POLISH LEGAL THEORY: PAST AND PRESENT*

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Jurisprudence in Poland after the Second World War shared the situation of the other social sciences. It had to solve a difficult and *prima facie* unsolvable problem: how to make the continuation of pre-war academic traditions compatible with the recognition of Marxism as the "official" doctrine constituting a universal methodology and theory of all social sciences, including jurisprudence.

In fact, the contemporary development of Polish jurisprudence was shaped by these two powerful and, to a large extent, contradictory factors: (1) the living tradition of Polish jurisprudence of the first half of the 20th century which was either indifferent or hostile towards Marxism; (2) the role of Marxism as an officially declared universal methodology and theory. The role of the first factor was obvious: after the Second World War, the old generation of professors who survived and their direct disciples returned to the universities and — in a completely new political situation — tried (successfully until 1948-49) to continue to develop their views on law and the state.

This generation was under the strong impact of pre-war Polish jurisprudence which was shaped mainly by two principal schools of thought. One of them, undoubtedly the most original and innovative, was the psychological and sociological theory of law of Leon Petrażycki. The expression "school of thought" is hardly relevant to the case of Petrażycki; he was essentially a lonely thinker; nevertheless there were a few of Petrażycki's disciples (his most faithful adherent was Professor Jerzy Lande) who propagated (and sometimes, as is the case of Lande, corrected) the teaching of their Master. Curiously enough, the genuine influence of Petrazycki's theory grew after his death and — in particular — after the Second World War.

Undoubtedly, one of the main sources of the fascination created by Petrażycki's teaching in pre-war Poland was the fact that his theory

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was so fresh, so uncommon, so innovative in contrast to the traditional positivist approaches adopted by Polish legal sciences in the first half of this century. It must be stressed here that Polish jurisprudence was dominated then by positivism pure and simple, by the most dull and rigid brand of positivism; because, *firstly*, it was created mainly by specialists in straight legal subjects and not by theorists; *secondly*, it was under the influence mainly of the German tradition of positivism which was neither so inspiring nor socially sensitive as the Anglo-Saxon brand of positivism commenced by John Austin, who had almost no influence on Polish legal sciences.

It is therefore obvious that in such an intellectual environment Petrażycki's realistic theory of law provided an attractive alternative to monotonous doctrinal studies of law and formal juristic analysis. As Professor Kazimierz Opalek (The University of Cracow) rightly suggests, the theory of Petrażycki "provided a convincing proof of K. N. Llewellyn's words that 'there is more to the law than mere rules', it showed simply that law was not so terribly arid and dull as the professors had tried to persuade their students".[1] His theory corresponded to the general conviction of the learned public of the first decades of the 20th century that law has both important sources in and implications for psychological and sociological phenomena.

As a matter of fact, the weakest point of Petrażycki's theory (from the point of view of its further influence and importance) was his ontology of law conceived as a psychological phenomenon with an established emotive and intellectual composition. The specific nature of law, according to Petrażycki, lies in the parallel imperative (i.e. duty-creating) and attributive (i.e. right-creating) character of the emotions stemming from legal phenomena while in the case of other normative systems (and in particular, morals) the emotions are solely imperative and not attributive. This view was rejected by many scholars not only because of the extreme vagueness of the limits of legal phenomena in this definition; it was at the same time criticized by moral philosophers — such as Professor Maria Ossowska, the leading figure in Polish ethical theory—who pointed out that ethical norms can also provide grounds for the attributive emotions (or in other words, that ethical norms give birth not only to duties, but also to claims and rights).

On the other hand, Petrażycki's other ideas, mainly on the methodological level, were and still are very popular and influential. He is — quite legitimately — considered as a Founding Father of Polish legal sociology, although Petrażycki himself preferred to classify his sociological considerations under the label of the effects of law

[1] K. Opalek, "Leon Petrazycki's Theory and the Contemporary Theory of Law" (1973) 6 *Archivum Iuridicum Cracoviense* 59 and 62.

and not law as such. In this area, it is important to mention Petrażycki's original and inspiring doctrines about the functions of law (organizational and distributive), about developmental trends in modern law (in particular, the tendency to increase legal requirements, to change motives and to reduce legal pressure), about the group determination of the intuitive-law experience, about the need for "legal policy" as a separate branch of legal science engaged in the studies of the efficiency of legal means towards achieving social aims, etc.

In particular, Petrażycki's opposition of "intuitive" versus "official" law is probably still one of the most powerful ideas promoted by this brand of Polish legal sociology which is under the direct influence of Petrażycki's theory. By intuitive law Petrażycki means the society's spontaneous behaviour guided by people's legal intuitions as contrasted to "official law" which he defines as "law applied and supported by the representatives of state power in view of their duty to perform social service". This dichotomy, totally alien to all formalist and positivist approaches, seems to be very fruitful theoretically. Professor Adam Podgórecki, a leading Polish legal sociologist and probably the most ardent follower of Petrażycki, took this dichotomy as a point of departure for the theory of relations between social and legal systems. He maintains that official law corresponds to structurally diversified social systems while intuitive law prevails in cohesive social systems. Heterogeneous systems have to provide members with precise formal prescriptions regulating their behaviour in order to maintain a sound stability, whereas homogeneous systems rely rather upon informal social control. Abstracting from the correctness of this conception (which is mentioned here only as an example of the acceptance of Petrażycki's theoretical premises by modern Polish jurisprudence) it should be noted that the opposition — intuitive versus official law — is a good methodological device for social criticism of authoritarian social engineering (with the use of legal tools) from the point of view of grass-roots, societal values. That is why this theoretical dichotomy was applauded by the critically oriented brand of Polish legal sociology (originating from sociological rather than legal faculties) engaged — to use the words of Podgórecki — "in the difficult task of unmasking social quackery, which sometimes — under the cover of socialistic planning — uses the law to change social institutions and mores".[2]

The second current of pre-war Polish jurisprudence, much less original than Petrażycki's psychologism, was a school of logical and linguistic research on the law. One of the most important academic centres of this current was a Wilno group with Professor Bronisław Wróblewski whose particular contribution was a deep analysis of legal versus juridical languages as well as research on the nature and struc-

[2] A. Podgórecki, *Social Systems versus Legal Systems—Basic Issues* (mimeographed text, unpublished, no date) at 1.

ture of normative utterances. The other influential centre was a Poznań group associated with Czeslaw Znamierowski, whose special interest was a general theory of norms and evaluations, relations between legal and moral systems, etc. Both scholars, Wróblewski and Znamierowski, had a number of disciples who continued this jurisprudential tradition after the War. Despite all the differences between their approaches, it is legitimate to treat them as one current (in particular, when contrasted with Petrażycki); both of them considered law as an essentially normative phenomenon and therefore an analysis of linguistic and logical aspects of law was seen by them as the main task of legal theory. Although they did not create any original ontological theory of the "essence of law", their methodological approach corresponded to the deeply rooted positivism of Polish legal thinking. This formalist tradition had much bigger impact on contemporary Polish jurisprudence than the realistic theory of Petrażycki, and probably also a bigger impact than the adoption (or, in a less favourable version, imposition) of Marxism as the methodological basis of jurisprudence after the Second World War.

It is time now to explain the role Marxism played in the development of Polish jurisprudence after the War. Legal thinkers of the pre-war generation were generally opposed (or, at best, indifferent) to Marxism. They actually shared the common attitude of most social scientists of pre-war Poland who, although often favourable to leftist, socialist and democratic ideologies (sociologists Ossowski and Hochfeld, economists Lange and Kalecki, philosopher Kotarbiński, etc.) were nevertheless sceptical (to say the least) about the Marxist version of socialism. This was still more emphasized in legal theory for at least two reasons: *firstly,* legal sciences all over the world are probably more conservative than the rest of the social sciences in their societies; *secondly,* because they considered Marxism as simply irrelevant to jurisprudence, which taking into account the essential positivist and formalist character of Polish legal sciences then, was rather understandable.

When, therefore, in the years 1945-49 Marxism was gradually imposed upon social sciences in a more and more arbitrary way (it is noteworthy to stress, however, that the years 1945-47 were a period of a relatively free pluralism in Polish social sciences) until the moment when it became *the* official and the only "scientific" theory, legal thinkers — like all the other social scientists — faced a growing dilemma which had not only academic and theoretical, but also dramatic personal dimensions. Two attitudes were typical in that period. One, characteristic of the older generation of professors who refused to be "neophytes" in their fifties or sixties, was so called "internal immigration". Although generally not threatened by physical repression, they were separated from their students and it was impossible for them to publish their works. This was true of Professor Znamierowski. The

younger scholars, however, found it quite easy to use Stalinist slogans in order to meet the requirements imposed by censorship and ideological controllers. That is why almost all the jurisprudential literature of 1945-56 is virtually of no scholarly value; even books written with great technical skill and with an impressive amount of research are so permeated with pseudo-scientific aggressive Stalinist vocabulary and phraseology that they are hardly readable now. The most typical articles and books in this period concerned either the interpretation of legal problems in Stalin's recent works, or the criticism of the anti-communist, "imperialist" and "neo-fascist" nature of modern bourgeois legal thought.

Unfortunately, this period of 1948-56 had a bigger impact on Polish jurisprudence than merely to produce some tons of books and periodicals without any scholarly value. The general attitude taken by legal thinkers in 1948-56 is to some extent still present although it is expressed in a completely new form. The habit of using Marxist (but often not Marxian) terminology without real relevance to an actual piece of research or analysis produced a general attitude of not taking Marx seriously. It may appear paradoxical, but in fact there are very few legal thinkers in Poland now who take Marx seriously in the sense of drawing the conclusions of Marx's writings on law. What actually happened was that Marx was never really considered as relevant to jurisprudence: in 1948-56 he was used for "decorum", as a necessary "alibi"; therefore, after 1956, it was only natural that the same writers did not care to consider Marx as really relevant to jurisprudence. There was a tacit agreement that Marx is relevant to the theory of state, while jurisprudence can quietly stay outside problems outlined by Marx. I think that this attitude has its deep roots in the Stalinist period: *firstly* as a result of very superficial and scholastic reference to Marx in this period; *secondly*, as a result of an effort to liberate themselves from ideology by the formalistically oriented legal theorists, who had to (or *thought* they had to) use and abuse ideological phraseology in a previous period. That produced in some of them a quite understandable distaste.

The result was not that Polish legal theorists marked their opposition or even scepticism about Marxism (they were far too careful and opportunist to do that) but that they rather avoided some problems which stem from the essence of the Marxian concept of law. In particular, they managed to avoid almost completely the central problem of Marx on law: the problem of the withering away of law in a socialist society. While the issue of of the withering away of the state is quite often discussed in Polish literature, the same problem in relation to law simply does not exist! There was never any serious discussion about the specificity of socialist as opposed to bourgeois law or, to put it in other words, about the relevance of law in non-commodity-exchange socialist economy. This broad issue leading to a

general question: "How is law possible in a socialist society in the light of Marxian theory" is absent in Polish jurisprudence; it would be even considered a *faux pas* to put such a question in a scholarly discussion. The idea that law is necessary in a socialist society in the exactly same manner as in a capitalist society, and that it will never wither away seems to be so obvious and self-evident that so far no one has tried seriously to question it. There was never a Polish Pashukanis or a Polish Stuchka — not because of fear to follow their fate, for in the Polish situation, this would not certainly be the case. The reason is that there never was a genuine effort to reconsider the essence of law as such in the light of Marxian ideology (by the way, both these Soviet theorists remain almost unknown to Polish jurisprudence, anyway much less known than Hart, Kelsen or Alf Ross). That is what I mean by not taking Marx seriously. There is a striking contrast between the problems (and I mean here just *problems*, and not scholarly quality) discussed in Soviet and in Polish theory of law. While Soviet theorists are still involved in discussing "a Pashukanis problem" (compare, e.g. the Round Table discussion in "Sov. Gosudarstvo i Pravo" No. 7/1979) although their answers are far from satisfactory and often are full of slogans and pseudo-scientific rhetoric; while some Hungarian and Czech legal theorists (Szabo, Varga, Kubes) try again and again to reconsider principal Marxian problems of the essence of law (although often in an unreadable, neo-Hegelian language), Polish legal thinkers are involved in very sophisticated analyses of the legal norm, jural relations, legal cybernetics, legal interpretation, etc., in fine field research on legal consciousness and motivations of legal subjects, carefully avoiding some painful questions about the status of law in Marxian legal theory and in a socialist society.

But, keeping the above reservations in mind, one must state that modern Polish jurisprudence is relatively pluralist. It is quite possible that this pluralism is facilitated exactly by avoiding some of the crucial points that I have just mentioned. As far as the other questions are concerned, however, in recent years there have been various controversies and discussions which testify to the relatively rich intellectual life of Polish jurisprudence. In what follows I will try to mention some of these controversies. The choice is inevitably arbitrary and is determined by my own view about the hierarchy of importance of problems discussed in Polish legal theory. It is evident that the list of issues is by no means exhaustive: it cannot even give an approximate description of all the major problems analysed in Polish jurisprudence. Quite intentionally, I am concentrating here only on controversial issues, on problems around which there were discussions and controversies. I believe that the area of controversies and not the area of general consensus expresses the field of real intellectual life in any social science, including jurisprudence. Presentation of this area is my main goal in this article.

It is impossible — although one is tempted to do so — to distinguish various "currents" or "doctrines" of Polish modern jurisprudence. The number of legal theorists in Poland is limited, and the positions taken in different academic discussions rarely can be described in terms of some coherent "doctrines" clearly distinguishable from others. Some scholars, of course, tend to take more formalistic attitudes in most matters discussed, while others favour more empirical, sociologically-oriented approaches. This is not, however, a sufficient ground to attribute to them labels of such or another "current" so the positions can be distinguished only on a case-to-case basis.

One of the longest and most fierce controversies in modern Polish jurisprudence concerned the *scope and structure of legal science,* and in particular — so-called "legal dogmatics". In the early 60's, Professor Stanislaw Ehrlich (The University of Warsaw) launched a frontal attack on the status of "positive legal disciplines" (or straight legal sciences), accusing them of having a non-scientific character. These "dogmatic" branches of legal science — in the form generally practised in Poland — have not the attribute of real "science" (which consists of widening our knowledge about the objective world) but have a purely practical aim: to describe, explain, interpret and systematize the contents of legal provisions.

At the same time, independently from Professor Ehrlich's brilliant arguments, Professor Adam Podgórecki in one of his early books translated 12 years later into English,[3] attacked legal sciences in an even more radical manner; he not only denied the attribute of "science" to the positive legal disciplines but also denied the usefulness of "speculative" jurisprudence which should, he argued, be replaced by the sociology of law as the only legitimate theoretical legal science. This "reductionist" proposal provoked, not surprisingly, an immediate response by legal theorists (including Professor Ehrlich), who would rather see a sociology of law as one of the parts of a general theory of law.

The discussion of legal dogmatics, initiated by Stanislaw Ehrlich, had at least one important result: it uncovered the extremely formalistic, thoughtless character of most straight legal disciplines in Poland, in particular, a family of civil legal sciences which until now manage to defend themselves effectively against any empirical, sociological approaches (this clearly is not the case of criminal law science which is quite well integrated with empirical criminology, penology, victimology, etc.). But at the same time, on a theoretical level, the argument by Professor Ehrlich about the non-scientific but purely practical character of "legal dogmatics" was rebutted by many legal theorists (not to mention representatives of straight legal disciplines). They tried

[3] A. Podgórecki, *Law and Society* (London, 1974) at 8-13.

to prove that the methodology of "legal dogmatics" shares the general methodological assumptions of many naturalistic and non-inductive sciences; in particular, the assumption of rational behaviour which is proper to humanistic interpretation of any cultural phenomenon. This point was made by Professor Leszek Nowak (University of Poznań) who argued that legal dogmatic uses the assumption of a rational law-maker. The construction of models of legal sciences — analysed also by one of the leading Polish legal theorists, Professor Jerzy Wróblewski (The University of Łodź) — in comparison with methodological models of extra-legal sciences proves, according to these scholars, that legal science can be treated as a "true" science. In addition, Professor Zygmunt Ziembiński (University of Poznań) defended the "scientific" character of specialized legal disciplines by referring to such formal features of these disciplines as a complexity of intellectual operations, uniformity and coherence of methodological rules, precise determination of the subject-matter of these sciences, etc.

As far as *the definition of law* is concerned, an almost unanimous view accepts the "academic" Marxist definition of law as a set of norms enacted (or recognized — in the case of customary law) by the state, supported by state coercion and securing the interests of a ruling class. The only significant dissent to this definition is by Professor Podgórecki and his disciples, who adopt Petrazycki's concept of law — a concept which is *par excellence* realistic and which treats state coercion as a secondary factor. Podgórecki and his followers, although relying fully on Petrażycki's concepts in empirical studies of legal phenomena (cf. an excellent book by Jacek Kurczewski on "primitive law" in which state coercion is obviously irrelevant) never elaborated more deeply questions of definition, treating terminological investigations as a "necessary evil" and not the aim in itself.

Concerning the above-mentioned definition, there were some reservations about including a reference to class character as an element of the definition itself. These objections — formulated by Professors Jerzy Kowalski (University of Warsaw) and Ziembiński — did not touch, however, the essence of class determination of law but stemmed from the methodological opinion that such a definition is pleonastic in the sense that the class determination of law is not a necessary condition of the *definiendum*, but an element of the *theory* of law. Statements about the class nature of law are synthetic, and not analytic statements. Definition is not supposed to contain all the important elements of a defined phenomenon as determined by its theory, but only the necessary elements which differentiate one defined phenomenon from another (*genus proximus* + *differential specifica*: in this case the *genus* is "a set of norms" and the *differentia,* "enactment by the state"). As often happens in Polish social sciences, this modest methodological objection was, probably unconsciously, an effort to defend a theory against some extremely orthodox, ideological views.

There were also other objections to the prevailing definition of law. Professor Henryk Rot (University of Wroclaw) noticed that this definition dangerously "opens" a spectrum of law thus creating uncertainty about sources of law. If we accept the idea that law consists of rules enacted by the state, we cannot prevent the Kelsenian-style conclusion that "anything the State wants is law".[4] This "loosened concept of law sources" is dangerous from the political point of view; as another legal theorist, Professor Leon Łustacz (The University of Warsaw) remarked, it can lead to the "legitimation of lawless acts of the State power".[5] The only remedy, however, that both these theorists find against such consequences is to stress generality as the essential feature of legal norms, thus excluding from the area of law all individual acts of state authorities.

For many years, it was assumed that the Marxist theory of law is essentially and fundamentally opposed to the positivist conceptions of law. The grounds of the opposition, *Marxism vs. positivism* are most often found in the fact that the Marxist theory of law stresses economic (and in particular, class-determined) sources of positive law while positivism contents itself with statements about the state authorities' will to enact (or recognize) certain rules as legal. Recently, however, there have been some dissenting views on this issue. Professor Ziembiński in his recent book mentioned *en passant* that a Marxist concept of law is linked with "classical positivist views" because it finds criteria of validity of norms in the institutional fact of their enactment by the State.[6] This issue was developed by one of Professor Ziembiński's disciples, Professor Anna Michalska (The University of Poznan) who finds that the element of State enactment inherent in a definition of law accepted generally in socialist countries "puts it among the definitions based on positivistic concepts".[6a] Professor Michalska maintains that there are several negative consequences of this approach, and among them she mentions the incapacity of socialist jurisprudence to deal with such "borderline" (between legal and extra-legal) phenomena as: norms established by social organizations, social rules of primitive communities, Medieval "corporation law", canon law, international public law (and in particular, binding decisions of international organizations), judge-made law, etc. Although she does not propose any alternative definition, her remarks seem to be very accurate. It is a fact, however, that a majority of the "jurisprudential

[4] H. Rot, "A Tentative Formulation of the Concept of Socialist Law" in A. Lopatka (ed.), *Contemporary Conceptions of Lew* (Warsaw, 1979) at 76.

[5] L. Lustacz, "Akt prawotwórczy a zindywidualizowany akt wladzy państwowej" (The law-making act and the individual act of State authority) in St. Ehrlich (ed.), *Studia z teorii prawa* (*Studies in Legal Theory*) (*Warsaw*, 1965) at 116.

[6] Z. Ziembinski, *Peroblemy podstawowe prawoznawstwa* (Fundamental Problems in Jurisprudence) (Warsaw, 1980) at 187.

[6a] A. Michalska, "The Positivistic Element in the Marxist Definition of Law and its Evaluation" in A. Lopatka, *supra* n. 4 at 93.

community" in Poland is convinced that Marxist and positivist concepts of law are fundamentally incompatible.

The problem of positivism is nevertheless still there. Polish legal theorists try in many ways (sometimes, as we shall see, not very coherent) to convince themselves of important differences between their theory and positivism. One theoretical construction is a concept of so-called *multi-plane legal analysis*. In its methodological aspect, this idea can be simply reduced to a directive to study legal phenomena not only in their "logico-semiotic" aspect ("law in books") but also in their psychological and sociological aspect ("law in action"). This directive is quite correct, although there is nothing original about it: it is well known at least since Karl Renner that studying the socio-economic roots and implications of legal norms does not necessarily undermine the purely positivist concept of what law really is. But some Polish legal theorists in their anti-positivist zeal have transposed this methodological multi-plane conception to the ontological sphere of the concept of law. They claim that law itself (or, more carefully, "the legal phenomenon") is an ontologically complex phenomenon which has its normative as well as socio-phsychological *dimension*. Probably the most radical view of this sort was the conception of Professor Wieslaw Lang (University of Toruń) who maintained that "the structure of the legal phenomenon" consists of: (1) external human behaviour, (2) psychological emotions, (3) the content of these emotions (i.e. legal forms), (4) physical and psychological "products" (utterances, legal provisions, etc.).

This idea provoked some important objections based on purely philosophical considerations. Professor Ziembiński argued that a "multi-plane" conception of law causes more troubles than it solves problems: the obvious postulate that one should investigate the impact of legal norms (understood in a strictly normative way) on the external world need not lead to incoherent conclusions about "ontologically mixed phenomena", whose existence is at the same time a semiotic and socio-psychological nature. Professor Jan Woleński (University of Cracow), using general methodological arguments, proved that one and the same "theory" (in a non-metaphorical sense of the word) cannot include at the same time empirical statements (belonging to a socio-logical theory) and logico-linguistic language (which is part of semiotic theory). These are simply two different theories. Professor Kazimierz Opalek (University of Cracow), criticizing the concept of "complex legal phenomena", argued that normative utterances and empirical facts cannot jointly constitute any complex, specific "objects" because the links between these two spheres are not of a causal, but uniquely of normative nature.

The view generally accepted in Polish jurisprudence involves a distinction between a legal norm and a legal provision. This distinction

stems mainly, I believe, from the essentially statutory nature of Polish law. "Legal provision" is understood simply as a normative phrase included in a legal act, while a legal norm is conceived as the meaning of this provision, as the logical and coherent sense of the legal provision (constructed in the process of legal interpretation). The relation between legal provision and legal norm is therefore a reflection of the relation between a sign and its meaning. Legal norms are therefore an end product of legal thinking and legal interpretation of legal provisions. On this ground one of the disciples of Professor Ziembiński, Dr. Maciej Zieliński (University of Poznan) developed an interesting theory of "decoding legal texts" leading to a reconstruction of legal norms.

While relations between legal norms and legal provisions are a domain of consensus, the problem of the *structure of a legal norm* is clearly one of the traditional issues of controversy. There are at least three different views about this. The first view, prevailing until recently, is the so called "three-elements conception of legal norms", widely propagated mainly by Warsaw theorists (Ehrlich, Kowalski, Łustacz). They maintain that *each* and every legal norm can be best analysed as a complex of three elements: hypothesis (determining conditions of the application of that norm), disposition (behaviour which is permitted, prohibited or ordered) and sanction. They claim that this construction reflects in the most adequate way the general functioning of a legal system, therefore the structure of each individual norm should be understood in this way. The second view holds that this "three-elements conception" does not correspond to the specificity of certain norms (e.g. norms which do not have an explicit sanction — so called *ius dispositivum*). What is more important, however, is that some norms have at the same time different ranges of addressees. When e.g. we interpret a legal provision which prohibits a murder, we can see that what is a sanction for the general public is at the same time a disposition of behaviour for a judge. It is therefore more logical to present legal norms as a set of two linked norms: a sanctioned norm (addressed to the general public and determining proper behaviour) and a sanctioning norm (addressed to the organs of law enforcement and determining their behaviour in application of legal sanctions). This view was first developed by Professor Lande. And there is also a third view, expressed in particular by Professor Ziembiński, who marks his distance from this controversy and says that the problem of the structure of a legal norm is a purely conventional issue.

The conventionality of legal concepts is also connected with a theory of *jural relations*. The dominant view in Polish jurisprudence is that jural relations are social relations "governed" by legal norms. In other words, they are the "realization" of a legal norm in concrete social relations between individuals (and other legal subjects). Now, this view leads to certain difficult theoretical problems. There are no

difficulties with explaining jural relations in, say, civil-law obligations: a legal norm "creates" certain duties and claims which can be attributed to concrete couples of persons. The situation is much more difficult in the case of property rights where we can easily identify only *one* subject of rights and no corresponding, concrete subject of duties (the general theory of property holds that on the "other" side we have *all* the people whose duty is not to disturb the exercise of property rights). But how can we speak of relations where only one side is identifiable? The situation is still more difficult in the case of e.g. criminal law. What kind of social relations are "governed" by criminal law norms? The "realization" of these norms consists in a forbearance, but which are the concrete persons to whom we can attribute forbearance and — what's more important — what sort of social and concrete relation exist among them in the stage of forbearance? Some theorists (in particular Professor Kowalski) for the sake of general coherence of a doctrine distinguish three types of jural relations: mutually individualized, one-sided individualized and mutually non-individualized. An example of the first kind of relations are obligations: we can easily identify in them both sides of a relation. Property relations represent a second sort of jural relations: only one side of a relation (namely the subject of property rights) can be individually identified, while on the other side we have an unlimited class of people, whose duty is to respect property. Thirdly, criminal law relations constitute an example of the third kind of jural relations; on both sides we have a general class of people, who have both duties and rights stemming from criminal law norms.

But this idea was strongly criticized by Professor Ziembiński who pointed out that the only reason for using the category of "jural relations" is that they help us to describe relations (in terms of rights claims and duties) among concrete, individual subjects of law. It is the only feature that distinguishes the notion "jural relations" from "validity of a legal norm", which has a general and abstract character. It is therefore — for reasons of methodological economy — necessary to admit that the notion of "jural relations" is relevant only to some branches of law. There are certain legal norms which give birth to jural relations (such as obligations in civil law) and certain which do not (such as criminal law).

One of the most typical conventional pieces of wisdom in Polish jurisprudence — probably as in all jurisprudence developed on the basis of a statutory law system is a sharp distinction: *law-making versus application of law*. This dichotomy, which is not so strongly stressed in common law jurisprudence, expresses well a general positivist attitude towards law. According to this dogma, law-making which means the enactment of general and abstract rules of conduct can and should be clearly distinguished from the application of law to concrete cases by courts, administrative bodies, etc. True, the

bodies have to interpret law (in particular when law is not clear), but this interpretation has nothing to do with law-making, which is the domain of the legislator.

This dogma was questioned in an important manner only once in Polish modern jurisprudence, by Professor Andrzej Stelmachowski (then University of Wroclaw, now University of Warsaw) in his influential article on the law-making role of courts.[7] After concluding from analysis of the Constitution that it does not prohibit judicial law-making, and in particular, on the basis of the courts' jurisdiction in civil law cases, he concluded that judicial precedents cannot be limited to a function of simple "interpretation" of law since they often develop the general clauses and unclear norms in directions which were not foreseen by a legislator. This opinion was criticized by an overwhelming majority of Polish legal theorists and, in particular, by Professor Wróblewski, who maintains that the separation of law-making from application of law exists in the Polish legal system and moreover that it is one of the prerequisites of legality and rule of law. In one of his recent articles[8] he restated this opinion, claiming that in Polish law there is no precedent rule in the judicial application of law" and the courts have no "law-making power". At the same time, however, he expressed the opinion that in statute-law systems, the role of "precedent jurisdiction" in the making of legal decisions is growing.

The general belief of Wróblewski in the sharp distinction between law-making and the application of law is shared — as I have already mentioned — by the great majority of scholars. It is nevertheless significant how often they appeal to arguments about democracy and legality. This may be incomprehensive for many Common Law theorists, who see judge-made law and the rule of law as perfectly compatible (although some of them, e.g. Professor Ronald Dworkin, have an opposite opinion about it). In Poland where the independence of judges has not always been respected in practice and where the bureaucratic apparatus of the state was often the source of arbitrary decisions putting citizens in a perplexed situation (from both a legal and a practical point of view), the rejection of judge- (or bureaucrat-) made law was often conceived as a theoretical device protecting a citizen against State intrusion. This is expressed in Łustacz's phrase that "a negation of the generality of law may be utilized for legitimation of lawless acts of the State power".[9] This example clearly indicates to what extent theoretical constructions of Polish jurisprudence are determined by political realities and to what extent real political controversies are disguised in apparently academic discussions.

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[7] A. Stelmachowski, "Prawotwórcza rola sadów" (The Law-making role of Courts), (1967) 4-5 *Państowa i Prawo*.

[8] J. Wroblewski, "The Concept and the Function of Precedent in Statute-Law Systems" (1974). 7 *Archivum Iuridicum Cracoviense* 7.

[9] *Supra* n. 5.

One other example of such hidden political thoughts behind a formal academic discussion was a controversy about the notion of *legality* (or rule of law — both these terms are translated in Polish in the same way). Among the controversial issues concerning the concept of "legality" (besides such problems as so called formal vs. substantive legality, guarantees of legality, etc.) was the problem of addressees of the demand of legality: should legality mean a proper application of law by state organs, or both by state organs and citizens? In other words, should we assess the degree of legality in any given country uniquely by the behaviour of its officials or by the behaviour of the state as well as of citizens, social organizations, etc?

The latter view, which may sound strange to an Anglo-Saxon reader, was expressed by a large number of Polish legal theorists (*nota bene*: it seems to be also a prevailing view in Soviet legal theory and in most other socialist countries) including Professor Stanislaw Ehrlich Andrzej Burda (University of Lublin), Adam Łopatka (Polish Academy of Sciences, Warsaw), etc., who pointed out that the legal situation and rights of all legal subjects are influenced not only by State action (although these theorists admit that this factor is a most important one) but also by the behaviour of fellow citizens. In particular, a high degree of criminality can very seriously limit people's rights and liberties in a society. Why limit our attention then in considerations of legality only to the behaviour of State agencies? "Legality is incompatible with mass disrespect for law" — Professor Stanislaw Ehrlich stated in his influential book.[10]

This view was strongly criticized by a number of other legal theorists, including Professor Opalek, Lang, Maria Borucka-Arctowa (The University of Cracow) and recently Professor Józef Nowacki (The University of Katowice) in his interesting and unorthodox small book on legality.[11] He pointed out that this theoretical view in practice is never consistently applied even by its adherents; no one dares to deny the legality of a state where illegal behaviour — however frequent — is immediately and properly punished by state bodies. Secondly such a view would lead to a conclusion that in fact no country deserves to be appraised for its record on legality because no state is free (and none ever will be) from illegal behaviour by its citizens. What is therefore essential to considerations of legality is to see both the legal provisions and legal practice of a state's reactions to citizens' illegal actions and also to see what is the state's practice in other fields as far as conformity to law is concerned. The citizens' obedience to law is of course an important social issue but is relevant to the considerations of "legality" or "rule of law" in a state.

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[10] St. Ehrlich *Wstep do nauki o panstwie i prawie* (*Introduction to the theory of state and law*) (Warsaw, 1971) at 270.

[11] J. Nowacki, *Praworzod nosc* (*Legality*) (Warsaw, 1977).

The hidden political thoughts in this apparently scholastic, terminological discussion are implicit in both positions. Nowacki, criticizing a view that both the state's and citizens' behaviour are relevant to problems of legality argues that such a theoretical construction has negative consequences: it "lessens the loneliness" of State organs in our assessments on legality; it enables the negative record of a state to be presented in a comparatively better light than in the case in reality.[12] These are purely political considerations rooted in bad experience of the uses and misuses of theory for political propaganda. The opposite side also had its discrete political motives: widening the range of subjects whose behaviour is relevant to issues of legality makes it possible to take into account the actions of political parties (and in particular — of hegemonic Communist Parties) which in socialist countries exert much bigger political power than state organs *sensu stricto* and which are therefore responsible for grave abuses of law, particularly in a Stalinist period. From a strictly legal point of view, a party cannot be treated as a State body and the failure to consider its behaviour towards law when we are speaking on legality would lead us to a mistaken picture of legality in socialist countries.

This last example shows to what extent academic writings of Polish legal theorists are permeated by political *"derrierre pensées"* and may be correctly understood only within a very special political and social context, where certain words do not always mean what they might be supposed to mean otherwise. But the general motivation of all these "second thoughts", allusions and remote motivation is convergent and quite significant. After the end of the Stalinist period Polish legal theorists (although never particularly courageous) tried — in the majority — not to use ideological principles which could lead to authoritarian conclusions but rather — within the limits determined by changing political climates — to try a more liberal version of Marxist theory. It was not so clear as in the case of Polish sociologists, but in comparison with other countries, the record of Polish legal theorists in this respect is not too bad.

Coming to the end of my paper, let me stress very clearly once again that it does not pretend to reflect the whole spectrum of achievements and failures of Polish jurisprudence. My view, inevitably personal and subjective, cannot show the whole poverty and richness of this theory: Its poverty — failure to consider some essential but delicate and "dangerous" issues stemming from the very heart of the Marxian concept of law, tendency to formalistic and scholastic discussions, defensive reactions against non-orthodox thinking; and its richness — its undeniable pluralism, effort to continue and enrich the heritage of the jurisprudential tradition, sophistication of linguistic and logical analyses, good quality of empirical research, open attitude to

[12] *Id.* 50.

scholarly developments in the world. My concentration on controversial issues (and only those which seem to be the most interesting or significant) narrowed the scope of my presentation — but its purpose was not to give a comprehensive view of the actual "status" of jurisprudence in Poland.

One final remark: institutionally a theory of law is integrated in Poland (as well as in all the other socialist countries) with a general theory of law; this integration is also very clear in teaching at law faculties. Its reasons are double: firstly, a theoretical dogma as to the very close links between law and state; secondly, the underdevelopment of political science which, in an Anglo-Saxon world, could do the bulk of what a theory of state does in socialist countries (*nota bene*: this is the case also in many other European continental countries, such as France where general theory of State was, until very recently, associated with legal, and not political science faculties). But on the level of research, the division of labour is quite evident in Polish theory: some scholars write almost exclusively on the theory of law; others, only on the theory of the state. There are of course some exceptions, but what is most important, there is a trend to strengthen this "division of labour" and to widen the gap between theory of law and theory of state. It was fostered by establishment of faculties of political science which attracted a certain number of theorists of state previously linked with faculties of law. This is one of the reasons why I could present the situation in jurisprudence totally abstracting from a theory of the state.