METHODOLOGICAL MODELS
OF THE GENERAL THEORY OF LAW

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Abstract: There are two governing views on the general theory of law in the European law thought: synthetic and analytic. With the passage of time, the analytic model has emerged earlier, but synthetic model is the most widely spread model of the general theory of law.

1) Synthetic Model. In the general theory of law in Serbia, Toma Živanović and Radomir Lukić, particularly Živanović, have contributed their crowning achievements to the construction of the synthetic model.

Živanović's synthetic model of the general theory of law is based upon the far-reaching synthesis of the knowledge on law, starting from the basic concepts of the special law sciences, through intermediary and basic law concepts of higher law sciences to the basic law concepts of the highest law science (general theory of law). The basic Živanović's method is the method of generalizing abstraction, synthesis – explicative noncausal synthesis. Also, he used other logical methods, first of all the method of analysis, which precedes the synthetic method.

Lukić's attempt to construct the general theory of law, as a generalizing science, is less successful than Živanović's creative undertaking from the logical point of view.

2) Analytic Model. The general theory of law originally appeared as an analytic theory of law in England in the 30s of the 19th century with John Austin, its founder. With the advent of Kelsen and his pure theory of law, analytic theory of law gets almost perfect logical form.

The analytic theory of law affirms the general theory of law as a law science and the method of structural analysis as a principal method of study and creation of the general theory of law. Kelsen's methodical procedure of structural analysis falls in the explicative functional analysis (as a higher degree of descriptive analysis).

Contributions of the analytic theory of law, specifically those of Kelsen, are enormous. Kelsen has precisely confined the theory of law as a general law science from the sciences and disciplines on law: sociology of law, history of law, psychology of law and philosophy of law. In addition, analytic model has singled out some basic law concepts unknown to the synthetic theories of law, such as particularly is the concept of assignment. Also of paramount interest is Kelsen's understanding of validity of legal
norms and understanding of legal norms as deppsychologized commands, particularly his dynamic understanding of law as a process of self-creation of law, the process within which each legal cat (except the act of carrying out) is at the same time the act of creation and act of application of law as well.

**Key Words:** basic law concepts, synthetism, normative science, explicative science, pure theory of law, structural analysis of law, dynamic understanding of law.

There are two basic methodological models of the general theory of law as law science: synthetic and analytic models.

1. **SYNTHETIC MODEL OF THE GENERAL THEORY OF LAW**

**Introduction**

The synthetic model of the general theory of law has emerged in the Eurocontinental law thought primarily thanks to Merkl, the German theoretician of law, the main formulator of the general theory of law, a trend the purpose of which was to push out a speculative philosophy of law and to occupy its place. In its prevailing part, the speculative philosophy of law was not in a closer relation with special law sciences. That is how they could neither rely upon it nor expect from it whatever tangible help and benefit. The general theory of law took positive law as its subject of study with the aim of finding out that what is common to all branches of law, which can be achieved by a logic method, the method of generalizing abstraction. Under the elements common to all branches of law Merkl understands concepts that are common to all law sciences, which are the concept of law and the concept law relation. Korkunoff (St. Petersburg, 1888) proceeds similarly in his *Lectures on the General Theory of Law*. The purpose of the general theory of law is generalization of knowledge provided by the special law sciences. Belonging to the same trend are Liszt, Bergbohm and Shershenyevich.

As for the theory of law with Serbs, Toma Živanović and Radomir Lukić, the two most outstanding theoreticians of law, have shaped their work according to the synthetic model. Toma Živanović has particularly successfully done that by means of original supplements. Form the logical point of view, and within the synthetic model, his theory of law is without peers not only in this country but worldwide. No matter that he calls his theory of law, in the sense of the so-called scientific philosophy, philosophy of law, that is, philosophy of positive law, although he calls it the highest and the general synthetic law science as well.

I Živanović’s Synthetic Model

Živanović has completely exposed his synthetic view, in an almost perfect way, in his monumental work titled *Sistem sintetičke pravne filozofije* (The System of Synthetic Law Philosophy), published in several books in 1921, 1951 and 1959 and in French in 1927 and 1970. The system of synthetic philosophy of law is a scientific and a legal and philosophical work. Also, it includes the theory of law (under the name formal philosophy of law) and metaphysics of law as well as the legal logic with methodology and the theory of legal knowledge, which Živanović calls the philosophy of law sciences.
From this paper point of view, of primary importance is to present Živanović's synthetic model of the theory of law, but not completeness of his exceptionally original System of Synthetic Law Philosophy. After all, professor Vračar has also commented that synthetism is the principal feature of Živanović's scientific and philosophic legal work. To understand Živanović's synthetic model of the theory of law, one must start from his basic philosophic view. Živanović is an advocate and prominent representative of the so-called scientific philosophy (although he is also, in a part, a speculative law philosopher, creator of the transcendent objective legal idealism and purely biological natural law, but all that without any closer influence on the model of his theory of law). Živanović makes his theory of law dependent on special law sciences and higher legal sciences. Or, to put it more precisely, he deduces it from the stated sciences by a particular logical method, the method of generalizing abstraction. That way of synthesis or unification of legal knowledges has clearly been announced in his general prolegomenon to Sistem sintetičke pravne filozofije (The System of Synthetic Law Philosophy), in Nauka o sintetičkoj pravnoj filozofiji (The Science on the Synthetic Law Philosophy). He understands science as a system of defined concepts on defined phenomena (static concept of science) and as a systematic grouping of created concepts by co-ordinating and subordinating them (dynamic concept of science). The concepts formed by the law sciences are of different degrees and all of them are created by generalization. Special law sciences such as penal law, civil law, administrative law, in addition to lower concepts, contained in the particular parts of those sciences have also basic concepts that are close common genera for the lower concepts, which are contained in the general parts of those sciences. Knowledge on objects of special law sciences, contained in their lower and basic concepts, is not the only possible knowledge on them, since there is a substantial similarity among the objects of certain related special law sciences. In view of that, it is necessary to proceed with the generalization procedure until the highest co-ordinated legal concepts, so-called basic legal concepts, have been created. Thus, the basic legal concepts come as the last legal concepts (in view of the way of their derivation) or as the first legal concepts (in view of their function in the realm of the legal world). While the special law sciences are synthetic only when their basic concepts are taken into consideration, higher law sciences and the highest law science (theory of law) are synthetic law sciences, since they include a synthesis of knowledges obtained from the special law sciences, that is, synthesis of knowledges acquired from higher law sciences.

The path taken by Toma Živanović is obviously that of Auguste Compte. Živanović gives recognition to Compte for his precisely understanding the relation between philosophy and special sciences in his "positive philosophy". Compte has, as it is well-known, rejected absolute cognitions both of theology and metaphysics. The purpose of philosophy is to perform synthesis of knowledges acquired from the special sciences. Here, philosophy is obviously understood as a general science, that is, the most general science.

That is why its method, positive method, observation and reasoning, is an empirical method. Spencer and Wundt understand the relation between philosophy (the most general science) and special sciences in a similar way like Compte. Therefore, Živanović is a positivist of Comte's path in his Theory of Law. That is why the objects of higher law sciences (for example, private law and public law) are synthetic genuses objects of related law sciences, while the objects of the highest or general synthetic law science (theory of law) are synthetic genuses of objects of higher law sciences. Thus, the objects of the theory of law include (indirectly, through the objects of higher law sciences) objects of all special law sciences as well. Knowledge, on the other hand, on the object of the theory of law, i.e., the contents of the theory of law is knowledge on the entirety of the legal world. Accordingly, higher law sciences, together with the theory of law, are only a continuation of generalization, synthesis of knowledges of special law sciences. Their method is common: synthesis, generalization of knowledges. Therefore, the difference among the specific law sciences, higher law sciences and the theory of law is only in the degree of generality of their concepts. Because of that, not only higher law sciences, but the theory of the law as well, are law sciences, such as, after all, are special law sciences.

To determine, according to the aforementioned paradigm, synthetic genuses for the basic concepts of special law sciences (objects of higher law sciences) and synthetic genuses for the basic concepts of higher law sciences (objects of the theory of law), Živanović had to, in view of the synthetic nonconstructiveness of special law sciences, get down to an exceptionally hard and voluminous task, synthetics revision of special law sciences. Out of special law sciences it is only penal law that is a constructed science, in a consistent synthetic way, with clearly singled out general part within which the basic penal and legal concepts have been worked out: penal law, lawbreaker and penal sanction. It is well-known that Živanović is responsible for separation of a lawbreaker (from the so far objectively-subjective understood criminal act) into a self-contained, basic criminal and legal concept, by means of which he has done personalization of the criminal law (and later of other special law sciences, ethics and philosophy of law as well). To carry out the synthetic revision of the special law sciences, Živanović has switched himself from the criminal law, the discipline thanks to which he has originally won a worldwide reputation, to other special law sciences. The result of some of these investigations he has also published in separate books.3 Thus, he has discovered, within the civil law as the object of synthesis for higher law sciences (private law) and for the theory of law as the highest law science, the concept of civil law (as the denominator of other civil and legal concepts), civil subjective law, civil legal subject and the conflict of civil laws (that is, spatial validity of domestic civil law against that foreign).4 And so on, for the trade law (as a private law science), for criminal law and other delict law sciences, for constitutional law, administrative law, public international law and church law (as a public law science). The work of Toma Živanović makes a paramount impression in this sense as well. That what

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3 See, Dr. Toma Živanović, Osnovni problemi Krivičnog i Gradjanskog procesnog prava (postupka), Beograd, Akademija nauka, 1940 (Book 1) and 1941 (Book 2).

4 See, Dr. Toma Živanović, Sistem sintetičke pravne filozofije 1. Nauka o sintetičkoj filozofiji prava 2. Nauka o sintetičkoj filozofiji pravnih nauka (s elementima nauke o sintetičkoj opštoj filozofiji i nauke o sintetičkoj filozofiji nauka), Beograd, SANU, 1951, pp. 35-40.
has not been done by specialists for their own disciplines (special law sciences) over the centuries, has been done by Toma Živanović! Unfortunately, even today most of the specialists do not know at all, to their disadvantage, the scientific results of Živanović in this field.

After having completed the task of synthetic revision of the special law sciences, he has embarked upon for necessity, Živanović has also discovered the objects of higher law sciences and objects of the highest law science, the theory of law. As a result of generalization, synthesis of the special legal knowledge, there emerged two hierarchical degrees of the higher law synthesis: indirect higher synthesis (higher law sciences) and the highest synthesis (the highest law science, theory of law). The result of the indirect higher synthesis is indirect basic legal concept (objects of higher law sciences) and the basic legal concepts (objects of the theory of law). Since higher law sciences have not yet been constituted, Živanović has introduced their objects (indirect basic legal concepts) into the Separate part of his theory of law, the basic legal concepts into the General part of the theory of law. According to the already mentioned paradigm, Živanović has, first, separated higher legal concepts (indirect basic legal concepts), and only then, the highest legal concepts (basic legal concepts) starting from the three rows of the synthesis objects: concepts of some branches of law, basic concepts of special law sciences and concepts of conflict of laws in some special law sciences. In this way, all law sciences emerge as three hierarchical ordered systems of concepts: concepts of special law sciences (the lowest degree), concepts of higher law sciences (middle degree) and the concepts of the highest law science, theory of law (the highest degree). Consequently, the concepts of higher law sciences constitute a halfway between the concepts of special law sciences and the concepts of the theory of law. They are that indispensable link, bridge, that connects special law sciences (their concepts) with the Theory of Law (its concepts). Generated by generalization from the lowest concepts, and higher (indirect basic legal concepts), the highest (basic legal concepts) are empirical concepts. Therefore, lower concepts (concepts of special law sciences, their basic legal concepts) are logical assumptions of higher and highest legal concepts. This proves the scientific character of Živanović’s theory of law, because his higher and highest legal concepts are not appriori ones, from the mind derived concepts, without grounds in experience, but empirical concepts.

Indirect basic legal concepts are divided into several groups according to the principle of division of law: private law, public law, process law, private delict and public delict concepts, twenty four in total. An enormous novelty in the classification of law was introduced by Živanović. Instead of a traditional Roman division of law into the public and private laws, he has stated as a primary division of law division of law into law (the law on law) and the law on nonlaw (delict law). It is only then that division of both the law on law and the law on nonlaw follows to the public and private laws. Although procedural law falls into the public law, Živanović singles it out into a separate group of laws, because due to its institutions it is a formal law.

Finally, at the top of the law synthesis, Živanović discovers the basic legal concepts as a close common genuses for higher legal concepts, the nine of them: the concept of law (the first, basic legal concept), subjective law, legal responsibility, legal subject (a person in law), action (function), nonlaw or delict (violence of law), breaker of law (subject of nonlaw), legal sanction (nonlaw legal consequence) and conflict of laws (norms). The aforementioned nine basic legal concepts are a minimum of legal concepts Živanović has
established in accordance with the principle of scientific economy. Out of the nine basic legal concepts only three are general concepts, common to all special law sciences: law, legal subject and conflict of laws (except in the international law).

There are two basic methods of knowledge in origination as established by Branislav Petronijević in his Osnovi logike (Basics of Logics): analysis and synthesis. Synthesis is understood in two ways: like "an objective process of connecting parts (elements) into an entirety" (for example, organic synthesis in chemistry) and like "subjective process by means of which connecting of elements into an entirety is being done in ideas". If synthesis is understood as a subjective method, there are descriptive synthesis, explicative synthesis, reproductive synthesis and productive synthesis. What type of synthesis does Živanović's synthesis belong to he used in constructing his synthetic theory of law? Let us go back, for a moment, to Petronijević' s Basics of Logics. Under the descriptive synthesis, Petronijević understands description "in what way an entirety is made from its parts", that is, description in what way an entirety is created.6 Explicative synthesis, Petronijević points out, "shows in what way an entirety originates from its parts (elements) as logic causes".7 Explicative synthesis may be casual (when "origination of an entirety is explained on the grounds of causal connections existing among elementary parts") and non-causal (in which "existence of the entirety is derived from the existence of noncausal relations /relations of comparison and simultaneous dependence/ existing among the elements").8 Finally, by means of a reproductive synthesis "re-established is an entirety that was broken into parts by analysis" and by the productive analysis "new entireties are created from elements obtained by an analysis, the entireties the ideas of which did not exist earlier".9

It's beyond any dispute that the theory of law of Živanović was being created by the explicative noncausal synthesis. Thus, for example, logical concept of law, as a detentor of all abstract beings, legal institutions, legal concepts, as an entirety of the legal world, has been derived by means of abstraction and generalization from the concepts of law branches and from the concepts of related law branches, based upon comparison, similarity and dependence of lower and higher legal concepts with the law as the highest concept. That also refers mutatis mutandis to other basic concepts. Živanović himself calls his synthesis a unific synthesis. It is important to mention that the synthetic procedure of Živanović is always accompanied by the analytic procedure as well. Živanović has in fact used analytic-synthetic method as well as other logic methods, but the synthetic method, according to him, is a principle method. Also, he often calls it the method of generalizing abstraction. In Nauka o sintetičkoj filozofiji prava (Science on Synthetic Philosophy of Law), Živanović says that generalizing abstraction is the principal method, while supple-

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6 Ibid. p. 174. "While descriptive analysis of, for example, one (phanerogamic) plant consists of description that the root, trunk and branches with leaves are its components parts, descriptive synthesis of a plant simply consists of a description that it originates by extending the root into the trunk, and the trunk into branches with leaves "
7 Ibid. p. 174.
8 Ibid. p. 174.
9 Ibid. p. 174.
menting methods are as follow: historical, comparative-law, teleological and realistic methods. For the generalizing abstraction, Živanović points out, in his *Metodološka logika* (Methodological Logics) that it is "the principal method of all, even the law sciences" and that its objective is "defining concepts and classification of derived concepts in this or that science and, thus, creation of a system of concepts in various sciences". That the synthetic and analytic procedures are connected and that they make a living entirety can be seen from Živanović's statement that "synthesis is (approached) after analysis".

Having in mind the completeness of Živanović's scientific and law and philosophical work, Professor Vračar has rightfully pointed out his (Živanović's) "law and philosophical synthetism" giving recognition to him as one of the "leading worldwide law synthetics". Živanović's synthetism is demonstrated, says professor Vračar, in "synthesizing knowledges and concepts", in "unifying positive law, natural law and the idea of law", in "unity of the subject, methodical and contents synthetism", in "synthesizing results of traditional jurisprudence", in "unifying ontologic, gnoseological and axiological problems". Estimations of Professor Vračar on the law and philosophical synthetism of Živanović are of capital importance for further, in-debt investigations of Živanović's *Sistem sintetičke pravne filozofije* (The System of Synthetic LawmPhilosophy). After all, Professor Vračar, as an excellent methodologist, is one of our rare law writers, in fact the only one, along with Toma Živanović, who has properly observed that "lawyers (...) are or analysts or theoreticians".

An interesting book, *Dedukciona promišljanja Sintetičke pravne filozofije* (Deductive Thoughts on the Synthetic Law Philosophy) by Dr. Svetislav M. Jarić, has recently been published presenting an unusual, but controversial, estimation on the character of Živanović's law philosophy from the methodological point of view. Namely, he exposes a thesis on the axiomatic character of Živanović's law philosophy. Starting from the fact that "great philosophical systems include axiomatics" he has drawn a doubtful conclusion that it is "therefore that (...) the Synthetic law philosophy, as a great philosophical system, must also include it". Controversial in this syllogism is the first premise, that all great philosophical systems include axiomatics. It is not clear what Jarić understands under "philosophical system". No doubt that there are great axiomatically constructed philosophical systems such as, for example, system of *Ethics* of Espinosa. Most of great philosophies are rationalistic philosophies. They are often axiomatically constructed. The philosophy of Compte, however, under which influence Živanović has worked, is empirical and positivistic. May his "positive philosophy" be denied the character of great phi-

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12. Ibid. p. 797.
16. See, Dr. Stevan K. Vračar, op. cit., p. 309.
17. See, Dr. Svetislav M. Jarić, *Dedukciona promišljanja Sintetičke pravne filozofije*. Utvrđivanje pravnolo-

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losophy? There are philosophers who try to do that, including Lesek Kolakowski. In his work *Philosophy of Positivism* he points out that positivism is "antiphilosophic horizon". If it were accepted, the whole philosophy, based upon the gnoseological method of empiricism, would be denied a philosophic character. Thus, England would be next to a country without any philosopher. Are philosophies, originated from practice, as a source of knowledge, for example, Marx's philosophy, great and axiomatic? Doubtless that Marx's philosophy is of epochal importance. Is it axiomatic as well? It would be hard to prove. It is analytic-synthetic and dialectic. The way of exposing, for example, in *Das Kapital*, which is deductive, need not be deceiving. Presented there (in a deductive form) are completed results of investigations, reached not from (apriori or empirically) set axioms.

Jarić says that Živanović has set five axioms: 1. Axiom of theoretical concept of science (law science); 2. Axiom of theoretical concept of division of sciences, 3. Axiom of theoretical concept of the legal concept; 4. Axiom of theoretical concept of synthetic knowledge; 5. Axiom of theoretical concept of philosophy. If the contents of Živanović's formal synthetic philosophy of law (that is, theory of law), dealt with in this work, is in view, then it is, doubtless, as I have already shown, a typical and, perhaps, the most successfully, to date, created synthetic theory of law, as is the opinion of Professor Vračar. Živanović has reached the basic legal concepts, objects of the theory of law (discovered them, as he used to say), by the method of generalizing abstraction. Consequently, not by means of deduction from the in advance set axioms. His basic concepts are empirically, but not apriori, from the mind, from axioms, by means of deduction, derived concepts.

As for the speculative part of Živanović's law philosophy, his metaphysics of law, transcendental objective legal idealism and purely biological natural law (absolute and relative), its is also hard, there, to accept a thesis on his axiomatic character. Because, for his starting idea, positive law in itself (the absolute idea of law), which has all at once been realized in the absolute natural law, and through the relative natural law is being evolutionarily implemented in the positive law, Živanović himself says that it is "obviously a scientific hypothesis set for the purpose of explaining reality and occurrences". Živanović's hypothesis, as he calls it "scientific hypothesis", has been understood by Jarić as an axiom, although Živanović himself does not use that word and concept. From the positive law itself (absolute idea of law), as a scientific hypothesis and the starting attitude, Živanović has, by deduction, derived absolute natural law, then relative natural law from it and, finally, positive law, not created by a legislator, because it has already been "created in cosmos", but he only "expresses it (...) in an unreliable way and gradually in keeping with the developments of the existence needs of a society – state and law science".

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18 Ibid., p. 39.
20 Ibid., p. 630.
II Lukić's Synthetical Model

I will describe here, in short, Lukić's synthetical model of the theory of law as well. As a basis, I will take his two-volume *Teorija države i prava* (*Theory of State and Law*)\(^{21}\), published in his Collected Works, on the occasion of his 80th anniversary of birth. The first edition of these books was published way back in 1953 and 1954. Those were the one-party, communist monopoly times, under the Broz's unenlightened dictatorship. That must be taken into account when considering works of those times. Marxism-Leninism and the party ideology were a starting point and framework for the law sciences too, particularly for the theory of state and law. Lukić himself had to follow those times and that ideology. The very name of the discipline the theory of state and law has come down from the Russian-Soviet side, Strogovich-Golunsky and Denissoff's textbooks were the model, which for some time, until the political severance of relations with USSR, were official textbooks at the faculties of law in Yugoslavia.

Lukić was in his fourtysh when he wrote his *Theory of State and Law*. He was an excellent expert on the traditional theory of law, the bourgeois theory of law as it was spoken of in those times, and on the official Marxism-Leninism. In the so-called bourgeois theory of law he found a stimulus to create a theory of state and law as a general generalizing science. That positivistic, inductive analytically-synthetic path can be seen from this view of him: "The theory of state and law creates, from the most general concepts and laws of individual law sciences, the highest and the most general concepts and laws that can be found in the complete law, that is, in all states and laws. It is in this way that it comes to the most general basic concepts: to the concept of a state itself and law."\(^{22}\) However, since he has determined the subject of the theory of state and law "as general qualities (features, characteristics, properties) and general connections of a state and law"\(^{23}\), Lukić was forced to partially leave the synthetic model of the theory of law. For, investigations of general connections of a state and law (both mutually and to a society, that is, to the principal social phenomena) made him embark on a world of sociology and, possibly philosophy, and leave the frameworks of law sciences. Therefore, when he speaks of the method of theory of state and law, he says that it is a materialist-dialectic method whose "equal component elements, moments" are legal as well as sociological

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\(^{22}\) Ibid., p. 55. An inadmissible error crept into the work of such a powerful and intellectual author such as Lukić. He makes mention of individual law sciences. It is only as an exception that a science can be something individual (For example, the science on planet Moon). All sciences are abstract, general, because they are a system of concepts. As for the degree of generality, however, sciences differ, even those of law. Thus, law sciences are divided into individual and general. Individual sciences are special law sciences, the general one is theory of law. There are higher law sciences between them. When, for example, criminal law determines the concept of theft, it determines it *in abstracto*, consequently, in a general way. Individual thefts, that of John here or of Steven there, are not dealt with by the criminal law, as a special science, but its a court that establishes it according to separate procedure. In reality, of course, there is only a single theft. The general (delict) and the special (theft) are the moments of an indivial theft that determine its essence. This is to prove dialectic relationship among the general, special and indivudual. Individual is assigned to the special and general, while the general and special are the moments of individual.

\(^{23}\) Ibid., p. 50.
and philosophical method. By means of this methodological syncretism, Lukić has called into question the character of the theory of state and law as a law science, general law science, as he has already defined it. Rightfully, the theory of state and law could be understood as a law science as well as a sociological and philosophical discipline. Therefore, no wonder that Lukić, a writer of the general sociology and sociology of morals, has not written the sociology of law as well. It is the contents in his theory of state and law, although not in a complete form.

As for differentiation of general concepts from those basic and laws, Lukić says "that the basic concepts on a state and law are contained logically necessary in each law and state and must be contained in their each part and phenomenon as well as in every concrete states and laws even when not sought for, while the general concepts need not logically necessary be contained, but can be contained and it is, therefore, necessary to empirically establish their existence". However, he himself recognizes that this differentiation was not successful, because "if the general concept were defined in this way, it is a question whether such concepts existed at all and were not they all reduced to the basic concepts (as we have defined them)". When compared, in this sense, Lukić and Živanović, superiority of Živanović is an eyesore.

In his work Pojam teorije prava (The Concept of the Theory of Law), which is a programming text, but not completed because of the author's late age and work on other books, Lukić has incomparably better determined the character of the theory of law, its subject, assignments which that discipline should carry out on its subject, division of theory of law to the formal and material and its method. Now, he agrees with the possibility of exposing the theory of law separately from the theory of state, that is, he does not call into question its self-contained position as a general generalizing law science. He differentiates theories of law of "different degrees of generality". In contrast to the law dogmatism, the theory of law, even when it is special (Theory of law of "medium degree" and national theory of law) is a generalizing science on law. Its subject is "law in general" and the assignments as follow: 1. determination of the concept of law; 2. determination of component parts of law; 3. determination of connections among the component parts of law; 4. determination of connections among the component parts and law as an entirety; 5. determination of "differences and similarities" among law and similar phenomena; 6. determination of connections among law and related phenomena; 7. determination of connections among law and on it influencing phenomena; 8. determination of "general regularities of creation of law as a phenomenon and its development"; 9. determination of causal as well as technically structural connections both among law and other phenomena (causal connections) and among the very elements of law and law as an entirety (technically-structural connection). How does theory of law come to its statements? Lukić accepts the view of Živanović that those statements can be reached by the "method of (generalizing) abstraction".

24 Ibid., p. 64.
25 Ibid., p. 55.
26 Ibid., p. 55.
The stated designations determine, says Lukić, "the formal concept of the theory of law". One more determination of the material (contents) concept of the theory of law is needed, that is, it is necessary to "establish which general and generalizing statements are there in the Theory of Law". From the material point of view, different theories of law are possible, holds Lukić, which is conditioned by the complexity of law and, in connection with this, by the possibilities of using different methods. This is how the normative theory of law is created, says Lukić, which is of the longest tradition and the most developed, sociological theory of law (theoretical sociology of law), psychological theory of law and politico-scientific theory of law (law political science), if it is considered a self-contained science, but not a part of the sociological theory of law. Other theories of law are also possible, such as biological and anthropological theory of law. Lukić is against these reductionist theories, as Lukić calls them, of law. He stands for the general theory of law, as a synthesis of all mentioned reductionist theories of law, which would "as harmoniously as possible" connect normative, sociological, psychological and politico-scientific theory of law, which would result in "a general theory of law in the true sense". It seems that Lukić thinks that each of the mentioned, and according to him reductionist theories, is a general generalizing science. When they all shall have been constructed to a satisfactory level, synthesis of their results within the general theory of law would be possible.

As it can be seen, Lukić in his late age partially changes his views formerly exposed in his two-volume Teorija države i prava (Theory of State and Law). Now, he unambiguously points out that the theory of law is a general generalizing science created by the use of the generalizing abstraction method. This method is, anyway, used to construct the synthetic model of the theory of law. However, he still sticks to his view that the general theory of law is a legal, sociological, psychological, politico-scientific etc. science, which dilutes its law character. It is, in that way, transformed from a law science to some integral science, which is, from the logical point of view too, unacceptable. Nevertheless, there is an advancement. Lukić has finally recognized that philosophy of law differs, in principle, from the theory of law, as a science, so that he no more makes mention either of the philosophical method, as one of the methods of the theory of law, or of the need of synthesis of philosophically-legal knowledges within the general theory of law.

III Conclusion

It is beyond any doubt that the theory of law, constructed according to the synthetic model has contributed to better understanding of law. Defining law in the logical and extensive sense, separating basic legal concepts, establishing connections among the basic legal concepts as well as among them and the law as an entirety, it has risen the law science to the so far undreamed-of height. In the theory of law, special law sciences have also found a reliable support for their scientific derivations. If substantial is in that what is general, they will be in position to deepen their concepts, building general moments into their systems of concepts. Thus, knowledges established by the theory of law shall appear as a necessary supplement to knowledges provided for by the special law sciences. Instead of the disunited and scattered world of law knowledges in a great number of diverse special law sciences now, at one place, within the theory of law, there is an extract and sublimate of all law knowledges. In that sense, being at higher level of abstractness, the theory of law shows itself as "more scientific" discipline, if we may say so, than the
special law sciences. Each of them covers only a part of the law reality, certain branches of law, that is, abstract law beings, legal institutions, legal concepts made objective in them. The theory of law, however, recognizes complete law reality providing on it statements in the form of the most general legal concepts and, first of all, in the form of the concept of law, the supreme concept of the law thought. The synthetic model of the theory of law has shown that it is an empirical and rational discipline, consequently, a science, but not philosophy (in the speculative sense), what are, after all, other spiritual sciences as well. With the best of its representatives, such as Živanović, the character of the theory of law as a law science has been preserved, regardless of certain borrowings from other disciplines, which are indispensable, even in the criminal law. "It borrows its material not only from the law sciences, but from philosophy, from psychology, forensic medicine, criminal anthropology and sociology too, nevertheless, nobody will say that it transforms to a nonlaw science", says Tomá Živanović.28 For, as Tomá Živanović says again, "that a science would be forced to borrow material from others, cannot change its character, that what distinguishes it from other sciences, it is not the quality of its material, but the quality of its objects."29

2. ANALYTICAL MODEL OF THE GENERAL THEORY OF LAW

Originally, the general theory of law has appeared as an analytical theory of law in the Anglo-Saxon literature, with John Austin, with his work Lectures on Jurisprudence or the Philosophy of Positive Law some decades prior to the Merkl's synthetic theory of law.

From the logical point of view, that original model of analytical theory of law was not polished up. It is only with the advent of Kelsen and his pure theory of law that the model of the analytical theory of law gets its almost perfect logical form. Although for the analytical method used, which differs from the method of synthetic theory of law, analytical theory of law worthily represents the theory of law as a general law science. If there are still sociological ingredients with Austin in determining the basic legal concepts, the theory of law has grown with Kelsen into a proper general law science with precisely determined investigation objects and assignments to be carried out over those objects by the theory of law, primarily using a logical method of analysis.

Kelsen's model of analytical theory of law has been successfully applied by Alfred Merkel and Verdross (in the field of international law), Leonidas Pitamic with original works and our Slobodan Jovanović.

I Austin's Model

In view of the nature of English law based upon customary law and court precedents, much more than upon laws, at least in the times Austin had produced his works, there was a need, not only from the law education point of view, for a general law discipline. That need could not be, in a proper way, satisfied by the works of Austin's predecessors, under whose influence he himself had worked. Francis Bacon's works, Legus Regum in particu-

28 See, Tomá Živanović, Sistem sintetičke pravne filozofije 1. Nauka o sintetičkoj pravnoj filozofiji, p. 62
29 Ibid., p. 62.
lar, Thomas Hobbes’ *Leviathan* and particularly Sir William Blackstone’s *Commentaries on the Laws of England* and Jeremy Bentham’s *Principles on Morals and Legislation* have probably encouraged Austin’s law-spiritual activities as well as Hugo’s work *Lehrbuch des Naturrechts als einer Philosophie des positiven Rechts*, which, regardless of its title, deals with positive law.

His theory of law Austin calls general jurisprudence and philosophy of positive law. There are writers, for example, Harrison, who calls Austin's trend the analytical English school of jurisprudence. That name has been assimilated at the present. The very term jurisprudence is polysemious, so that it can cause confusion. It is sometimes used to denote a set of all law sciences, and sometimes, particularly in French literature, court decisions, that is, court practice. To designate his theory of law, Austin also uses, in addition to the term general jurisprudence, the term universal, comparative or abstract jurisprudence, in view of its objects of study.

In keeping with the English empirical philosophy, Austin strives to ground his theory of law as a (general) law science, thus completely pushing out the Philosophy of natural law in England. Positive law is a study subject of his theory of law. He has, thus, separated the theory of law as a law science both from philosophy of law and from ethics, but from politics as well. Hans Kelsen will, later on, take the aforementioned paths, but in a more radical way than Austin.

Stating the objects of his theory of law more precisely, Austin says that those are the concepts that are common to various systems of positive law. Like in the synthetic theory of law model, the subject of the theory of law is positive law (but not some philosophical, sociological law, etc.). However, the difference is in that the study objects in the synthetic theory of law model the are the concepts common to all law sciences (MerkI), while Austin holds the view that those are the concepts common to all legislatures, that is, as he says, to mature legislatures. The synthetic theory of law model relies on the results of special law sciences, while the analytical theory of law model is constructed without grounds on the basic concepts of special law sciences. Austin was not much in position to construct the synthetic theory of law model, in view of the fact that special law sciences in England were nonsynthetic. They do no have, even at the present, constructed systems of concepts, they are nonsystematical.

Under the concepts common to all legislatures Austin understands the concepts that are, according to him, inevitably contained in each legislature. In addition to the concepts common to all legislatures, Austin also adds principles and differentiations, having in mind, for example, differences between private and criminal delict. When he says that study object of his theory of law are the concepts common to all legislatures, Austin then thinks of the concepts common both to all branches of law and of concept common to only one branch of law in each positive law. Thus, Austin's highest concepts are not of the same conceptual rank, they are not in the co-ordination relation.

At least in this form, Austin's analytical theory of law was of great impact on the development of law thought in England, being governing for a long time and followed by a great number of advocates such as G. Campbell (An Analysis of Austin's Lectures on Jurisprudence or Philosophy of Positive Law), R. Campbell (Lectures on Jurisprudence or Philosophy of Positive Law), W.J. Brown (The Austin Theory of Law) and Eastwood (A Brief Introduction to Austin's Theory of Positive Law and Sovereignty), among the most renowned. There were, however, strongly worded critics particularly standing out of
which was Sir Frederick Pollock, in particular in his work *Essays in Jurisprudence and Ethics*, who disputed Austin's abstract jurisprudence, considering it unnecessary, since it was, as alleged, tacitly contained in the special law sciences.

II Kelsen's Model

Hans Kelsen is a principal representative of the analytical theory of law model, which is along with the Živanović's synthetic theory of law model, from the logical point of view, the most successful model of the theory of law worldwide.

Highly praised, but even more not understood and disputed, mainly for unjustified reasons, he is greatly responsible for construction of the theory of law as a law science freed from all nonlaw elements, philosophical as well as those sociological, psychological, ideological and political.

Kelsen was fully aware of the fact that law is connected with the world of social phenomena, with the world of values, with the world of psychological phenomena etc., but he thought that those connections were not the subject of study of the theory of law, but of other disciplines. That what could have been achieved by the use of analytical method, Kelsen has achieved. In that sense, the question is whether further steps could be made at all. What he has set up for his study subject, as well as the tasks to be completed on that subject, by the method of analysis, *to single out that what is specifically legal and to explain it*, he has done in the best possible way. He has, like a "technologist", by means of a specific "technological" method, extracted from "ore", that what is specifically legal, and that is legal what ought to be leaving to sociologists, psychologists, philosophers and others the rest what belongs to the world of being or to the metaphysical and ethical world.

He has done that with an incomparable power of an almost ingenious thinker. In that sense, he has by far exceeded his predecessors, Austin in England, and Paul Laband and Georg Jellinek in Germany. That Kelsen's superiority is particularly reflected in investigating law as an ideal phenomenon, its existence as nonmaterial being, that is, as a spiritual (intelligible) being, the existence of which emerges in effectiveness, particularly in analytical and logical derivations.

Kelsen has exerted great influence on our law thought too. Out of our great law writers, it was in particular Slobodan Jovanović who produced his works under his influence, but also influenced were Djordje Tasić and Radomir Lukić. Three doctoral dissertations were written on his work. The first one, *Filozofske osnove pravne teorije Hansa Kelzena. Prilog kritici "čiste teorije prava"* (Philosophical Basics of Hans Kelsen's Theory of Law. Contribution to the Critics of "Pure Theory of Law") (1962), was that of Tadić and the best one. Then, that of Grebo, *Marks i Kelsen. Kritička analiza Kelzenove kritike naučne osnovanosti Marksovoj shvatanja društva, države i prava (Marx and Kelsen. Critical Analysis of Kelsen's Critical Scientific Well-Foundedness of Marx' Understanding of Society, State and Law)* (1979). And, finally, that of Snežana Savić, *Pojam prava kao normativnog poretku. Prilog kritici Kelzenove normativne doktrine (Concept of Law as a Normative Order. Contribution to the Critics of Kelsen's Normative Doctrine)* (1995). Ljubomir Tadić i Zdravko Grebo dispute Kelsen, in their dissertations, Kelsen from the Marxist point of view. Their critics are not immanent (from the Kelsen's doctrine point of view), but transcendental (from the other, Marxist doctrine point of view). Snežana Savić wrote with some liking on Kelsen, sometimes strongly argumenting her
view, but sometimes not going into much more detail, praising him to the skies, probably under Lukić's influence.

Kelsen's greater influence was, perhaps, exerted on the European law thought. A great number of papers has been written on Kelsen's work. Some of them will be mentioned here. Felix Kaufmann wrote on logics and law science in the pure theory of law (Logik und Rechtswissenschaft. Grundriss eines System der reinen Rechtswissenschaft, 1992), while Francis Jaeger made problematic Kelsen's doctrine on sovereignty (Le problème de la souveraineté dans la doctrine de Kelsen. Exposé et critique, 1932). Renato Treves has published a serious work on Kelsen, on the philosophic grounds of Kelsen's pure theory of law (Fondamento filosofico della dottrina pura del diritto del Hans Kelsen, 1934). Ernst Man has approached Kelsen's work from the international law, constitutional law and theory of law point of view in his doctoral thesis L'Ecole de Vienne et le développement du droit des gens, 1938. After the Second World War, in former socialist states, Poland, Soviet Union and Bulgaria, critically coloured works on Kelsen's pure theory of law from the Marxist point of view were published. Jerzy Wroblewski has published Krytyka normatywistycznej teorii prawa i państwa Hansa Kelsena, 1955, Tymanoff Критика современной буржуазной теории права, 1957 and Popov Критика на современа буржоазен правен нормативизъм, 1964.

Kelsen's scientific opus is enormous. However, from the point of view of representing his model of analytical theory of law three books are important: Hauptprobleme de Staatsrechtslehre, entwiker aus der Lehre vom Rechtsatze, 1911, Reine Rechtlehre, 1934, and General Theory of Law and State, 1945, the last one in particular, otherwise all three have been translated into Serbian, in addition to other important Kelsen's works such as Šta je pravda. Kelsen is incomparablebaly more influenceal thinker than our Toma Živanović, probably for one reason more because he worked in great worldwide centres, in Europe and in the United States of America, and because he published his works in great world languages.

30 See, Dr. Radomir D. Lukić, Sistem filozofije prava i Filozofija II Filozofija prava, Sabrana dela, Book Four, Beograd, Zavod za udžbenike i nastavna sredstva, BIZ, 1995, pp. 365-366. "One can say that Kelsen is too deep, to a certain degree too sophisticated and gifted mind, who can see much more than the others and that like that he causes aversion and instinct resistance of others who cannot follow him on the winding and steep paths of his thought even more if that thought seems to be basically true, and that it is hard to refute. For, in fact, it seems that nobody (including the writer of these lines when he was young) has not well-enough understood Kelsen, has not reached the depth of his thought that he could successfully and in a well-founded way criticize him. All of them remained on the surface and their criticism was that of the deaf, not understood – they criticized him for something he had never thought of to claim, for assertions he had even expressly refuted claiming expressly and eloquently the contrary." "Kelsen's troubles with lawyers come from the fact that he was far above them – he was a philosopher – lawyer, but they, unfortunately, only lawyers. He wanted to raise them to the height of philosophy, but they were not capable for that".


first of all in German and English. Although the principal works of Tomo Živanović were also translated into French, he was somehow unknown in Europe and all over the world and, unfortunately, in this country as well, although for his intellectual reach he is not probably below Kelsen.

Prior to his 30s he had published his *Glavne probleme državnog prava* (*Principal Problems of State Law*). There, he has exposed his basic ideas as well as basics of the pure theory of law. In his other works, published later on, he has mainly worked out his thoughts, presented in the aforementioned book, which is programming in its character. Similar to him, in that sense, is our Tomo Živanović, who used to work out his ideas, presented in his programming book *Nauka o sintetičkoj pravnoj filozofiji* (*Science on Synthetic Law Philosophy*) (1921), for decades not changing his opinion. In that sense, Živanović, is more consistent than Kelsen.

That one could understand the Hans Kelsen's model of the analytical theory of law, it is perhaps best to, first, gain insight into his statements contained in prefaces to his *Glavni problemi državnog prava* (from 1911 to 1923). Kelsen says that his "guiding thought" was that "legal rules" should be recognized as a central concept of law construction on the basis of "revision of methodological bases".

Thus, Kelsen has directly pointed to the two principal questions of his theory of law, the question of its object and the question of method. Here, he has particularly pointed out that "the work has mainly methodological character" and that "the principle of methods (...) is sometimes put in the forefront to that extent that presenting and solving the problems of the theory of state law that appear within the drawn borders do not occur so much for their own purpose as for, unfortunately, obvious methodological principles exemplified, which are known as correct". Obviously, for Kelsen, according to his own view, *the problem of methods is the principal problem*, particularly when "borderline regions" of those sciences and disciplines are in mind that touch the theory of law, which are, first of all, sociology of law and philosophy of law. That the terrain of the theory of law, as a general law science, is easily left and that other disciplines, such as ontology of law, anthropology of law, sociology of law, aprioristic phenomenological philosophy of law, critics of law, etc. even "The school of economic analysis of law" (which is said to be a "modern law and theoretical concept and orientation") are entered, which resulted in too big dilution of the theory of law, as a general law science, let a recently published book *Teorija prava* serve as an illustration.

Then, Kelsen explains the phenomenon of methodological syncretism in law sciences. In law sciences, says Kelsen, "at every step, such borderline regions are encountered, because its subject is: the social phenomenon law, belongs only by a single side, but by greater part, maybe by the greatest, is subject to the manner of considering other sciences, such as sociology or psychology".

How does Kelsen recognize the method, the law method in particular? Is it to him a means to explain law or the manner to precise his research subject? Kelsen wants to point
out only his "starting point" because "a word on suppositions in principle is in question, which, substantially, are rooted in the world view, so that they are subjective and they cannot be discussed".37 It is obvious that under the method he understands the theoretical method, as a set of knowledges on nature and intellect, but under the law method, the theoretical method, as a set of one's own knowledges on law as an intellectual phenomenon. Of course, this meaning of the method should not be mixed up with the analytical method, which Kelsen used to construct his theories of law. As it will be shown, analysis, as a logical method, was almost exclusively used by Kelsen in the structural analysis of positive law (as a research subject).

In principle, Kelsen differentiates what is and what ought to be, contents and form. These concepts are mutually exclusive, according to Kelsen. They cannot be connected into a higher unity. For, as Kelson says, there is an unbearable gap "between Me and the world, soul and body, subject and object, form and contents".38 From differences between what is and what ought to be result differences in principle between explicative disciplines that in a causal way explain the world of what is, by means of natural laws, and normative disciplines "which are facing the world of what ought to be and norms". Of course, under the normative science Kelsen does not understand a science that prescribes norms for conduct of people "in the sense of power that creates law". Because of that the term "normative science", says Kelsen, is a "problematic term". Nevertheless, he uses that term because those disciplines are facing the world of norms of positive law, their particular understanding. That is why the history of law is not a normative science, but a branch of historical sciences. It studies law (historical), but not positive law in a causal manner as the natural sciences do, so that between it and, for example, the dogmatic jurisprudence "there is no any connection", there is only "outside" connection in fact. In order to single out the basic law concepts, anything explicative must be rejected. Sufficient and the only permissible is the normative approach. In a similar way Kelsen sets border lines both towards the sociology of law and towards the psychology of law. When a glance is not directed only to the world of what ought to be then, "unusual monsters now so much popular 'psychological' jurisprudences" are possible as well.39 Kelsen recommends to each theoretician of law "the most far-reaching self-restriction" to avoid internal contradictions in his system of concepts, so as to create "logically sustainable basic concepts".40 The world of what is and what ought to be cannot be connected by concepts. The business of a sociologist of law and a psychologist of law is to explain (causally) "realistic happening, actions of people".41

Kelsen makes one more methodical limitation in advance. He wants a theory of law, as a purely formal science, completely freed from contents. He subjects those theories of law

37 Ibid., p.7.
38 Ibid., p. 7.
39 Ibid., p. 8.
40 Ibid., p. 9.
41 Ibid., p. 9."Otherwise he shall expose himself to danger to make the same error that may be assigned to the theoreticians of natural law who imagine that hey can resolve a sociological problem by a legal construction when to the question: How did a state originate? they answer: by means of a contract. Connecting the ways of consideration that exclude each other necessarily leads to fiction, assertion of a reality in a conscious opposition with reality.
to criticism the basic law concepts of which are formally and materially determined. The world of law is an ideal world, but not a real one. Exemplary for the ideal world is only "formal speculation".

As for the philosophy of law, Kelsen's view is that it should be (it is not still) a connection "between a small world of the law science and a great world of an universal philosophical system."42

In the introduction to his Glavni problemi teorije državnog prava (2nd edition, 1923), Kelsen presents some more exceptionally important notes. He, first, makes clear the purpose of his early book, his capital work in fact, which is "Pure Theory of Law as a Theory of Positive Law", or to put it differently "independence of law as a subject of scientific knowledge".43 First, border lines are set both towards the sociology of law and towards the philosophy of natural law. It means that the law science may create its knowledges in the form of concepts and opinions "only from the positive law material". Thus, independence of the law sciences and the theory of law as law science is protected against their dilution in a kind of sociological or philosophical General Theory of Law. 44 Then, Kelsen with all his power points to the key importance of the category of what ought to be it is, according to Kelsen, "an expression for one's own legitimacy of law that should be determined by the law science."45 Here, Kelsen relied, as he himself said, upon Windelband and Simmel interpretations of Kant. This shows direct and deciding connection of Kelsen with the Neo-Kantian philosophy.

In addition to concepts, the law science consists of "law attitudes" (in the logical sense of judgements). They are specific legal laws (scientifically legal laws) within which "specific legitimacy of law is manifested", which is, as we have said, what ought to be.46 In the legal opinion (scientific legal law) as well as in the natural law judgement "for a certain condition certain consequence is connected", only without the "causal nexus", but with "not less strictness of what ought to be".47 Here, Kelsen thinks of connecting a delict with a sanction that is necessarily connected, such as necessarily connected are a condition and a consequence in the domain of nature. Kelsen will not say that this is also an explicative explanation of the legal norm too, because he uses the term "explicative" in a narrower meaning, in the meaning of the causal explanation. It is essential, however, that the law attitude (scientific legal law) has the same level of validity as well as the natural law

42 Ibid., p. 11.
43 Ibid., p. 13.
45 Of course, it does not cross Kelsen's mind to "forbid" a lawyer to deal with sociological and other investigations. He only says that such investigations are, by their nature, explicative and that they do not deserve their place in the law science. "It goes without saying that formal, strictly normative view of a lawyer is one-sided and that he is not at all capable of understanding the complete law phenomenon. One should not say that a lawyer need not get down to sociological, psychological investigations, that he must not get down to, let us say, historical investigations. On the contrary! They are necessary; it is only that a lawyer must always be aware that he as a sociologist, psychologist or historian threads quite different path than that which leads him to his specifically law knowledges, the results of his explicative considerations he must never take over to his normative conceptual constructions" (see, Hans Kelsen, Glavni problemi teorije državnog prava, p. 61).
judgement. It is a question of language, but not a substantial one, whether the word "explicative" will be used in the narrower (usual) or wider meaning. There, natural legitimacy is in question, while here it is a logical legitimacy that is in question (because causal legitimacy is not possible among intellectual beings/delict and sanction as the component parts of the legal norm), but with the same degree of validity. Legal opinion (scientific legal law) is, in the logical sense, a hypothetical judgement, as well as objective one, such as objective is also the natural law judgement. This is how Kelsen establishes the law science as a science, rejecting the attitude on the legal norm as an imperative (like something subjective). In connection with the specific legality of law, Kelsen introduces assignment into the field of analysis "as a connection existing among the elements covered by the legal opinion, that connection which is grammatically established by means of 'should'".

To preserve the unique system of law, Kelsen cancels dualism of objective and subjective law, reducing "subjective law to that objective" as well as dualism of public and private law and dualism of a state and law. He thinks that "state nature of law and law nature of a state do not mean materially anything different; those are only two facets of a single medal". Also, Kelsen deems that, from the law point of view, "there may not be any difference between the so-called 'physical' and the so-called juridical persons" and that "there may exist only juridical persons and that particularly a state as juridical person must be the same as all other juridical persons".

As a principal change in his pure theory of law, Kelsen cites dynamic understanding of the order of legal norms resulting from the Merkel's theory of degrees. That theory of degrees Kelsen has, as he himself says, "taken over into the system of pure theory of law as (its) intrinsic component part". It was, thus, that, in addition to the general legal norms, in contrast to the traditional understanding, individual legal norms were made component parts. To establish the unity of the system of general and individual legal norms, a need was being imposed "the first legal norm" to be founded on something, that being Kelsen's "basic norm (...) as a supreme rule of creation for prescribing other legal norms, the rule that organizes the unity of the complete system, but that it itself must be supposed, but not taken as prescribed according to the norm".

Also of paramount importance is Kelsen's introduction to his book Opšta teorija države i prava, which covers not only the problems of "civil continental law", as was the case with Reine Rechtlehre of 1934, but also "the problems and institutions of English and American laws". Kelsen says that it is a general theory of positive law that "have

48 Ibid., p. 16.
49 Ibid., p. 22.
50 Ibid., p. 23.
51 Ibid., p. 21. "Every merits go to Adolf Merkle for his recognizing and presenting the legal order as a genetic system of legal norms, which in a gradual concretization advance from a constitution through law and regulation and other intergrades to individual legal acts of performance. In a series of works (...) he has vigorously exposed that theory of gradualness of law as a theory of legal dynamics against the prejudices on law contained only in a general law sticking to which are still the Main Problems and has made relativistic – to the absolute petrified – contradiction between the law and performance, creation of law and application of law, general and individual, abstract and concrete norm".
52 Ibid., p. 20.
53 See, Hans Kelsen, Opšta teorija prava i države. O granicama izmedju pravničke i sociološke metode, p. 47.
come from the comparative analysis of different law orders". 54 It is only here that Kelsen, for the first time, uses a word and concept analysis (he says comparative analysis because he creates a general, but not a national theory of law), in the sense of the method of construction of his theory of law. Its objective is construction of the basic law concepts "exclusively from the positive-legal norms contents". Clearing up the nature of this analytical procedure, Kelsen says that his theory of law is "directed (...) towards structural analysis of positive law". 55 To avoid any ambiguity, Kelsen emphasises that orientations of his Pure Theory of Law and Austin's analytical jurisprudence are "in principle" identical and that he wants "to come to the results exclusively by analyzing positive law", adding that "purity of his method" is accomplished (...) only reducing jurisprudence to the structural analysis of positive law." 56

Now, as the subject of the theory of law ("principal subject", as he says) he determines legal norms, their elements, their interpretation, legal order as an entirety, its structure, relation among different legal orders and the unity of law within the multitude of positive legal orders. 57 It is that same, earlier, determination that positive law is generally only now partitioned to more of its component moments, but also observed as an entirety with reference to such other entireties, but also as a moment of the universal system of positive law (unity of international law and positive law of all states).

Kelsen's pure theory of law appears mainly as a system of basic legal concepts, where the concept of law is a detentor of other basic legal concepts. He determines law as a forced system of valid norms on human conduct, as a "specific social technique of a forced order". 58 This is how law, as a normative system, clearly differs from other, in some element similar, normative systems, such as are, for example, morals. In addition, such flexible definition of law covers not only positive laws of certain states, but international law as well. Because, it is also a forced system of valid norms on conduct of states (indirectly of people).

Of unusual importance for Kelsen's theory of law is the principle of validity. Validity, after all, is one of the key moments in defining law. Under validity Kelsen understands "specific existence of a norm. To tell that a norm is valid, it means that we think that it exists or, (...) that we think that it has 'obligatory power' for those whose conduct it regulates". 59 At the same time, Effectiveness appears as a "condition of validity; condition, but not the reason of validity". 60

Generic characteristic in the definition of law is a legal norm. Under it Kelsen understands a norm that "prescribes a certain forced act, that is, sanction" 61, but no imperative

54 Ibid., p. 47.
55 Ibid., p. 48.
56 Ibid., p. 49.
57 Ibid., p. 47.
58 Ibid., pp. 55, 71, 72, 89.
59 Ibid., p. 83. "Validity of law means that legal norms are compulsory, that people should conduct as stipulated under the norms, that people should obey legal norms and apply them" (p. 92). Validity of law is the "quality of law", while effectiveness of law is the "quality of actual conduct of people".
60 Ibid., p. 94.
61 Ibid., p. 97.
or command. Here, "determined sanction is made dependent upon certain conditions, the
dependence of which is expressed by the concept 'should'".62 In addition, a legal norm
also appears as an estimation criterion "in the sense that it makes a basis for a specific
judgement on validity that qualifies conduct of an organ or subject as consistent to law
(lawful, legal) or illegal (unlawful, guilty).63

This is how the concept of the legal norm is shown to be the "central (...) concept of
the law science".64 Other basic law concepts are only the elements of the legal norm, sub-
ordinated thus to the concept legal norm. The basic legal concepts analytically discovered
by Kelsen in the legal norm are as follow: sanction, delict, legal obligation and in con-
nection with it legal responsibility, subjective law, competence, assignment and legal
subject. Added also to them the concept of law, there are nine basic legal concepts in to-
tal, the same as with Živanović. Six basic concepts, both with Kelsen and Živanović hold
the same names: the concept of law, subjective law, legal obligation, legal subject (the
concept of legal subject being divided by Živanović into two separated basic legal
concepts: subject of law and subject of nonlaw), delict and sanction. Also separated by
Živanović is the action (function) and collision of law, while Kelsen separates legal
responsibility, competence and assignment. Apparently, by means of the opposite
methods, analysis and synthesis, respectively, they have achieved, in the prevailing part of
their work, identical results.

Kelsen's dynamic understanding of law is superior over the Živanović's synthetic
understanding of law. While Živanović has determined law (in the extensive sense) as a
set of general legal norms, Kelsen, adopting Merkel's theory of degrees, determines law as
a set of both general and individual norms, which in their unity make a legal order. At the
same time, all legal acts, as the forms of law, holder of legal norms, are also the acts of
creation and application of law. Of the kind are also individual legal acts, such as, for
example, court act. Thus, a judge by means of his (court) act not that he only applies law
(a statute, for example), but he necessarily creates it.

Kelsen's basic norm is a basis of validity of legal order. It provides its unity. Kelsen
says: "The norm the validity of which cannot be derived from some higher norm we call
'basic' norm. All the norms the validity of which can be connected to the same basic norm
make a system of norms or an order".65 Clearing up the character of the basic norm he
adds: "The basis of validity of a norm is an assumption, a norm which is assumed to be
ultimately valid, that is, that it is a basic norm".66 It is "only a necessary assumption of
each positivistic interpretation of legal material".67 The basic norm is not, therefore, a
positive-legal norm. It is not created by a state. Nevertheless, it is "valid because without
that assumption no human act can be recognized as a legal act, and particularly – as an act
by means of which law is created."68

62 Ibid., p. 97.
63 Ibid., p. 100.
64 Ibid., p. 103.
65 Ibid., p. 168.
66 Ibid., p. 168.
67 Ibid., p. 173.
68 Ibid., p. 173.
The Kelsen's theory of law postulate is a unity of the positive law of certain states and the international law. At the same time, the laws of certain states are lower orders, which derive their validity from the international law, as a higher order.69 Kelsen's view is that the basic norm of the international law is "a norm which establishes a custom constituted by the mutual conduct of states as a factual state that creates law".70 Thus, according to Kelsen, "the basic norm of higher order – as the highest degree of the overall order – is the supreme basis of validity of all norms, even the norms of lower orders."71

I have demonstrated that Kelsen has mainly used analytical procedure in creating his theory of law. In connection with that, however, a question is being raised. What kind of analysis does Kelsen's procedure belong to? Under analysis, Petronijević understands, in his Osnovi logike, "either an objective process of breaking down a thing or phenomenon into their component parts or subjective process by means of which we reproduce in ideas the objective analytical process, that is, by means of which in ideas we single out parts from an entirety".72 He adds that under analysis as a logical method he mainly understands "subjective psychic process by means of which the idea of entirety is broken down into the ideas of parts to recognize objects envisaged in ideas".73 If an analysis is understood as a subjective process, four kinds of it are possible: 1. descriptive analysis, 2. explicative analysis, 3. reproductive analysis, 4. productive analysis. Under descriptive analysis "ascertainment and listing of component parts of an entirety, broken down into parts by means of an analysis as an objective method"74 is understood. Then, also understood under it is "listing of relations of similarities and differences (qualitative and quantitative) existing among those parts".75 Under the explicative analysis, as a higher degree of descriptive analysis "dependence relations existing among the parts of an entirety is ascertained".76 The explicative analysis may be causal ("referring to entireties the parts of which are successively given, so that previous parts condition those which follow them and consist of ascertaining these successive casual links") and functional (referring to entireties the parts of which are simultaneously given and consists of ascertaining functional connections /connections of simultaneous dependence/ existing among those parts").77 Finally, reproductive analysis "consists in reproductive analysis as an objective process, the analysis becomes productive if some parts of an analysed entirety are isolated, which may be separated one from another by an objective analysis."78

69 Ibid., p. 437. "A lower order has its own relative basic norm, which means a basis which determines its creation in the higher order."
71 Ibid., p. 89.
73 Ibid., p. 171.
74 Ibid., p. 172.
75 Ibid., p. 172.
76 Ibid., p. 172.
77 Ibid., p. 172.
78 Ibid., p. 173.
Undoubtedly, Kelsen has constructed his theory of law using the explicative functional analysis. The basic legal concepts contained in the legal norm were singled out by the analysis, the eight of them, and then functional connections (simultaneous dependence connections) were ascertained among some basic legal concepts as well as with the entirety of the legal norm, and wider, the law as the forced system of valid norms. Such is, for example, the functional connection between the sanction (as a legal consequence) and delict (as a condition), between the legal obligation and the legal responsibility, between the legal obligation and the subjective law, between the legal subject and the subjective laws and legal obligations, etc. Along with the analysis, Kelsen used synthesis, as a logical method, but secondarily. From the analysis singled out parts he constructs the concept of law, as the forced system of valid norms, and follows the course of self-creation of law (when law is dynamically understood). It is obvious that Kelsen has, in fact, as is the case with Živanović, used the analytically-synthetic method. The difference is that Živanović puts emphasis on the synthetic, while Kelsen puts emphasis on the analytical meted.

### III Analytical Method Estimation

The analytical method of the theory of law, particularly in Kelsen's variant, has proved the dignity of the theory of law as a general law science. Singling out from the law, as a social phenomenon, its ideal, intellectual sides, as the research subject of law sciences, they are in a precise manner delimited from the law sciences: history of law, sociology of law, psychology of law as well as from philosophy of law. It is an epochal contribution of the Kelsen's pure theory of law. In addition, by means of the analytical method, singled out were some basic legal concepts, unknown to the synthetic theories of law, such as is the assignment concept. Also added to the Kelsen's epochal contributions should be his understanding of validity of legal norms and understanding of legal norms as deppsychologized commands as well as his (from Merkl taken over, but originally interpreted by Kelsen) dynamic understanding of law, as a self-creation process of law, the process of which each legal act (except the act of performance) is at the same time the act of creation and act of application of law as well. Thus, the traditional understanding was surmounted according to which included into the contents of law are only general, but not individual legal norms. In addition to a number of other things, Kelsen has in a new way shed light on a concept of delict, as a specific condition of law, thus recognizing delict, in contrast to the traditional understanding that holds it as nonlaw, as law. Outstanding, but basically correct, is Kelsen's view that subjective law and legal obligation are component parts of the legal norm. Resulting from abstract subjective laws and legal obligations (constitutional, lawful, sublawful), through concretization by means of individual legal acts (legal affairs, administrative act and court act) are subjective laws and legal obligations in the narrower (specific) meaning of the term. Instead of the etatistic definition of law, which reduces law to the system of state norms, Kelsen provides a wider definition (law as a forced order of valid norms in which there can be found place for international law too).

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79 See, Hans Kelsen, Čista teorija prava. Introduction to the problems of the law science, P. 25. "(...) nonlaw comes from the negation of law, which is made such from a law and political point of view, a specific condition of law and only thus a possible subject of law understanding. Even nonlaw can understand this only as law. The concept of nonlaw leaves its extra system position, in which it can only be held by a prescientific naive jurisprudence, and occupies intersystem position" (p. 25)
In any case it can be ascertained that, the two aforementioned, governing models of the theory of law, analytic and synthetic, have come to the same or similar results. Those two models, based upon their yields, do not exclude each other, but harmoniously supplement each other. Thanks to their existence and their epochal results, it is possible already today to approach construction of the third, axiomatic model of the theory of law. It is only then that the theory of law, axiomatically created and exposed, will become a science in the proper meaning of the term, like geometry, arithmetic and some branches of physics.

METODOLOŠKI MODELI OPŠTE TEORIJE PRAVA
Milijan Popović

Dva su vladajuća modela opšte teorije prava u evropskoj pravnoj misli: sintetički i analitički. Vremenski, analitički model je nastao ranije, ali je sintetički model najrasprostranjeniji model opšte teorije prava.


Živanovićev sintetički model opšte teorije prava zasnovan je na dalekosežnoj sintezi pravnih znanja, polazeći od osnovnih pojnova specijalnih pravnih nauka, preko posrednih osnovnih pravnih pojnova viših pravnih nauka, do osnovnih pravnih pojnova najviše pravne nauke (opšte teorije prava). Osnovni metod Živanovićev je metod generalizujuće apstrakcije, sinteza i to eksplikativna nekauzalna sinteza. On se služio i drugim logičkim metodama, a pre svega metodom analize, koja prethodi sintetičkom modelu.

Lukićev pokušaj konstrukcije opšte teorije prava, kao opšte uopštajuće nauke, sa stanovišta logičkog, je manje uspešan od Živanovićevog stvaralačkog poduhvata.


Sa pojavom Kelzena i njegove iste teorije prava, analitička teorija prava dobija gotovo savršenu logičku formu. Analitička teorija prava afirmiše opštu teoriju prava kao pravnu nauku i metod strukturalne analize kao glavni metod izučavanja i stvaranja opšte teorije prava. Kelzonov metodski postupak strukturalne analize pripada eksplikativnoj funkcionalnoj analizi (kao višem stupnju od deskriptivne analize).

Doprinosi analitičke teorije prava, posebno Kelzenovi, su ogromni. Kelzen je na precizan način razgraničio teoriju prava, kao opštu pravnu nauku, od nauka i disciplina o pravu: sociologije prava, istorije prava, psihologije prava i filozofije prava. Pored toga analitički model izdvojio je neke osnovne pravne pojmove nepoznate sintetičkim teorijama prava, kao što je posebno pojma uračunavanja. Od velikog je značaja i Kelzenovo shvatanje važenja pravnih norm i shvatanja pravnih normi kao depsiholigiziranih zapovesti, a naročito njegovo dinamičko shvatanje prava, kao procesa samostanavanja prava, procesa u kojem je svaki pravni akt (izuzev akta izvršenja) u isto vreme i akt stvaranja i akt primene prava.

Ključne reči: osnovni pravni pojmovi, sintetizam, normativna nauka, eksplikativna nauka, čista teorija prava, strukturalna analiza prava, dinamičko shvatanje prava.