

# Philosophy of Law in the Arctic

edited by Dawid Bunikowski

The University of the Arctic

The Arctic Law Thematic Network

The Sub-group of Philosophy of Law in the Arctic

Rovaniemi 2016

*The term "Arctic" is not only ecological but also mythical. The term refers to the areas which were thought to be located under the constellation 'Ursa Major' (the Great Bear).*

J. Pentikäinen, *Shamanism and Culture*, Helsinki 2006, p.120.

*If we shadows have offended,  
Think but this, and all is mended,  
That you have but slumber'd here  
While these visions did appear.  
And this weak and idle theme,  
No more yielding but a dream,  
Gentles, do not reprehend:  
if you pardon, we will mend (...).*

William Shakespeare, *A Midsummer-Night's Dream*,  
*Epilogue*, Cambridge University Press 1924.

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## 5.

### Legal Pluralisms

*Karol Dobrzeniecki\**

#### Abstract

“Legal pluralism” may denote various things in very various contexts. Its popularity in contemporary socio-legal debate sometimes additionally impedes the accurate understanding.

#### 1. Introduction

An issue that requires careful consideration, always when writing about legal pluralism, is an adequate and conscious usage of the term<sup>58</sup>. “Legal pluralism” may denote various things in very various contexts. Its popularity in contemporary socio-legal debate sometimes additionally impedes the accurate understanding. Different meanings are confused by polysemy. In my opinion legal pluralism cannot be confined solely to – as a popular definition says - “the idea that in any one geographical space, there is more than one law or legal system”<sup>59</sup>. Each plane of legal research (linguistic or analytical, psychological, sociological and axiological) offers a different view on legal pluralism. Below I would like to sketch exemplary usages of the term.

#### 2. Exemplary usages of the term "legal pluralism"

Analytical approach concentrates on the logical structure of law, the meanings and uses of its concepts, and the formal terms and the modes of its operation. Legal pluralism, from this perspective, was described by Nick Barber. In his view, a single legal system can contain multiple rules of recognition<sup>60</sup> that leads to the system with unranked

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\* Assistant Professor in Legal Theory Dr. Karol Dobrzeniecki (Poland; Nicolaus Copernicus University in Torun, Faculty of Law and Administration), [kardobrz@law.uni.torun.pl](mailto:kardobrz@law.uni.torun.pl)

<sup>58</sup> N. W. Barber, *Legal Pluralism and the European Union*, “European Law Journal”, Vol. 12, No. 3, May 2006, p. 306–329.

<sup>59</sup> M. Davies, Legal Pluralism, in: *The Oxford Handbook of Empirical Legal Research*, P. Cane, H. M. Kritzer (ed.), <http://www.oxfordhandbooks.com/> [access: 22.03.2016].

<sup>60</sup> The rule of recognition points which rules belong to a given legal system. All the rules that could be identified through the application of the rule of recognition constituted a single legal system.

legal sources. This kind of inconsistency cannot be resolved within the legal system because of the lack of legal mechanisms which could be used for such purpose. In analytical approach to legal pluralism, it is assumed that there is no higher constitutional body that can resolve such kind of dispute through adjudication or legislation. “Consequently, pluralist legal systems contain a risk, which need not be realised, of constitutional crisis; of officials being compelled to choose between their loyalties to different public institutions.”<sup>61</sup> For Barber, pluralist model of a legal system requires both multiple sources of law, and, also, the possibility of inconsistency between legal rules<sup>62</sup>. Systems with inconsistent rules of recognition existed not only as theoretical constructs. Pluralist legal orders in this sense occurred e.g. during Rhodesian crisis of 1965. The concept might also be applied for explanation of the relations between European and domestic legal orders.

The founder and the most prominent representative of the legal psychologism was Leon Petrażycki (1867 – 1931). His concept consists in treating of all legal phenomena as a mere subclass of ethical ones<sup>63</sup>. The basis for the theory was a concept of emotion, especially ethical emotion regarded as an inward impediment to individual freedom. These psychological phenomena comprise both passive experiences (feelings) and a drive toward a certain action. According to Petrażycki, if a man is facing the possibility of committing an ethically wrong act, it will evoke in him repulsive emotions that reject such an act. Ethical appulsions, on the contrary, usually cause proper behaviour, like paying debts or helping the poors etc.<sup>64</sup> Experiencing ethical emotion is a condition for every ethical act. Such observation leads Petrażycki to conclusion that, in fact, all ethical and legal phenomena are purely and exclusively individual phenomena and the consent and approval on the part of others, if any, are irrelevant from the point of view of defining and studying their nature<sup>65</sup>. Ethical and moral phenomena differ in the aspect of reference to others. Obligations as to which nothing appertains are moral obligations. Ones which are felt as unfree with reference to others should be termed legal obligations<sup>66</sup>.

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<sup>61</sup> N. W. Barber, *op. cit.* p.306.

<sup>62</sup> *Ibidem*, p. 308.

<sup>63</sup> E. Fittipaldi, *Chapter 18 - Leon Petrażycki's Theory of Law*, in: *A Treatise of Legal Philosophy and General Jurisprudence, Volume 12 Legal Philosophy in the Twentieth Century: The Civil Law World, Tome 1: Language Areas, Tome 2: Main Orientations and Topics*, E. Pattaro, C. Roversi (eds.), Dordrecht 2016, p. 447.

<sup>64</sup> L. Petrażycki, *Law and Morality*, Cambridge, MA 1955, p. 30.

<sup>65</sup> L. Petrażycki, *Law...*, p. 75.

<sup>66</sup> *Ibidem*, p. 46.

Important for the discussed issue of legal pluralism is Petrażycki's distinction between official and unofficial law. Official imperative-attributive phenomena are made up by what state officials actually experience in their capacity of public-legal authorities<sup>67</sup>. Unofficial law (e.g. system of norms governing the life of any family) does not possess this significance in the state<sup>68</sup>. From the theoretical point of view there are no essential differences between them. Positive law are rules referring to any kind of normative fact, which could be official (as statutes, administrative decisions), as well as unofficial (command of a leader) or may have only psychic nature. It refers to anything that is referred to by an agent as the source of the norm<sup>69</sup>. Petrażycki's definition of law covers each imperative-attributive phenomenon anywhere and anytime<sup>70</sup>. Capacity to experience such kind of feelings is not limited to humans, but covers also other kind of beings, even animals and plants.

Legal pluralism moved to centre stage in socio-legal studies in the late 1980s. Many anthropologists and sociologists adopted the concept of law set forth by John Griffiths, in the article "What is Legal Pluralism?" from 1986. He distinguished a nonuniformity of law (when more than one role is applicable to the same situation) from legal pluralism. The latter must be not normative but empirical, being an attribute of a social field, not of a legal system. Legal pluralism is a concomitant of social pluralism. "It is when in a social field more than one source of 'law', more than one 'legal order', is observable, that the social order of that field can be said to exhibit legal pluralism."<sup>71</sup> Griffiths applies Sally Falk Moore's concept of the 'semi-autonomous social field'. He argues that law is present in every such field, and "since every society contains many such fields, legal pluralism is a universal feature of social organization."<sup>72</sup> He argues that there are many rule-generating fields in society, hence there are many legal orders in society, including the family, corporations, factories, sports leagues, and indeed just about any social area with social regulation

Similar phenomena are taking place at the supranational level. As another sociologist, Günther Teubner noticed: wherever autonomous social sectors develop, at the same time autonomous law is produced, in relative distance from politics. World society is coming about not under the leadership of international politics, nor can it be equated with

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<sup>67</sup> E. Fittipaldi, *op. cit.*, p. 499.

<sup>68</sup> L. Petrażycki, *Law...*, p. 139.

<sup>69</sup> K. Motyka, *Leon Petrażycki challenge to legal orthodoxy*, Lublin 2007, p. 39.

<sup>70</sup> *Ibidem*, p. 35.

<sup>71</sup> J. Griffiths, *What is Legal Pluralism?*, "Journal of Legal Pluralism and Unofficial Law" no. 24, 1986, p. 38.

<sup>72</sup> *Ibidem*.

economic globalisation. “Instead, globalisation is a polycentric process in which simultaneously differing areas of life break through their regional bounds and each constitutes autonomous global sectors for themselves.”<sup>73</sup> Law-making takes place outside the classical sources of international law, e.g. in agreements between global players, in private market regulation by multinational concerns, internal regulations of international organisations, interorganisational negotiating systems, world-wide standardisation processes, etc.<sup>74</sup>

### 3. Iusnaturalism

An example of a legal research on axiological plane is iusnaturalism. In this context legal pluralism might be understood as co-existence of different kinds of law, not in psychological or sociological but in metaphysical sense. Aquinas recognized four main kinds of law: the eternal, the natural, the human, and the divine. The eternal law is “the type of divine wisdom, as directing all actions and movements”. The natural law is eternal law as it applies to people; it is “promulgated by the very fact that God instilled it into men's minds so as to be known by them naturally”. The divine law is the revealed word of God. The human law is created by men and its aim (*telos*), according to Aquinas, is the common good. The human law is “an ordinance of reason for the common good, made by him who has care of the community.”<sup>75</sup> Aquinas’s definition of law requires that there should be an authority in political communities, translating certain principles of natural law into positive law and reinforcing these principles with legal sanctions. Justified authorities derive the positive law they make from the natural law or, equivalently, translate natural law principles of justice and political morality into the rules of positive law<sup>76</sup>.

Positive law may be derived from the natural law in two ways. First, as a conclusion from premises, secondly, by way of determination of certain generalities. Some things are therefore derived from the general principles of the natural law, by way of conclusions. For example, that "one must not kill" may be derived as a conclusion from the principle that "one should do harm to no man". But some are derived there from by way of

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<sup>73</sup> G. Teubner, *Societal Constitutionalism: Alternatives to State-centered Constitutional Theory*, Storrs Lectures 2003/04 Yale Law School, p. 10.

<sup>74</sup> *Ibidem*, p. 13.

<sup>75</sup> St. Thomas Aquinas, *The Summa Theologica*, Benziger Bros. edition, 1947, Q. 90, art. 4.

<sup>76</sup> J. Finnis, *Aquinas : Moral, Political and Legal Theory*, Oxford 2008.

determination. For example, the law of nature has it that the evil-doer should be punished. But that he be punished in this or that way is a determination of the law of nature<sup>77</sup>. Those things, which are derived from the law of nature by way of particular determination, belong to the civil law, as each state decides on what is best for itself<sup>78</sup>. Accordingly, both modes of derivation are found in the human law. Those things, which are derived in the first way, are contained in human law not as emanating from that place exclusively, but have some force from the natural law also. Aquinas says that laws whose derivation from natural law is of this second type have their force 'from human law alone' (*ex sola lege humana vigorem habent*)<sup>79</sup>.

Iusnaturalism is considered as having double or triple character. Besides positive and natural laws, L. L. Vallauri distinguished also "free law"<sup>80</sup>. Because of this fact, iusnaturalism is often considered as "ontological pluralism of law"<sup>81</sup>.

#### **4. Conclusion**

Legal pluralists reject narrow-minded perspective of traditional, positivistic and state-centred legal theory. They look for a different paradigm, which would recognize the plurality of law. The attitude should be praised as long as the pluralistic approach is used consciously and precisely, in order to explain legal issues at this research plane in which legal discourse is conducted.

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<sup>77</sup> St. Thomas Aquinas, *op. cit.*, Q. 95, art. 2.

<sup>78</sup> *Ibidem*, Q. 95 art. 4.

<sup>79</sup> J. Finnis, *op. cit.*, p. 267.

<sup>80</sup> P. Ferreira de Cunha, *Rethinking natural law*, Heidelberg 2013, p. 9.

<sup>81</sup> *Ibidem*.

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