The Nature of the General Theory of Law

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Abstract

The present paper is intended to ascertain the problem of the nature of the general theory of law, is it an emanation of the philosophy of law or is it just one of the legal sciences with the only difference that it does not study a branch of the law, but the law in its entirety? It is our opinion that the general theory of law is a positivist science which has objective law as exclusive object of study and that it is part of the category of legal sciences (in opposition with the auxiliary sciences studied in law school – legal sociology, legal philosophy, criminology, criminalistics, forensic medicine, etc.). Nevertheless, the total elimination of contributions from other sciences (sociology, politology, economy, philosophy, etc.) would only unjustifiably emasculate the explanations of the general theory of law.

Key words: general theory of law; science of law; philosophy of law; positive law
J.E.L. classification: K 00; K 10

1. Introduction

The object of study and the nature of the general theory of law have long been discussed with the specialised literature. Points of view have oscillated between considering the general theory of law as an emanation of the philosophy of law and considering it a positivist discipline, limiting it strictly to objective law. „The general theory of law, born out of the success of positivist sciences at the end of the 19th century, was known as a way to exceed the simple description of objective law, and free of the theories of natural law at the same time; its fundamental idea lay in the fact that law can be « the object of study of a positive science ». After World War II the general theory of law was considered, as anti-positivist reaction, as a search for non-legal values, norms and ideals under the appearance of the neutrality of the legal rules and theories thus conceived. The notion of the general theory of law is ambivalent, ambiguous as it is for some authors an emanation of philosophy of law and for others a scientific approach, close to « the legal dogmatics », i.e. that part of the science of law dedicated to the interpretation and systematisation of the norms"(Bergel, Jean-Louis, 2003, p.3).

In order to be able to reach an exact as possible explanation of the nature and object of the theory of law we must first examine the two approaches mentioned above.

2. Philosophy of law and the general theory of law

Philosophy of law is a branch of practical philosophy which deals with the study of law.

Etymologically, the word philosophy comes from the Greek *phylo* and *sophia*, so love of Sophia, a name that normally stands for wisdom. So, philosophy is not necessarily the possession of wisdom, but love of wisdom. Karl Jaspers in his *Introduction to Philosophy* insists on this idea: philosophy is the search for truth and not the possession of truth (Vergez, André; Huisman, Denis, 1995, p. 8).

The problematics of philosophy is suggestively presented by Immanuel Kant, in *"Logic"*, using four fundamental questions that have preoccupied man philosophically: What can I know? What do I have to do? What am I allowed to hope for? What is man? According to the answers philosophy gives to the four questions, it categorises its themes into several philosophical disciplines.

Philosophical disciplines can be grouped according to the answers to the first two Kantian questions as follows: a) Theoretical philosophy. Answering Kant's first question, it studies the first principles of existence and knowledge and it includes the following branches of philosophy: ontology or metaphysics (this in its turn includes philosophy of religion and philosophy of history), gnoseology or the theory of knowledge, logic, psychology and aesthetics; b) Practical philosophy. It answers Kant's second question and it includes the following branches of philosophy: moral philosophy and philosophy of law.

Political and legal philosophy is one traditional part of all great philosophical systems; since Antiquity (from Plato and Aristotle) to contemporary philosophers, practical philosophy has had its place impossible to overlook by all great thinkers.

Giorgio Del Vecchio, a voice with a lot of authority in the field, defined philosophy as follows: "the discipline that defines law in its logical universality, researches the origins and general characters of its internal development and cherishes the ideal of justice asserted by pure reason". This entails that the philosophy of law channels its research on three levels: a) on the logical level, by investigating law in its logical entirety, i.e. knowing what the essential elements common to all legal systems are, ignoring their particularities and following the universal concept of law; b) on the phenomenological level, by bringing to light that "positive law is not the product of special and exceptional causes, but a phenomenon common to peoples of all times, in other words it is a product of human nature"; c) on the deontological level, by outlining the fact that the practicing legist is limited to understanding and interpreting positive norms per se and does not wonder whether there could be better norms, the philosophy of law looks for the grounds of legal norms, social values and the justification of the existence of legal norms. Moreover, philosophy of law can afford to look for the ideal legal norm and compare it to the objective legal norm (Del Vecchio, Giorgio, p. 27-31).

The science of law has as object of study the various legal systems considered separate for each peoples at one point in time, such as: Roman law, Byzantine law, Italian law, German, French, etc. Furthermore, branch legal sciences do not cover the entire law system, but follow distinctions and successive specifications by analysing one single part of the respective system (constitutional law, administrative law, penal, procedural penal, civil, commercial, and procedural civil, etc.). What is more, typical to philosophy of law, the third research level as stated by Giorgio Del Vecchio is the deontological level, which is a constructive criticism of objective law. Thus, human spirit has never stood passively in front of the law, as if the law were immutable and unchangeable. Each individual has a sense of justice, an intuition of ideal law (natural law) and from there on the research of the ideal legal law can begin and by comparing it to the objective norm the idea of the improvement and perfection of positive law can start.

From this perspective (the general theory of law as an emanation of legal philosophy) our discipline is a more technical analysis of the law, but analysed through the lens of philosophy.

As a temporary conclusion, we hold that there is no denial that through its abstract character, through the overall image it offers, through the answers to fundamental questions the general theory of law borders the perspective of the philosophy of law.

3. General theory of law from positivist perspective

The second approach to the general theory of law places it in the ranks of positive legal sciences which have as object of exclusive study objective law (the assembly of legal norms ordered or sanctioned by the state). The difference between the general theory of law and the branch legal sciences would thus be only the fact that particular legal sciences would have as object of study one branch of the law each (civil law, commercial, administrative, etc.) while the general theory of law would refer to the whole legal system.

Positivism largely refers to an attitude of trust for the methods and results of experimental science. Strictly speaking, positivism is represented by the philosophy of Auguste Comte and, by extension, any philosophy which favours scientific knowledge and fights metaphysics. Auguste Comte's positivism states that the scientific (or positive) spirit by an invincible law of the progress of the human spirit will replace theological beliefs or metaphysical explanations. To this age of science should correspond a politics founded on a rational organisation of society and also a new

religion without God, the religion of Humanity (Clément, Elisabeth Demonque, Chantal; Hansen – Love, Laurence; Khan, Pierre, 2000, p. 407-408).

Legal positivism rejects any idea of natural law, any transcendental justice and orients legal knowledge to economic, social, political, legal, linguistic, etc. realities. Positivism has several orientations which can be classified as follows: a) utilitarianism; b) sociological positivism; c) pragmatic positivism and d) analytical positivism (Djuvara, Mircea, . 1995. p. 394-398).

From the perspective of legal positivism, Hans Kelsen supports the "purification" of the theory of law of any foreign element, the object of study of theory of law being only the objective legal norm, regardless of whether or not it is still valid and regardless of the state it belongs to. "If it is called «pure» doctrine of the law, this happens only because it intends to save knowledge based on the law and to eliminate from this type of knowledge anything that does not belong to the field exactly determined as being the law, which means that it intends to clear the science of law from all elements foreign to it. This is the basic methodological principle employed. It seems to be something obvious. However, a view of the traditional science of law as it developed during the 19th and 20th centuries clearly shows how far it really is from the requirements of purity. In a non-critical way, jurisprudence has mingled with psychology and sociology, with ethics and political theory. This mixture could be explained by the fact that these sciences refer to fields which are undoubtedly linked to the law. If the Pure Doctrine of the Law attempts to draw a line between the knowledge of law and these disciplines, it does not do so because it would ignore or deny their interdependency, but because it attempts to avoid a syncretism of methods which clouds the essence of legal science and blurs the borders drawn by the nature of its object." (Kelsen, Hans,2000, p. 13-14).

4. Critical analysis of the two perspectives

General theory of law as an emanation of legal philosophy

First, we show that philosophy most certainly exceeds the strict domain of the science of law, as any science can analyse only the objective exterior reality and cannot analyse and theorise an intangible ideal, it cannot afford rational fantasies. Legal sciences cannot afford to investigate ideal law, but only the law valid at a certain time and possibly old legal norms which have lost their legal force (the latter analysis is mainly done by the history of law). Philosophy can afford this luxury and it is here that the usefulness of this auxiliary discipline lies as the perfection of law can be accomplished only through the natural aspiration of man for evolution, for a better norm. Here is the distinction between the philosophy of law, which remains an auxiliary discipline, and the general theory of law, which is part of the body of positive legal sciences (those that study objective law). Another important distinction lies in the fact that the philosophy of law has a universal dimension, in the sense that it studies the legal phenomenon regardless of the historic period or political borders, while the general theory of law studies law from the perspective of a national law system. There is no general theory of law in its universality, but in its particularity, linked to its positive way of existence. We find a general theory of law anchored in the French positive law, another in the German, Romanian, etc. The general theory of law compiled by the French authors does not contain the categories of "legal report", "configuration factors", "legal consciousness", "and source of judicial precedent". The English theory of law does not contain the categories "law branch" or "proving modalities" (Mihai, Gheorghe C., 2008, p. 13, 24-25).

From a positivist perspective, the general theory of law should study exclusively objective law, and its explanations should not be allowed to break the strict borders of the legal. But how can science wishing to explain what law is achieve its objective by limiting itself exclusively to knowledge produced in the strict frame of legal sciences and by excluding the precious contributions of sociology or philosophy? In our view, such a general theory of law would be profoundly sterile, unable to offer a complete image on the law. Law was born in human society and it is one of the most complex social phenomena. The best demonstration of the failure of such an approach allegedly purified of any element foreign to the positive science of the law is the very work of Hans Kelsen. The value of the work of the Austrian theoretician cannot be contested, but his claim to build a pure theory of law is just a chimera. Theorisation in an attempt to rise from the crude reality to the abstract inevitably leads to philosophy and furthermore, the author himself

shows his vast philosophical culture in his method. Here are some arguments to this end: a) in *The Pure Doctrine of the Law* Hans Kelsen builds an entire system of legal thought of great originality by which the author wishes to explain the law exhaustively, this approach resembles the old dream of philosophers to create theoretical systems which can explain the entire existence, b) positivism itself is a philosophical movement (opposite to metaphysics), c) the method of demonstrations proves a solid humanist culture with special inclination towards philosophy and logic, d) the terminology used most of the times indicates the philosopher hidden behind the legist, so we meet a series of terms used mainly in philosophy: purity, positivism, transcendent sanctions and immanent sanctions liberty, moral virtue, free will, ground norm (grundnorm), etc.; e) it is not seldom there are direct referrals to philosophers (Immanuel Kant or Marx, for example), these being expressly named either in the text of the paper or in the footnotes. After all, any anti-philosophy (as a demonstration of the gratuity/ uselessness of philosophy) does nothing else but add yet another page in the long history of philosophy.

5. Conclusions

In our opinion, the general theory of law is a positivist science having objective law as exclusive object of study and it is part of the category of legal sciences (in opposition with the auxiliary sciences studied in law school – legal sociology, legal philosophy, criminology, criminalistics, forensic medicine, etc.). Nevertheless, the total elimination of contributions from other sciences (sociology, politology, economy, philosophy, etc.) would only unjustifiably emasculate the explanations of the general theory of law. Employing philosophy is inescapable in the general theory of law. Even Hans Keller, who virulently excludes any foreign element, as shown above, ends in employing philosophy.

6. References

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