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Jakub Kříž: *Nepatřičné právo Příspěvky ke studiu nespravedlivých zákonů* [Inappropriate Law: Contributions to the Study of Unjust Laws] Prague: Leges, 2022

Under socialism, Czechoslovak jurisprudence was dominated by a political ideology of Marxism—Leninism, which was in particular reflected in the way it was taught at the time at universities, namely as the Theory of State and Law. The very name of the subject implies that, according to the ideologues of Marxism—Leninism, only the state can be the creator and guarantor of law. Philosophy of law was completely abolished and only the History of Political and Legal Doctrines was taught as a diachronic overview of important legal thinkers. After the year 1989, teachers of state and legal theory turned to a sociological conception of law, most notably Viktor Knapp in his book *Teorie práva* (Theory of Law; 1995). Pavel Holländer (2006), in turn, explicitly called his scholarly work "philosophy of law." Therefore, it would be useful to look for other authors who would deal with the subtopics of legal philosophy in greater depth.

One such author is undoubtedly Jakub Kříž, who in his book *Nepatřičné právo...* (Inappropriate Law…) provides the reader with an insight into the complex issue of natural law. The title of the book sounds somewhat ironic, but it is in fact a reference to the well-known Radbruch formula (1946), according to which a codification of manifest injustice cannot be accepted as law. On the one hand, the author offers his reflections to readers with the view that they "open a door to a world of which law gradu-

ates are usually not very aware, even though their entire area of expertise is based on it" (p. 12). On the other hand, the author is aware that much has been written on the subject of inappropriate law albeit mainly abroad, and so he selects an Australian legal philosopher John Finnis and Robert Alexy, a German jurist, from the plethora of available literature. However, an examination of the literature used reveals that his scope of interest, while centred on these authors, is by no means exhaustive. For example, the ancient Greek philosophers, Plato and Aristotle, and many modern authors are also referred to and discussed.

The interpretive method and the overall approach to interpretation adopted by Jakub Kříž testify above all to the author's affinity with the Thomistic way of thinking and reasoning, which enables him to grasp the material in a transparent and discursive form. In doing so, he also uses pedagogically attractive simile: "We find real necessity in a world of facticity dominated by the principle of causality. If an apple is separated from a tree branch, it cannot but fall to the ground. However, if a man is compelled by certain rules to do something, he may defy them, and act in accordance with his will" (p. 14). The author acknowledges that the thinking based on a just, "divine" law, which came from the Stoics, especially Cicero, and was "sanctified" in Thomas Aquinas' *Summa Theologica*, was abandoned under the influence of the modern turn. However, in the various modern forms of natural-law thought, the theme of higher justice keeps returning, as can be seen in the example of Alexy, who "under the influence of the Radbruch's formula, strips extremely unjust norms of their legal validity, thus reviving the classical natural-law maxim *lex iniusta non est lex*" (p. 20).

It is clear that Thomas Aquinas' legal thought is rather rejected today because of its being rooted in theology (p. 22). Thus, natural law thinking is only accepted if it avoids ontological, metaphysical claims or the thesis of the existence of God (p. 28). A general part of Catholic moral theology is close to the account of basic human goods developed by neoclassical natural-law theory (pp. 31—35). The highest of the seven goods is life, but "peace in relation to God, the gods, or some non-theistic but superhuman source of meaning and value" comes last. The first principle of practical reasonableness in human action was not discovered until the neoclassical natural law school; it had already been formulated by Thomas Aquinas as the requirement that "good is to be done and striven for, and evil is to be avoided." There has also been a rediscovery of Aquinas' notion "that it is in practice unreasonable (and therefore wrong) to choose an action which one finds in one's deepest nature to be unreasonable, or not to choose an action which one's judgment of reason says one ought to choose, no matter how mistaken one's judgment of conscience may be.

This principle thus includes the obligation to follow an erroneous conscience" (pp. 42—43).

Another major difference with Marxism—Leninism and other statist theories of law is the separation of law from the necessary connection with state power, understood as the guarantor of the legal norm, which is absent in the moral norm: "Law would be necessary even in a society of angels or completely law-abiding people, precisely because of its coordinating function. Even in an ideal society, which would do without a system of sanctions because all its members would fully obey the law, it would be necessary, for example, to lay down rules of the road" (p. 45). Law does not primarily enforce people's actions, but enables individuals to realise important human goods that would either not be realisable at all or would be very difficult and only partially realised without law.

In some cases, it is very clear that the positive legal norm has an obvious natural law inspiration. The prohibition of rape is such an example (pp. 49—50). In most other cases, however, one must resort to a process that Thomas Aquinas calls *determinatio* — "a kind of specification of general things" (p. 51). Thus, according to Aquinas, the legislator's activity resembles that of the architect. However, while the examples of the architect or the rules of the road are recurrent in the literature, the author has recently found an interesting example of this *determinatio*, namely the implementation of European directives setting only general objectives and presupposing the use of diverse means of national law (p. 51, footnote 180). However, legislators may also seek to make legislation as detailed and as specific as possible, leading to a "legislative whirlwind" or "normative dash" based on the idea that every social problem can be solved by enacting legislation (p. 53, footnote 189).

The author proves that the notion of an unjust law as no law at all (*lex iniusta non est lex*) is incompatible with legal positivism. Unjust rules are rules that are directed against or in favour of certain groups, rules established in contravention of the prerogatives of an authority (*ultra vires*), rules contrary to the *rule of* law or denying a fundamental human right (p. 60). If compliance with the law is considered a moral obligation, then there is a perceptible conflict, for example, with a judge or official who is supposed to apply a law that he or she is convinced is unjust (p. 64).

The author deals with law and religion and it is not surprising that the book contains an example from this field, which the author wants to use to indicate the difference in the exercising of religious freedom as a collective right: "For example, the USA and the Czech Republic share the concept of the right of a community of persons of the same religious faith to an autonomous legal existence. In the Czech Republic, it is speci-

fied in such a way that these communities of believers can acquire legal personality in the form of a legal entity referred to as a church or religious society. In contrast, in the legal system of most US states, no specific legal form is reserved for churches, and communities of believers thus exercise their right to autonomous legal existence through general legal forms such as single-member corporations, religious trusts, or membership corporations" (p. 78). As an example of an extremely unjust law, the book cites one of the Nazi anti-Jewish measures, namely the deprivation of German citizenship of Jews (p. 89) and, in connection with this, the 1968 ruling of the Federal Constitutional Court in the case of the citizenship of a Jewish lawyer. Here the Court applied Radbruch's formula of the intolerable degree of conflict between law and justice (p. 94).

According to the author, the root of the *ius naturale* controversy is the question of knowledge, that is, to what extent man is able to merge reality with reason and to what extent people can reach a common consensus on the basis of knowledge. Practice requires the establishment of rules and order, so that if there is no consensus, the right of the stronger will be realized: "The negative solution of the noetic problem plunges man into a random world and a society without order. A world of the stronger and a world of sentiment. Noetic scepticism renders rational considerations about the natural structure of human society untenable" (p. 119). The noetic theme is then followed by the anthropological theme: "Without an appreciation of the notion of the person, human dignity, and freedom, considerations of natural law are useless. The negation of human freedom denies the possibility of rationally motivated action, and thus ultimately renders impossible the existence of natural law, morality, and ethical evaluation of human actions" (pp. 121—122). In these concluding remarks, the author's Thomism-rooted thinking again comes to the surface, which, moreover, corresponds to the principles that guide the teaching office of the Catholic Church in assessing the moral conduct of man.

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