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THEORY POSITION IN THE STRUCTURE OF LEGAL SCIENCE

Nurul Qamar
Universitas Muslim Indonesia, Makassar

**Correspondence Email: nurul.qamar@umi.ac.id*

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Abstrak. *This study aims to explain the theory position in the structure of legal science. This research is a normative legal research. The data collection technique used is literature study. The data that has been collected is then processed in a qualitative descriptive manner, then described in a narrative manner. The results of the study indicate that legal theory is one of the theoretical disciplines, whose object of study is law in a broad sense. The legal theory does not study law in a dogmatic definition and does not examine law in a positive law sense but explores legal science in a broader sense. The legal theory examines legal science from a critical, concrete, and analytical perspective so that the approach is interdisciplinary and multidisciplinary. Legal theory is a more in-depth approach to legal science in positive legal science approaches and legal dogmatics. Therefore, legal theory is positioned as a meta-theory of the science of law theory as a positive legal theory and legal dogmatics.*

Keywords:
Dogmatic;
Empirical;
Legal Science;
Theory Position.

INTRODUCTION

In everyday life, it is not uncommon for us to hear conversations that say that it is just a theory as if the theory is not in the empirical realm. That is not true because the theory should not be isolated from the real world. Theories do not need to be veiled by empirical facts.[1] Theories can describe concrete phenomena in the practical world and imaginary expressions of reason or thoughts about something conceptualized substantially and systematically.

The theory is a conceptual proposition with a causal relationship with each other in a structured way about a scientific object.[2] Theory must be testable and, at the same time, can be a benchmark for testing an object of observation in the empirical world as well as in the realm of rationality. The theory is born from a concept and then built with propositions that have a probability relationship about an object of science.

[1]Sayuti, S. (2013). Arah Kebijakan Pembentukan Hukum Kedepan (Pendekatan Teori Hukum Pembangunan, Teori Hukum Progresif, dan Teori Hukum Integratif). *Jurnal Al-Risalah: Forum Kajian Hukum dan Sosial Kemasyarakat, 13*(2), p. 2.

[2]Fajar, F. (2019). Praksis Politik Nabi Muhammad SAW (Sebuah Tinjaun Teori Politik Modern dan Ketatanegaraan). *Al-Adalah: Jurnal Hukum dan Politik Islam, 4*(1), p. 89.

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What about legal theory? Philosophically, the answer to this question is an area of epistemology. From the structure of legal science, legal theory is the second stratum in the degree of legal science or the position between legal dogmatics and legal philosophy. Legal theory is a species discipline of the genus of theoretical disciplines. Legal theory is not a legal discipline because the formal object is a theory. In contrast, the material object is law, so the legal theory is a theoretical discipline whose object of study is law in a broad sense.

The above thought may not align with other thinkers, who argue that legal theory is a legal discipline. Or legal theory as a branch of legal discipline. For writers, differences of opinion are a gift, so there is no need to be questioned or questioned.

Legal theory is a scientific discipline that examines the science of law in a broad sense and from various theoretical disciplinary perspectives. Therefore, the legal theories highlighted in legal science have backgrounds from multiple points of view, such as theories of social science disciplines and theories from exact disciplines, such as systems theory, and others.

Exploring theory in the jungle of law is a study of legal theory. Legal science is studied, researched, and explored in depth in a broad sense. The legal theory does not stop only at theoretical studies of legal philosophy and legal theory. What is legal dogmatic, what is the legal principles, legal norms, and the rules of law, and the rule of law, but all the concepts and meanings that are expressed and implied in each of these aspects.

METHOD

This research is normative legal research. Normative legal research is legal research that includes research on legal principles, legal systematics, legal history, and comparative law.[3]

The types and sources of data used in this study are secondary data, namely data obtained from browsing library materials, in the form of legislation, references, legal, scientific journals, legal encyclopedias, and texts or official publications.[4]

The data collection technique used in this research is a literature study. Literature Study was carried out by inventorying and analyzing legal literature materials related to the problems studied in the research.[5] The data that has been collected is then processed in a qualitative descriptive manner and then described in a narrative manner.

[3]Qamar, N. & Rezah, F. S. (2020). *Metode Penelitian Hukum: Doktrinal dan Non-Doktrinal*. Makassar: CV. Social Politic Genius (SIGn), pp. 48-49.

[4]Mafulah, H. (2020). Pengecualian Perjanjian yang Berkaitan Paten dan Lisensinya dalam Pengawasan Persaingan Usaha. *SIGn Jurnal Hukum, 1*(2), p. 90.

[5]Lestari, P. (2020). Pengadaan Tanah untuk Pembangunan demi Kepentingan Umum di Indonesia Berdasarkan Pancasila. *SIGn Jurnal Hukum, 1*(2), p. 74.

RESULTS AND DISCUSSION

A. Mistakes About Theory

What is that theory? The answer found to this question has a variety of arguments. Otje Salman & Anthon Freddy Susanto suggests that such questions are complex, have a broad scope, and are philosophical.[6] The question is as tricky as the question of 'what is that law?

The word theory is a widely discussed term among academics and practitioners when faced with problems or problems that intersect between reality and scientific concepts. The term theory has its tendency, where theory is always associated with abstract objects. Such characteristics in certain circumstances give rise to multiple interpretations of the meaning of the theory itself. Even ironically, the theory is sometimes placed in a cornered position, in the sense of the emergence of expressions. It is only a theory as if the theory does not touch the realm of reality or the world of immanence.

Otje Salman & Anthon Freddy Susanto (2005) further said that there is an impression where the term theory is not something that must be explained but seems to have understood its meaning.[7] The theory is often interpreted as meaningless terminology if it is not related to the word that is its equivalent, for example, economic theory, social theory, legal theory, and others. The equivalent word seems to be more meaningful than the theory itself.

There is even confusion in the use of theoretical terms. For example, the theory seems to be equated with concepts, models, schools, paradigms, dogmas, doctrines, and other words, So it can be said that at a certain level, many uses of these terms are theoretically imprecise as if just to give a scientific impression of something.

The attitude that belittles theory by equating it with other scientific concepts, as mentioned above, is a fundamental error. There is a separate science that examines theory and metatheory.

B. Theoretical Description of Theory

If a systematic search is carried out on the origin of the word theory, it can be revealed that the word theory comes from Latin, namely *Theoria*, which means contemplation. Referred to in Greek, the root word *thea* is found, which means essentially as reality.[8] From the root word *thea* in Greek, then in modern language, comes the word theatre, which means a show or spectacle.

[6]Salman, O. & Susanto, A. F. (2005). *Teori Hukum: Mengingat, Mengumpulkan, dan Membuka Kembali*. Bandung: Refika Aditama, p. 19.

[7]*Ibid*.

[8]*Ibid*., pp. 19-21. *See also*, Sulaiman, S. & Rahayu, D. P. (2018). Pembangunan Hukum Indonesia dalam Konsep Hukum Progresif. Hermeneutika: *Jurnal Ilmu Hukum, 2*(1), p. 128.

According to Otje Salman & Anthon Freddy Susanto, that in a lot of literature, some experts use the word theory to show the building of thinking that is structured systematically, logically (rationally), empirically (in fact), as well as symbolic.[9]

Soetandyo Wignjosoebroto suggests that theory is a construction in the human mind or idea, built to reflect on the phenomena encountered in the realm of experience, namely nature that is listened to by the human senses.[10] Furthermore, he also stated that inevitably, when talking about theory, one will face two kinds of reality: Reality in abstract, which exists in imaginative idea, and reality in concreto, which is in sensory experience.[11]

In contrast to this view, I found several opinions regarding the understanding of the theory. J. J. H. Bruggink argued that people could interpret a complete statement (claim, *beweringen*) related to a theory.[12] Furthermore, he also stated that if one puts a set of views in a relationship, one can already talk about a theory.

Based on J. J. H. Bruggink's view, for a theory to be called a scientific theory, it must fulfill three conditions:

1. There must be a hypothesis or a determination of the problem studied by the theory;
2. Theory must legitimize certain specific methods;
3. There must be a consistent and controllable set of statements that embodies the theory as a product of the scientific activity.

W. Lawrence Neuman says that theory is a system composed of various interconnected abstractions or ideas that condense and organize knowledge about the world. It is a concise way of thinking about the world and how it works.[13] Furthermore, W. Lawrence Neuman said that according to Sarantakos, the theory is a set/collection/combined, propositions that are logically related to each other and are tested and presented systematically.[14] The theory is built and developed through research to describe and explain a phenomenon. Malcolm Waters in Otje Salman & Anthon Freddy Susanto, citing the Oxford Dictionary, suggests that theory has various definitions, including being more appropriate as an academic discipline.[15] The theory is a scheme or system of ideas explaining a group of facts in a statement.

[9]Salman, O. & Susanto, A. F. (2005). *Ibid*., p. 23.

[10]Wignjosoebroto, S. (2002). *Hukum: Paradigma, Metode dan Dinamika Masalahnya*. Jakarta: ELSAM & HuMa, pp. 184-185

[11]*See also,* Sudiyana, S. & Suswoto, S. (2018). Kajian Kritis terhadap Teori Positivisme Hukum dalam Mencari Keadilan Substantif. *Qistie: Jurnal Ilmu Hukum, 11*(1), pp. 115-116.

[12]Bruggink, J. J. H. (1999). *Refleksi tentang Hukum: Pengertian-Pengertian Dasar dalam Teori Hukum* (Trans. by Bernard Arief Sidharta). Bandung: PT. Citra Aditya Bakti, p. 2. *See also*, Wibisana, W. (2018). Perspektif Politik Hukum dan Teori Hukum Pembangunan terhadap Tanggung Jawab Sosial dan Lingkungan Perseroan Terbatas. *Jurnal Komunikasi Hukum, 4*(1), p. 104.

[13]Salman, O. & Susanto, A. F. (2005). *Op. Cit*., p. 22. *See also*, Neuman, W. L. (1991). *Social Research Methods: Qualitative and Quantitative Approaches*. Boston: Allyn & Bacon.

[14]Salman, O. & Susanto, A. F. (2005). *Ibid*.

[15]*Ibid*., p. 21. *See also*, Waters, M. (1994). *Modern Sociological Theory*. London: Sage Publications; Martin, E. A. (Ed.) (2003). *Oxford Dictionary of Law* (5th edition). London: Oxford University Press.

Referring to the arguments above, we can say that the general impression about the theory is a set of ideas that develop and try their best to meet specific criteria. However, it may only make a partial contribution to the overall theory that is more general. Referring to this view, something called a theory should include all sets of deliberately formulated statements that meet the following criteria:[16]

1. The statement must be abstract. That is, it must be separated from the social practices carried out. Theories usually achieve abstraction by developing technical concepts that apply only within a particular community.
2. The statement should be thematic. Stating a thematic argument must use a coherent and robust set of statements.
3. The statement must be logically consistent. The statements should not contradict each other and we can be concluding them.
4. Must be able to explain the statement. Theory must express a thesis or argument for certain phenomena that can reveal, and present the form of substance or existence.
5. A statement must, in principle, be general. Statements must be able to explain all examples of whatever phenomenon they are trying to explain.
6. The statements must be independent. Must not reduce the statement in the interest of certain parties.
7. The statements must be substantively valid. The statement must be consistent with what is known about the social world by participants and other experts. At least there must be translation rules that can connect theory with other sciences and knowledge.

From a general perspective, it is found that there are three types of theories, namely as follows:

1. Formal Theory Type;
2. Substantive Theory Type;
3. Positive Theory Type.

Formal theory is the most inclusive theory, where this type of theory tries to produce schemas, concepts, and statements about society or the interaction of the whole human being. Often a particular theory has a paradigmatic character and tries to create an overall plan for future theoretical practice against the claims of opposing paradigms. On the other hand, they often have a foundational character and try to identify a single set of principles that are culminate in life and explain them.

This type of substantive theory is the opposite of formal theory because it is less inclusive. This theory does not try to explain as a whole but rather to specific things. Furthermore, A type of positivistic theory, trying to explain empirical relationships between variables by showing that one can conclude from more

[16]Salman, O. & Susanto, A. F. (2005). *Ibid*., p. 23-24.

abstract theoretical statements through these variables. This theory explains particular views because it focuses on certain empirical relationships. However, this finding does not have a significant effect.

Talking about theory, it is very closely related to facts or reality. Reality often manifests itself in different forms. Sometimes it seems like a guess, but usually comes unexpectedly, sometimes it appears as imagined, but often it appears not as imagined, sometimes it appears in order, but more often it appears in disorder, sometimes it is a reflection of rationality, but often also a reflection of irrationality.

Reality is like a dynamic geographical map, appearing in a wealth of contours, surfaces, lands, cracks, or pieces, the elements often changing, moving, and transforming. Reality is a subject of study that is widely discussed in philosophical studies.

Otje Salman & Anthon Freddy Susanto said that the debate about reality has existed for a long time.[17] *For example*, since the days of Ancient Greece (Socrates, Plato, Grotius, and others), the modern world of thought, such as the positivistic school of thought (Auguste Comte, Durkheim, and others), the rationalist-idealist school of thought (Hegel and Immanuel Kant). Furthermore, existentialist thought (Kierkegaard, Sastre, Camus), to Post-modernist thought (Foucault, Derrida, and Baudrillard).

The question of 'what is reality?' is a common question. What is meant by real? is real only that can be grasped by the senses? Is it only physical, or is it something that has an object?

In this regard, Steven Law states that if most people answer about reality, they refer to what they experience and feel about everything around them.[18] The fact, for him, is what is experienced and felt in his life.

If viewed from a historical perspective, reality can be revealed in:

1. As something that can only be grasped through the ability of reason (ideas, ideas, essence), this is the thought of idealism.
2. As something actual, real, exists, and objective, which can only be recognized and understood through the mechanism of intuition and senses, this is the thought of empiricism.

Apart from the realities mentioned above, other realities emerge from the development of science and technology. When science and technology, with their sophistication, can create an artificial world, namely a reality that cannot be included in the two previous meanings of reality above, that is because this reality has exceeded the boundaries of the existing reality.

[17] *Ibid*., p. 148.

[18] Law, S. (2003). *The Philosophy Gym: 25 Short Adventures in Thinking*. New York: Thomas Dunne Books, p. 2.

Theories can be born from abstract imagination and imagination in concreto so that the strong relationship between theory and reality, cannot be ignored. The imagination abstract is formed from the experiences of the objective ratio, while the imagination in concreto is developed from real empirical experiences.

The reality, usually defined as which is a fact. According to the empirical school of perception, the truth can be seen, felt, and discovered practically. The situation is different from the transcendental school, which interprets reality as not limited to empirical reality but also abstract.

In general, great philosophers and Sufis, who moved their intellectual imaginations, combining the logic of taste and the language of the heart, can grasp reality with their abilities. However, it is impossible for others who do not have the qualities commensurate with the philosophers. The perspective of the study of legal science assumes that reality is nothing but *das sein*, which is always associated with *das sollen*. Possibly the two can coincide, or vice versa.

C. The Position of Theory in the Structure of Legal Science

From the development of general law teachings, a legal theory was born, where this legal theory, in two respects, shows continuity with general law teachings, namely as follows:

1. Legal theory as a continuation of general legal teachings definitively occupies a place between legal dogmatics on the one hand and legal philosophy on the other. The teaching of general law by some writers (among others Adolf Merkel) is still seen as a continuation of a metaphysical and unscientific philosophy of law. So legal theory is now firmly recognized as the third discipline besides legal philosophy and legal dogmatics. All three of them still master their fields and values.
2. As is the case with the teaching of general law, legal theory is seen at least by most people as a value-free and non-normative science. That is a distinguished legal theory from legal philosophy and legal dogmatics. Its fields and research are not the same as legal philosophy and legal dogmatics.

According to Sudikno Mertokusumo & A. Pitlo, comparing the content of legal regulations and the understanding of law as an object of research typical of general law teachings has shifted to research on the structure and function of legal rules.[19] In comparison, the legal system is the object of research from legal theory.

Sudikno Mertokusumo further said that legal theory knowledge aims to precipitate or methodological deepening in studying law in a broader sense, namely exploring methods in studying law, solving legal problems, and drafting regulations.[20]

[19]Mertokusumo, S. & Pitlo, A. (1993). *Bab-Bab tentang Penemuan Hukum*. Bandung: PT. Citra Aditya Bakti, p. 13.
[20]Mertokusumo, S. (2004). *Penemuan Hukum: Sebuah Pengantar*. Yogyakarta: Liberty, p. 61.

Therefore, the main problem or the core of the study of legal theory is how legislators, judges, and legal scientists work and what methods they use.[21] The methodological precipitated, in legal studying, will produce better knowledge, clearer descriptions, and broader insight into the science of law.

In this regard, Jan Gijssels & Mark van Hoecke suggests that legal theory as a new science generally shows an unclear profile.[22] Therefore, it is necessary to provide orientation and an overview of legal theory.

The general theory is a genus of theory. In contrast, like other theories, legal theory, like political theory, economic theory, and social theories, is a type of theory.[23] Legal theory can be classified as a theory species in the field of legal science.

If library research is carried out, many terms will be related to legal theory. Soerjono Soekanto suggests that the term legal theory is a translation of the following terminology:[24]

1. Legal Theory;
2. Rechts Theorie;
3. Jurisprudence;
4. Legal Philosophy;
5. Theory of Justice;
6. Legal Theory and Legal Philosophy.

The terms mentioned above are sometimes used interchangeably, resulting in overlapping usage, especially regarding Legal Theory, Jurisprudence, and Legal Philosophy. Discussing legal theory means we study law. However, legal theory is not the same as legal science. Legal theory is not a science of law. On the other hand, the science of law is also not a legal theory.

This argument needs to be emphasized because some people do not know it by equating legal theory with legal science, thus obscuring the meaning of legal theory. However, to know the legal theory, it is first necessary to understand the science of law.

It needs to be emphasized to maintain scientific error that the science of law is the theory of positive law or the theory of legal practice. Meanwhile, legal theory is the theory of legal science. In other words, that legal science is the object of legal theory. As a theory (legal science is a theory of legal practice and positive law), legal theory is called a meta-theory. The legal theory deals with the law in general, not only positive direction such as legal science.

[21]Hakim, L. (2019). Implementasi Teori Dualistis Hukum Pidana di dalam Rancangan Kitab Undang-Undang Hukum Pidana (RKUHP). *Krtha Bhayangkara, 13*(1), p. 14.

[22]Gijssels, J. & Hoecke, M. v. (1982). *Wat is Rechtsteorie*? Antwerpen: Kluwer Rechtswetenschappen, p. 8.

[23]Farida, A. (2016). Teori Hukum Pancasila sebagai Sintesa Konvergensi Teori-Teori Hukum di Indonesia. *Perspektif, 21*(1), pp. 60-61.

[24]Soekanto, S. (2003). *Faktor-Faktor yang Mempengaruhi Penegakan Hukum*. Jakarta: Rajawali Pers, pp. 4-5.

Legal science is structurally lower in degree or level than legal theory because legal science only questions enforceability (geltung) and or validity (validity). Legal theory examines the why and how, which requires a more in-depth explanation.

According to Ian McLeod, the real difference between legal theory and legal science is that the questions and objects of the legal theory are broader and theoretical compared to legal science.[25] Legal science questions seek answers in the science of law and positive law, while legal theory is not satisfied only with answers in positive law.

Concerning what is mentioned above, it can be said that legal science is practical-concrete and contains elements of value, as well as normative, practical, concrete, because it is a concrete problem solving, contains the value because it is prescriptive normative. In contrast, legal theory is theoretical- abstract, value-free, and non-normative.

Legal theory can be viewed from a general meaning, and it can also be seen in a narrow sense. In general, the legal theory includes legal theory in a narrow sense (legal theory) and legal science, which contains dogmatic law and empirical law.[26] Explaining the meaning of legal theory is not easy because there are still disagreements about whether legal theory is a branch of legal discipline or independent scientific discipline.

Several writers, among others, Sudikno Mertokusumo, classify legal theory as a branch of the legal discipline.[27] However, on the other hand, they also say that legal theory is not a science of law. The author's stance is different from Sudikno's because the author refers to the scientific argument that the character of legal science (the science of law) is a norm. In contrast, the legal theory does not question norms but examines his science of norms, which is none other than science law. Is it not that the legal theory is the theory of legal science? However, the science of law is positive legal theory and practice.

However, the author does not intend to ignite the fire of conflict. This writing aims to express the theoretical meaning of legal theory and various theories that include a review of legal theory. The nineteenth century was the beginning of the historical development of legal theory, which was influenced by the success and rapid progress of the natural sciences using positive natural science methods.

At the beginning of the nineteenth century, legal experts saw the need for a legal discipline that was not too theoretical-abstract, such as philosophy of law,

[25]McLeod, I. (1999). *Legal Theory*. London: Palgrave Macmillan, p. 53.
[26]Zaini, Z. D. (2012). Perspektif Hukum sebagai Landasan Pembangunan Ekonomi di Indonesia (Sebuah Pendekatan Filsafat). *Jurnal Hukum, Universitas Islam Sultan Agung, 28*(2), p. 943.
[27]Hakim, M. H. (2016). Pergeseran Orientasi Penelitian Hukum: Dari Doktrinal ke Sosio-Legal. *Syariah: Jurnal Hukum dan Pemikiran, 16*(2), p. 111.

and not too practical-concrete, such as legal dogmatics, namely a discipline that lies on the side between legal philosophy and legal dogmatics. Legal theory by some jurists emphasizes that legal theory is neither a philosophy of law nor a science of dogmatic law. That does not mean that legal theory is not philosophical or oriented to dogmatic legal science. Legal theory is somewhere in between. Legal theories can be more easily described as theories with various properties regarding objects of abstraction, level of reflection and function.[28]

John D. Finch, said that:[29]

> *"The legal theory involves a study of the characteristics essential to law and common to legal systems. One of its chief objects is the analysis of basic law elements, making it law and distinguishing it from other forms of rules and standards. It aims to distinguish law from systems of order that cannot be (or are not normally) described as legal systems and other social phenomena. It has not proved possible to reach a final and dogmatic answer to the question 'what is law?"*

The above view means legal theory as a branch of legal science that analyzes critically using an interdisciplinary perspective on various legal manifestations (phenomena). The theoretical conception and practical implementation aim at better knowledge and a more detailed description of juridical materials.[30]

According to Wolfgang Friedmann, all systematic thinking about legal theory is linked at one end with philosophy and, at the other end, with political theory.[31]

Legal theory is a branch of legal science that discusses or analyzes not just explaining or answering questions or problems critically in law and positive law by using interdisciplinary methods. Not only using synthetic methods.

Legal theory is critical because the questions or problems of the legal theory are not automatically answered by positive law. Legal theory questions or concerns require argumentation or reasoning in contrast to legal dogmatics, where the answers to questions or problems are already contained in positive law.

Legal dogmatics and legal theory both study positive law, legislation and jurisprudence. Thus, legal dogmatics is a theory, namely a positive legal theory. Legal theory, on the other hand, besides studying positive law, its object is also legal dogmatics, so that legal theory is dogmatic legal theory. As a theory, legal theory can be called a meta-theory.

According to the author, legal theory is a theory that examines and reviews critically, descriptively, about the science of law, neither in a philosophical sense

[28]Soekanto, S. (2014). *Teori yang Murni tentang Hukum*. Bandung: PT. Alumni, p. 87. *See also*, Klanderman, J. H. M., *et al*. (1981). Rechtstheorie in Nederland: Ontwikkelingen in de Jaren Zeventig. *Nederlands Juristenblad, 56*, 61-84.

[29]Finch, J. D. (1979). *Introduction to Legal Theory*. London: Sweet & Maxwell, p. 2.

[30]Gijssels, J. & Hoecke, M. v. (1982). *Op. Cit*., p. 184.

[31]Friedmann, W. (1960). Legal Theory. London: Stevens & Sons, p. 3.

nor in a legal norm. Therefore, it is said that legal theory is not law. Legal theory is legal science, and legal science itself is a theory of law in the dogmatic definition and norms. Legal theory, a metatheory of legal science theory

Understanding legal theory well will sharpen the analysis of legal science. The sharpness of the analysis will make the analysis results more valid.

CONCLUSIONS AND RECOMMENDATIONS

Legal theory is one of the theoretical disciplines, whose object of study is law in a broad sense. The legal theory does not study law in a dogmatic definition and does not examine law in a positive law sense but explores legal science in a broader sense. The legal theory examines legal science from a critical, concrete, and analytical perspective so that the approach is interdisciplinary and multidisciplinary. Legal theory is a more in-depth approach to legal science in positive legal science approaches and legal dogmatics. Therefore, legal theory is positioned as a meta-theory of the science of law theory as a positive legal theory and legal dogmatics.

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