

## Czech legal thinking – Brno normative legal school

A very important center of philosophical and legal thinking in the period between the Wars in Czech Republic was at the Faculty of Law of the University in Brno. Normative theory of law, created by significant Czech legal theorist **František Weyr** (1879-1951), strived to create a genuine scientific theory of law by applying the normative methodology of legal cognition, the core of which was Kant's and Schopenhauer's critical idealism strictly distinguishing normative cognition from causal cognition. His spiritual benefits gave Brno Faculty of Law in the interwar period a very distinctive character through founding a normative legal school. The importance and renown of this legal school crossed the borders of the republic.

Weyr's normative theory was associated with **Hans Kelsen**, Weyr's friend and supporter of the same normative approach in jurisprudence. The conjunction of these two significant legal theorists and philosophers was not accidental; we can say that these two great lawyers were kindred spirits, as it can be expressed. Both authors reached almost simultaneously and independently the concept of **pure jurisprudence**, which is purified from all non normative approaches. Their conviction of correctness of legal normativism had been further strengthened after their first personal encounter in summer 1912. Their acquaintance based not only on their close scientific cooperation, but also on life-long personal friendship. Their paths fatally met and showed some similarities. Weyr was born in Vienna and Kelsen in Prague. For a short period they grew up in the same city - in Vienna. Both participated in 1919 in creation of national constitutions, both edited the journals, which became a forum of normative legal theory: Kelsen in Vienna the journals *Österreichische Zeitschrift für öffentliches Recht* and *Wiener staatswissenschaftliche Studien* and Weyr the journals *Časopis pro státní a právní vědu* (*Journal for State and Legal Science*) a *Vědecká ročenka* (*Scientific Yearbook*). Weyr and Kelsen together published in French and German. They especially enriched each other by their ideas on development of normative legal theory.

All Weyr's pedagogical and scientific activities were focused on the promotion of normative legal theory. Weyr expressed the basic idea of normative theory in two of his basic works. He articulated his first systematic interpretation of normative theory in his work *Základy filosofie právní* (*Foundations of Legal Philosophy*) (1920), which represents a milestone in the Czech legal philosophical works. Weyr spent several years on this work. The work was created under the strong influence of Hans Kelsen and his pure theory of law, but a number of issues represent his own way of thinking. Weyr places in his work in contraposition causal (of natural science) and normative (legal) method of cognition and defines the basic difference between the world "how it is" (according to law of causality) and the world "how it ought to be" (according to specified rules). Weyr refers to jurisprudence as to the "science of law - science of norms", science belonging to the group of normative sciences (such as ethics, grammar, logic). He states that the reason of validity of legal system is a metanormative finding and combines validity with a stepped construction of legal system. Great attention is paid to concept of obligation, which is a fundamental concept of normative cognition and necessary foundation and starting point of any normative considerations.

His next book named *Teorie práva (Theory of Law)* is continuation of thoughts of his previous book *Foundations of Legal Philosophy*. It was published in 1936 and represents, in Weyr's words, "a milestone in his up to now scientific activities and a summary of what he had taught." In this book Weyr deals with the philosophical foundations of his normative theory, based on Kant's critical idealism. In detail he is devoted to noetic issues, he defines the concept of legal norm as an object of legal cognition and separates jurisprudence from other social sciences. He distinguishes between the validity of norm and its effectiveness, between static and dynamic point of view of legal studies, between norm and value, between interpretation and application of norms. In an extensive appendix of his book (entitled *The origin and previous development of normative theory*) Weyr describes the development of Vienna and Brno branch of normative legal theory and differences between them. It is a pity that neither one of that two basic Weyr's works has not been translated into German or another foreign language, which limited the availability of Weyr's ideas for international professional public.

In 1946 Weyr published a brief summary of his normative theory under the title *Introduction to a legal studies (normative theory)*, especially as a study aids.

Beside theoretical issues of law Weyr also focused to the segments of positive law and wrote several extensive works on constitutional and administrative law, such as *The system of Czechoslovak state law* (1921, 1924), *Czechoslovak Constitutional Law* (1937) and *Czechoslovak administrative law, general part* (1922). He also wrote several hundreds of professional articles, as well as over five hundred editorials, commentaries and essays for newspapers. He was a significant organizer of scientific and public life.

Fields of Weyr's activities seems to be to much for one human life. Results of his scientific and pedagogical activities appreciated many of his contemporaries. Weyr can be regarded as a multilateral legal thinker and great spirit, who fundamentally contributed to the development of legal theory, legal philosophy, many sectors of positive law (especially constitutional, administrative and financial law), but also to political science and statistics in the period between two world wars.

The Brno normative theory was headed by František Weyr, who before Hans Kelsen in his first work (*Some Contributions to the Theory of Forced Bonds - 1908*) laid the foundations of a juristic philosophical theory, which met with a wide reception throughout the world, both in the positive and negative sense. What Weyr, Kelsen and their followers were, above all, making jurisprudence more scientific and creating a noetic and methodological approach to law, while focusing on a concrete juristic logic. All these philosophers of law professed Kant's critical method, the idea of a dualism between cognition and volition. The philosophy of law should examine the a priori principles of juristic cognition, with aim to apply this knowledge to any possible juridical experience: therefore. it should be a theory only of formal elements. Their thesis of the dualism between being and ought departs from Kant's dualism of nature and morality, and is based on Kant's statement from the *Critique of Pure Reason* that "Ought expresses a kind of necessity and connection which otherwise does not occur in nature"

They showed that notions such as obligation, norm, etc., cannot be conceived in causal terms, but only in the normative ones. The classification of sciences follows from this. Adherents of this school of thought intended to complete Kant's philosophy by

attempting to examine the noetic and logical foundations of normative sciences, assuming that Kant had carried out only a classification of natural sciences.

Having rigorously distinguished between the cognitive and the volitional spheres, they came to the conclusion that science should be limited only to cognition. They wanted to create a theory of positive law and put aside the question of how to create the law properly, considering this issue unscientific. In this, they were **uncompromising juridical positivists**, their characteristic feature being a resolutely anti-theoretical stance. Thus, they opposed all forms of the doctrine of natural law. It follows from their relativism that no absolute juridical form is conceivable. They pointed out the need for jurisprudence to be absolutely self-contained and hence rid of all that does not belong to the subject labelled as law.

Weyr's normative theory contributed to the theoretical and scientific profiling of Brno Faculty of law, however not all the pedagogues accepted Weyr's normativism. Without Weyr's charismatic influence the Brno normative legal school would not be formed. But the Brno normative school is not only represented by František Weyr, but also by other professors of the Brno Faculty of Law. It was especially Jaroslav Kallab, Jaromír Sedláček, Jan Loevenstein, Josef Krejčí, Vaclav Chytil, Hynek Bulín, Vladimír Kubeš, Ota Weinberger and others. It was only natural that among individual representatives of the school, all excellent lawyers, there were certain differences in opinions. **Jaromír Sedláček** (1885-1945), an outstanding expert in civil law and in Kant's transcendental philosophy, to a certain degree ceased to distinguish strictly between the cognitive and volitional spheres. **Jaroslav Kallab** (1879-1942), professor of criminal and international law and of the philosophy of law, denied consistently the absolute cleavage between these spheres and attempted to master the volitional spheres. Kallab was inspired by Windelband, Münsterberg, and Rickert, and to a certain degree even by Bergson.

Among the younger professors at the Faculty of Law in Brno who abandoned the normative school was **Vladimír Kubeš** (1908-1988), professor of civil law and the philosophy of law. At first Kubeš also professed Kant's transcendental philosophy and wrote a large work on it during the World War II (as yet unpublished). As he changed his focus toward systematic philosophy (most of all due to Nicolai Hartmann's critical ontology, whose lectures he had attended in Berlin in 1932), he gradually crossed the "narrow confines of normative theory".

As Kubeš himself put it, the deepest foundation of his philosophy was (in contrast with Hartman) an optimistic attitude to the world. It assumed the general tendency to attain perfection (i.e., normative ideas of truth and rightness, morality, law and beauty) to be not only individual, but historical, that there is a similar tendency in humankind as a whole. He considered an optimistic position to be the most fundamental condition for philosophy, every science, all that man undertakes, the whole of human life: pessimism, in historical terms, amounts to a statement that all that man does lacks any sense.

Kubeš thought that the dualism between the real world and the ideal one -

the sphere of normative ideas - was based on this optimistic attitude toward the world. In turn, he thought that the unique human awareness of the ideal world conditioned the Ought (das Sollen) or obligation. In his view, the possibility of a positive answer to the "grand question of the freedom of will lay in the relation between dependence and autonomy or independence".

In his studies and works, Kubeš dealt with the ontology of law and its relation to the structure of law, with jurisprudence and ethics, with modern natural law and the attempt to master the sphere of law and volition rationally, and with the freedom of will. He wrote also (as an historian and interpreter of modern European philosophy of law) *The Juristic Philosophy of the 20th Century*. After the coup d'etat in 1948 he had to leave the Faculty of Law; he taught there again in 1968-1970. After 1974 he taught as a visiting professor of philosophy of law at the University of Vienna, by that time his new work could be published only abroad.

Another member of the Faculty of Law in the period between the Wars was **Karel Engliš** (1880- 1961), a leading Czech economist and methodologist. He also took as a point of departure Weyr's and Kelsen's normative theory and Kant's transcendental philosophy in his Schopenhauerian interpretation. However, later he developed his own approach, namely his theory of orders of thought. Engliš did not recognize any a priori notions or opinions: all our mental creations are historically conditioned (variable), purpose-oriented means which help us to explain and understand reality. The various categories and notions create systems or orders of thought with inner connections.

Until that time, the adherents to the Brno normative school had distinguished between the "sphere of causal rationality" and the "sphere of normative rationality". Engliš introduced the "sphere of teleological rationality", which enabled him to consider, along with the ontological-causal sciences and the normative sciences, also the teleological sciences. Their main feature was the fact that they arrange their notions or ideational contents according to their finality, that is, as purposes and means. All that can be said about reality is the result of sensations and ideas processed by the corresponding order of thought. Norms and postulates differ from judgments (which result from causal cognition) in that they express the human will in a certain manner.

Engliš applied his teleological mode of observation to the functioning of the national economy and economic politics, dealing with both theoretically in his work *The System of the National Economy* (1937), and practically as Minister of Finance in several Czechoslovak governments and as Governor of the National Bank. After the war, Engliš taught at Charles University, where he was appointed Rector. Upon the *coup detat* in February 1948, he was forced to leave the university and, later, even Prague. Engliš thousand-page work *Major Logic* also remains unpublished.

The basic issue of the Pure Theory of Law is the description of law as a specific social method involving the control of human behavior by means of coercion.

The Pure Theory is a theory about norms: it sees its subject - positive law - as an ought-system (Sollensordnung). The legal system is described as a structure of legal norms rather than of social facts. Only this normative interpretation is adequate in respect to the immanent meaning of law, its claim to validity. The Pure Theory of Law thus stands in opposition to certain theories of sociological jurisprudence, which deny the possibility of normative (legal doctrinal) jurisprudence.

The Pure Theory of Law is a positivist theory - legal norms are defined as the meaning of human acts of will. It discards all natural law doctrines, whether they see law as a product of supernatural will or as constructions of reason. Accordingly, the task of legal doctrine is essentially to ascertain as precisely as possible the will of the law-maker.

The Pure Theory of Law is based on the **separation of Is and Ought** (Sein und Sollen) - its foundation is the epistemological dualism of facts and values, statements and norms, cognition and volition. In this way, it rejects all legal theories that derive the validity of law from its effectiveness. The ultimate justification for the objective validity of law is grounded in an assumption that Kelsen terms the Grundnorm (basic norm). This does not lie at the basis of just any normative ("ought") order, but - in accordance with legal positivism of one that is effective as a whole.

However, social effectiveness does not provide the reason for the validity of law, rather it is (only) a reasonable condition for legal science, given that there exists an interest in describing effective coercive systems. It is also a result of the fact that the Pure Theory of Law relativizes the moral value of law. The interest in knowledge in positive law exists regardless of whether individuals should obey, disregard, or even fight the legal system; it is important to have knowledge even of an inhuman legal system - albeit if only in order to escape from it.

The Pure Theory of Law leads to a strict separation of legal science and legal policy. In the sense of a relativism of epistemological values, superior ("absolute") values cannot be recognized. The purity of this legal theory also appears in its separation of positive law from other normative systems, especially that of morality. Positive law must thus remain distinct from its valuation. Hence, because the focus of legal science is the cognition of law and because the focus of legal policy is the creation of law, these two areas must be carefully distinguished.

The Pure Theory of Law separates positive law and legal science, prescriptive legal norms and descriptive normative propositions. With normative propositions, legal scholars describe a legal situation. Legal science cannot "create" legal norms.

A further important element of the Pure Theory of Law is the structural notion of the dual legal perspective, expressed most notably by Merkl, i.e., the relativity of the opposition between the creation of law and its application.

This insight leads, by extension, to a skeptical view of the possibilities of legal scientific interpretation.

The Pure Theory of Law thus has a dual function: on the one hand, it is an epistemology, a methodology upon which jurists can base legal science (in the sense of *Rechtsdogmatik*, a specifically German concept); on the other hand, however, it also represents a critical dispute with conventional jurisprudence, which Kelsen accused of distorting positive law "ideologically" under the guise of seemingly juridical constructions. One could say that the Pure Theory of Law is a legal theory with both legal and sociological ramifications.