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THEORY OR PHILOSOPHY OF LAW?

TEORIA CZY FILOZOFIA PRAWA?

The article discusses the theory of law in terms of the extent to which it is part of jurisprudence, on the one hand, and a philosophical pursuit, on the other. The question is explored considering the historical development of the legal sciences and the situation of Polish theory of law in the latter half of the twentieth century. Also, the author relies on the analysis of selected theoretical-legal concepts, notably the so-called multiplane theory of law and the views thought of Zygmunt Ziembiński. The conclusions suggest that philosophy is inevitable in jurisprudence.

Keywords: jurisprudence; doctrinal studies of law; logic; ontology; axiology

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Artykuł rozważa pytanie, w jakiej mierze teoria prawa jest częścią prawoznawstwa, a w jakiej ma charakter filozoficzny. Kwestię tę przedstawiono na tle historycznego rozwoju nauk prawnych i sytuacji w polskiej teorii prawa drugiej połowy XX w. oraz na podstawie analizy wybranych koncepcji teoretycznoprawnych, w szczególności tak zwanej wielopłaszczyznowej teorii prawa oraz poglądów Zygmunta Ziembińskiego. Konkluzja rozważań wskazuje, że filozofia jest nieunikniona w prawoznawstwie.

Słowa kluczowe; prawoznawstwo; dogmatyka prawa; logika; ontologia; aksjologia

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The place of the philosophy of law in jurisprudence has been a subject of perennial debate, ever since the times of antiquity. A few decades ago, Polish law students would attend a course in Theory of State and Law. At many universities, the lecture course (and the classes likewise) began with the history of the discipline, with emphasis on theory of law. This was followed by the eighteenth-century natural law (which was approached as a point of departure, an intermediate stage between philosophy and legal theory, illustrated using doctrines from the period of the French Revolution); this was due to the fairly widespread notion that the general reflection on law was philosophical until the turn of the nineteenth centuries, when it transitioned into the theo-

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retical-legal approach (possibly with exceptions, such as the Catholic concep-
tion of natural law), thus encompassing the legal-historical school, Marxism,
legal positivism, Leon Petrażyckian psychologism, Léon Duguit's solidarism,
Hans Kelsen's normativism, American functionalism and Scandinavian real-
ism. The next development was the systematic part, which covered elements
of the theory of law (system of law, interpretation, functions of law, etc.), and
theory of state (types and forms of regimes, origins and future of state, rule
of law, etc.). The two-part course material by Stanisław Erlich (there was no
'official' textbook, the first ones becoming available in the late 1960s) entitled
*Teoria państwa i praw*a [Theory of State and Law][1] served as a teaching aid
(it lacked the aforementioned historical part); admittedly, Marxist thought
predominated there, but it did provide extensive information on the theoreti-
cal-legal solutions adopted in other currents. Moreover, the lectures (and the
classes) as well as the course material included much information pertain-
ing to philosophy, though it was not particularly distinguished from theoret-
ical-legal content. Another course, designated as History of Political-Legal
Doctrines, covered the period from antiquity to the turn of the nineteenth
century (incidentally, the scope of instruction depended on the preferences of
the given lecturer). There was no uniform textbook either, and one could use
the works by Edmund Krzymuski[2] or Jerzy Lande[3] (the latter was published
as lecture notes). It may strike one as rather odd today, but lawyers were often
(though perhaps not always) educated in a manner that involved a substantial
amount of philosophy.

As regards the relationship between legal theory and philosophy, it is
readily noticed that the multiplicity of theoretical orientations in law resem-
bles the multiplicity of philosophical approaches, as both advance numerous
solutions and tend to contradict one another. Moreover, this does not ap-
ply exclusively to the earlier periods, when law was reflected upon by such
thinkers as Plato, Aristotle, Cicero, Aurelius Augustine, Thomas Aquinas,
Locke, Leibniz, Montesquieu, Rousseau, Kant or Hegel, since the twentieth
century witnessed similar controversies. While the views on law, state and
politics espoused by the above thinkers (whose list is by no means exhaus-
tive), from Plato to Hegel, may be considered a part of the philosophical
systems they created, such a straightforward formula cannot be employed
with legal theorists such as Holmes, Petrażycki, Kelsen, Axel Hägeström,
Alf Ross or Herbert L. A. Hart (the historical school of law, Marx, and nine-
teenth-century legal positivists are deliberately omitted here, as they date
from before the twentieth century). Oliver Wendell Holmes was a member of
the Metaphysical Club at Harvard University – the cradle of pragmatism –
and a colleague of James's. He was a legal theorist, the first significant legal
functionalist. Was he a legal theorist or a pragmatist philosopher? The same
could be asked with respect to the others, as each may be regarded as a legal

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[1] Ehrlich (1958).
[2] Krzymuski (1923).
[3] Lande (1930).

theorist or a philosopher-psychologist (Petrażycki), neo-Kantian philosopher (Kelsen), co-founder of the Uppsala school of philosophy (Hägerström), logical empiricist (Ross), or representative of the Oxford philosophy of colloquial language (Hart).[4]

Naturally, such questions may be answered by asserting that they were partly philosophers and partly (perhaps even primarily) jurists. Although Holmes's bad man was conceived under the influence of the philosophy of pragmatism, it functioned as the nucleus of legal functionalism, which approached law from the standpoint of its effectiveness in the actions of the individual. Petrażycki suggested a psychological definition of law: he recognized it as a psychological entity from an ontological point of view, but it served him as an underpinning for his theory of law. Kelsen's understanding of normativity undoubtedly displayed Kantian provenance, but it yielded a pure theory of law within the framework of obligation; Scandinavian legal realism stemmed from the general philosophical position of Hägerström and Ross, who was influenced by logical empiricism or related views; whereas Hart's open texture of law actually applies the conception of vagueness of linguistic contexts developed within Oxford philosophy. Obviously, it may be argued that legal theory relies on philosophical premises of one kind or another, which are then utilized to analyse and solve problems concerning law; thus, Marxist legal theory is based on dialectical materialism, functionalism on the pragmatic conception of truth, Petrażycki's psychologism assumes that cultural creations exist as psychological entities, normativism adopts a radical distinction between being and obligation, realism exploits the conviction that only empirically verifiable judgments may be made about law, while Hart builds on the meaning of linguistic expressions in their typical usage. However, the earlier concepts were no different; after all, what philosophers from Plato to Hegel said about law derived from their general assertions about the world and knowledge. Incidentally, it is also worth noting that asking about the philosophical substance in legal thought from the more or less distant past is thoroughly legitimate. Were the sophists philosophers or jurists? – they are regarded as the former, but they were professionally engaged in legal consultancy; was Ulpian a Stoic philosopher or a jurist, given that his definition of jurisprudence was a replica of the Stoic definition of philosophy? The sophist Protagoras had a disciple Euathlus. They agreed that payment for tuition would be made when the pupil won his first trial, but Euathlus was not eager to start practicing law. Protagoras put the matter thus: 'I will sue you and you will have to pay, because if I win, it is by judgment, and if I lose, it is by contract.' Euathlus replied: 'I will not pay, because if I win, it is by judgment, and if I lose, it is by contract.' Were they arguing philosophically (logically) or legally? If criminal jurists of the dogmatic persuasion debate the causation of omission, does their dispute concern law or ontology?

Hence, it is no surprise that the relationship between philosophy and jurisprudence and, consequently, the question of the status of the philosophy of

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[4] A synthetic historical outline of the European theory of law may be found in Kelly (1992).

law, must be approached as serious issues, even if it is claimed that they have
little bearing on the specific solutions offered within legal dogmatics and, more
importantly, the practical decisions of legal practitioners. However, this is no
reason to dismiss the problem under consideration. Concrete mathematical
theories are not contingent (or only to a minor degree) on whether one recog-
nizes that mathematical objects exist in the manner of Platonic ideas or other-
wise, while physical theories do not depend on whether the world is determin-
istic or not. With this analogy in mind, the question posed in the title – even
understood trivially – that is along the lines of 'how much philosophy and how
much jurisprudence is there in a given theoretical-legal concept?', does deserve
attention. Let us refer to history once again. The faculty of law was an integral
part of the university from the moment that this institution emerged in me-
dieval Europe. It may be assumed that jurists, just as the representatives of
the liberal arts, medicine and theologians, believed that their field (let us call
it jurisprudence) to be independent (liberated) from philosophy in the sense
that it belonged to the specialized disciplines, or positive disciplines as they
were termed later. Nevertheless, one should also remember that the modern
understanding of jurisprudence developed in the nineteenth century, having
been significantly influenced by the emergence of an elaborate system of law
that was characteristic of the contemporary states, the existing and the newly
established alike. Jurisprudence – legal dogmatics in the main – evolved in
the form of disciplines concerned with particular branches of positive law: the
law in force 'here and now' (which reinforced the aforementioned notion that
jurisprudence belonged to the specialized sciences); also, its scope was broad
enough to accommodate legal history and the so-called general science of law.
In fact, that model had essentially been accepted by the legal-historical school,
but it triumphed fully in legal positivism. The history of law was regarded as
a prerequisite for understanding contemporary legal systems, especially their
origins: a crucial element given the conviction that law is one of the expres-
sions of national consciousness (a view typical of Romanticism as a cultural
current). In turn, legal dogmatics was the principal field in jurisprudence, con-
cerned with the systematics of the law in force, whereas the general science
of law examined certain legal universals, including the notions of the legal
system – such as the legal norm, legal relationship, legal fact, legal sanction.

Where would philosophy of law fit in there? An extreme legal positivist
would probably argue that philosophy – of law in this case – is speculation
that has no place within the positive science of law: one which meets a cer-
tain standard of scientificity. Consequently, it was thoroughly legitimate to
approach philosophy of law as a pursuit that may be confined to axiological
inquiry concerning the value of law from the standpoint of its relation to nor-
matively understood morality. The positivists by no means denied the need for
axiological reflection on law, but they set it apart from scientific jurisprudence.
One response to positivist reductionism – and which enjoyed some popularity
in Poland – distinguished three historical traditions of understanding the gen-
eral science of law, whereby it was conceived as philosophy of law, analytical

jurisprudence, and legal theory.[5] The first was essentially identified with natural law and the axiological evaluation of law (hence its distinction drew on legal positivism); the second with jurisprudence rooted in common law, English in the main (Jeremy Bentham and John Austin); the third with the concepts developed in Germany (e.g. Kelsen) and Russia (e.g. Petrażycki, including his Polish period, i.e. after 1918); and Polish theoretical-legal thought was considered to fall within the latter tradition. In that arrangement, the aforementioned division of jurisprudence into a 'philosophical' period, thus until the end of the eighteenth century, and a later 'theoretical-legal' stage, was considered valid with respect to all three traditions, with the exception that the character of philosophy of law (as construed here) remained unchanged. This explains why it became customary in education to begin the history of the general science of law (i.e. theory of law in the present-day sense) with the French doctrine of natural law, emphasizing that – as already noted – it was a transitional phase preceding the historical-legal school, which included the then influential Marxist conception. Theory of law should of course be aware of its historical affinities with philosophy.

According to Jerzy Wróblewski, the relationship between legal theory and the philosophy of law was as follows:

> First, it may be a matter of whether and in what form a given theory refers to a particular philosophical system or part of it, whether by drawing on that system (or its part) or by dissociating itself from a particular philosophy, or by leaving that association unsaid. ...
> Second, this may involve an examination of the substantive link between the propositions of a particular theory and the philosophy of law regardless of whether and to what extent this is explicitly expressed in the propositions of the theory. ... These two approaches to the relationship between legal theory and philosophy are fundamentally different. Whereas the first approach expresses *sit venia verbo* the philosophical self-knowledge of legal theory in a manner contingent on multiple factors, the second approach to the relationship between legal theory and philosophy is concerned only and exclusively with the links between propositions from the standpoint of logical dependencies *sensu largo*. ...
> I will speak of theory of law as having a philosophical position when the relationship between that theory and philosophy satisfies one of two conditions: (i) the theory invokes a certain ... system of philosophy; (ii) the theory invokes certain sets of accepted philosophical propositions. ... In other cases, however, when a theory invokes neither a system nor any set of accepted philosophical propositions, or when it expressly dissociates itself from such propositions, we are dealing with an aphilosophical position.[6]

Consequently, when any particular variant of legal theory is analysed, one must also consider its philosophical involvement, both that which is overt, and thus explicitly articulated by the author in question, as well as that which is implicit. Wróblewski was of the opinion that it is preferable to adopt a philosophical stance than an aphilosophical one, because the latter often consists in rather unconvincing negation of the philosophical presumptions one makes, or in leaving them to the conjectures of the readers.

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[5] Cf. Opałek (1962).
[6] Cf. Wróblewski (1966): 25–26 (in the reprinted edition).

It soon became apparent, however, that the matter of the philosophical component in legal theory, understood as theoretical or general deliberations on law, demands further analysis, as citing the philosophical premises of jurisprudence does not suffice. What is law? A system of norms of a certain kind, as Kelsen envisaged? A psychological experience, as Petrażycki argued? A social fact, as the American functionalists and Scandinavian realists maintained? In the sketches collected in the aforementioned mentioned volume *Studia z filozofii prawa* [Studies in the Philosophy of Law] (the volume may just as well have been titled 'Studies in the theory of law'), Lande – a self-professed loyal disciple of Petrażycki's – saw that there was place for the science of the legal norm, the inquiry into legal experience, and the study of the social origins of law and its impact on the life of a community. What, then, are legal phenomena? Are they norms which exist in the reality of obligation, are they psychological experience, human conduct informed by law, or all of these elements in some kind of a conjunction? Simultaneously, it turned out that the analysis of norms gravitated increasingly towards logic and semantics, the study of the legal experience towards psychology, social psychology in particular, while the reflection on the origins of law and its social effect involved sociology. This gave rise to the so-called multiplane conception of law,[7] which distinguished (at least) three planes, namely logical-linguistic, psychological and sociological, all of which were understood in ontological or methodological terms. The ontological planes encompassed certain objects: linguistic phenomena, psychological experiences and social facts, respectively, whereas the methodological planes determined the methods by means of which such objects may be studied. In consequence, the issue which soon had to be addressed concerned the nature of the coexistence of the different ontological aspects of law; for instance, Wiesław Lang advanced a conception of law as a complex ontological structure.[8] A more moderate conception (developed by Kazimierz Opałek and Jerzy Wróblewski) suggested that it suffices to put it thus: norms are linguistic expressions and should therefore be studied using methods of logic and semantics, the experiences related to law (for example, legal consciousness) fall within the methodological purview of psychology, whereas the social context of law is the province of sociology. Hence, there is the logic and semantics of law, which takes advantage of, for example, deontic logic, the psychology of law, which may draw on the psychological findings concerning motivational processes, and the sociology of law, which may examine the influence of social status on compliance with the law, for instance. The added value of that approach was the possibility of integrating legal studies with other disciplines which may be applicable in the study of law, including philosophy. As a result, the role of the ontological planes is considerably reduced, whereas the methodological ones take precedence. According to the multiplane conception, the

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[7] Its precursor was Lande, whose ideas were continued by his disciples, Opałek and Wróblewski in the main; cf. Opałek, Wróblewski (1969).

[8] Cf. Lang (1962).

theory of law is part of jurisprudence while the specificity of law is situated in the logical-linguistic plane, since it is concerned with norms.

A different view on those issues was adopted in the Poznań milieu, whose main representative was Zygmunt Ziembiński. The latter scholar – as well as his disciples, including Sławomira Wronkowska, Leszek Nowak, Maciej Zieliński and Stanisław Czepita – never accepted the multiplane theory of law, whether in its ontological or methodological variant. The Poznań approach to the theory of law was pioneered by Czesław Znamierowski, who believed that the general science of law was concerned with the notions which serve to describe law, both the provisions in force and the laws whose introduction one recommends from the axiological standpoint (axiology was fundamental in Znamierowski's project, including for example the norm, legal relationship, legal system, interpretation, effect of law, moral appraisal of law, etc.).[9] In the theoretical reflection on law, the scholars of Poznań also drew on the conception of philosophy originating with Kazimierz Adjukiewicz (or more generally, the Lvov-Warsaw School), who construed the study of law as an analysis of concepts. Ziembiński elucidated his systematics of theoretical-legal issues and his understanding of the theory of law in several monographs.[10] The terminological issues are immediately noticeable, while the volume co-written with Wronkowska was the only one to have 'theory of law' in the title, most likely because it was a textbook and the title matched the curriculum of law studies. Apart from that, there are references to jurisprudence or legal sciences, including their specialized varieties, and attributes such as 'logical', 'ethical', 'methodological' and 'fundamental' are used. Even so, Ziembiński found that the deliberations in the monographs listed in footnote 6 below were well within the framework of jurisprudence, which is most clearly evinced in the title *Socjologia prawa jako nauka prawna* [Sociology of Law as a Legal Science][11]. An important methodological premise adopted by Ziembiński was that the scope of jurisprudence is to be determined in line with the research practice of jurists as opposed to preconceived projects.

Given the problem under consideration, it may be somewhat surprising that no book by Ziembiński is entitled 'Philosophical problems of jurisprudence,' though this does not mean his works failed to mention philosophy altogether. One of the volumes which it would be worthwhile to consider from that perspective is *Problemy podstawowe prawoznawstwa* [Fundamental Problems of Jurisprudence].[12] The book comprises the following parts: 1. Systematization of the research scope of legal science; 2. Complexity and multiaspectual nature of legal phenomena; 3. Legal norms; 4. Structure of the system of legal norms; 5. Law-making facts and the rules of their exegesis; 6. Fundamentals of law-making theory and policy; 7. The scope of research into the effects of law; 8. Functions of law. Since the first three parts devote considerable attention to

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[9] Cf. Znamierowski (1924).
[10] Ziembiński (1966), (1972), (1974), (1975), (1980), (1983); and Wronkowska, Ziembiński (1991), whose work is an academic textbook.
[11] Ziembiński (1975).
[12] Ziembiński (1980).

methodological and logical issues, they may readily be construed as addressing philosophical-legal problems. This is even more prominent in other Ziembiński's monographs which successively delved into the logical,[13] methodological,[14] and ethical problems of jurisprudence.[15] Nevertheless, in the opinion of the present author, all those works qualify as legal science. Importantly enough, Ziembiński recognizes that legal phenomena are multifaceted and exceedingly complex, but carefully avoids talking about the planes of law. This is how Ziembiński may have sought to underscore his own distinctiveness with respect to another theoretical-legal milieu and convey a certain degree of reluctance towards the multiplane ontology of the legal phenomena. Also, it should be noted at this point that Polish theory of law in 1960–1980 saw two principal currents of inquiry: the Krakow–Łódź–Poznań current focused predominantly on logical and methodological issues, whereas the Warsaw–Wrocław line prioritized theory of state and its political aspects (incidentally, the work of Adam Łopatka, a legal theorist from Poznań, was consistent with the latter).

The renowned monograph by Gustav Radbruch on the philosophy of law (though initially inclined towards legal positivism, this author became one of the main proponents of the so-called natural law revival after 1945)[16] included the following parts: 1. Reality vs. value; 2. Philosophy of law as a reflection on the value of law; 3. The currents within the philosophy of law; 4. The concept of law; 5. Law and morality; 6. Law and custom; 7. The purpose of law; 8. Party theory in the light of the philosophy of law; 9. Antinomies of the idea of law; 10. The binding force of law; 11. Law from the perspective of the philosophy of history; 12. Law in the light of the philosophy of religion; 13. The psychology of the legal person; 14. The aesthetics of law; 15. The logic of the science of law; 16. Public and private law; 17. The person; 18. Property; 19. Contract; 20. Marriage; 21. The right to inheritance; 22. Criminal law; 23. Capital punishment; 24. Pardon; 25. Trial; 26. The rule of law. 27. Ecclesiastical law; 28. International law; 29. War; Appendix 1. Draft afterword to *Philosophy of Law*; Appendix 2. Five minutes of philosophy of law; Appendix 3. Statutory lawlessness and supra-statutory law. The appendices date from 1945–1947 and introduce Radbruch's famous formulation of statutory lawlessness and supra-statutory law (the relevant fragments testify to Radbruch's shift towards the conception of natural law), whereas the remainder was included in the first edition. Sections 16–29 are clearly concerned with typical theoretical-legal issues, but there can be no doubt about the philosophical content in the rest. The aforementioned Hart noted: 'No very firm boundaries divide the problems confronting these various disciplines from the problems of the philosophy of law'.[17]

Guided by that thought, Hart characterizes philosophy of law by distinguishing several problems it involves, namely: 1. definitional-analytical issues

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[13] Ziembiński (1966).
[14] Ziembiński (1974).
[15] Ziembiński (1972).
[16] Radbruch (2003); first edition – 1932.
[17] Hart (1967): 264.

(definition of law, analysis of the concept of law); 2. issues of legal reasoning (role of deduction, precedent, methods of discovery and standards for the appraisal of reasoning as correct, clear cases and indeterminate rules); 3. issues of legal criticism (criteria for the evaluation of law, substantive law, procedural law, justice and utility, the obligation to obey the law). One readily notices that traditional theoretical-legal problems intertwine in this list with issues characteristic of the philosophy of law.[18]

Undoubtedly, contemporary philosophy of law has broadened its scope compared to its traditional understanding, in which it was practically reduced to legal axiology. The latter still constitutes a considerable – perhaps even a major – proportion of what philosophical reflection on law is concerned with, as an unquestionable aftermath of the Second World War and response to the complex political and social issues of the present day. Nevertheless, the range of philosophical-legal deliberation has been expanded to include logical and ontological issues, with considerable contribution from Polish scholars, including the theoretical-legal milieu of Poznań.[19] There is no particular reason today to argue whether the issues explored as part of philosophy of law lie within the purview of general philosophy or legal theory. The crucial conclusion is that, perhaps contrary to Wróblewski's view, no actual aphilosophical approach is in evidence in theory of law and many other areas of legal studies. In all likelihood, it is not that each legal issue – a dogmatic one in particular – involves a philosophical aspect, yet such a component may be found in many questions. Here, one may once again mention causation of omission or observe that for example the presumption of innocence is not only a procedural institution, but also reflects the fact that one does not prove (except in special cases) negative (contradictory) statements or overtly counterfactual presumptions when assuming that the persons who died in a plane crash died at the same moment. If this is the case, the issue to be confronted is how to practice philosophy of law: which meta-philosophical position to adopt. In a manner of speaking, Ziembiński and his school contributed the classics of analytical philosophy (or, preferably, theory) of law. The philosophical inclination of jurisprudence makes it resemble other disciplines of the social sciences and humanities. Hence, it is not at all surprising that there are many possible ways of practicing philosophy of law as a philosophical discipline rather than just as a part of jurisprudence.

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[18] This is the case in extensive collective studies, such as Patterson (1996), Coleman, Shapiro, Himma (2002) or Pattaro (2005–2016).

[19] Cf. Woleński (2020).

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