ГОСУДАРСТВО И ПРАВО В СОВРЕМЕННОМ МИРЕ: ПРОБЛЕМЫ ТЕОРИИ И ИСТОРИИ

THE TASK OF LEGAL SCIENCE AND HOW TO PERFORM IT

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In the presented article there is the author's opinion of how the legal science should function and what its subject is. Also the attitude is explained towards the proper methods and ways of legal scientific researching activity in the article. The author supposes these two items to be the most and vitally important for gaining the objectiveness and fruitful results of such kind of the mental activity. The author also thinks that during the recent times the imaginations, including the scientific ones, of the social aim of the legal science and law have been broken and have become false. It means that the influence of law on the society and on the relationship among the individuals is not proper now and law does not perfect them. It also means that, due to the above said, the results of the scientific research of law are not always objective nowadays and they do not reflect the reality. As an example the author demonstrates the outcome of the Scandinavian countries legal systems functioning. These results are positive thanks to the fact that the mentioned legal systems are aimed at the social prosperity and at providing the high standards of living, because the Scandinavian law are traditionally tightly connected with social targets of the northern European countries inhabitants. The author persists on his viewpoint that the success of law — making process completely depends upon the participation of the majority of the inhabitants in it. It might be realized through organizing and holding the referendums, talks between the authorities and the inhabitants, through the activity of the civil society institutions. Then the author formulates his recommendations of how to deal with scientific research in law, how to carry out it and how to work out the positive results of it through using them by both the beginners and by the experienced professionals. He tries to avoid the legal scholars' false and mistaken methods of scientific research. Basing his recommendations on his own positive scientific legal research experience, the author of the article describes, explains and underlines the concrete positive and proper ways of researching, leading to the fundamental discovers in law.

Keywords: legal science, tasks, legal scholars, methods of legal study (research), substance matter of study, legislation, acts of parliament, valid law, approach, analysis, independence.

ЗАДАЧИ ПРАВОВОЙ НАУКИ И КАК ИХ РЕШИТЬ

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В статье изложены точка зрения автора на то, чем и как должна заниматься наука о праве, а также его представление о методах и способах научной деятельности исследователя права. Автор полагает, что это наиважнейшие условия для объективного познания права и результативного его исследования. В последнее время представления, в том числе и научные, о социальном предназначении права деформировались, в связи с чем влияние права на общество и межличностные отношения не приводят к их совершенствованию, а итоги научного изучения правовых явлений не всегда отражают реальность. В качестве примера представлено функционирование правовых систем скандинавских стран, которые нацелены на обеспечение процветания населения и его высокого уровня жизни, так как право в Скандинавии придерживается традиционных для северной Европы общественных ориентиров. В статье обосновывается необходимость привлечения значительной части населения к правотворческой деятельности, включая референдумы, переговоры населения с властями, законотворчество институтов гражданского общества. Автор формулирует рекомендации в целях их использования в научно-исследовательской работе в праве для начинающих и опытных исследователей, предостерегает от перечисляемых им негативных средств и методов научного исследования. Основываясь на собственном опыте научной деятельности в области права, автор описывает конкретные научные приемы, приводящие к познанию научной истины в праве.

Ключевые слова: правовая наука, задачи, исследователи права, методы правового исследования, основной предмет исследования, законодательство, акты парламента, действующее право, подход, анализ, независимость.

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What is legal science and how do we as scholars perform it?

Are legal scholars like me just old men reading dusty books and sitting mumbling in our beards to each other unintelligible words collected from old Roman writings or — as for Scandinavia — what was said and agreed upon in the county councils of the Viking era (“ting”)?

Not surprisingly I think the answer is no. In Scandinavia law is created by politicians by majority vote in Parliament and manifested in formal legislation — Acts of Parliament — and Orders (made by the government’s administration within the framework of such legislation). If a legal issue occur, which has not been solved by express legislation, the assumption is that Parliament has accepted custom and practice as valid law.

It might seem as if this leaves no room for legal scholars for independent work. However, as is the case in most countries it is not always clear what Parliament has actually agreed upon. For example the wording of the legislation might leave room for different interpretations, or practical situations occur which Parliament never thought of, or one Act might contradict another Act. Moreover, what is valid customary law?

These and similar examples are superfluous. In such situations it is important to distill what could be supposed to be valid law. As for establishing the implications of Statutes agreed upon in Parliament this might for example be done on the basis of the general idea behind the legislation in question, the discussions in Parliament — which might show what was the meaning of the paragraph (article of the Act) in question — Court practice (precedencies) on subject matters close to the actual one and knowledge of the practical situations in which the paragraph should apply. And as for customary law the scholar could find out what court practice is on the issue, what people usually do in the given respect and the reasons pro et contra differing substantial solutions. In general, there might also be “fixed points” — meaning points where it is undoubtedly known what valid law is — between which the scholar will draw the lines which show what law presumably is on open questions.

So the legal scholar will in this and other ways collect what he is able to find in order to show what valid law is — in preparatory works to the Act, court precedence etc. On this basis he will draw as detailed as possible an overall picture of the legal state of affairs in broader areas — constitutional law, law on public administration, law on contracts etc.

If the legal scholar performs a reliable work of this kind, it might even be accepted by the courts which will refer to him as expressing valid law — and the Parliament might refer to him in later discussions on the issue. He could also give reliable advice to the legislator as to how new statutes might best be drawn so that they are consistent and fit into the overall picture — and to private parties as to how to formulate private contracts.

Moreover legal science encompasses for example the study of the history of law, the way in which valid law actually works in the practical world and how people respond to it (sociology of law) etc.

The key issue is whether the scholar performs a reliable work meaning whether he is trustworthy or not. Does his writing for example represent the best of what we know as the actual fact or is it infected by for example his own personal political opinion? He is of course allowed to express such an opinion and conclude on a personal basis what he would like to be law now or in the future. However, in order to be trustworthy as a scholar it is vital that he does not put himself in place of valid law. Therefore he should always state clearly what the facts are on the subject matter (in studies on dogmatic law, meaning law as should be applied by the courts in their rulings — in latin “*de lege lata*”, the given law) and what is his own opinion (“*de lege ferenda*”, what the writer would like to be valid law).

I will not elaborate long on these issues in this forum as I will return to them in my later lecture. But it might be appropriate to summarize some of my key points in what I would like to call positive and negative values:

To conclude I tend to sum up what I could call negative and positive values:

Negative values are i.a.:

- Popular works or student-textbooks presented as genuine research (which they are pr. definition not).

- Long enumerations of this and that are not much better — even if the public often mistake such writings for qualified research.

- Presentation of what the author apparently has found by pure accident, knows already or chooses due to irrelevant factors such as commercial aspects (the wish to find a huge market for the book), see his name in printing or please specific groups or persons.

- Uninspired rewriting of what others already wrote and without independent spirit and meaning.

- Neglect of what we already know for sure (unless properly counter argued).

Much of what I read is of no real value. It has not contributed to our knowledge and it does not present old knowledge from a new approach either. Very often it represents only downright rewriting of what is already there — possibly even a repetition of what the author himself wrote before. Works of this kind are superfluous and harmful as they impede the overall view of the substance of the issue concerned — they might even form harmful timeconsumers, and they might distort the attention of the reader from the original works. Moreover, one could often doubt the reliability of such works since they might form second-hand, third-hand or even later, bad repetitions. Works like that are not genuine research and should not be mistaken for such research.

Thus, what counts as *positive* values is:

- The author’s apparently extensive knowledge of the substance matter of his study, meaning that his writing

proves that he has a broad overview and understanding of its inner structure.

— His excellent ability to contemplate on the issue.

— His excellent ability to exploit and evaluate the quality of available sources.

— His constructive approach to the functional problems involved.

— His useful alternative methods for the approach and analysis.

— His independence, originality and innovation. Even new methods of analysis of a well-known substance might be of positive value.

— The fact that the work could be expected to have a long-term value.

In short, that the author has given us something valuable in a credible, way which we did not have before. Consequently, after having read the last page, I lean back in my chair and ask myself: what did I learn from this?

A positive answer to that question could be “well, now I understand”, meaning what I read gave me a new understanding of a well-known substance. Or the positive answer might be “how interesting”, meaning that this is completely new.