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GLOBAL LEGAL PLURALISM: A NEW WAY OF LEGAL THINKING

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**GLOBAL LEGAL PLURALISM:
A NEW WAY OF LEGAL THINKING²**

The subject matter of this article is the terminology which is used in contemporary law and sociological jurisprudence to denote changes in legal regulation. Among the most fashionable terms are those of globalization and pluralism. In the author's opinion, these two terms indicate diverse phenomena and have different tasks. Pluralism is a concept allowing the description and explication of various legal facts, institutions, relations which are not generally recognized in state-centered theory of law. Globalization is a common name for the distinctive characteristics which distinguish the present-day Western civilization from other civilizations. The amalgamation of these two different aspects into one set of methods and ideas inspired by the need to explain modernity does not lead to the formation of a new methodology or of a scientific conception. Rather globalization talks about plurality in contemporary law having another function – to describe the changing mentality, new ways of legal thinking which are growing in the Western world. These changes have repercussions in many fields of science, i.e. in a new understanding of such traditional concepts as sovereignty.

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The notion of globalization is relatively imprecise, and can be used loosely to embrace a large variety of different modern phenomena. Theorists abuse the G-words (a term of Twining⁴) to demonstrate radical changes, or at least the changes which seem to be radical to some philosophers. Generalized references to new (quasi-)realities allow theorists to escape a long and laborious examination and comparison of legal phenomena in the past and in the present. This new kind of reductionism does not seek to describe complex systems through one or several prevailing elements as the classical scientific paradigm does. On the contrary, it is claimed that the growing complexity of the world requires a multidimensional approach which tries to embrace every aspect of reality.⁵

The need for a plausible explanation of such multidimensional reality leads to a strange amalgamation of terminology inherited from the classical scientific tradition, and of methodology inspired by post-classical philosophies. Even in this latter part, the classical paradigm of scientific knowledge leaves no alternative to the “subject-object” dichotomy, and a renewed vision of the world remains captive to the scientific language of modernity.⁶ This amalgamation leads to the increase of kitschy conceptions which pretend to say new things in the legal sciences only by adding new terms charged with innumerable connotations. The meaningless character of these reformulated generalizations can be seen in much of the loose talk about “global legal pluralism” which has recently become one of the labels to generalize certain trends in contemporary civilization. “Globalization”, “pluralism”, “sustainability” and other words are mixed together here to describe the new realities of the changing world from a totally new perspective.

These words became a Klondike for smart fundraisers in various disciplines, but to what extent are the realities in question cardinally new, in that they cannot be described by the notions and the explanations worked out previously in the legal sciences?⁷ In other words, are these new concepts (in our case, “globalization” and “pluralism”) analytically necessary for the description of the law in modern (or, as some would say, “postmodern”) societies? Our hypothesis is that they reflect new models of legal thinking and thereby gain the ability to serve as regulatory concepts. One of their functions is to facilitate the description of new types of social control. As the topic of “Global legal pluralism” covers a multitude of diverse and heterogeneous

⁴ Cf.: *Twining W.* Globalization and legal education. Nijmegen, 2011.

⁵ *Luhmann N.* Law as a Social System. Oxford, 2004. In what concerns the application of the theory of systems to the problem of globalization cf.: *Gopinath C.* Globalization: A Multidimensional System. New York, 2008.

⁶ About the problems of describing legal phenomena through fundamentalist schemes and categories c.f. *Melkevik B.* La philosophie du droit dans le tourbillon de la modernité (in Russian) // *Rossiiskiy ezhegodnik teorii prava.* 2009. No 2. P. 527-545.

⁷ Cf. the masterly indictment against the traditional legal parlance: *Schlag P.* Formalism and Realism in Ruins (Mapping the Logics of Collapse) // *Iowa Law Review.* 2010. No 95.

phenomena, the methods used in discussions about this topic may not claim to have systemic coherence, and thus cannot serve as analytical tools for true scientific research.

When describing the law as it exists in modern societies, one encounters a difficulty even at the level of the attribution of terms and notions to the constellations of facts which do not have any satisfactory explication in the state-centered doctrine of law. These are not unique: *lex mercatoria* and similar non-state legal orders have been known for a long time. Neither a uniform contractual law nor the attempts of trading companies to create a transnational network of legal institutions are new – one can mention *Hansa* or the Roman lawyers who created comparable projects in the legal field exploiting new tools to shape a world in which they could flourish according to the rules they set.⁸ As a consequence, the new facts referred to as legal pluralism or globalization, do not contain anything extraordinary or unheard of. From this perspective, the very fact of a “changing world” does not authorize the researchers to abandon the old notions and explicative schemes and recklessly introduce the new ones.

In this sense the assumption about the “end of history”, which implies that modern, global capitalism within a liberal democratic political framework represents the last word of socio-economic evolution⁹ can appear as hyperbole. From such a perspective one is tempted to say “*nil sub sole novum*”, objecting to those who declare to have discovered new realities in contemporary law and who wish to attach new labels to these realities. However such a negation would constitute the opposite conceptual extremity. A skeptic would say that our changing world is reproducing old patterns rather than creating any substantially new phenomena, so that the contemporary processes of globalization are just versions of age-old capitalism.¹⁰ To such an extent, this skepticism is not constructive; as such, new notions and terms do not endanger legal science provided they are used correctly and in an appropriate context without undue discrimination against the old ones. In our opinion, it is the definition of such a context that is one of the main obstacles for exploring changes in law through the lens of the philosophy of global law.

The intensity of social change in our time is impressive, and fundamental shifts in the legal field are evident.¹¹ Acknowledging that the law is becoming quite (although not completely) different compared to the law which existed in the Western legal tradition until the

⁸ Cf.: *Modelski G., Devezas T., Thompson W.R.* (ed.) *Globalization as Evolutionary Process: Modeling Global Change*. London, 2008.

⁹ *Fukuyama F.* *The End of History and the Last Man*. New York, 1992.

¹⁰ *Wallerstein I.* *Globalization or the Age of Transition? (A Long Term View of the Trajectory of the World System)*. <http://fbc.binghamton.edu/iwtrajws.htm>

¹¹ *Held D., McGrew A.* *Global Transformations*. Cambridge, 1999.

mid-20th century, one can legitimately ask for a new term which describes this new legal reality. This relatively new reality can be called “globalized” or by any other “G-word”, no serious dispute can arise about the words which people attribute to things; simply because there are no objective criteria for the veracity of these terms. One can adhere to the classical definition of Giddens who saw globalization as the intensification of worldwide relations which link distant localities in such a way that local happenings are shaped by events occurring at great distances;¹² or to the definition of globalization which represents, according to Wallerstein, an uncertain process of transition of the world into an unknown socio-economic alternative; or one can choose another definition which will be equally plausible. However if the discussion is to be continued not only in the “nominalist” but also in the “realist” dimension (the analogy with the medieval controversy about real entities behind words seems to be suggestive here), one needs to decide on the logical necessity of the links established between the newly introduced terms and the phenomena referred to by the older terms.

From this point of view, the resolution of any intractable scientific problems would be better carried out not through the creation of a new language (*Novdroit*, if we use the term introduced by Melkevik¹³) but through a critique of the attempts to create such a new language (a critique understood from a constructive, Kantian perspective). The main point of this critique is to differentiate between the objective language of law and the meta-language which is used to describe it. The new narrative about law in the globalized world does not describe the language used by lawyers, lawmakers, judges; it rather shapes a new world-outlook where the law acquires new specific qualities it has not possessed before.¹⁴ Utilizing such an objective language does not provide the concept of globalization with any explanatory power, so the “globalization vocabulary” in the sphere of law (here we refrain from any conclusions about economics, politics, and other social spheres) do not provide the conceptual tools for description.

Analyzing this vocabulary, one can say that the main feature of legal globalization is a trend toward privatization of what is public in law.¹⁵ It is maintained by many authors that the centre of gravity has passed from the law as a product of the state will, to contracts between individuals (even if those “individuals” are the big multinational companies); therefore there are serious challenges to the perceived monopoly of the state in making and administering law. This goes hand in hand with a growing loss of state sovereignty as a consequence of the advance of

¹² Giddens A. *The Consequences of Modernity*, Cambridge, 1990. P. 64.

¹³ Melkevik B. Parlez «Novdroit»! Ou comment le politiquement correct se legitime «juridiquement» (in Russian) // *Pravovedenie*. 2012. No 1. P. 37-56.

¹⁴ Cf.: Melkevik B. *Philosophie du Droit*. Quebec, 2012.

¹⁵ Michaels R., Jansen N. Private Law beyond the State? Europeanization, Globalization, Privatization // *American Journal of Comparative Law*. 2006. Vol. 54.

both supranational and transnational law. It is argued that the traditional type of sovereignty, i.e. the exclusive jurisdiction sovereignty, no longer exists in the modern era of globalized legal systems. Instead, participation in plural or composite structures (sometimes called “*plurilateral*”¹⁶) is the prevalent form of sovereignty in the era of the global economy.¹⁷ Consequently, there is an increase in the power of non-state actors which create new sources of law.¹⁸

In these discussions the term globalization amounts only to an assertion of the tendency towards a growing interconnection and interdependence between all countries and societies in the world.¹⁹ It is a process whose engine is international trade and capital flows, and the law can be seen here as a recipient of those changes. A typical example is already cited “*lex mercatoria*” which regulates international trade and which is not made either by national states or by public institutions of an international nature, but instead by the major private legal actors.²⁰ There emerges a new type of *soft law* in which resorting to coercion is less important than in state law, because this law functions as a means of the structural linking of social processes.²¹ As examples of this *soft law* can be cited such private legal orders as ICANN, UDRP, the norms produced by the WTO appellate body, procedural rules of international arbitration, standards of EDI/EDIFACT, and so on.

These examples affirm that the economical transformations (referred to as “globalization”) have indeed a significant effect on the law; the changes necessitated in the law by the economical shifts of the modernity help transforming many of legal institutions, giving rise to new forms of adjudication, modifying the classic functions of law, etc. In this approach, introduction of the “globalization vocabulary” is nothing more than reaffirming the old and banal truth about the interconnection between law and economy: given that economical structures are subject to “globalization” changes, one can reasonably expect that the law would be subject to similar changes. A major part of the “Law and Globalization” discussions leads to advocating the necessary changes in law which should be produced due to appropriate economical

¹⁶ Cerny P. Globalization and the Changing Logic of Collective Action // International Organization. 1995. No 49. P. 446.

¹⁷ Cf.: Jackson J. Sovereignty: A New Approach to an Outdated Concept // American Journal of International Law. 2003. Vol. 97. No 4. About the theoretical implementations for Russia cf.: Antonov M. Theoretical Issues of Sovereignty in Russia and Russian Law // Review of Central and East European Law. 2012. No 1. 95-113.

¹⁸ Jayasuriya K. The Rule of Law in the Era of Globalization: Globalization, Law and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance // Indiana Journal of Global Legal Studies. 1999. No 6.

¹⁹ It is symptomatic that the World Bank defined the globalization as, “the growing integration of economies and societies around the world” (The World Bank Group. [Globalization](http://www1.worldbank.org/economicpolicy/globalization/). <http://www1.worldbank.org/economicpolicy/globalization/> March 22, 2008).

²⁰ Cutler C. Private Power and Public Authority: Transnational Merchant Law in the Global Political Economy. Cambridge, 2003.

²¹ Cf.: Krawietz W. Ausdifferenzierung des modernen Rechtssystems und normative strukturelle Kopplung – sozial oder sozial? // Peter G., Krauß R.-M. (Hrsg.) Selbstbeobachtung der modernen Gesellschaft und die neuen Grenzen des Sozialen. Springer, 2012, pp. 73-101.

transformations in the global markets, thus updating the law to fit the new globalized economic reality.

So far so good: this connection between the law and the economy is important for the majority of legal thinkers. Nevertheless, an awareness of the is/ought problem and remembering Hume's Guillotine prevents a careful researcher from uncritically extrapolating the results obtained from an observation of the contemporary economical realities to the field of law. In economics these observations are mainly descriptive in character; brought into the field of law, they acquire prescriptive connotation: "from the fact of emerging global markets, and the given interconnection between law and economy, we can expect that law too should ...", and so drawing implications for the development either of domestic legal systems or of international law.²² This prescriptive connotation is even better expressed in the joint use of the term "globalization" together with another fashionable label, "sustainability",²³ which prescribes "that we acknowledge the primitive origins of human ecological dysfunction and seize conscious control of our collective destiny".²⁴

Reflecting on the origins of prescriptive modality which characterize the conclusions drawn from the "globalization vocabulary", it is very important not to lose sight of the fact that the law has not only suffered the effects of globalization but has also played a causal role in the process, and these effects would be impossible if the necessary legal instruments had not been already present (explicitly or implicitly) in the law. We can speak of changes and transformations in the law only insofar as it remains the law and does not become anything else, a conglomerate of undifferentiated social regulators like taboos, superstitions and tradition which are typical for primitive societies. It is still the law which authoritatively governs human behavior through imperative prescriptions backed by socially organized sanctions.²⁵ It remains the object language of normative regulation. If one concedes that nothing changes this nature of the law in modern societies even in the context of globalization processes, then using the "globalization vocabulary" can be portrayed just as a kind of politics, as a deliberation process where society and individuals express their opinions about compromises between state law and

²² A typical example of this "imperceptible change", so regretted by David Hume, can be found in the work of David Gerber where the author concludes his reflections through listing imperatives to be followed by governments in the era of globalization (Gerber D. *Global Competition: Law, Markets, and Globalization*. Oxford, 2010).

²³ Ashford N.A., Hall R.P. *Technology, Globalization, and Sustainable Development: Transforming the Industrial State*. Yale, 2011. In this book the authors require integrating economics, industrial development, national and international law to sustain the challenges of globalization. Much of the literature on law-globalization-sustainability is overcharged with similar deontological demands.

²⁴ Rees W.E. *Globalization and Sustainability: Conflict or Convergence?* // *Bulletin of Science, Technology and Society*. August 2002. No 22 . P. 249.

²⁵ This understanding of law can be found in, e.g.: Timasheff N.S. *An Introduction to the Sociology of Law*. Transaction Publishers, 1939.

free (social, economical) law.²⁶ From this point of view, the “globalization vocabulary” can serve today as a substitute to the old (and probably, outdated) idea of natural law. Lyotard remarked that “modernity, in whatever age it appears, cannot exist without a shattering of belief and without the discovery of the ‘lack of reality’ of reality, together with the invention of other realities”.²⁷ But the issue is whether there is any “real” reality and whether there is a unique modernity or multiple modernities.²⁸ In the last case, no performative contradiction arises from a bit of sound constructivism in explaining the evolution of scientific knowledge.

It is useful to draw a parallel with the ideas of natural law which emerged each time societies had to deal with the problems irresolvable through the present instruments of legal regulation. The natural law problem focuses first of all on the issue of the axiomatic foundations of law. There is a lot of versions of *ius naturale* which differently describe (or rather prescribe) these foundations. For example the position of Dworkin who has significantly enriched the ius-naturalist manner of thinking i.e. through reflections about the integrity of law. For him, the integrity of the law is a regulatory idea which grants us the possibility to study it as an independent object: “Law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in the fresh cases that come before them, so that each person's situation is fair and just according to the same standards”.²⁹ It follows from here that the integrity of the law is a result of our coherent reasoning about law. This coherence, again, can be guaranteed by the consistent use of terms and notions which constitute this reasoning.

Therefore, in talking about transformations in the law one should pay attention not to any external (to human cognition) factors, but rather to the internal “logic” of the law, its argumentative continuity, the sources of its persuasive force.³⁰ As such, forms of law can drastically change over the time; they cannot provide a secure guideline in reflections about changes in nature of legal regulation.³¹ Günther wisely suggests that the very use of the word “law” by various groups enables a universal code of legality that in turn defines the very object of intercommunity debate.³² This debate gains much more impact than before because of new

²⁶ “To what extent the logic of the market system should be turned loose, where and in what framework the market should ‘rule’; are ultimately questions, which, in a modern society, should be left to deliberative politics to decide” (*Habermas J.* Crossing globalization’s valley of tears // *New Perspectives Quarterly*. 2000. No 17 (4). p. 55).

²⁷ *Lyotard J.F.* The Postmodern Condition: A Report on Knowledge. Minneapolis, 1984. p. 77.

²⁸ *Eisenstadt S.E.* Multiple Modernities - A Paradigma of Cultural and Social Evolution // *ProtoSociology*. 2007. No

²⁹ *Dworkin R.* Law's Empire. Cambridge, 1986. p. 243.

³⁰ About the contemporary implications of argumentation in law cf.: *Frydmann B.* Le sens des lois. Histoire de l'interprétation et de la raison juridique. Bruylant, 2005.

³¹ *Dalberg-Larsen J.* The Unity of Law: An Illusion? On Legal Pluralism in Theory and Practice. Berlin, 2000.

³² *Günther K.* Legal pluralism or uniform concept of law? Globalization as a problem of legal theory. 2008. <http://www.helsinki.fi/nofa/NoFo5Gunther.pdf>

mass media, the Internet, and other means of communication; the proliferation of such communication in “intercommunity debates” about law can explain the new legal forms which emerge nowadays (or at least, new manners of legal reasoning). If one refers to the suggestive image proposed by Belley, pluralism and globalization are just alternative mental constructions to represent the surrounding world, and as such these concepts do not reflect this world but rather serve as explanatory models.³³ Or they are alternative aesthetics, to use the artistic vocabulary of Schlag.³⁴

The question about transformations in the law then turns into a question about new types of legal reasoning or legal discourse, if we follow the terminology of Goodrich: “Legal discourse is simply one of many competing normative disciplinary discourses, discourses of morality, religion, and social custom, to which it is closely related and from which it draws many, if not all of its justificatory arguments. It is a discourse which should ideally be read in terms of control—of dominance and subordination—and of social power-relations portrayed and addressed to a far more general audience than that of law-breakers and wrong-doers alone”.³⁵ From this perspective, the law is a system of usage that stands outside of and tries to control “the conflicting usages and differently oriented accents of social dialogue”,³⁶ even if we are suspicious of the attempts to reduce social control to relations of dominance and subordination. Developing this line of thinking, one can easily come to understand globalization as a paradigm shift from groups to discourses, from unitary states to a Global Bukowina – the idea introduced and defended by Teubner.³⁷

If the law functions translating social reality into its own terms in order to control it, then globalization, pluralism, sustainability, and other words can be perceived merely just as signs which indicate the new modalities of social control where traditional actors (states, corporations, etc.) are replaced by others, where traditional sources of law give way to others. As a result, it is not the law (as a special kind of social discourse) which changes; changes can be discovered at the level of the general culture of thinking where new terms to display the eternal problem of coordinating the social and the individual are introduced.³⁸ This problem (totality vs. personality;

³³ *Belley J.G.* Le droit comme *terra incognita*: conquérir et construire le pluralisme juridique // Canadian Journal of Law Society. 1997. No 12. p. 1-15.

³⁴ *Schlag P.* The Aesthetics of American Law // Harvard Law Review. 2002. No 115.

³⁵ *Goodrich P.* Legal Discourse: Studies in Linguistics, Rhetoric, and Legal Analysis. New York, 1987. p. 20.

³⁶ *Ibid.* p. 188.

³⁷ *Teubner G.* Global Bukowina: Legal Pluralism in the World Society // Teubner G. (ed.) Global Law Without a State. Dartmouth, 1997. P. 3–28. This approach is based on Teubner’s system theory which considers the law as not generated by the state but instead as self-creating. In this theory Teubner claims that the center of lawmaking is to be sought not in state but in the periphery of non-state actors.

³⁸ Cf.: *Gurvitch G.* L’idée du droit social. Paris, 1932. About possible applications to the contemporary problems of law of Gurvitch’s legal sociology cf.: *Riechers G.* Die Normen- und Sozialtheorie des Rechts bei und nach Georges Gurvitch. Berlin, 2003. This feature of globalization has recently been once again justly marked by Koskenniemi (*Koskenniemi M.* Global legal

sociability vs. individuality) preoccupies not only contemporary legal philosophers. In some other terms but essentially in the same direction debates about these bivalent principles led the previous generations of legal theoreticians to questions about plurality in law, about supranational lawmaking actors – the issues nowadays discussed in the terms of globalization. Attempts to resolve these issues in legal science through a non-classical scientific paradigm can be dated as early as the beginning of the 20th century.³⁹

Here it is important to be distant from globalization as an objective force dominating the social reality (as if it were something like “production forces” in the Marxist social philosophy), as a unilateral factor determining the lawmaking and law-enforcement processes. Rather the above described globalization effects can be seen as a result of the interplay between different institutes, structures and levels of law. An examination of the impact that the constantly renewed legal doctrine exercises on changing legal institutions and of impact of the political and philosophical globalization discussions on changes in legal doctrine becomes a fertile ground for the reassessment of the ongoing processes of transformations *in* law (which do not necessarily witness about any transformations *of* law).⁴⁰ From this vantage point, discussing globalization is not a goal *per se*, but to some extent a pathway to reaffirming, reshaping old legal concepts in respect to the new social and cultural realities.

The problem of globalization is thus equated to use of the term of “globalization” in legal discourse. Proponents of critical legal studies and of the postmodern philosophy of law, who require from us “incredulity toward meta-narratives”⁴¹ can object that it does not matter which words are used to disguise the factual power of governors. However, as has been noticed before, there is no logical necessity to link social control with relations of subordination and dominance. If one steps onto the insecure terrain of deconstructing the tools of cultural domination,⁴² language inclusive, one risks losing the very object of knowledge – law.⁴³ As Teubner and Korth

pluralism: multiple regimes and multiple modes of thought. 2005. <http://www.helsinki.fi/eci/Publications/MKPluralism-Harvard-05d%5B1%5D.pdf>.

³⁹ Cf.: Polyakov A., Antonov M. Leon Petrazycki's Legal Theory and Contemporary Problems of Law // Melkevik B. (ed.) Standing tall: Hommages á Chaba Varga. Budapest, 2012. pp 371-81. Though there are attempts to find “true” legal pluralism only in the contemporary globalization conceptions, thus excluding Gurvitch and other “classics” from the list of pluralists (e.g., Corsale M. Legal pluralism and the corporatist model in the welfare state // Ratio Juris. 1994. No 7. p. 95–103). On the contrary, if one reads from Santos that legal pluralism is “a psychological state of the individual subject to more than one set of norms or as a description of a dynamic state of affairs” (Santos B. Toward a New Legal Common Sense: Law, Globalization and Emancipation. 2nd ed. Cambridge, 2002), one can feel a striking similitude with the ideas Petrazycki had been arguing a century before.

⁴⁰ Cf. this reasoning in Perelman's works, e.g.: Perelman C. The idea of justice and the problem of argument. New York, 1963.

⁴¹ Lyotard J.F. The Postmodern Condition: A Report on Knowledge. Minneapolis, 1984. P. XXIV.

⁴² Bourdieu P. Pascalian Meditations. Stanford, 2000.

⁴³ The dangers connected with analyzing law through the lenses of cultural approach, and the limits of this approach have been often discussed. Cf.: Krawietz W., Riechers G., Veddelar K. (ed.) Konvergenz oder Konfrontation? Transformation kultureller Identität in den Rechtssystemen an der Schwelle zum 21 Jahrhundert. Berlin, 1999.

stress, if everything becomes law, law loses its analytical (and also its normative) force.⁴⁴ One can hardly hope to find a new scientific conception of law claiming to merge legal discourse with other types of discourses in society, and thereby to arrive at a meta-philosophical inference about the interconnection of everything in this world.

At the first glance, it seems that discussing globalization in law in terms of legal culture offers several advantages. First of all, to find a basic philosophical category could serve as a base for an axiomatic analysis of law. Following Cotterrell, we can define legal culture as something which “controls the pace of production of demands brought before the legal system for specifically legal solutions to problems or protection of interests. And, by more obscure and complex means, legal culture seems also to determine the legal systems’ responses, partly through the operation of internal legal culture shaping legal structures and partly through ‘external’ pressures, reflecting social distributions of power and influence, which equally affect the system’s responses”.⁴⁵ From this standpoint, the problems examined with reference to G-words, seem in the first place to be connected with shifts in legal culture and, probably, with some serious transformations in this culture. But as such, these shifts do not affect the nature and the main modalities of normative regulation in society. Saying that culture determines changes in law (or in society, or in anything else in human world) would be a truism without any explanatory force. Therefore, a more detailed analysis needs to be focused on some particular elements of legal culture, even if such elements would be extremely large (as legal thinking or legal argumentation). A particular element of legal culture is the way the positive law is integrated into social reality – the problem discussed under the heading of legal pluralism.

If one turns attention to legal pluralism, this eternal complement of “law and globalization”, one can easily see continuity of the pluralist problem in law since Aristotle and Grotius. Nowadays, the growth of non-state law, adjudication outside official courts, corporate codes and rules, and the like are usually discussed under the title of legal pluralism. Unlike the term globalization, that of legal pluralism does not make any claims to originality and to exclusivity for contemporary societies.⁴⁶ “Globalization” is a purely descriptive term, it is relatively new. The term “legal pluralism” has a long history and a deeply elaborated doctrine behind it. It is constructive in the sense that this term implies not only a set of disparate

⁴⁴ Teubner G, Korth P. Two kinds of legal pluralism: collision of transnational regimes in the double fragmentation of world society. 2009 // <http://ssrn.com/abstract=1416041>

⁴⁵ Cotterrell R. The Concept of Legal Culture // David Nelken (ed.) Comparing Legal Cultures. Dartmouth, 1997. P. 19

⁴⁶ It is possible to distinguish two or even more conceptions of legal pluralism, e.g. classical and new (Merry S. Legal pluralism // Law and Society Review. 1988. No 22. P. 869–896), sometimes a third perspective of legal pluralism is added – that which is connected with the problems of globalization (Hertogh M. What is non-state law? Mapping the other hemisphere of the legal World // van Schooten J., Verschuuren J. (ed.) International Governance and Law: State Regulation and Non-State Law. Cheltenham, 2008).

phenomena but also a methodology of scientific research, a particular philosophical understanding of law, its nature and its evolution; a methodology which allows the construction of a coherent body of hypotheses and conceptions. Once the interchangeability of the terms “legal pluralism” and “the globalization of law” (and of the phenomena supposed to be behind these terms) is accepted, one can start a new substantial discussion about the new legal realities.⁴⁷ Although, as Michaels justly points out, in the contemporary literature on “legal pluralism plus globalization” (or “global legal pluralism”) neither political pluralism nor general normative pluralism, by contrast, are discussed as such.⁴⁸ The term “legal pluralism” is usually associated with the idea that the state has no monopoly on lawmaking and that along with state law there are many alternative sources of law in society.⁴⁹ In the words of Benda-Beckmann legal pluralism means “the theoretical possibility of more than one legal order within one social-political space, based on different sources of ultimate validity and maintained by forms of organization other than the state”.⁵⁰ As has been shown before, non-state law is not a particular characteristic only of the modern law, it was known in Medieval Europe, in other parts of the world in different époques.⁵¹ So, distinguishing features of legal pluralism will be sought in other places.

Many challenges to law which are associated with globalization resemble the particularities of non-state legal orders studied by legal pluralists.⁵² Among these challenges are the coexistence of state law and social law (in the terms of Gurvitch), the absence of a unique hierarchy of laws which could help decide on the superiority of competing legal orders. These and other topics of legal pluralism nowadays emerge also on the global level, and are reiterated in the discussions about globalization in the law. The core question for this newly emerging concept of global legal pluralism becomes whether it constitutes a mere continuation of traditional legal pluralism, known from the times immemorial, or are the contemporary debates capable of yielding new methods to explain the nature and reality of law differently.

⁴⁷ Cf. an excellent overview of these discussions: *Michaels R.* Global Legal Pluralism // Annual Review of Law and Social Science. 2009. Vol. 5.

⁴⁸ *Ibid.* p. 243.

⁴⁹ *Griffiths J.* What is Legal Pluralism? // Journal of Legal Pluralism and Unofficial Law. 1986. No 24. Another approach was to postulate new legal realities which can be characterized by their *porosity* or *interlegality* meaning the inseparable unity of legal orders (*Santos B. S.* Towards a New Common Sense: Law, Science and Politics in the Paradigmatic Transition. London, 1995. p. 117ff). From this perspective, a true legal pluralism only appears as the key concept in a postmodern view of the law characterized by *interlegality*.

⁵⁰ *Benda-Beckman F., von.* Who's Afraid of Legal Pluralism? // Journal of Legal Pluralism and Unofficial Law. 2002. No 47. p. 275. Cf. a successful criticism of state-centered conceptions of legal pluralism: *Shahar I.* State, Society and the Relation between Them: Implication for the Study of Legal Pluralism. p. 436.

⁵¹ *Goldman D.* Globalization and the Western Legal Tradition: Recurring Patterns of Law and Authority. Cambridge, New York, 2007. Cf. also: *Tamanaha B.* Understanding legal pluralism: past to present, local to global // Sydney Law Review. 2008. No 30. p. 375 ff.;

⁵² About limits of the pluralist approach in examination of non-state law cf.: *Michaels R.* The re-State-ment of non-state law: the state, choice of law, and the challenge from global legal pluralism // Wayne Law Review. 2005. No 51.

Pluralism is inherent in the social reality of law, and that is why legal pluralism seems to be beyond doubt. The law can be understood as an instrument of social coercion, its function being to induce people to accomplish certain acts. Here under the syncretic label of “law” can be classed different normative mechanisms, and the very attempt to differentiate them could be suspected of subjectivism. This conclusion made by Griffiths is obvious from the given perspective. If one follows Malinowski and accepts the basic tenet of legal pluralism – law includes all mechanisms of social control – then law is everywhere one meets social coercion. This proposition inevitably leads to the negation of the thesis that state law is the only law.⁵³ On the other hand, given that the mechanisms of social control are intermingled and form semi-autonomous fields of social interaction,⁵⁴ the specificity of law cannot be sustained any longer. Therefore, following Griffiths, it is necessary to abandon the very idea of separating law from morals, as true legal pluralism cannot tolerate one single normative system of regulation in society.⁵⁵ There must be several competing orders normatively inducing people to comply with rules set out by these orders, so that legal pluralism is another name for intrinsic normative pluralism in society.⁵⁶ And there can be no clear dividing line between normative orders.

Numerous objections have been raised against this simplified description of legal reality which implies reduction of official law to state law. This description considers state law as something necessarily coherent and integrated, though it is not always the case. Even state law can be perceived in the terms of *policentricity*,⁵⁷ let alone the enormous field of the “official law” which often incorporates legal orders of transnational companies, law firms, clubs, churches, and political parties.⁵⁸ A persuasive example here can be drawn from Soviet history where the state and the ruling Communist Party were formally separated, so that the “legal” prescriptions of the Communist Party of the Soviet Union (whose real compulsive effect exceeded the normative force of acts issued by the official government of the USSR) were not included in the state legal order and stood apart in the hierarchy of “other normative acts with obligatory force” (as well the acts of Soviet trade unions, of All-Union Leninist Young Communist League (Komsomol) and analogous institutions of the Soviet system). As has been noted many times in the pluralist

⁵³ Griffiths J. What is Legal Pluralism? p. 5.

⁵⁴ Moore S. F. Law and Social Change: The Semi-Autonomous Field as an Appropriate Subject of Study // Law and Society Review. 1973. No 7. p. 719–746.

⁵⁵ Cf.: Griffiths A. Legal Pluralism // Banakar R., Travers M. (ed.) An Introduction to Law and Social Theory. Oxford, 2002. P. 289–310; *idem*. The idea of sociology of law and its relation to law and to sociology // Current Legal Issues. 2005. No 8.

⁵⁶ Twining W. Globalization and Legal Theory. 2000.

⁵⁷ Petersen H., Zahle H. (ed.) Legal Policentricity: Consequence of Pluralism in Law. Aldershot, 1995.

⁵⁸ Berman P. Global legal pluralism // Southern California Law Review. 2007. No 80. P. 1155–1237.

literature, the borderline between the state, the official and other legal orders is rather vague and does not always allow clear distinction.⁵⁹

Until now, we have followed a general line of argumentation of legal pluralism even if we are incapable of specifying genuinely “social”, purely “unofficial” law and to contrast it with state law. If state law also can be described in terms of a pluralist approach, it rather brings water to the mill of legal pluralism. Nevertheless, establishing that the law goes beyond the will of the state and the forms chosen to fix this will in legal propositions, does not prove anything about the ontological opposition of social and official law. In other words, if we agree that the norms created (and also recognized, incorporated, deferred, delegated⁶⁰) by the state do not exhaust the whole body of law, will we then necessarily join the thesis about plurality of law? There are no persuasive arguments to give a positive reply to this question. Especially dubious are affirmations that conflicts between state law and non-state (transnational, ethnic, religious laws, human rights) law should be resolved by mixing elements from both legal orders to come up with an intermediate law.⁶¹ From this perspective one must be vigilant about keeping some distance between the terminological and the ontological aspects of the problem.⁶² It is possible to use the term “law” for labeling different mechanisms of social control, for grouping such realities which were sometimes described in the terms of “thieves’ law”, “children’s law” under this heading.⁶³ Such uses of this term do not prove any factual similarity between the functions exercised by official (state) and unofficial (non-state) systems (to use the vocabulary of Alchourron and Bulygin⁶⁴). Nor has it proved the normative equivalence of these systems.⁶⁵ Undoubtedly, one can accept that the law does not exist in a “pure” state form, that lawmaking and law enforcement are supported by various social processes where the state can play a minor role, or not play any role whatsoever. At the same time one can keep intact the analytical distinction between law and other social regulators, use another explicative scheme implying

⁵⁹ Cf.: *Shahar I.* State, Society and the Relation Between Them: Implication for the Study of Legal Pluralism // Theoretical Inquiries in Law. 2008. No 2. P. 417–441, especially: p. 428–430.

⁶⁰ To refer to the phenomena covered by the “weak version” of legal pluralism criticized by J. Griffiths.

⁶¹ *Teubner G, Korth P.* Two kinds of legal pluralism: collision of transnational regimes in the double fragmentation of world society. 2009 // <http://ssrn.com/abstract=1416041>

⁶² Cf.: *Tamanaha B.* The Folly of the ‘Social Scientific’ Concept of Legal Pluralism // Journal of Law and Society. 1993. No 20. P. 192–217; *idem.* A Non-Essentialist Version of Legal Pluralism // Journal of Law and Society. 2000. No 27. p. 296–321). *Teubner* draws similar arguments to object the naïve realism of legal pluralism (*Teubner G.* Two Faces of Janus: Rethinking Legal Pluralism // *Cardozo Law Review.* 1992. No 13. P. 1443–1462).

⁶³ *Petrażycki L.* Law and Morality. New Brunswick: NJ, 2011.

⁶⁴ *Alchourron C.E., Bulygin E.* Normative Systems. New York, 1971.

⁶⁵ Cf.: *Tamanaha B.* The Folly of the ‘Social Scientific’ Concept of Legal Pluralism. p. 192. Additionally, it can be pointed out that state law can refrain from the monopolization of the legal sphere, but it nevertheless can exercise an important function in the integration of this sphere into one more or less coherent whole (*Roberts S.* Against Legal Pluralism // Journal of Legal Pluralism. 1998. No 42. P. 95ff).

neither the hierarchical structure of the global legal order, nor a multiplicity of self-regulating legal orders, but rather a structural coupling of mutually interrelated legal orders.⁶⁶

Summing up the key propositions from the discussions about globalization, legal pluralism and the contemporary realities of law, several common trends can be stated. Globalization is not a descriptive term to depict the contemporary realities of law; it works mainly as a regulatory conception to affirm certain regularities of social evolution to be respected by scholars, lawyers, and politicians. The conclusions about the concrete imperatives the positive law is to comply with, vary in a degree similar to that of the discussions about natural law in the 17-18th centuries. However the ideological connotation of these imperatives is easily observable in the persistent trends to connect globalization with certain processes in society which are seen as socially desirable.

In this aspect, the discussions about globalization somewhat remind us of the search for social ideals at the turn of 19-20th centuries (*toute proportion gardée!*) when so much ink was spilt to describe the social reality “objectively”, and from this “objective” description to conclude in favor of a certain ideals of further development of civilization. This “objectification” of the explanatory models through linking them with the laws and regularities allegedly found in social evolution, helped Marxists, anarchists, liberals, and other representatives of social sciences to substantiate their ideological schemes at the end of the 19th century.⁶⁷ The incertitude of those past days are reminiscent of the global anxiety when the world, after the fall of bipolar system, went looking for new balances.

The reflections about law in the era of globalization which were characterized above generally do not represent law as it is, but rather prescribe which law is needed for mankind to meet the perils of our changing times. These reflections go back to the main ideological problem (according to Mannheim) of the correlation between individuality and social totality, which was so patent in the works of Marx, Durkheim, Weber, Tarde and which is still patent in the numerous writings on legal pluralism. Unanimously rejecting the Hobbesian model, the pluralists depict human societies as self-organizing entities capable of producing their own autonomous regulation, independent of the will and discretion of particular individuals. Naturally, the question about the role of *libre arbitre* of individuals in social development becomes one of the

⁶⁶ Krawietz W. Ausdifferenzierung des modernen Rechtssystems und normative strukturelle Kopplung – sozietal oder sozial? // Peter G., Krauß R.-M. (Hrsg.) Selbstbeobachtung der Gesellschaft und die Neuen Grenzen des Sozialen. Wiesbaden, 2012. S. 71-102.

⁶⁷ Ideology here is to be understood in the terms of social philosophy of Mannheim as an “outlook inevitably associated with a given historical and social situation” which stems from the hermeneutic problem of the relationship between the whole and the parts (Mannheim K. Ideology and Utopia. An Introduction to the Sociology of Knowledge. London, 1960. p. 111).

central philosophical issues.⁶⁸ The range of possible solutions is very broad, from social anarchism of Hayek to the universal harmony of social systems in the writings of Luhmann. Regardless, finding an answer to this issue requires vast philosophical efforts.

The phenomena summed under the title of legal pluralism have neither historical nor social originality as such. Legal pluralism does not reveal new social laws or regularities, it does not provide new explicative schema (rather it merely changes the words in the older schema), and the challenges of globalization are only relatively new. Rather the reality referred to through these terms outlines a renewed intellectual climate which offers new axes for discourses. From this point of view, the problem of legal pluralism, and the issue of globalization are not devoid of scientific interest, and discussions on this matter can effectively contribute to the progress of social knowledge. But, in all probability, one cannot reasonably expect that from replacing terms and factual data one can gain innovative knowledge about the interrelation of law and society. A more fertile ground to cultivate this knowledge is that of reflections on the fundamental issues of social philosophy and sociological jurisprudence.

⁶⁸ The debate between Habermas and Rawls can be cited here as one of the best examples (cf.: *Melkevik B. Rawls ou Habermas. Une question de philosophie du droit.* Quebec, 2002).

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