Opałek, Kazimierz

The "General Science of Law" : Main Approaches and Their History

Organon 3, 79-94

1966

Kazimierz Opałek (Poland)

THE "GENERAL SCIENCE OF LAW": MAIN APPROACHES AND THEIR HISTORY

I. INTRODUCTION

This paper is aimed at discussing three main kinds of forms of the study of law in general as opposed to the study of particular branches of valid law in a given country. These kinds of the "general science of law" (*allgemeine Rechtslehre*) are: philosophy of law, analytical positivism, and theory of law. In the period of their formation they differed widely in the problems considered, in the philosophical foundations and methods, and they differ still to some extent in all these respects, though the distinctions between the approaches under the headings of legal philosophy, analytical positivism, and legal theory, become nowadays sometimes not so explicit as they used to be. All these attempts at creating a "general science of law" were marked factually with particularism closely connected with the philosophical and scientific trends and traditions of the countries of their origin, partly also, as in the case of analytical positivism, with the restricted scope of data taken under consideration (valid law of some particular countries as the basis of the theses on law in general). Although this particularism seems to be partly overcome now, there is still some justification in characterizing the "general science of law" in the West as "a chaos of approaches to a chaos of topics, chaotically delimited" [1]. The task of this paper will be to examine the origin and development of these approaches, the present situation and the prospects of this kind of study.

II. PHILOSOPHY OF LAW

It is typical of philosophy of law that it is concerned with considerations about ideal law, norms of universal validity, values embodied in law, etc. The origins of this discipline reach far back, but its developed

[1] J. Stone: *The Province and Function of Law. Law as Logic, Justice and Social Control, a Study in Jurisprudence*. Sydney 1946, p. 16.

form, a form which at some time made it possible to isolate it from philosophical considerations concerning other subjects, appeared late, first in the natural law doctrines of the 17th and 18th cent., while its complete and systematic exposition is due to reflections whose origins should be traced back to the ideas of German classical philosophy. It is in this period, *i.e.* at the beginning of the 19th cent., that the denomination "philosophy of law" was created, and then granted as well, though *ex post*, to the doctrines of natural law [2]. Under the joint influence of the principal philosophical systems of the time: the Kantian and the Hegelian, it was assumed that the character of cognition in the respective branches of human learning was twofold: *viz.*, that it was either philosophical or scientific, the former being treated as superior to the latter. According to Kant, philosophy gave substantiation to science, conditioning it, determining its possibilities, while practical philosophy was assigned the highest place, for it provided justification to metaphysical principles relating to ethics, principles unprovable by theoretic thought. According to Hegel, philosophy, the highest form of the spirit, represented its self-cognition, independent of transitory or unessential elements while philosophy of law, state, history, etc. embraced the highest developed manifestations of "objective spirit". Another conception of some importance in this connection was that of Fichte who regarded philosophy as *Wissenschaftslehre*.

All these interpretations, adapted by the legal science, have led to the assertion that law may be conceived in two different ways; scientifically, which led to knowledge of a lower kind, and philosophically, which was supposed to provide knowledge of a superior kind, the higher just in such spheres as law, morality *etc.*, as it offered possibilities to solve metaphysical questions which cannot be successfully handled by scientific methods. On the one hand it was assumed that an object may be examined not only by scientific methods, but also, and better at that, by extra or supra-scientific means. On the other hand, metaphysical speculations on legal ideas and values were further reaffirmed, and philosophy of law has concerned itself with these speculations up to the present day. Thus either it was assumed that it was possible to follow two separate ways of considering one single object,

---

[2] The term "moral philosophy" has been of a relatively long usage (*e. g.* L. A. Muratori: *La filosofia morale*. 1735, or in Polish authors of the Enlightenment), whereas "philosophy of law" is a latter name, having originated at the turn of the 18th and 19th cent. Hegel was not the first to use it, as it was maintained by J. Lande: *Studia z filozofii prawa*. (*Studies in Legal Philosophy*). Warszawa 1959, p. 633. G. Hugo in his *Lehrbuch des Naturrechts als einer Philosophie des positiven Rechts*. Berlin 1798, included the former law of nature into philosophy of law, considering that it indulged in a philosophic play on words such as law, liberty, the sovereign, *etc.*, p. 7—8. The promoters of the law of nature in the 19th cent. (*e.g.* K. Krause, H. Ahrens, K. Röder) generally identified the law of nature with philosophy of law.

by which virtually philosophy was put beyond the scope of science, instead of being treated as a separate branch of science, or it was assigned a scope of its own, yet metaphysically invented. These misunderstandings lying at the very base of the examined branch affected its character: namely, it has been vested so far with the characteristics of different varieties of idealist philosophy, variants which more or less took their origin in the philosophy of Kant, Hegel or contiguous trends of thought.

It was in Germany that lied the cradle of this conception of philosophy of law. In that country in the 19th cent. the examined branch of science went through its principal fluctuations. After a period of great popularity at the beginning of the century came a period of decline, when analytical positivism separated itself from speculations, either introducing a formally-dogmatic general theory of valid law to take the place of philosophy of law, or restricting the general reflections on legal theory to the so-called *Encyclopaedia of Law*. At the turn of the 20th cent. however, German philosophy of law was revived against the background of neo-Kantian and neo-Hegelian trends, and later its development was coupled with the more recent varieties of objective idealism, up to the contemporary phenomonologist philosophy, existentialism and similar trends. It extended also to other territories, especially to Romance countries, thus attaining a worldwide career, in spite of strong opposition coming from other parts.

But to understand this new course of development and in particular to explain the reason why philosophy of law became so deeply rooted in Romance countries, which finally superseded in its cultivation even Germany, the following circumstances must be considered. Romance countries in their prevailing majority have been under the strong influence of Roman Catholic traditions and culture, and in consequence the attitude predominant upon these territories favoured always natural law speculations. On the other hand, in France, there was maintained (even if the tradition was somewhat weakened with the course of years), the interpretation of some legal problems in categories of the law of nature and untransmittable human rights, at a certain time these ideas having reached in France an intensity higher than anywhere else. Although the list of the influencing factors is certainly not completed, yet I shall restrict it to these as being more palpable, omitting to take into consideration more doubtful issues.

Owing to the factors here examined, at the time when Germany had developed a speculatively subtle philosophy of law, in Romance countries there existed another type of the same branch, more muddled in its principles and of lesser precision than the former, rather a continuation of previous doctrines. This was the law of nature either in the version set forth by Catholic doctrine, or — in France — promoting

the ideology expounded in the principles of the basic legislative acts. When the attainments of "science positive" put into a doubtful light philosophy of law in this version, there arose a demand for a more sophisticated speculation on law. Principles were supplied by German philosophy, exploited now by countries which formerly had had a more vulgar version of the philosophy of law, obviously not to be maintained in the 20th cent. On the other hand, in Germany there was a gradual recession from the issue under discussion, due to the extensive development of social science in that country, which markedly contributed to the weakening of the position assigned to philosophy of law (though it went through a new revival when the "racial mission" and the "principle of leadership" were being mystically justified). In France, too, the positivist "physique de moeurs", opposed to their metaphysics, gradually was shifting the study of law to more realistic positions. The reformed philosophy of law subjugated then chiefly the remaining Romance countries, Italy in the first place, a country where the neo-Hegelian theory was deeply rooted, having found its promoters in F. Gentile and B. Croce. But in this country also one might discern lately some new developments of our branch of study [3].

Philosophy of law conceived as above indicated, has been adopted also in other Western countries, where it expanded especially after the Second World War in connection with the revival of natural law doctrines seeking to establish moral standards of positive law in reaction against the Fascist *gesetzliches Unrecht* [4]. Such penetration led at the same time to the clash and intercombination of different conceptions of the general study of law, to the formation, on the one hand, of eclectic combinations of philosophy of law with other interpretations; the "analytical" or realistic ones, while, on the other hand, to the frequent use of the denomination "philosophy of law" in a more neutral meaning, not necessarily of axiological considerations, but of a general study of law, whatever the mode of its cultivation. Thus now *e.g.* this label is assigned sometimes as a common denominator to various conceptions in our branch of study, as it was in the title of a compound work *Interpretations of Modern Legal Philosophies* (1947), containing various tentative interpretations of the general study of law, or in the

[3] Cf. G. Opocher: *Considerationi sugli ultimi sviluppi della filosofia del diritto italiana.* „Rivista Internationale di Filosofia del Diritto" 1951, pp. 40—57; V. Paresce: *La filosofia del diritto in Italia nel secolo XX. ibid.* pp. 21—39; N. Bobbio: *Trends in Italian Legal Theory.* "The American Journal of Comparative Law" 1959, VIII 3, p. 334 f.

[4] Formulation of G. Radbuch: *Rechtsphilosophie.* Stuttgart 1956 V ed.; on the revival of natural law in U.S. cf. K. Opałek — J. Wróblewski: *Współczesna teoria i socjologia prawa w U.S.A.* (*Contemporary Theory and Sociology of Law in the USA*). Warszawa 1963, ch. II; for attitudes in Japan characteristic Yasaki Mitsukuni: *On the Discussion of Fidelity to and Validity of Nazi Laws.* "Osaka University Law Revue" 1962, 10.

title of the American publication *The Twentieth Century Legal Philosophical Series*, comprising both legal philosophical works in the proper meaning of the term, and studies representative of other trends of thought. Sometimes the name "philosophy of law" is used in a rather specific meaning of personal views and experience of an individual jurist (*My Philosophy of Law*, 1944), at other times it is used to define studies concerned with the logical analysis of the legal language, inspired by the neopositivist movement (Scandinavia) [5], while sometimes again it is meant to embrace jointly legal theory and legal politics [6]. But virtually philosophy of law *sensu stricto* continues to represent any considerations on the idea, aim and value of law (in the U.S.A. appearing sometimes under the name of philosophical jurisprudence) [7]. It is to this meaning too, that currently refers the term "history of legal philosophy", defining a branch of science analysing the axiological considerations on law of the authors of previous times. This discipline but seldom concerns the recent story of this branch: and, if it actually has done it sometimes of late, this was again coupled with a widening of scope comprised by the name philosophy of law, and with vesting it with a more "neutral" meaning, combining various different conceptions and systems of the general study of law [8].

III. ANALYTICAL POSITIVISM

The second developed kind of the general study of law is analytical positivism in two main versions: the earlier, Anglo-Saxon, called jurisprudence, and continental, called legal positivism [9]. The application of the term jurisprudence to this discipline is somewhat puzzling, and thence some introductory words should be said about the fluctuation of the meaning of the term. It has been used in Rome, yet the definitions found in the sources are far from being instructive, their rhetoric reaching the height of pathetic vagueness: *Jurisprudentia est divinarum atque humanarum rerum notitia, justi atque injusti scien-*

---

[5] Studies of this character are generally conducted at the Departments of Philosophy within the course of "practical philosophy" — but for students of law there are, too, lectures or seminars in "philosophy of law" whose anti-metaphysical tendencies are markedly opposed to the term in its traditional meaning.

[6] L. Petrażycki: *O filozofii.* (*On Philosophy*). Warszawa 1939; F. Somlo: *Juristische Grundlehre.* Leipzig 1917, p. 13 ff.

[7] Cf. E. W. Patterson: *Jurisprudence: Men and Ideas of the Law.* Brooklyn 1953, p. 19 ff.

[8] Thus actually in G. del Vecchio (though otherwise he is a pure adherer to the traditional philosophy of law). His history of legal philosophy which constitutes part I of *Lezioni di filosofia del diritto.* 10th impression, Milano 1958, comprises everything that might be included into the general study of law.

[9] Cf. K. Opałek — J. Wróblewski: *Pozytywizm prawniczy.* (*Legal Positivism*) „Państwo i Prawo" 1954, 1.

tia [10]. But even this definition permits us to assume that what the authors meant was the intuitive wisdom and professional skill of the jurists, or simply the study od law. This meaning of the term was maintained throughout the next centuries, in England among other countries. "Jurisprudence" stood for the definition of the study of law, sometimes supplied with various specifications (as *e.g. jurisprudentia criminalis,* but also *jurisprudentia naturalis,* in England for instance equity jurisprudence, *etc.).* Upon the European continent this mode of interpreting the term has been maintained generally till the present day. At one time it was opposed to philosophy of law namely denoted the study of particular branches of valid law [11]. In France exceptionally the term jurisprudence was meant to represent as well sets of legal principles formed by judicial decisions [12].

Jurisprudence became upon Anglo-Saxon territories a synonym of a specifically conceived general study of law owing to the classical work of John Austin, *The Province of Jurisprudence Determined,* 1832 [13]. This specific interpretation consisted in assigning to this branch of study a character of a general "analytic" formally — dogmatic discipline. Austin presumably was referring here to the primary and literal meaning of the term, defining a kind of essential legal wisdom; that was why he used it to define a discipline which was both general and fundamental. He created his version of jurisprudence in accordance with the work of English thinkers, with the older conceptions of Hobbes (idea of sovereignty) and the more recent ones of Jeremy Bentham, but also under the influence of the continental study of law promoted by German Pandektists. He considered it to be his main task to found general principles for the systematization of concepts of the British law, a law strikingly disordinate when compared to the condition in which Austin had found continental laws [14]. Austin failed in creating any really general study of law, for both the material on which he had founded his work, and his approach were far too one-sided. Nevertheless he was the first to initiate systematically analytical studies of the legal language, as it is termed to-day, and he was the founder of the mode of doing general science of law still influential in Great Britain.

This "analytic", formally dogmatic character of Austin's conception provides numerous analogies with the work of continental, mainly German positivists of several decades later (Gerber, Bergbohm, Merkel and

---

[10] "Digesta" 1. 1.10. 2. Inst. 1.1.1.

[11] J. Schein: *Unsere Rechtsphilosophie und Jurisprudenz.* Berlin 1889, p. 124 ff.

[12] Cf. A. Esmein: *La jurisprudence et la doctrine.* "Revue trimestrielle de droit civil" No. 1 1902.

[13] On the concept of jurisprudence cf. *e.g.* R. W. M. Dias — G. B. J. Hughes: *Jurisprudence.* London 1957, p.l. ff; W. Buckland: *Some Reflections on Jurisprudence.* London 1945.

[14] Cf. Stone: *op. cit.,* p. 55 ff.

others) [15]. Their version of the general study of law might be thus included into the same category — not without reservations, though. Jurisprudence was an analysis of concepts of English law (or of Anglo-Saxon law in general), while positivist theory was an analogous analysis of continental law. But in England and on the continent the sources of law are different, differences appear in the process of forming and applying law as well as in their actual and doctrinally admitted role, and in either case there is a specific individual store of legal concepts and a specific mode of division of positive law; all these factors combining to make these two general studies of law stand apart from each other and depriving them of a common language in a series of particular matters at issue. The jurisprudence of Austin and his followers comprises such divisions of legal concepts which are quite alien to continental law, and vice versa, continental positivists stayed under the overwhelming suggestion that to treat law and its sources just like they did was imperative, necessary and that only their approach provided grounds for general assertions. Full evidence hardly could be provided here: to make clear how jurisprudence was contrasted with continental positivism it will be enough to state briefly what is involved in the basic divisions of jurisprudence, divisions concerned with the sources of law and legal concepts. Among sources the first place is assigned to custom, *viz.* to legal custom, usage, general custom; then comes precedent with an extensively developed doctrine of *stare decisis, ratio decidendi, dicta, etc.*; only then come the statutes with their interpretation, comprising a great many rules quite alien to continental jurists; finally, omitting from our review less essential issues, there comes the vast division of equity, also quite unknown on the continent. Among the many divisions and legal concepts let us mention, by the way of example, recklessness and reasonableness referred to the subject's behaviour, the division of *choses* into *chose* in action and *chose* in possession, or property into real and personal property, and further such categories of the subjects of law as corporations sole, corporations aggregate, public corporations, unincorporate associations, *etc.* But the matter will be still more complicated if we turn to the various categories comprised in the sphere of equity [16]. But this is only one aspect of the different character of Anglo-Saxon jurisprudence when it is compared to the continental positivist theory. Another aspect consists in its having a far lower grade of systematic order, an almost complete absence of

[15] But this problem is still under discussion, (cf. N. A. Falk — S. I. Shuman: *The Bellagio Conference on Legal Positivism.* "Journal of Legal Education" 2, 14 1961).

[16] Data relating to these differences to be found in a paper by A. Ross: *Prawo skandynawskie a prawo państw kontynentu i common law. Kilka ogólnych refleksji.* (*Scandinavian Law, Continental Law, Common Law; Some General Reflections*). „Zeszyty Naukowe Uniwersytetu Jagiellońskiego, Prawo" No 7 1960.

"theories" so much cherished upon the continent, like those relating to *e.g.* subjective rights, legal persons, *etc.*, generally an absence of striving for the heights of abstraction and of theorizing tendencies. And this coupled with a probably innate tinge of specific pragmatic approach: if the courts do not thus perceive a given issue, then the theory in question is not "true", since it is useless. Although under one aspect this is a remedy against jurisprudence being isolated from practice, yet on the other hand an approach of this kind means underestimating of the guiding role of the theory.

It is noteworthy that although the views have considerably evolved and Austin's theses have recurrently met with a critical attitude, yet jurisprudence in England up to the present day has maintained not only its name, but its basic contents as well, its original form of formally--analytical research. Barring a few scattered exceptions, English scholars did not accept either the more ancient philosophy of law or the more recent versions of the realistic legal theory, a fact sometimes disapproved of by modern representatives of jurisprudence, who nevertheless submit to the traditional approach [17]. English authors in their work appear as representatives of the same, compact school of thought. The changes which one may detect lately in English jurisprudence, consist on the one hand in the recurrent attempts to apply to it the more recent attainments within the logical analysis of the language and, on the other, in taking into account various conceptions of the general study of law coming from outside the British territory. The knowledge of these conceptions is there, however, incomplete (the almost only works taken into consideration being those published in the English language and not even all of them, whatever their significance may be). The principal discussion is going on mostly in a closed circle, among British authors. Now as regards the logical-semantic principles, they, too, are founded upon works written by English authors [18]. Even American thought is taken into account to a small extent only.

Nevertheless in our century some changes d i d occur in jurisprudence, changes brought about by another group of scholars concerned with it: namely, American scholars. Initially, in the 19th cent., the scholars of the United States fully adhered to the views promoted by Austin and his school, but already at the turn of the century we find two eminent writers whose starting-point had been traditional jurisprudence but who eventually became forerunners of new trends. They were J. Ch. Gray and Oliver Wendell Holmes: they set the way towards

[17] On the contemporary situation of jurisprudence in England H. L. A. H a r t: *Philosophy of Law and Jurisprudence in Britain (1945—1952)*. "American Journal of Comparative Law" 2 1953.

[18] Particularly by B. R u s s e l, but also by C. K. O g d e n and I. A. R i c h a r d s: *The Meaning of Meaning*. London 1923. G. L. W i l l i a m s: *Language and the Law*. "Law Quarterly Review" 61 1945, 62 1946, *et. al.*

the so-called realism [19]. This was the starting-point for the bursting of bounds of the previous jurisprudence, partly through adapting the European conceptions, and partly by means of shaping functional sociological research methods of their own. Thus the ways of the British and American jurisprudence came to diverge to a great extent. The American study of law realized the possibilities which from the very beginning were always inherent in the field of research of those concerned with common law, for whom the problem "what courts will do in fact" had always considerable importance. It was simply that a different mode of law-making provoked research on "law in action", sociological or, to specify, "realistic" research.

Thus, though the potential possibilities under the rule of common law were the same for English and American jurisprudence, they yet differ widely, and this happened for more reasons than one. It was the intention of Austin and his followers to formalize the study of law (with some influence exerted by continental models) in order to make common law more systematic and stable. This stability has been *de facto* attained to a considerable extent owing to the long development of the British legal institutions. American institutions are of more recent origin. The "judicial" point of view being the same for both countries, in the U.S.A. the conception of a judge consciously shaping the law is still vivid and alive, while in England there is a marked tendency to treat the judge's activities as rather mechanical and apt to be included into the frame of the formalistic conception, differing only in one point from the continental one, namely that here the starting point is the judge, and not the legislator. Still other points of issue should be mentioned here, to wit; the competence of American judges in the sphere of control over legislation from the standpoint of its accordance with the constitution, the eligibility of judges of lower ranges and the differentiation among the common law systems of the respective states, systems which had one common root, and whose differences are due to the creative activity of the courts [20]. Against this background the American jurisprudence puts an easily understood emphasis upon "law in action", emphasizing extra-legal factors inducing deviations from the "law in books". This latter viewpoint has led even to extreme views expressed in reducing law to individual judicial decisions whose motives sometimes apparently had not much in common with the "law in books" [21].

---

[19] There is abundant literature on the subject: comp. E. W. Patterson: *op. cit.*, p. 537 ff., 572 f.; A. Ross: *Towards a Realistic Jurisprudence.* Copenhagen 1946, p. 50 ff; G. Gilmore: *Legal Realism: its Cause and Cure.* "The Yale Law Journal" 70, 7 1961.

[20] Cf. R. W. M. Dias and G. B. J. Hughes: *op. cit.*, p. 468 f.

[21] Cf. on the subject E. W. Garlan: *Legal Realism and Justice.* New York 1940, *op. cit.*, p. 2.

The extremist theories of the "realists" belong to times past, yet the emphasis put upon empiric research within the range of jurisprudence has retained its actuality (sociological, experimental jurisprudence, *etc.*). Sometimes the result of this is that jurisprudence in the American version loses not only its character of a formally-analytical discipline, but also that of a general study of law, since empirical works by their very nature are particular: it is only the programme theses and the methodological parts of the jurisprudence studies that retain their general character. And so when nowadays an Anglo-Saxon scholar tries to give a general answer to the question, what is jurisprudence, he can but say that this discipline comprises any study of law, other than a technical exposition of the particular branches of law, and he will include into the scope of jurisprudence indiscriminately *e.g.* studies concerned with the economical effects of imprisonment for the convict's family, or those relating to the theory of justice in antiquity, or to the psycho-social factors in the activity of the judges, influencing the development of common law in its different sections and during different periods [22].

Here I shall not discuss in detail the positivist general study of law. It is akin in its main characteristics to jurisprudence (of course, to the classical, English version of it).

I could hardly agree with the recent thesis of S. I. Shuman that there is a basic difference between continental positivism and English jurisprudence, the former being a theory of the nature of law and the latter only a method of doing jurisprudence [23]. Austin's command theory (with later modifications) is definitely a theory as to the nature of law, and, on the other hand, continental positivists laid great stress on the juristic method. There can be only some difference in degree, not in principle.

Although in Europe at a time great popularity was reached by a trend analogous to the English jurisprudence, yet the latter remained unknown for long, and even up to the present day one can hardly say that its theses have been included into the continental discussion on the general study of law. The English jurisprudence found in Europe only a solitary promoter in F. Somló [24]. Jurisprudence in the modified Ame-

---

[22] C. K. Allen: *Jurisprudence — What and Why* ?. in *Legal Duties and Other Essays in Jurisprudence.* Oxford 1931, ch. I. Cf. also W. Buckland: *op. cit.*, p. 2.

[23] S. I. Shuman: *Legal Positivism. Its Scope and Limitations.* Detroit 1963, p. 11 ff.

[4] Somló: *op. cit., passim.* It was through his intermediary that some of the Austinian conceptions of jurisprudence have been adapted in Poland by S. Cheliński: *Pojęcie rozkazu w świetle ogólnej teorii norm. (The Concept of Order in the Light of the General Theory of Norms).* „Czasopismo Prawnicze i Ekonomiczne" No 23, 1924, p. 89 f. One of the few European experts on jurisprudence was G. Radbruch: *Anglo-American Jurisprudence Through Continental Eyes.* "Law Quarterly Review" 52, 1936.

rican version is nowadays better known and exerts a certain influence upon the Western continental study of law. Several European authors publishing their works in English have even adopted the nomenclature proper to jurisprudence; this sometimes being merely the result of a wish to conform to Anglo-Saxon concepts but at other times testifying to the fact that certain Anglo-Saxon conceptions are equally being adopted [25].

IV. THEORY OF LAW

It was the theory of law, however, which had the most striking origin and development. The theory of law has developed last of all the disciplines here examined. It is not only that this particular denomination of the general study of law appeared late: this was a discipline with a programme of its own, with a neatly delineated conception, different from the trend represented by philosophy of law, jurisprudence and the continental equivalent of the latter.

Theory of law was formed under the influence of positivism: not legal positivism, but positivism as it is conceived in general philosophy, *i.e.* a trend which was opposed to traditional metaphysics in search for a better-founded empiric knowledge, in social sciences as well. Theory of law according to its programme was to be a "positive science" of realistic character. It has been set against philosophy of law, as a "theory", investigating real data, against the vague dreams of an "idea of law" and legal values. It was to provide a "theory" in its capacity of systematic science as opposed to the *Encyclopaedia of Law* which was merely a casual conglomerate of various elementary information on law. Finally it was a "theory" as a knowledge of psychosocial facts, and not of what is valid, differing here from the formally-dogmatic science of legal positivism. Thus the programme of the theory of law which was gradually crystalizing, created a new general study of law, set against the previously cultivated versions.

It is of extreme interest that this new conception was first set forth by Russian scholars at the turn of the 20th cent. We would look in vain for it in the West, even in German science, so abounding with ideas, although it must be admitted that the promoters of the theory of law, in the first place N. M. Korkunov, L. Petrażycki and G. Shershenyewich [26], were under its influence. The successive works of those scho-

---

[25] Thus *e.g.* A. Ross in his latest studies — moreover, he wants even the general study of law to follow a way which would be mainly "analytical". *On Law and Justice.* London 1958, p. 25.

[26] N. M. Korkunov: *Kurs obszczej teorii prawa.* (A *Course in General Theory of Law*), Petersburg 1887. French translation 1903, English translation 1909; L. Petrażycki: *Teoria prawa i gosudarstwa v sviazi s teoriej nravstvennosti.* (*Theory of Law and State in Respect to Theory of Ethics*). Petersburg 1907, II edition 1909/10; G. Shershenyevich: *Obszczaja teoria prawa* (*General Theory of Law*), 4 vols, Moscow 1910—1912. Another conception of a "Legal theory of state" was exposed by N. Palenko (1912).

lars represented a direct criticism of the versions of the traditional general study of law extant in Russia, chiefly of philosophy of law and the encyclopaedia of law, sanctioned with the official programme of lectures. It was L. Petrażycki who gave theory of law its most consciously and consequently isolated form, dedicating much work to provide it with sound methodological foundations. In the work of Petrażycki, and among his disciples mainly in that of a Polish scholar, J. Lande, we may distinctly trace the way of vesting theory of law with the characteristics of a new general study of law, set in opposition to the previously cultivated similar discipline [27].

Despite numerous endeavors, more or less parallel in other countries during the succeeding period the conception of the theory of law was exposed consciously and spreading only upon a relatively restricted area in East-Central Europe and did not extend its influence to other countries. In Poland it has been universally accepted and thus in this country it can be easily assumed that theory of law is known everywhere, that scholars all over the world are well conversant with it. But it is not so altogether. Now still, though the situation has changed under so many respects, there are scholars concerned with the general study of law who ignore everything about theory of law. The meritorious conception of the theory of law was popularized throughout the world on a restricted scale, although gradually analogous conceptions were sprung up, or separate elements of such conceptions came to life. For various reasons within the sphere of (generally speaking) jurisprudence, and even of philosophy of law, tentatives were made more or less related to the theory of law. Of course, the name gradually separated itself from the conceptions which it comprised initially, and in some places its usage became as much "neutral" as "philosophy of law" to determine any or every conception of the general study of law. But "theory of law" never extended to so many conceptions as "philosophy of law" had done, and so continues to be a rather rarely applied name. It began being accepted though on a limited scale, owing to an originally scarce, and lately (since the period directly preceding World War II) to a more frequent influence of the work of scholars who were running away from the countries dominated by Hitler to the West. This was the case with quite a number of scholars, of whom particularly W. Friedmann and his *Legal Theory* (1st edition 1944) has exerted an influence of wider scope. Nowadays it happens sometimes that the founders of various conceptions of the general study of law who never

[27] The relation of the theory of law to the traditional forms of the general study of law was defined by J. Lande, a representative of Petrażycki's school (cf. *Studia z filozofii prawa.* p. 337 f., and specially his interesting remarks on p. 627 ff.).

before had adhered to theory of law, adopt this name-label in their works. Thus it was *e.g.* with H. Kelsen in his *General Theory of Law and State* (1949). In Europe the name "theory of law" became somewhat more popular in its "neutral" meaning, as a result of the publication of a periodical, first published at Brno in 1926, under the title "Revue Internationale de la Théorie du Droit", ("Internationale Zeitschrift für Theorie des Rechts").

There are two points of interest here, one may say even striking points: first, the fact that theory of law is by no means universally known, and second that it originated so close to our territory, in Russia, and that in Poland it expanded with exceptional force. Our contemporary Marxist theory of state and law owes quite a lot, under the genetic respect, to the conception of the theory of law: Not only its name transformed from it, but moreover, it continues still under certain respects this trend of the general study of law. The Marxist theory of state and law represents, of course, a philosophical and methodological viewpoint fundamentally different from that adopted formerly by the founders of the theory of law in Russia. Nevertheless, it should be borne in mind that while it has had a critical approach to their conceptions, it yet has followed a direction rather akin to theirs. It did not namely follow the way set by the formal analysts or by the speculative philosophy of law, but instead adopted a viewpoint proclaiming and, at least to a certain extent, realising empirical and rational methods in the general study of law. The main difference consists in that while Marxist theory of state and law in its realism and empiric rational methods followed the way set by historical materialism, the theory of law founded in Russia was inclining towards subjective idealism (*e.g.* the psychologist conception of Petrażycki), which was an inheritance of philosophical positivism, particularly in its farther stages of development.

At any rate, the case of the theory of law should be still further examined. It would seem desirable to initiate historical research to establish what were exactly the ways by which this branch was formed and shaped and what are the affinities between its conception and the first beginnings of the theory of state and law in the Soviet Union [28].

V. CONCLUSIONS

It is easy to construe any discipline of a highly general character when the store of facts at one's disposal is small. But when one reaches a more extensive knowledge of such facts, the simplicity of the syn-

[28] Some interesting — though incomplete — data on the subject in the book of J. Kowalski: *Psychologiczna teoria prawa i państwa Leona Petrażyckiego. (Psychological Theory of Law and State of Leon Petrażycki)*. Warszawa 1962, p. 187 ff.

thesis, formerly regarded as praiseworthy, will become a point against it. The image of a given sphere of interest, becoming more and more complicated and complex turns at the same time more and more difficult to grasp. What can any investigator do and what does he actually do when faced with such a course of events? He either maintains the synthesis to which he has become so much used, just filling in only the most blatant gaps, while on principle expressing his contempt of the world of facts, so capriciously wayward and multiform. Or he gives up any idea of synthesis, preferring to recur to descriptive, photographic data relating to various fragments of reality with which he is concerned. Or, finally, assuming certain hypotheses for his starting-point, he undertakes the enormous task to investigate in their light various materials and various points of view, so as to construe, by way of comparing partial results, an edifice of generalisations, no more suspended in the air, but founded upon a sound basis of particular assertions.

Many a representative of the general study of law may feel rather put out nowadays. They are faced more and more frequently with data which they had previously disregarded in their considerations, faced with other scholar's assertions worked out upon other sets of facts and conducive often to conclusions differing from their own "general" assertions. One may, of course — and it is actually done mainly by scholars representative of the older generation, who have become used to a certain way of posing problems — with merely some slight and superficial dabs of retouche, cling to the old generalisations: jurisprudence in the traditional version, theory of law making use of some sociological or psychological conception, worked out more or less by idealistic speculation, or (this being the easiest of all) philosophy of law which being concerned with the sphere of ideas, is least interested in facts. This approach is still the popular, being further reinforced by the fact that the old views and standpoints have been sanctified by tradition, forming stabilized schools.

But there are also some slight changes to note. Here the first place is due to the gradual overcoming of ignorance of the legal material and the attainments of the general study of law upon other territories. Thus gradually *e.g.* the inaccurate imaginings of Western scholars concerning socialist law, of Europeans on common law, and of Anglo-Saxons on continental law, are ousted by more definite data on the respective subjects, while philosophy of law, theory of law and jurisprudence and their basic literature come to be more widely known, beyond the closed particular circle of founders and addressees. Simultaneously adherers to the respective conceptions of the general study of law begin to have some doubts as to whether their theses are really of universal value,

or whether they should rather be more limited in scope. The realisation of the fact that a concrete thesis may be maitained, but *e.g.* only applied to common law, or still more strictly, to British law, that another is true when applied to civil law, but not (for instance) to criminal law, is a most important step towards a proper construction of generalisations with the right perception of their scope [29]. Further on, the progress of science in various directions, and particularly in linguistics, sociology and psychology, undermines the previous systems of general assertions: it reveals the defects lying at their foundations, indicating *e.g.* that the traditional jurisprudence falls in its views when submitted to a logical-linguistic examination, that the traditional theory of law has been founded on a doubtful psychology, as it was *e.g.* with Petrażycki's theory. Still more is philosophy of law undermined by antimetaphysical trends: on the other hand, however, it becomes evident that the essential problem posed by it (though posed in a fantastic way), the problem of perfecting law, is highly important and ought to become the subject of empirical research [30]. At the same time it becomes more and more evident that the particularism of various forms of the general study of law has been (and still is) induced by the misconception that "law" is uniform and may be comprised within a one-directional interpretation: whether formal-logical, psychologistic or sociological. Meanwhile law is complex and intricate and its various planes require different interpretations and different handling. Neither traditional jurisprudence, nor its reformed "realistic" counterpart, nor analytical positivism in its new version of normativism, nor again psychological or sociological legal theory could be maintained as a general study of law.

Thus, notwithstanding that the traditionally conceived general study of law is still maintained and its main forms subdivide it into the spheres of their respective influences, important changes in this discipline seem unavoidable; its further development will surely consist in reaffirming theoretical science of law, examining law under its various aspects and varieties differentiated in time, space and object of research, and only then look for generalisations. It is most important for the proper development of a discipline of this kind to cultivate legal-comparative research with different states since only through a really wide material one may expect to reach actually valuable generalisations.

We meet frequently with complaints darted at the general study of law for giving no proper aid to the practice of lawmaking and the appli-

---

[29] Cf. K. Opałek: *Problemy metodologiczne nauki prawa.* (*Methodological Problems of the Study of Law*). Warszawa 1962, p. 260 ff.

[30] Cf. M. Arctowa: *Drogi rozwoju polityki prawa.* (*Legal Policy and Its Development*). „Zeszyty Naukowe Uniwersytetu Jagiellońskiego, Prawo" No 6, 1959, p. 31.

cation of law. How well-founded these complaints are, we may judge by the above argument. Indeed, abstract formulae, derived from separate fragments of law, different each time, are of no great use to practice. Science does not consist of acts of revelation, nor is revelation a privilege to representatives of this discipline. The situation would have been perfect, were they to be able by a stroke of intuitive genius at once and properly combine all the elements, offering unquestionable and adequate syntheses. But it is not so. For this reason it is imperative to give up the search for "general ideas" in the law for the sake of more effective if more strenuous work.