

PROTECTION OF PERSONALITY IN SCOPE OF LEGAL PHILOSOPHY AND APPLICABLE LAW

1. Summary

We can see law from two main perspectives. Law is either complex of written regulations, which are prepared by human beings based on some interests or it is a complex of rules, which although are written, but its nature are originating from higher normative system.

First is a present perspective. Current law science is preferring valid law as complex of regulations published in statute book. What is not banned by law, is allowed. Though this law philosophy is leading to instability in society. Every year legislator is making hundreds of amendements and create new laws to cover new circumstances which appear in the society.

Despite legislator effort is society further unsatisfied with legal state. Society claims that law is enforceable for those who are able to hire big law firms, which can find necessary grey areas.

Immanuel Kant among the first draw a problem between legality and legitimacy. But it is not only matter of legislator whether he acts legitimately or legally, but as well as of receiver of law norm. Is every legal act of the receipient of the legal order of the Czech Republic legal as legitimate? Legal yes, if in conformity with legal order. But is it even legitimate? And is it moral?

For juspositivism is sufficient that legislator act is legal. Even for the receipient is only assumption for the act's consideration whether it is outside the law, legality itself. Legitimacy and morality is almost never considered.

Because man is homo homini lupus, we have to come back to I. Kant, where legitimacy is described as justified justification. But who is going to determine such justification. From which normative systems will come up? For sure cannot rise from valid law.

If we ever admit idea that only valid law, meant law written and published in statute book of the Czech Republic is the law to comply with, than we are opening doors to regimes like Hitler's nacism and comunism.

Exactly totalitarian regimes are trying to convince the man that jusnaturalism is legal direction which is obscurantism. Especially when it is jusnaturalism rising up from God.

John Locke said that legislator legitimacy is coming from default consent of the nation. American political sociologists Seymour Martin Lipset said that legitimacy of government is ability to convince its citizens that this government is most convenient for society.

This however means that human beings do not have any correction to its behaviour. Then every government which is changing once a 4 years, especially when it has constitutional majority has legal and legitimate right to change dramatically law system of our country. Its values.

German political philosopher Dolf Sternberger named legitimacy as system, where government is convinced about its right to rule and some are accepting it. But is it really enough?

On the contrary stands jusnaturalism. For sure is not possible to say that it is always better than juspositivism.

Fact that nor even basic requirement for government functionality, more precisely understanding legality is not clearly understood and defined, is making from promising imperative (legitimacy) legally – moral not standard, because the core of the standard is its clarity and understanding.

This problem describes two basic german terms - „Sein“ and „Sollen“. It is about fact, whether society to itself is supreme lord who determine what is possible or there is a God who determine what is allowed.

So it is about being, which is predefined and man cannot influence it by his own will. Ernst Forsthoff concluded that number of natural law theories is countless, because term naturalness can be interpreted by countless perspectives.

As I outlined above, naturalness is always connected with wisdom. So it is not obscurantism, which would be connected with today's view for morality, as system, given by Catholic church, which wanted usurp the power and control on humans hearts and minds.

Hans Kelsen expressed already before WW2 that fact that some behaviour is illegal, is not caused by overstepping of some moral belief, meant by overstepping some value scale which is transcendent, but because behavior is illegal only and therefore that valid law say so and breaching of the norm is sanctioned. But is that correct?

Very interesting approach for natural law provides Saint Thomas Aquinas. In accordance with his belief justice and naturalness is very connected. What is rightful has to be natural. On other hand is not valid that natural has to be rightful.

Saint Thomas is defining law as „*some designation of mind, published and announced for wider goodwill by someone who is taking care about society*“. Receiver has to be aware that law is for wider goodwill that implies him.

Saint Thomas is distinguishing three sorts of law. Eternal law – called as *lex aeterna*, *lex naturalis* as natural law and *lex sumane sive positiva* - positive law. Where state that above mentioned definition include, or more precisely is valid for all sorts of law.

Protection of personality is connected more with philosophy then with law as system. It is about a question, Who is human being, what constitutes his personality. Who shall protect it and under which circumstances can be interfered.

It is not legal issue as acquisition from not owner. Money, more precise wealth is important, but is it only tangible substrate in the end. Personality and its interfering is influencing core of the human being and society itself. How we approach to the individual than we approach values, which is not determined by society, but always few individuals.

Current system of personality protection is absolutely insufficient. The paragraph version of the Civil Code (further CC), same as amended Civil Code (further ACC) is only vague essay of legislator to codify, what has to be codified, but not to deal with the core itself. And it is to avoid interference of personal rights.

Europe has decided after two thousands years lasting history and after 20th century where she faced lack of freedom and suffering, to emphasise freedom of free speech at the expense of personality protection. United States of America has advanced this accent on law making pedestal and decision taking of US Supreme Court.

But in my opinion it is a big mistake. For sure it is necessary that society has right for informations. It is also important that media would have all necessary acces to all informations. It is not possible to assume in advance, with some exceptions, what media has right to know and what has not. It inevitably leads to totalism.

On the other hand we cannot say that some people, more precisely specified by Constitutional court of the Czech Republic as people who are publicly active (so not only politicians where we can partly understand this description, but also actors, models, but also barristers) have lower threshold of personality protection.

Idea that working on public, I am automatically, implicitly and voluntarily giving up on some certain level of protection of myself, my family, my privacy, has to conclusively lead to demotion of people, who will be publicly active.

Individual who is successful at his profession and his family, will never have interest to speak out publicly, because otherwise will lose most valuable possession what has developed, his privacy.

After all, what is more than to walk freely with my wife and children wherever I want and not to be afraid of kidnapping? This is why really wealthy people are very reluctant to release anything from their privacy to public.

We can call present day world as mediocracy than a democracy. Media are ruling to politicians, celebrities and social topics. Current medias are very shallow, simplifying informations, some given off at all. On purpose. As you cannot learn to understand law from popular articles, same as you cannot choose a politician well, national superstar or the society's ideal representative without proper evaluation, by which the media is not providing. Media are only giving us tabloids, scandals and only exceptionally some sunny side. Reason is marketability and favourableness. It is budget wise to publish lie for example about Mr M. Vasut and earn two millions crowns on it than not to publish anything, especially when I know that potentially imposed sanction came out from lost law suite will be lower than profit.

And exactly for this reason I am proposing law modification de lege ferenda. I believe that until there will not be clear law instrument how to significantly punish those who are based on calculations interfering individual rights, himself, his family and also his surroundings then we cannot expect from society to return to the manners, which will satisfy us.

Individual was fundament of the society as well as fundamental unit was family. We allowed today that individual can be pilloried by media for entertainment of the society (because already Romans knew rule „panem et circenses“ – „bread and circuses“).

Return to original values, more precisely to morality as determinant of valid law, will lead to decrease of disorganization in law system of the Czech Republic therefore to higher satisfaction and understandability to citizens with law order and society itself. It will be also positive for institute of personality protection.