pointed out that such clear measurements and standards are non-existent – for which reason they are not clearly determined in Rawls's teaching either, nor is there a feasible procedure that inevitably leads to the righteous outcome, i.e. to procedural justice. But all this did not prevent Rawls from arguing that the impartial procedure "transfers" its impartiality to the righteous, i.e. fair "outcome". Therefore, again it has to do with his belief that procedural justice can be achieved.

Rawls also claims that it is not necessary any more to take account of the infinitely varying circumstances and constant changes of the relative positions of certain persons, as was once done in civil naturally-legal theories of the Social Contract, because it is sufficient for the system (that referring to the state, and especially to the legal one) to be righteously set up ("structured"). As if the system could do that in what nature fails. On that occasion he also ignored that Jean-Jacques Rousseau and John Locke derived the establishment of the state and legal system from the natural and social state, and not the natural and social state from the one and same state and legal system. As has been mentioned above, neither in this construct or simulacrum of the original state, as well as in the subsequent social status, are individuals equal.[300] Instead of this road map, Rawls arranges conditions (which he himself lays down in advance) into the artificially created virtual concept of the "original position".[301] By claiming that it is wrong to focus attention on the varying relative positions of individuals and by expecting that any such change is just per se, Rawls himself challenges his own initial premise and admits that it is fictional, that it also has to do with the construct and the simulacrum. Similar problems at the time made Ronald Dworkin develop his political theory of the law that came after his legal theory (which could not answer the ultimate legal questions, which was the task he set upon himself).[302] Neither in the latter, the political, did Dworkin succeed in finding the criteria and standards for the flow of natural law into positive law. Instead, he managed only to set forth the guidelines, and similarly did Rawls when he spoke of procedural justice.

Rawls's teaching of the "principle of the openness of position" and the existence of the "independent criteria", is obviously the matter of

300 Id., p. 119 etc.

301 T. Glintić, Book Talk of J. Rawls's Theory of Justice, pp. 526–527.

302 See: R. Dvorkin, The Empire of the Law (translation), Belgrade 2003; Understanding the law seriously (translation), Zagreb 2003.

his personal belief. However, this is the case with Rawls's conception of perfect and imperfect procedural justice, too. Simply, it is not possible to determine a procedure which provides a desired result with certainty in the sense of the achievement of procedural justice, especially not automatically. This is acknowledged by Rawls himself, who is right when he says that perfect procedural justice does not exist, but is wrong when he claims the opposite of imperfect procedural justice, because procedural justice does not exist at all.[303] Both of them are chimaeras. Justice is not a chimaera, and neither is it procedural.

When it comes to the teaching of Otfried Höffe, which is set forth in his book Justice: Philosophical Introduction,[304] first it should be noted that Höffe begins his presentation of procedural justice with the statement that for the legally binding decisions are "necessary defined procedures". This is not under dispute, but something else is open to dispute though: his claim that these procedures are "based on the principles of justice" (e.g. What does the procedure of tax payment by citizens has to do with the principles of justice? One who claims it, has to concede that any state which levies taxes on its citizens is just or at least based on the principles of justice).[305]

Open to dispute is also the following Höffe's statement. He says that when it has to do with the procedure, it is not directly related to the contents or the results, but to the jurisdictions, terms and forms, which are not the purpose in themselves but produce that general readiness for the acceptance of the decisions of the legislator that are not yet determined in terms of the content (here Höffe confuses readiness of the citizens to have the legislator with their readiness to accept the legislator's "pig in a poke", in the form of any future law whose content they cannot be acquainted with in advance). Also, proceeds Höffe, procedures must be open to the needs and interests of those whom they concern (this only in case that the respective subjects are telepaths when it has to do with future laws – subsequent acquaintance with such laws, which have already been adopted, is harmful for citizens and dangerous). In addition, adds Höffe, the procedures themselves must be such that they can be learned (why and who from?), and, besides, they must rely on the previous givens

303 See: J. Rawls, pp. 90–95.

304 See: O. Höffe, Justice: Philosophical Introduction (translation), Novi Sad 1998. About this book Höffe's see comprehensive display I. Jovanov, "Justice. Philosophical Introduction", Zbornik radova Pravnog fakulteta u Novom Sadu, No. 2 (2014), pp. 495–500.

305 O. Höffe, p. 47.

which are, on their part, also fair – which, at least, are not inconsistent with substantive justice.[306]

In addition, Höffe distinguishes three types of procedural justice, unlike Rawls who contents himself with its two types. It is related to "pure", "imperfect" and "perfect" procedural justice. Only "pure" procedural justice is something more than "mere subsidiary legitimacy", which Höffe links with "imperfect justice ... which prevails in the law and the state". He has failed to observe that "imperfect justice" is of the "wooden iron" type. One way or the other, not even Höffe's imperfect justice (for which he himself admits that it is prevailing in the law and the state) can be deprived of the righteously executed procedure, impartiality, etc.[307] Otherwise, the following saying of Ulpian would hold true: *Quod principles placuit, legis habet vigorem*.

Höffe claims that "pure" justice "lies in the procedure itself, while of the criterion for the just result, which would be independent from the procedure, can be no mention".[308] He thus derives the concept of justice from procedural norms and claims that procedural justice can be derived from itself alone, from its own measurements, which cannot in advance provide a just result (which is his original "uroboros"). This way he relativises justice, as does Michael Walzer, and allows for the just to be considered also that what is unjust.[309] It is only that Walzer derives justice from the changeability of social conditions and the respective cultural milieu of a society, while Höffe does it directly from procedural rules which need not provide a just result in the form of legal or court justice or fairness. Besides, Höffe fails to explain why procedural rules are just at all, except that he considers them such. If the belief is an argument in philosophy, this is not the case in science.

Two other types of procedural justice are achieved "through the procedure". In so-called "perfect" procedural justice there is a kind of an independent measurement for a fair result, as well as a procedure through which this result is achieved with approximate certainty. Thereafter Höffe gives an example of the equal division of the pie, which refers to commutative justice and not to the procedural. He failed to note that it is important for (commutative, not procedural) justice, that the parts are equal, and not the way in which and by which means is the cake cut into equal parts (which, presumably, should

306 Ibidem.

307 Ibid., p. 48.

308 Id.

309 M. Walzer, Spheres of Justice (translation), Belgrade 2000, p. 16 etc.

apply to a non-existent procedural justice).[310] Also, Höffe claims, when it comes to "imperfect procedural justice" that then, too, "for the just result there exists an independent criterion". Höffe illustrates it by the example taken from criminal law and claims that criminal procedural justice is achieved when all real culprits, but only they, are punished in proportion to their guilt.[311] But such an independent criterion does not exist. And neither does the legal system which faultlessly punishes only the culprits. By this example Höffe challenges his own self: firstly, because he confuses substantive rules with the procedural, and secondly, because he confuses just outcome (that only the culprits are punished) with a righteously conducted procedure (which renders possible, or not, the achievement of such just objective in the form of court fairness). This realises Höffe himself, too, when he admits that it is obvious that there exists no procedure which excludes judicial misconceptions and which prevents the punishment of the innocent, as well as the non-punishment of the culprits, too severe or too mild. It is clear that such relative justice is neither legal nor procedural.

The attention should also be drawn to the fact that Höffe does not make a clear distinction between procedural justice[312] (which does not exist) and the right to a fair trial (which exists).[313] He, indeed, states quotations "Listen to the other side" (Audiatur et altera pars), and "No one should be a judge in his own cause" (Nemo ex iudex in causa sui), but ignores the fact that the right to a fair trial is the collective designation of a set of substantive rules and recommendations referring to the conduct of investigation and judicial procedure, and not a set of formal procedural rules which are classified under procedural justice. Also, he ignores that the right to a fair trial refers to the protection of rights of people in all stages of the proceedings before the court or other state authorities, as well as that it is concerned with substantive rules rather than the procedural. This is confirmed by the most important international documents in which it is clearly set forth that this right is the fundamental human right and that it is one of the generally applicable principles. As such, it cannot be only procedural in its nature. For example, the right to a fair trial is enshrined in The Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights, the UN General Assembly, The European

310 O. Höffe, p. 48.

311 Ibidem.

312 Ibid., p. 49.

313 See: N Mole, C. Harby, Right to a fair trial. Guide for the application of Article 6 of The European Convention on Human Rights (translation), Belgrade 2003.

Convention on Human Rights and other similar international treaties, and even in the norms of the customary international law. In all documents, especially in Article 6 of the European Convention on Human Rights, are determined international standards referring to a fair trial. Their determination and development are based on the idea that when human rights are not respected in a police station, interrogation room, in detention, court or prison cell, then the authorities obviously do not perform their duties. Apparently, these rules are inspired by justice, and perhaps they are even just, but they are not procedural.

Finally, Höffe concludes that one should take account of the fair and equal treatment of the parties, that one should keep in mind the objective and subjective independence of judges, the publicity of proceedings, legal remedies, the prescribed time frame of proceedings, etc. for without legal security, which they serve, there is no real justice either. But not even then is it about procedural justice, but about rules that should ensure a fair trial.[314] Their primary objective is not justice, but legal security.

3. Truthfulness and rightness

As has been mentioned earlier on, the aim of this work is not to support the idea of the existence of procedural justice, which idea is upheld by John Rawls, Otfried Hëffe and other writers, but to challenge it. This will be shown by referring to the obvious: that justice is synonymous with truth, and not with impartiality and rightness on which authors wrongly base their notion of procedural justice.

That justice should be derived from nature, i.e. truthfulness, is confirmed by numerous writers who derive the concept of justice from nature herself, from the ancient to the contemporary ones. This applies to Serbs, too, with whom justice has always been derived from that what "is", what is natural and truthful. Justice is the "foundation of everything" (St. Sava). It is the truth because "just is only that what is truthful" (Dositej Obradović). Otherwise, it must be hard to believe in any authority as truth, instead in truth as the only authority.

Such traditional metaphysical point of view is not shared by all writers. For example, according to Peter Koller justice is the most important part of morality, because its standards do not express only

314 See: N. Mole, C. Harby, pp 34–65. Cited according to D. Mitrović, Theory of State and Law, Beograd 2010, p. 534.

that what is good or evil but also that what is right and wrong in our relationships with other people. This means that the concept of justice, which is traditionally derived from truthfulness, Koller expands through the introduction of the concept of rightness in ethical and not in the positivist sense.[315] Other writers, especially in the field of social sciences, take "for granted" that procedural justice exists and they multiply that construct to make up different simulacra, i.e. different types of procedural justice, which are also non-existent (for example, criminal procedural justice, and why not civil procedural justice, too, administrative procedural justice, etc.).

It is perhaps for this reason that it is the right moment to set forth a number of observations about the relationship between truthfulness and rightness in general (that exists), and then also about the relationship between justice and procedural justice (which does not exist).

First of all, procedural legal rules can provide only rightness in the sense of properness, predictability and reliability (for example, in accordance with the application of substantive rules of impartiality and fairness /fair play/), but cannot provide truthfulness and justice. Rightness is proper administering. Something is done righteously because it has been administered in a proper, systematic and expert way, and not because it is true or just. Herein truthfulness appears only as a possible objective or a desirable result, rather than the ingredient of the respective procedure which is but the means of a possible achievement of that desired objective.[316] Rightness is particularly significant for the law, which is righteous when it is suitable for work, i.e. unrighteous when it is not suitable for work. But, it is the servant of truthfulness for procedural justice can be nothing more than "applicable rightness". Such rightness is useful because it can serve as a "reliable measure" and a "guiding principle".[317] But it has nothing to do with justice whatsoever, which has its own purpose ("supra purpose"), especially when it is inspired by mercy.

The same relationship can be considered in a different and more modern way, from the perspective of the natural sciences, which do not determine truthfulness any more as the absolute but the relative notion. Today, many natural philosophers and theoreticians of probability believe that instead of the terms "truthfulness" and "justice" one should use the terms "probability" and "concreteness". According

315 P. Koller, "On social justice" (translation), Anali Pravnog fakulteta u Beogradu, No. 1 Belgrade 2005, pp. 8, 11.

316 H. Jeffreys, Theory of Probability, Oxford University Press, 1948, pp. 17–18.

317 A. Ros, Law and Justice (translation), Belgrade – Podgorica, 1996, p. 57 etc.

to them, we can speak only of the "degrees of truthfulness". They incline towards "different degrees of probability" which tend to finally become the complete, absolute truth. This means that the debates about truth in a traditional and absolute sense should be replaced by the debates in a modern and relative sense about the "degrees of truthfulness", the "degrees of rational belief" or the "degrees of probability" (J. M. Keynes).[318] In line with this, truth is not considered only the relative, but also the unachievable value, except in one case in which it is indeed attainable. This is the case when truth is realised (established and confirmed, no matter what it exactly means). Until then we can speak only about the "degrees of truthfulness" (H. Reichenbach, H. Jefferies, K. Popper)[319] expressed in the form of "scaled certainty" that something is true. At the opposite end of the same scale there is "wrongness". Therefore, when we claim that something is true, the afore-mentioned writers believe, then we only say that we personally assume that something is true. And we can never claim that something is really absolutely true, except for the abovesaid exception. For this reason writers suggest "suitability for work" as the basic researcher's guiding principle, and not truthfulness of the obtained evidence which in the long run belongs to our referential system (L. Wittgenstein).[320]

To the briefly presented beliefs about truth and justice in natural sciences are added new descriptive approaches of the scientists from different social areas. They, too, focus more on the individual perception of truth and justice, therefore, on that what individuals regard as just, and less on the definitive or truthful abstract metatheoretical determination of justice. For example, some writers direct their study to the research of justice and rightness in the areas of social exchange, contracting, purchasing, etc. that is, in business relations in general (K. J. Greenberg) while others deal with justice from the standpoint of the possession of wealth and social power (R. Nozick), education opportunities, availability of medical care (F. d'Agostino). Also are reviewed the nature of organisational justice, the process of fair judgment in organisations (R. Korpanzano, B. Ambrose) or the forms of control in the organisation (R. Shapiro, E. Brett). Further are examined the effects of justice as to the consequences of righteous or unrighteous treatment in the workplace (M. Van den Bos, G. Conlon). Finally, the issues of the determination of justice in international

318 See: J. M. Keynes, A Treatise of Probability, London 1957, pp. 71–78.

319 See: H. Reichenbach, The Rise of Scientific Philosophy, Un. of California Press, Berkeley, 1968, p. 411; H. Jeffris, Theory of Probability, Oxford 1948, p. 341; K. Popper, Quest without end. Intellectual autobiography, Belgrade 1991, p. 93.

320 See: L. Wittgenstein, On certainty (translation), Novi Sad 1988.

relations are revived (R. J. Bies). What a quantity of the accumulated maculatura. It seems that this quantity and not its quality has in natural and social sciences given impetus to authors in legal sciences to ever more often and with an increasing persistence advocate for the existence of procedural justice (for example, in the case of "norms and procedures of the allocation of goods").[321]

Be that as it may, that what applies to truth, ought also to apply to justice. Yet, the claim about justice as the unachievable value, as well as the claim about truth as the unattainable value is not acceptable, because truth is nonetheless bound to be found out and justice flows into positive law, i.e. it is occasionally embodied in it in the form of fairness. This renders possible to conclude that justice nonetheless exists (as does truth, and that not only in the perfective, as something that is achieved or reached), therefore, not only in the way as proposed by contemporary writers. Also, one cannot consider truthful either the claim that justice is relative in the sense of scaling. Here it has rather to do with the degree of the realisation of efforts (successfulness) to achieve justice. Besides, it is arguable whether relative justice can be just at all. If nothing else, it is for certain that there exists the immutable conception of justice which motivates man to achieve it, in which he succeeds now and then, despite being so "fortunately shaped that there is no accurate measurement of truthfulness", but on account of this he has "more exquisite measurements of inaccuracy". Man is not only a rational, but also an intuitive being. Thus can be explained why there are so many misconceptions about truth, justice and its types.[322] Justice is a glorious idea which consists of divine ingredients in us.

Perhaps pointing out that truthfulness and rightness do not coincide, however they are determined in absolute or relative sense is more important than considering the relationship between truthfulness and rightness. Something that is truthful need not be righteous from the procedural point of view (for example, when the court establishes substantive truth, but on account of the unrighteous conduct of the rules of procedure must acquit the culprit). And conversely, what is righteous need not be truthful (for example, when the rules of procedure are conducted righteously but the result is not truthful on account of erroneously established substantive truth). Obviously, it has to do with the relationship between the objective (truthfulness, justice or fairness) and the means (rightness, properness, predictability, correct-

321 See: B. Ratković Njegovan, "Justice and business", Business School, Novi Sad 2015, pp. 169–176.

322 B. Pascal, Thoughts (translation), Belgrade 1988, p. 72, t. 82.

ness, i.e. solidity of the conducted procedure). This relationship shows that rightness is primarily the means of impartial application of the law, and only then and in the second-class the means of the possible achievement of fairness in the law. Also, the above-mentioned relationship shows that only the substantive legal rules can be just, while it cannot be the case with the procedural rules (for example, the rule that the procedural rules are to be impartially and fairly applied belong to substantive law and only this rule in this example can be regarded as just, while the procedural rules themselves cannot be regarded as such because for them it is enough only to be righteously conducted, and that in compliance with the aforementioned substantive rule).

The consideration of the relationship of truthfulness and rightness in the example of actually existing justice and actually non-existent procedural justice gives rise to yet another important question, and that is the question of the relationship between material (substantive) law and formal (procedural) law.[323] The former relates to the general legal norms which are classified according to their content, and the latter to the general legal norms which are classified according to their form. But this division, too, is "to a large extent artificial, as are the previous divisions, because it is not always easy to determine whether certain norm belongs to substantive law or formal law".[324] That it indeed has to do with artificial and unreliable division is shown by the set forth teachings of Rawls and Höffe, but also that of Koller, in which the rules of substantive law relating to the application of purely procedural rules, are classified under procedural rules. In other words, because it is rendered impossible to clearly and fully delineate between one and another, the proponents of procedural justice declare substantive rules relating to procedure the procedural, and all that only to construct the concept of procedural justice. Neither this can be accepted because, for instance, the rule of impartiality and the rule of fairness require only that procedural rules are righteously applied. Via these rules, and others, too, is determined the way of conduct of purely procedural rules. It is not one and the same to relate to something and to be something. For this reason, they belong to substantive law.

Be that as it may, the relationship between substantive law and formal law shows that rightness, and hence so-called procedural justice, is but the means of the application of the law. Also, it shows that only substantive legal rules can be just, while it cannot be the case with procedural rules. This allows to conclude yet something else: that

323 D. Mitrović, Theory of Law and State, Belgrade 2010, 219.

324 Ibid., p. 220.

truthfulness is the synonym for justice, and rightness is the synonym for the procedures which per se are not or do they have to be righteous, and even less truthful in the sense of justice. Therefore, rightness cannot be the synonym for justice and so-called procedural justice.

In yet a deeper shade lies the question of the relationship between natural law and positive law. It seems that insistence on the existence of procedural justice can be regarded as the belated response of the members of positivist jurisprudence. It is odd that for the existence of procedural justice also advocate writers who have originally belonged to the direction of naturally-legal jurisprudence. Particularly the proponents of positivist legal beliefs insist on the differentiation between positive law and natural law and between justice as truthfulness and rightness as properness. Such an approach could be called scientific, and not philosophical. It requires from the jurists realists-positivists to take an objective, value-based and ethically neutral attitude with respect to the law, as the norm, particularly procedural, need not be linked with any one system of social and legal values (for example, the achievement of common good, the realisation of justice, the protection of human liberties, etc.). That they have deviated from such value-based and ethical neutrality shows also the fact that those same jurists-positivists ever more often consider that the measurement of justice is the fact that the norm has been righteously applied, exactly according to the established procedure, as well as that only this is enough for positive law to be regarded as just. Such claim cannot be accepted if one bears in mind that positivists derive the law in a "bottom-up" manner (as has recently ever more often been the case with the members of the Anglo-Saxon jurisprudence direction), as well as that it is based only on the world of physical reality, instead on the world of metaphysical reality, because the law is simultaneously the realistic and the idealistic phenomenon. They wrongly identify the world of physical reality with the world of legal reality (which is a kind of "surreality", metareality), while the purely legal world of ideas (the world of the meta-metalegal reality) they exclude from their consideration. Despite these decisive flaws, they still, because of the alleged justice of procedural rules, readily regard positive law itself as just. And it is exactly this legal metaworld and the meta-metalegal world (or "world 2" and "world 3" as they are called by K. Popper), which jurists-positivists dispute and reject, that show that within the law as the metaworld there exist two separate worlds, i.e. its two special models: the legal world of rules (the metaworld of the substantive rules) and the legal world of the meta-metarules (the world of the procedural rules). The former regulates the content of legal communication, and the latter establishes the order of righteous conduct of

legal rules and human behavior under them. If only the righteous conduct of a procedure could secure the characteristic of justice to positive law, legal anarchy would begin shortly. Moreover, any order could be designated as just because of the righteous application of the law. This means that also the legal order in which the law is not always applied righteously could be considered legitimate. Obviously, rightness is the necessary condition for the application and normal realisation of the law, but it is not the basis of its justice.

4. Fairness as the meeting place of truthfulness and rightness

Between justice and procedure resides fairness as the meeting place and the coinciding of justice as truthfulness and rightness as properness (reliability, and correctness, i.e. solidity). This is also indirectly acknowledged by writers who advocate for procedural justice, especially those who are trying to find some kind of support for procedural justice in the rules of substantive law. Because of this, they consciously confuse substantive norms with procedural norms. However, procedural justice is non-existent, while justice exists, only it is not procedural, and neither is fairness, which can be considered the operative and applicable form of justice.

That fairness is the place where truthfulness and rightness meet and cross one another is shown by the connection of natural law and positive law which enables the rules of natural justice to flow into the rules of positive law. This link renders possible the determination of fairness in naturally-legal and positively-legal sense. Fairness "in the *naturally-legal* sense exists when a law directly refers to natural law in cases relating to legal gaps (when there is the absence of legal provisions referring to particular cases which provisions are not envisaged by law or the judge could not appeal to them as they do not fall under any one of general norms). On the other hand, fairness in *positively-legal* sense has at its disposal its legal (substantive) and judicial (formal) forms. *Legal* fairness in the positively-legal sense 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 in the

positively-legal sense 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 law does not embrace all the characteristics of a concrete case (legal gap case). It is then that judicial fairness enables the judge to decide the concrete case according to the rule he himself determines." It follows that the law only through fairness can serve the realisation of the idea of justice (Aristotle), and not through procedural justice (Rawls, Höffe and others). A similar thought is found in Radbruch's *Philosophy of Law*: the law is reality which has its meaning in the fact that it serves the idea of justice.

Open to dispute is also the place of procedural justice when compared to legal and court justice. If procedural justice were really to exist, legal and court justice would become its types. However, the scope of procedural justice would not have been exhausted because it would also have to relate to all other procedural rules adopted by other social subjects. This shows that procedural justice is in this sense also ambiguously conceived and determined, which is not the case with procedural rules, which have to be increasingly more determined and clearer for their righteous application.

5. Conclusion

To claim that procedural justice exists means to incline towards that what is modish in jurisprudence. Jurists-positivists can gain satisfaction in it, for, after all, positive law is also just, even if only in procedural sense. On the other hand, jurists of naturally-legal orientation, exaggerating with the broadening of the concept of justice, also make disservice to both themselves and jurists-positivists. They have started advocating for the existence of procedural justice, so that at least through it positive law becomes just. They have neglected that procedural justice is non-existent while justice exists, as well as that justice is not procedural, and neither is fairness.

That procedural justice does not exist can be shown by the statements as follows:

– Justice is synonymous with truthfulness, and not with rightness upon which the aforementioned writers build the concept of procedural justice.

- Truthfulness refers to that what is, what exists, whereas rightness relates to proper and accurate conduct of appropriate procedures.
- Truthfulness and rightness do not coincide, and neither do justice and the law. Something that is truthful need not be righteous. And *vice versa*, something that is righteous need not be truthful.
- The link between truthfulness and rightness shows that it has to do with the relationship between the objective (truthfulness, justice and fairness) and the means (rightness, correctness, accuracy, reliability, etc. in a word, solidity).
- Procedural justice is oftenly wrongly derived from the substantive rules referring to procedures which are thereafter declared procedural (for example, the principle of impartiality or the principle of fairness requires that procedural rules are applied righteously and fairly: they belong to substantive law and not to procedural law because through them is determined the way of conduct of the purely procedural rules). It is not one and the same to relate to something and to be something.
- Truthfulness and rightness, i.e. justice and procedure occasionally coincide and then they emerge in the form of fairness.

If the claim that procedural justice exists were accepted, then Hitler's Nuremberg race laws could be considered just only on the account of their being adopted in a legally righteous way. Or, in a milder case, any righteous and fair conduct of the rules of procedure in general could be considered just, while the unrighteous conduct of the same procedural rules would be legally acceptable, only it could not be called just in procedural sense. Obviously, it has to do with the dangerous simulacrum which replaces the substance of the law with its form (procedure), truthfulness with rightness, and justice with arbitrariness.

Insistence on the existence of procedural justice can be considered the belated response of the members of positivist jurisprudence, as has already been mentioned. It is odd that for the existence of procedural justice also advocate writers who have originally belonged to the direction of naturally-legal jurisprudence. Presumably, both the former and the latter have the same objective, only for different reasons: to present positive law as just. However, it is not Rawls's and

Höffe's construct any more but simulacrum of procedural justice which is readily accepted by jurists-positivists and supported by jurists of the naturally-legal orientation.

To sum up: procedural justice does not exist, but justice can be reached through righteous procedures. And vice versa, justice exists, but it is not procedural, and neither is fairness. Procedure is the only righteous means of the law, but the law is not the only righteous means of justice.

(Written 20 June, 2016, Belgrade)

ABSTRACTS

I
ON CONTEMPORARITY OF MULTIDISCIPLINARY LEGAL THEORIES AND WORLD STATE

The scientificity of a theory or theories is examined for a vast variety of reasons, such as insufficiently developed methodological apparatus, obvious one-sidedness and insufficiency, small probability, ethically unacceptable results, etc. A special subject of such examination and attention are the latest theories. As there are a large number of various multidisciplinary legal theories today, thus will be presented and commented upon only the most intriguing ones in which are laid out the results requiring serious re-examination of their scientific value or pointing at the goals which are less discernable or contained undisclosed in their deeper layers.

II
THE NEW PATH OF THE LAW. FROM THE THEORY OF CHAOS TO THE THEORY OF LAW

From chaos to chaos theory, from the primordial perception of the world as disorderly to the scientific research of disorder a long distance has been covered. This path implies openness of mind and scientific boldness which connect mythological perceptions of the world with philosophical and scientific interpretations of phenomena throughout the world in a quite distinctive way resting on the creation of a model and the application of computing. Owing to this, for the first time instead of asking *What awaits us in the future?* we can ask *What can be done in the future?* and get a reliable scientific answer to the question.

III
ECCLESIASTICAL LAW AND STATE LAW

The recently publictated revised, supplemented and expanded edition of the textbook Ecclesiastical Law by Sergey Viktorovich Troicki in Serbian language is a befitting occasion to call to mind his study on ecclesiastical law, to percieve contemporary place of ecclesiastical law among legal sciences and once again examine its relationship with state law. That contemporary ecclesiastical law, being partly public, private, international, internal, objective, subjective, etc. cannot with complete reliability be classified into a separate branch of the law seems closest to the truth. Therefore, ecclesiastical law may be said to make a separate sub-subsystem within the subsystem of autonomous law. The place of ecclesiastical law and its relationship with state law does not genuinely reflect contemporary influence of the church on the state and society, which is much more powerful and more comprehensive than the influence of its ecclesiastical law. That the link between the church and the state, and ecclesiastical law and state law, has almost never been broken is also shown by the fact that, starting from the Middle Ages, jurists have been awarded the degree (and title) of the doctor of the ecclesiastical and secular law (doctorus iuris utrisque).

IV
VIRTUAL REALITY AND VIRTUAL SUBJECTS OF LAW

The existence of legal reality implies the existence of the subjects of law as the creations of this reality. The law cannot even exist without its subjects. They are conditio sine qua non for the law. First, natural persons had become the subjects of law – although not all of them and not at the same time, and thereafter their creations – legal (moral) persons, also became the subjects of law. In both cases, it is about traditional virtual legal creations. However, as the information and technological developments could not have bypassed contemporary law, ever more frequently and intensively it has been thought about the third type of the subjects of law – virtual characters as the new subjects of law (law avatars). Today, this is not done out of curiosity, but for very practical reasons – i.e. for promoting business communication that is rapidly migrating to the area of computer virtual reality. Such change requires reconsideration of traditional beliefs and theories about what the subject of law is. It also requires the determination of a possible legal nature of virtual characters, irrespective of whether it is about virtual natural persons or legal persons. When it comes to the explanation of their essence, it seems that at this moment fiction theory is more acceptable than reality theory, which theory could prevail sometime, as it had happened with the subjectivity of a legal person at some point in time in the 17th century.

V
THE REALISTIC CONCEPT OF THE LAW

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, idealised and ideal concepts. However, 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 reach.

VI
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, existentialism, culturalist 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 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 this 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 natural law and positive law. The most difficult is to explain how the values of natural law flow into positive law. However, it is also attainable through the operative use of one or a number of naturally-legal values in the form of legal policies or decisive measurements which can be used for the choice of legal priniciples through which natural law flows into positive law and becomes its part. For example, justice flows into 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 natural law which becomes operational whenever it flows into positive law.

VII
WHY PROCEDURAL JUSTICE DOES NOT EXIST

Since the middle of the last century the interest in the naturally-legal research has been restored, and then intensified. At that time there have appeared new conceptions advocating for the existence of different types of justice (corporate, solidarity, organisational, international, etc.). This also applies to procedural justice. The best-known advocates of the concepts of the existence of procedural justice are J. Rawls and O. Höffe, and then L. Fuller, H. Hart, R. Dworkin, P. Koller, M. Van den Bos and others.

However, the aim of this work is not to support the idea of the existence of procedural justice, which idea is upheld by the above-named writers, but rather to challenge it. This will be shown by referring to the obvious: that justice is synonymous with truth, and not with rightness, on which the above-mentioned writers develop the concept of procedural justice. Truthfulness is related to that what is, what exists, and rightness to the proper and accurate performance of appropriate procedures. Otherwise, the founding of procedural justice in truthfulness would be a kind of contadictio in adiecto arising from the confusion between justice and procedurality.

As this is not concerned with the same but the related terms, truthfulness and rightness do not coincide, and neither do justice and the law. Something that is truthful need not be righteous. And vice versa, something that is righteous need not be truthful. Apparently, it has to do with the relationship between the objective (truthfulness, justice and fairness) and the means (rightness, correctness, accuracy, reliability, etc. in a word, solidity). Such relationship of truthfulness and rightness depicts rightness itself as the means of the proper application of the law, and only then and in the second-class as the means of the possible achievement of fairness in the law. Of justice therein can be no mention. The aforesaid relationship shows yet something else: that only substantive legal rules can be just, while it cannot be the case with procedural rules.

The consideration of the relationship of truthfulness and rightness in the example of the actually existing justice and the actually non-existent procedural justice, raises yet another important question: the relationship of material (substantive) and formal (procedural) legal rules. As it is rendered impossible to clearly and fully delineate them, thus are substantive rules relating to procedures declared the procedural, and all that only to acquire for procedural rules and positive law the aureole of justice. This cannot be accepted as correct because, for example, the principle of impartiality or the principle of fairness, which are wrongly considered procedural, indeed belong to substantive law.

In yet a deeper shade lies the question of the relationship between natural law and positive law. It seems that the insistence on the existence of procedural justice can be regarded as the belated response of the members of positivist jurisprudence. It is odd that for the existence of procedural justice also advocate writers who have originally belonged to the direction of naturally-legal jurisprudence. It seems that both the former and the latter aim at showing positive law as just. Only in this case it is not a construct but a simulacrum. It must be hard to believe in any authority as truth instead in truth as the only authority.

Between the truthfulness of justice and the rightness of procedure lies fairness as the place of occasional meeting of justice and procedure. Therefore, procedural justice does not exist. But justice exists, only it is not procedural, and neither is fairness. Procedure is the only righteous means of the law, but the law is not the only righteous means of justice.

ABOUT THE AUTHOR

Dragan M. Mitrović was born in Belgrade (1953), where he completed his primary and secondary (grammar school) education. He enrolled into the Faculty of Law, University of Belgrade in 1972 and graduated from it in 1976. He received his academic degree of Magister (magister iuris) in 1982 and also his Ph.D. with the dissertation "The Principle of Legality – The Concept, Content and Form" from the Faculty of Law in Belgrade in 1987 where he began his university career.

He was elected assistant in 1978, and thereafter assistant professor, associate professor and finally full professor in 1999. He teaches Theory of law and Autonomous Law (Department of Theory, Sociology and Philisophy of Law).

As a professor of theory and philosophy of law, he teaches Introduction to law and Autonomous law (general law course) and Theory of state and law, Autonomous law and special course entitled Holism and law (master and doctoral studies – i.e. postgraduate studies course).

Dragan M. Mitrović delivered about forty opening presentations and lectures in numerous eminent scientific and public institutions. Also, he participated in a large number of national and international conferences.

He is a member of the Group for Legal Theory of the Serbian Academy of Sciences and Arts and one of the founders of the Seminar Group for Theory of the State and Law of the Faculty of Law in Belgrade, as well as member of the Association for Theory, Philosophy and Sociology of Law of Yugoslavia, Novi Sad Association for Theory, Ethics and Philosophy of Law, Serbian Association for Legal and Social Philosophy and International Association for Philosophy of Law and Social Philosophy (IVR).

Dragan M. Mitrović was also twice (1994–1998 and 2000–2001) a Vice-Dean for scientific and research work of the Faculty of Law in

Belgrade, as well as the Head of the Department of Theory, Sociology and Pilosophy of Law (two consecutive terms of office 2009–2012 and 2012–2015). As of 2010 to present he is the Head of the Centre for Publishing and Informing of the Faculty of Law, University of Belgrade, the initiator of two law libraries (World Legal Heritage and Business Law), and editor-in-chief of several hundred titles encompasing all areas of legal science.

Also he was on the editorial board of the Annals of the Faculty of Law in Belgrade from 2009 to 2015, as well as a member of the editorial board of the international journal entitled Journal on Legal and Economic Issues of Central Europe from 2010 to 2015.

Main focus of his academic interest and research include theory and philosophy of law, within which the special fields of interest comprise the rule of law and modeling and computing in law.

Professor Dragan M. Mitrović, Ph.D. published over 200 works. However, below are given only the most important ones published from 1992 to 2017, which read as follows:

(i) "The State and Law in the Theory of State and Law", edited by *Službeni list,* Belgrade, 1992;

(ii) "Theory of Chaos and Theory of Law", edited by *Visio mundi academic press,* Novi Sad, 1993;

(iii) "Theory of Chaos and Theory of Law. Modeling and Computing in Law" (co-authored by Dr. Ljubiša V. Stanojević), edited by *Službeni list,* Belgrade, 1992;

(iv) "The Principle of Legality – The Concept, Content and Forms", edited by *Centar za publikacije Pravnog fakulteta Univerziteta u Beogradu,* Belgrade, 1996;

(v) "Autonomous Law" (a textbook co-authored by Prof. Dr. Budimir Košutić), edited by *Centar za publikacije Pravnog fakulteta Univerziteta u Beogradu*, and *AIZ Dosije,* Belgrade, 1996;

(vi) "Principles, Forms, Ideas and Heritage Arising from Theory of Law" edited by *Službeni list SRJ,* Belgrade, 1997;

(vii) "On the Rule of Law and Other Legal Subjects", edited by *Službeni list SRJ,* Belgrade, 1998;

(viii) "Introduction to Law" (a textbook co-authored by Academic Prof. Dr. Radomir Lukić and Prof. Dr Budimir Košutić), edited by *Službeni list SRJ,* 6th ed. Belgrade, 1999/2002;

(ix) "Path of Law", edited by *Službeni list SRJ,* Belgrade, 2000;

(x) "The Fundamentals of Law", edited by *Un. Singidunum*, 5th ed. Belgrade, 2003/2008;

(xi) "Theory of Law", edited by *Un. Sinergia,* 5th ed., Bjeljina, Bosnia and Herzegovina, 2006/2010);

(xii) "Autonomous Law", edited by *Pravni fakultet Univerziteta u Beogradu and JP Službeni glasnik,* 6th ed. Belgrade, 2007/2017;

(xiii) "Legal Theory", edited by *Pravni fakultet Univerziteta u Beogradu and JP Službeni glasnik,* Belgrade, 2007;

(xiv) "State, Law, Justice, Jurists", edited by *Pravni fakultet Univerziteta u Beogradu and JP Službeni glasnik,* Belgrade, 2009;

(xv) "Theory of State and Law", edited by *Dosije studio,* Belgrade, 2010;

(xvi) "Introduction to Law", edited by *Pravni fakultet Univerziteta u Beogradu,* 7th ed. Belgrade, 2010/2017;

(xvii) "On the law. Selected Essays", edited by *Pravni fakultet Univerziteta u Beogradu,* Belgrade, 1st ed. 2017., edited by *Dosije studio,* Belgrade, 2nd ed. 2017;

(xviii) "Introduction to Theory and the Philosophy of Law" (with Professor dr Gordana Vukadinović, edited by *Dosije studio,* Belgrade, 1st ed. 2019, 2nd ed. 2020).

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