

## DOES GENERAL THEORY OF LAW EXIST WITHOUT MORAL VALUES?

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*The article deals with current general theory of law in respect of need of moral values. The emphasis is based on 8 arguments revealing why West culture's general theory of law theory is rooted in moral values. There are analysed that moral values are obligatory in order to create general theory of law, because the individuals act morally in their daily life. Therefore, it distinguishes a correct judgment or law from an incorrect one. It is worth underlying that rational (moral) justice is vital to create common society good. This shows that law and moral are relative. The paper examines that moral justice is necessary for development of a person. To reach the goal of this article there were analysed that ius cogens is also based on moral values.*

**Keywords:** *general theory of law, moral values.*

**Introduction.** To the main question of law theory – what is law? – it is difficult to answer because of insufficient theories (there are a lot of drawbacks of theories, i.e. it is not possible to create one theory which would be able to answer to all questions). Nevertheless, since Antique various authors have modeled different legal systems based on legal theories. For example, natural law theory (Socrates, Aristotle, T. Aquinas, J. Finnis, R. Dworkin)<sup>1</sup>, legal positivist theory (Kelsen)<sup>2</sup>, theory of justice (corrective justice<sup>3</sup>, distributive justice<sup>4</sup>, justice as impartiality (called "justice as fairness," J. Rawls<sup>5</sup>), justice as a law („justice entitlement“, Nozick<sup>6</sup>), utilitarianism, Nussbaum, Nagel's theory of justice<sup>7</sup>, modern analytical jurisprudence (A. L. A Hart)<sup>8</sup>, sociological jurisprudence (R. Pound)<sup>9</sup>, historical jurisprudence (Savigny)<sup>10</sup>, realism, marxism, feminism concepts (A. Ross)<sup>11</sup>). Differences of these concepts are nature of values and performance direction. In different historical periods, they changed each other or have existed (or exist) at the same time. Not all theories equally recognize moral values (for example, according to prevailing positivism in

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<sup>1</sup> Freeman, Michael D. A. *Lloyd's Introduction to Jurisprudence* (London: Sweet & Maxwell Ltd. & Thomson Reuters, 2007)

<sup>2</sup> Hans Kelsen, *Grynoji teisės teorija* (Vilnius: ALK, Eugrimas, 2002)

<sup>3</sup> Ernest J. Weinrib. *Corrective Justice in a Nutshell. The University of Toronto Law Journal* Vol. 52, No. 4 (Autumn, 2002), pp. 349-356

<sup>4</sup> *Ibid*

<sup>5</sup> Rawls, J. (1958) *Justice as Fairness*, *The Philosophical Review*, Vol. 67, No. 2. (Apr., 1958), pp. 164-194

<sup>6</sup> Kenneth J. Arrow. *Nozick's entitlement theory of justice*. (*Philosophia* June 1978, Volume 7, Issue 2, pp 265-279)

<sup>7</sup> George P. Fletcher, *Basic Concepts of Legal Thought* (New York, Oxford: Oxford University Press, 1996)

<sup>8</sup> H.L.A. Hart, *Teisės samprata* (Vilnius: Pradai, 1997)

<sup>9</sup> James A. Gardner, *The Sociological Jurisprudence of Roscoe Pound (Part II)*, 7 *Vill. L. Rev.* 165 (1962)

<sup>10</sup> Shirley Robin Letwin. *On the History of the Idea of Law*. Cambridge University Press (2005)

<sup>11</sup> Freeman, Michael D. A. *op.cit.*

a legal dispute moral standards can be usable only if the law allows it)<sup>12</sup>. So, the question is why moral norms could be important in the legal system?

**The aim of the paper** - justify why the general legal theory is impossible without moral values in Western culture? **The object of the paper.** The moral values issues of application in developing and applying general theory of law.

#### *Concept of general theory of law*

The general theory of law is possible to understand in two ways. It could be term, which describes legal systems where dominated judicial precedents, like "common law"(for example, United States, United Kingdom)<sup>13</sup>. But according to this article the term „general theory of law“ reveals a practical aspect of application of legal theory. This is a legal system, which moral values for practical existence are necessary or not; it depends from creation of its theoretical basis. In accordance with moral values, the legal theory is creating from natural law to positive law. In addition, theory can dispose of a minimum content of morality, such as Hart modern analytical jurisprudence. Therefore, the definition of "legal theory" with the word "general" obtains a term expressing to all of Western culture individuals acceptable general legal system. Next it will be resolved only the issue of moral values scope.

#### *The concept of moral values*

Moral is the principles and norms that regulate behavior of people. It would be expedient to state what moral values natural law theorists distinguishes in the context of general theory of law. One of the most famous representatives of modern natural law John Finnis, identifies exemplary list of fundamental goods (basic goods). Values are pursuing by every reasonable prudent person. Values has not derived from facts but directly has derived from mind:

- Life;
- Knowledge;
- Game;
- Aesthetic Experience;
- Friendship;
- Practical intelligence;

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<sup>12</sup> For example, article 1.5. of The Civil Code of the Republic of Lithuania (Application of the criteria of justice, reasonableness and good faith: 1. In exercise of their rights and performance of their duties, the subjects of civil relationships shall act according to the principles of justice, reasonableness and good faith.

2. In the cases when laws do not prevent subjects of civil legal relationships from determining their mutual rights and duties upon agreement between themselves, these subjects shall act in accordance with the principles of justice, reasonableness and good faith.

3. If laws or an agreement between the parties provide for certain issues to be decided by a court according to its discretion, the court shall act in accordance with the principles of justice, reasonableness and good faith.

4. In interpreting and applying laws, the court shall be guided by the principles of justice, reasonableness and good faith.).

<sup>13</sup> L. Baublys et al. *Teisės teorijos įvadas*. 2010

- Religion.<sup>14</sup>

It is important to protect these fundamental goodness by law. Moral values protects against creation of immoral laws and it's application.

*Need of moral values in general theory of law*

Without moral values, the general theory of law cannot exist, because:

1. To develop a general theory of law it is necessary to choose the values, which is necessary to create such conceptions of theory. This necessity of value-laden selection of concepts and terms for use in a general theory of social realities such as law is evidenced in the work of Max Weber, prophet of "value-free" social science. His account, for example, of forms of domination (*Herrlichkeit*) identifies three pure, central, characteristic types (*ideal Typen*): charismatic, traditional, and rational (bureaucratic, legal). However, the accounts of the first two types are almost entirely in terms of how they differ from the rational type, whose rationality is self-evident to Weber and his readers based on their own knowledge of human goods (basic aspects of human wellbeing) and related practical truths. Natural law theory, as one sees it practiced already in Aristotle's *Ethics* and *Politics*, makes these valuations by the theorist overt and explicit (not hidden and embarrassed), and subjects them to rational scrutiny and debate.<sup>15</sup>;
2. Such selection of values is necessary, but the question is whether these values should be moral (Dickson). The author notes, if it is obvious that behavior of individual and group highly positive significance has morality based on criteria of reasonableness in everyday life practice. Then a moral value has decisive importance on forming concepts in social world, including the general theory of law<sup>16</sup>;
3. Positive influence of moral values to judgments reveals by the position of one of the most famous American natural law representative R. Dworkin. He says that one of the criteria to distinguish a correct ruling of court from incorrect and right argumentation from wrong argumentation is moral standards. According to him, if in a particular case the positive law is clearly contrary to moral norms there is a need to "lie" and apply a law whose application would result a moral court decision<sup>17</sup>. In other words, if the judge has faced with the legislation which application have obviously and wrongly violate the moral values, he must rely on general principles of law and apply legislation that a result would be moral.;
4. Welfare and interests of one group of public cannot be better protected than other. Rational governance of the state is necessary to develop the general good of society. Rational governance of

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<sup>14</sup> Freeman, Michael D. A. *supra note 1*

<sup>15</sup> John Finnis, *Natural Law Theories*", *The Stanford Encyclopedia of Philosophy* (Fall 2011 Edition), Edward N. Zalta (ed.), forthcoming URL = <http://plato.stanford.edu/archives/fall2011/entries/natural-law-theories/>

<sup>16</sup> Freeman, Michael D. A. *op.cit.*

<sup>17</sup> *Ibid*

the state based on morality (including legislation and enforcement of law) increases people's trust of the state.

5. In order that government and people would be able to cooperate effectively in managing the state, there must be a close not only a legal but also a moral relationship of rights and obligations (Finnis). This relation has provided when a person is a goal for a state, and the state for the person is a measure to achieve its goals <sup>18</sup>;
6. *Ius cogens* is based on moral values, for example, the persons who have been granted asylum in accordance with laws shall not be punishable under a law for which they were prosecuted abroad and shall not be extradited to foreign states. In the classical Roman period *ius gentium* consisted from such common principles that existed in all legal systems of conquered nations, for example, in generally was recognized that piracy is a crime) (Finnis). In modern legal period on this principles basis have been developed a fundamental human rights (these principles were named "the supreme, the most general conclusions of principles" by the T. Aquinas), which is based on *ius cogens, erga omnes*. It should be noted that in common law traditional system on fundamental basis of human rights were formed the system of values such as *mala in se* (obviously immoral phenomenon which law does not impose) and *mala prohibita* (immoral phenomenon is banned by the law ) (Finnis);
7. Society request the moral authority because these authorities protect the common good by legal or moral laws, provides moral justice and peace. Moral authority when searching for ways to preserve and maintain the welfare of the society creates a reliable legal system. This creates a reason for people to follow the law because laws help to achieve good. According to Finnis, the law must give reasonable cause to do so;
8. Finnis believes that legal system based on moral values is necessary for the integral, harmonious development and prosperity of the individual. J. Finnis distinguishes basic fundamental goods, which reveals natural human nature; is good by itself; is the reason of behavior of reasonable prudent person; human does not create it but it is recognized and pursued (life, health, knowledge, etc.). These values are universal, important for everyone, so the legal system provides the opportunity to use these values. These principles allow creating the rules. By these rules, community is available to create an order, which helps human prosperity<sup>19</sup>. For example, Finnis argues that it must be ensured everyone's right to private property because private things is being taken care of more carefully, and the property is exploited purposeful. It shall be presumed that a particular person could be able to achieve perfection, to realize oneself fully only if they would have options for it and would try one's best.

### **Conclusions**

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<sup>18</sup> For example, regulations methods of administrative law are to achieve its objectives.

<sup>19</sup> Freeman, Michael D. A. *supra note 1*

1. The general theory of law cannot be without moral values.
2. Moral based on criteria of reasonableness have positive significance of individual and group behavior.
3. Moral values have decisive importance in formatting conceptions of the social life.
4. Legal system based on moral values is necessary for integral, harmonious development and prosperity of the individual.

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