Abstract

The theme of this thesis is „formalism in law“ as a concept that permeates an essential part of modern legal thinking. This work shows that it is usually perceived as a critical concept, but without a clear and steady meaning. In recent times, however, the discussion involving this concept changed so that it now includes individuals positively acknowledging themselves as formalists. An overview of this debate (only marginally concerning the Czech environment yet, however) forms the bulk of the thesis. The second essential part of it is a separate rethinking of the place of formalism in law, in all its aspects - in interpretation and application of law, in the creation of law, even in legal education and legal scholarship.

This thesis consists of three unequal parts, the first of which is further divided into three sections.

The first part deals with the formalism as a topic of discussion in legal philosophy during the entire 20th century, and the intention is to present this debate to Czech readers. Its first section is devoted to a topic typically linked to criticism of formalism in law in Western legal scholarship, as it presents the American legal realism of the interwar period. It shows it as a strong and visible culmination of earlier critical efforts visible on both sides of the Atlantic since the late 19th century.

The second section of the first part deals with the situation after the Second World War. The war and its context fundamentally challenged the dominance and steadfastness of legal positivism, but also encouraged legal thinkers to rethink its basic assumptions. This section first introduces G. Radbruch and his famous formula, however, the central figure of this section is HLA Hart, the most prominent figure of legal philosophy in the 20th century. Extensive parts of this section are devoted to the scholarly discussions that he had with his contemporaries - with Lon L. Fuller and with Ronald Dworkin. In his discussion with Fuller Hart defends positivism with respect to Fuller’s peculiar form of secularized natural law, in discussion with Dworkin Hart faces a completely new approach, which he describes as a rather idealistic “noble dream.” On the other hand, Dworkin criticizes narrowness of Hart’s approach that ignores principles and other parts of law that cannot be easily converted to rules. In the concluding part of this section, however, attention is also focused on other critical approaches emerging in the postwar period, namely the Economic Analysis of Law and Critical Legal Studies. Both invoke the heritage of American legal realism, but in both

of them there is also an inherent departure from the basic assumptions of mainstream legal thought. Especially in the works of the "crits" the talk about formalism in law continues intensively.

The third section of the first part refers to recent past and present. In recent times there emerged a tendency to use the term "formalism" in legal theory and scholarship also in a positive sense, and there appeared thinkers who openly acknowledge themselves as formalists. In addition to these defenders of formalism (Schauer, Tamanaha, Weinrib, Scalia) this section also focuses on internal retrospective reflection of the discussion traced, and also on the emergence of other critical approaches with different accents than the previous ones. At the very end of this section and of its entire first part, the thesis summarizes the themes and meanings belonging to the discussion on formalism in law.

The second part of this thesis deals with the Czech environment, in particular the reflection of the foreign discussion in it. It is demonstrated here that it only had a marginal influence on local legal theory and scholarship in the interwar period, and basically none at all after the communist takeover. Czech legal scholarship only joined it after the restoration of democratic statehood, especially in the persons of two contemporary authors, Zdeněk Kühn and Tomáš Sobek. A separate chapter is devoted to each of them. The last part of this section consists of an empirical excursion into the practice of Czech supreme courts. Here the thesis looks at how these courts use the concept of "formalism." The purpose is to illustrate the current situation, not to analyze it precisely, therefore, it neither works with the latest information nor uses completely exact methods.

Finally, the third part contains a self-standing assessment of the theme of formalism in law. The answer to the question "is there a place for formalism in law" is affirmative, but the thesis also tries to show what all it entails at the level of basic approaches. Introduction to this part is devoted to a critical look at the current state of the legal business that shows that it is not possible to simply concur to the restrained defense of formalism in law based on the comparison to playing by the rules. The remaining chapters of this part are concerned with reflection on what form the legal business in the Czech environment should have to make any allegation of formalism unfounded.

In the area of interpretation and application of law, this thesis finds that the essential and grounding approach to the application of law must be awareness. Those

applying the law must be aware of that they do, why they do so and in what position do they do so. Here, law is seen as a limitation of public authority, with its task of service to citizens. It points to a difference between subjective rights of individuals and the powers of public authorities, including officials who act on their behalf. Finally, openness and transparency of interpretation and application of law is presented here as necessity.

Next, this thesis approaches the legislative creation of law by comparing the legislative process at the national level in the Czech Republic and at the EU law-making level. It deals separately with the formal provisions for the legislative process, including the content of legislative rules, and formal requirements imposed on the resulting acts. Here it notes that the most significant differences are not primarily a manifestation of efforts to limit the legislature, but rather attempts to approach the acts of their recipients. The final part of this chapter deals with the formal requirements contained in the legislation, emphasizing that they should be justified and transparent, and that they should be accompanied by "fill-in forms" corresponding to present-day IT reality.

The last chapter is devoted to the formalism in legal education and legal scholarship. The lawyering is treated as a craft, which is, however, quite different from other crafts. The basic component of this craft is the work with rules, which must therefore form the basis of legal education. However, the necessity of teaching other approaches is also is emphasized here. In the field of legal scholarship the thesis notes its diversity, which stems from the different nature of the various branches of law. Peculiar relationship of legal scholarship and legal practice is emphasized here, as well as the observation in what sense the present-day legal scholarship is a collective enterprise. Particular attention is paid to issues of methods and methodology, emphasizing both the need for consistent and full-fledged application of the traditional black-letter approach, and the need to apply other approaches. Regardless of the method chosen, the thesis concludes that it is especially necessary to avoid slipping into gibberish, which alone is entirely unacceptable form of formalism.