

**BETWEEN HISTORY AND SOCIOLOGY – REMARKS ON DIFFERENCES  
IN PERCEIVING “LEGAL CULTURE” AS A SUBJECT OF INTEREST  
BY VARIOUS DISCIPLINES OF JURISPRUDENCE,  
PARTICULARLY SOCIOLOGY OF LAW  
AND THE DISCIPLINES OF THE HISTORY OF LAW**

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**Abstract:** *One of the “pivotal” terms, showing the diversity of phenomena related to the cultural embedding of law is that of legal culture. It is used to describe the diversity of approaches to law as well as of the opinions on how this term is understood, on the role of social order, the practice of law application. The article deals with differences in the research approaches of various jurisprudential disciplines. Among the many topics covered in the article, the authors emphasize in particular the differences between the concept of “legal culture” in the textbooks of the history of law and social sciences, opposing legal history approach by that of legal sociology or philosophy of law. Striking in the attitude to the history of the numerous concepts of legal culture is the treatment of the historical phenomena not as an objective social, economic, or political reality, but as a certain intellectual construct that aims to “complete and justify the concept”. This is a purely instrumental approach: the possible phenomena from the past serve to strengthen and justify the shape of the contemporary reflection. This applies both to approaches that describe the legal culture as a predominantly historical phenomenon and to those that treat historical description as supplemental reasoning. It is also accompanied by far-reaching “presentism” as an attitude in the study of the phenomena from the past. Consequently, this may lead to a situation that extremely synthetic and abstract judgments relating to the past phenomena as the culture and the society can be misleading in the study and description of the legal culture insofar as one may combine events from the distant past with characteristics which they had not or reconstruct facts that probably did not occur.*

**Keywords:** *legal culture, legal sociology, legal philosophy, legal history, jurisprudence methodology*

## I. INTRODUCTION

When discussing the research approaches of various jurisprudential disciplines, the crucial question that needs to be addressed at the very beginning is establishing the fundamental subject of interest of the various disciplines. One attempt at tackling this question is the concept of Jerzy Lande indicating that jurisprudence deals with such diversity of questions that it is impossible to combine them or merge them into a coherent whole<sup>1</sup>. The attempt at surmounting this methodological stalemate consisted in identifying the research layers of jurisprudence (logical-linguistic, sociological, psychological, or axiological layers), which provided the answer within their fields of study.<sup>2</sup> In turn, according to Kazimierz Frieske, this approach provides at most a partial solution to the problem as

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<sup>1</sup> ZIEMBIŃSKI, Z. *Socjologia prawa jako nauk*. Państwowe Wydawnictwo Naukowe, Warsaw – Poznań 1975, after FRIESKE, K. *Socjologia prawa, Iuris*. Warsaw – Poznań 2001, pp. 18–19.

<sup>2</sup> OPAŁEK, K., WRÓBLEWSKI, J. *Zagadnienia teorii prawa*. Warsaw 1969, p. 326.

it pushes further away the answer to the question of what law as the subject of study is. And even further, it exacerbates the fragmentation due to the fact that the law is a different subject as regarded by different research layers.<sup>3</sup> In order to overcome this barrier and perceive law from the broadest possible perspective, and at the same time to regard it as an integral phenomenon, one may formulate opinions that refer to the cultural roots of law, indicating the fact that law is a product of culture on the one hand and a factor of culture on the other. It is part of a larger whole: the general culture of the society<sup>4</sup>. The law cannot exist outside the cultural heritage or next to it. It is one of many normative systems that impose social order and build the collective identification system of the community<sup>5</sup>. Whereas the thesis about the cultural embedding of the law has been generally unquestionable since the nineteenth century, its consequences for the different and hitherto separate legal fields of study have been pointed out (Frieske). The first and fundamental consequence undermines the assumption of the autonomy of law as the subject of study and reflection. At this point, it seems noteworthy that this thesis lays the foundation for a number of specific dogmatic sciences and their methodologies. Additionally, the assumption of the autonomy of lawyers' knowledge of law is questioned. The sophisticated legal-dogmatic reasoning and analyses turn out to be part of broader cultural models whereas their practical application is admissible insofar as it is allowed by the resulting conditions. It appears namely that the process of law creation and application may be described from the perspective of its cultural determinisms and the resulting image is far from the statements of dogmatic sciences.<sup>6</sup>

## II. THE LEGAL CULTURE: PIVOTAL AND AMBIGUOUS TERM

From this perspective, showing the diversity of phenomena related to the cultural embedding of law, the pivotal term is that of **legal culture**. It is used to describe the diversity of approaches to law as well as of the opinions on how this term is understood, on the role of social order, the practice of law application, etc. As it follows, the very term becomes ambiguous and besides a certain common core that is interpreted by various authors and various fields of study in the same way, differences emerge when it comes to details.

Ties and relationships between the approaches of law and legal history are complex. On the one hand, the historical context of the origin of legal culture is strongly emphasized. The stress on the historical context of the legal culture is visible in A. Kojder's approach, in which "the heritage of legal culture is evident not only in tangible monuments of the past, in the social institutions, myths, and collective identity symbols that are inherited from the ancestors, but also in the ingrained legal and moral rules."<sup>7</sup> The emphasis on the historical context of the phenomenon of law is a characteristic feature of the researcher's opinions on the entirety of legal matters. Consequently, his perception of the legal culture as a historical phenomenon is not unique.<sup>8</sup> According to K. Frieske, this no-

<sup>3</sup> FRIESKE, K. *Socjologia prawa, Iuris*. Warsaw – Poznań 2001, p. 19.

<sup>4</sup> According to PETRAŻYCKI, L. *Wstęp do nauki polityki prawa*. Warsaw 1968.

<sup>5</sup> KOJDER, A. *Godność i siła praw*. Warsaw: Oficyna Naukowa, 1995, p. 252.

<sup>6</sup> FRIESKE, K. *Socjologia prawa, Iuris*. Warsaw – Poznań 2001, p. 30.

<sup>7</sup> KOJDER, A. *Godność i siła prawa*. Warsaw 1995, p. 251.

tion of legal culture corresponds with that of Leon Petrażycki.<sup>9</sup> The Petrażycki's concept, and especially the part in which the author distinguishes between intuitive and positive law, is also strongly embedded in the historical context. Defining his approach to law, Petrażycki considered it in a broad historical perspective as a significant factor of civilisation and cultural progress (law as a crucial “engine of the history”).<sup>10</sup> At the same time, interestingly, Petrażycki rejected the major assumptions of legal positivism, especially those that identify law with orders and prohibitions imposed by the state coercion.<sup>11</sup> As a consequence, Petrażycki demanded the return to the division between the study of the existing law and of the desired one, i.e. the search of the ideal of law. As seen by A. Kojder, who referred to the thought of Petrażycki, this “positive” law is equipped with the sanction of state coercion, which is enforced by the authorities and set forth in the historic sources of law – such as statutes and regulations – jointly constituting the agenda of institutionalised state control. Cultural values preserved in such law largely serve pragmatistical purposes of the governing elite and the decision-making centre of the state which shapes them at its own discretion.<sup>12</sup> On the other hand, the intuitive law reflects values assumed by the culture that constitute autonomous phenomena and expresses the societal sense of justice performing the cognitive, orientating, and integrating functions.<sup>13</sup> In this sense, the legal culture is a relationship – a clash of these two visions i.e. the layers of law. How to create the positive law in a rational and correct way, how to apply it, what should be its content? The compliance between both spheres harmonises social relationships whereas their discord destabilises them inasmuch as a positive law which is not in line with the intuitive one leads to a crisis and instead of steering the citizens' actions in the right direction, it brings about the opposite effects that are induced by personal interests. In fact the legal culture consists in the relationship between both systems and the various states it undergoes: from internal coherence and high adaptive capacity of a given political and economic system to divergences that lead to dysfunctional legal culture and to the atrophy of the social order. Such additional circumstances that, along with the very content of the statute, should be considered when interpreting and applying the law (such as: practice, theoretical opinions, or the personality of the judge) fall within the scope of the intuitive law as described by L. Petrażycki. In consequence, this leads to the conclusion that, in spite of the formal omnipotence (reflected by the principle of the unlimited scope of the legislative matter), there are limits to the instrumental treatment of law.<sup>14</sup> At the same time, the whole question – according to Petrażycki and Kojder - is placed in the historical and temporal context that acts as a stage providing background to the processes of shaping a specific legal culture on the one hand and as a source of information on such processes on the other hand.

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<sup>8</sup> Ibid., p. 11.

<sup>9</sup> FRIESKE, K. *Socjologia prawa, Iuris*. Warsaw – Poznań 2001, p. 29.

<sup>10</sup> KOJDER, A. *Godność i siła prawa*. Warsaw 1995, p. 65 ff.

<sup>11</sup> Ibid.

<sup>12</sup> FRIESKE, K. *Socjologia prawa, Iuris*. Warsaw – Poznań 2001, p. 29.

<sup>13</sup> FRIESKE, K. *Socjologia prawa, Iuris*. Warsaw – Poznań 2001, p. 29.

<sup>14</sup> Ibid.

### III. THE LEGAL CULTURE AND SOCIOLOGICAL APPROACH - DIVERSITY AND CLASSICS

Other interpretations of the legal culture attach less importance to the historical context. It may be assumed that this is related to the rejection of the evolutionist paradigm for the benefit of a different approach (e.g. functionalism). L. Friedman formulated the concept that the legal culture consists in ideas, values, and expectations towards the law that are presented in a given community.<sup>15</sup> As a consequence, legal cultures of individual groups, organisations, and of the state may be distinguished. In this sense, further research directions involve legal culture of large groups such as nations, states, or supranational structures on the one hand, and legal culture of smaller groups within a society on the other hand. Following a similar direction to Friedman, J. Kurczewski suggested distinguishing the “popular” legal culture – regarding the society as a whole (the general population) – which is also referred to as the “external” legal culture. At the same time, he distinguishes the legal culture of individual professions – regarding the groups that deal with the law on a daily basis and perform specialised legal tasks. The latter is described as the professional legal culture, internal legal culture, or the “lawyers’ culture”.<sup>16</sup> This understanding does not refer to the history or it merely treats it as a secondary and supplemental reasoning, more so as an *argumentum a historiae*, used in the discussion to support the argument and indicate the “old age” and historical origin of the discussed phenomena and not as their general background and mechanism. This departure from the presentation of legal culture as a historical phenomenon is also related to the critique of the concept of legal culture as an imprecise and ambiguous and therefore a questionable one. This is because it overlaps with a number of similar notions such as: legal tradition, legal idea, etc. Moreover, as the dominant approach regards legal culture as a part of a larger whole – the general culture, to which the legal culture belongs - the problem of the lack of a precise definition of culture as such arises.<sup>17</sup> The occasional demands to cease the use of this term are probably too extreme. However, e.g. Menachem Mautner distinguishes at least twelve approaches - concepts regarding the relationship between the phenomena of law and culture.<sup>18</sup> Interestingly, as the theme of the relationship between law, culture, and historical context recurs in almost all the above concepts (including the approaches set out by Mautner), in my opinion, the historical aspect is present even where it is deliberately and consciously rejected in an attempt at describing the legal culture. Then it represents a kind of a “negative reference point” justifying the criticism of other, usually earlier, concepts.

In his very interesting essay *Three approaches to Law and Culture* Mautner, among the above-mentioned twelve approaches to the relationship between law and culture, distinguishes three that are worth mentioning here briefly. The first one, so to say a classical and historical approach, regards the relationship between law and culture stating that the culture lays the foundation for the law. Culture is the starting point whereas the law, shaped

<sup>15</sup> FRIEDMAN, L. M. *Legal System: A Social Science Perspective*. New York: Russell Sage Foundation, 1975, pp. 1–24.

<sup>16</sup> STĘPIEŃ, M. *Kultura prawna. Leksykon socjologii prawa*. Warsaw 2013, C. H. Beck, p. 121.

<sup>17</sup> *Ibid.*

<sup>18</sup> MAUTNER, M. *Three approaches to Law and Culture*. *Law Review*. 2011, Vol. 96, pp. 841–843.

under its influence, is the result. Law is born within the culture and eventually becomes a law of a nation. Mautner combines this approach with the German historical school and indicates that it was derived from the criticism of the Enlightenment conception of law as a product of a legislative intent of a parliament or authorities as formulated by Friedrich von Savigny. The law is the result of a spontaneous creative process in people's everyday lives. It emerges as the customs, practices, and dominant beliefs are shaped and as such it cannot be imposed by the state legislation. In this approach, lawyers are the “guards of the people”, whose task is not to give form and content to the laws, but rather to perform more technical work of “distilling” the law from customs and practices and organising it into a logical system of terms and institutions, and therefore preparing it for the parliament to adopt such organised law. The parliament should not be the creator of law, but only the “legislator” i.e. its preserver. Von Savigny situated the law “in the realm of social life and culture”. Mautner quotes the well-known comparison of law and language, which is also shaped as a result of a spontaneous and long process.<sup>19</sup> At this point, Mautner indicates that the von Savigny's model of jurisprudence was related to the concept of a nation state that engaged in creating homogenous culture through the unification of local cultures and assimilating the immigrants in the national culture. However, the model of multiculturalism has prevailed in the recent years. Modern states are perceived as multicultural due to the fact that they usually consist of a number of national, religious, or ethnic groups. From this point of view, even if the citizens share a certain cultural basis - the national culture of the particular state – in many cases they still identify themselves with and are loyal to a culture different than their national one: a culture of an ethnic or religious minority. Consequently, this approach assumes a pluralistic concept of law, which implies a differentiated application of the state law and opposes legal monism in terms of the classical “rule of law” typical of the “nation state” era. Moreover, Savigny saw the culture as a pure, homogeneous, and clearly designated phenomenon; whereas the contemporary research on culture shows culture more so as a hybrid derived from multiple sources and, therefore, the law in such a culture will be a mixture of local and borrowed elements, e.g. foreign sources.

While, according to Mautner, the historical school is obviously nothing more than a relic of the distant past, it still contains some extremely contemporary elements of reflection. An understanding of culture that has appeared recently regards it not as a system of meanings, but as a system of certain practices. This combines historical school not only with the modern understanding of culture but also with one of the modern approaches to the relationship of law and culture.

The second approach to the relationships between law and culture as discussed by Mautner emphasises the creation of the state culture by the state law – in a sense, the reversal of the von Savigny's assumptions. Referring to Joseph Kohler, this approach assumes that the role and vocation of humanity is the promotion and development of culture whereas the law is designed to fulfil this vocation. The law is a developing and dynamic medium that enhances development – and it represents a sophisticated elite culture. It balances between the stabilization and conservatism and the openness to novelty. This

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<sup>19</sup> MAUTNER, M. Three approaches to Law and Culture. *Law Review*. 2011, Vol. 96, p. 846.

new approach was revived in the 80s and 90s of the previous century, stressing that the law forms and shapes the social life. Its task is to form and develop adequate approaches and relationships in the social life by the appropriate development of legal institutions. The law should be an active participant of the social life – on the one hand, it is created by the culture and, on the other hand, it is the law that affects the culture in a creative and shaping way. In any case, they remain in a permanent interaction. This shift of approaches is associated with the evolution of the American legal culture. In this sense, until 1920s the so called formalism (similar to the European classical positivism) was dominant, in which organising the law into a hierarchic and logical system was seen as the ideal, whereas the mechanism of decision-making was transformed into a half-automatic, technical and mechanistic process. The concept assumed that all subjective/human elements of the decision-maker will be reduced to the minimum in order not to influence the decisions made (such as personal beliefs, cultural background, etc.). At the same time, the law would be used only in accordance with its internal logic, regardless of the impact the act of its application will have on the society in which it is enforced. Formalism was ultimately criticized and rejected by the proponents of the new approach - the legal realists. At the same time, the personal element was restored to the mechanism of the law operation. The subject of decision in this sense – i.e. of the act of law was not the “legal problem”, but the understanding and explanation of the normative sense of the possible legal solutions to the problem and the consideration of the social consequences of the adopted solution. Regardless of other elements of criticism, the rejection of formalism paved the way to the perception of law as an important element that is part of the culture and shapes the culture at the same time. An element that gives sense to the concepts and creates social relations. The law and its application cannot be separated from social relations. The law does not set a framework and does not form such relationships - it consists in these social relationships and acts as a social relationship.<sup>20</sup>

What deserves a particular attention in Mautner's reflection is the third approach to the relationship between law and culture. In this approach, he considers the law created and applied by the Anglo-Saxon courts as a separate legal culture. Taking reference to the approach of the realists, he shows that even the Anglo-Saxon formalists did not claim that the actual decision-making process in the application of law corresponded to the theoretical structure of the act of applying the law. On the contrary, the multitude of contexts and scenarios provided space for a considerable discretionary power and the actual possibility of choice. Realists demonstrated in practice the great extent to which the human factor, i.e. the personality of the judge and his beliefs, affects a particular decision. Thus, they restored the role of the judge as an independent “human” actor capable of affecting the legal outcome of the case. At the same time, the supporters of realism had to face the greatest problem resulting from their concept of law. This problem was “the devil of subjectivism” – the heaviest accusation against appreciating the autonomous and creative role of the judge in the process of law application. How to avoid the situation in which each judge acted according to his or her own discretion? Karl Llewellyn – the intellectual leader of the advocates of realism – developed a concept of dealing with this problem by

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<sup>20</sup> MAUTNER, M. Three approaches to Law and Culture. *Law Review*. 2011, Vol. 96, p. 846.

recognizing the law applied by the courts as a cultural system. Llewellyn knew the work of Malinowski and other American anthropologists and was familiar with the concept and notion of culture as seen by anthropologists. The problem, however, was that this concept has been essentially defined by anthropologists for the purpose of description of pre-state and not Western primitive societies. Llewellyn could not, therefore, use this term to describe the operation of common-law courts so he only seldom used the term “tradition”, generally referring to the concept of “culture”. Nevertheless, the way in which he perceived the law as the subject of his research was exactly the same when he referred to the creation and application of the law by the courts. The Llewellyn’s concept of legal culture was based on two pillars. The first pillar consisted of the content of the law and the dominant legal ways of thinking. Llewellyn argued that the wording of the law is segregated according to specific categories and, in addition, that certain ways of legal reasoning and argumentation recur. Lawyers in the course of their professional life internalize both the content of law and the dominant manners of reasoning and argumentation. Thus, such content and manners of reasoning not only define the way in which lawyers act but also significantly reduce the available options. Therefore, the lawyers working within the same legal system will act in a similar manner and there will not be too far-reaching differences when dealing with similar issues. The second pillar supporting the concept of Llewellyn consisted in the professional culture of lawyers that Llewellyn described as “craft”, i.e. the set of rules used by the profession: “do this and do not do that”, which are internalized by those performing the profession in the course of their careers. The traditional court procedure and the methods of reasoning used in the legal expert opinions act just like those “craft rules” that govern the conduct of judges in a non-subjective way. Moreover, other individuals that act within the professional culture of judges, examine the opinions of judges on the ongoing basis. The same is done by other judges as well as law professors, students, other lawyers, etc. Readers - recipients of judicial opinions react in a positive way to the opinions that observe the norms and rules dominant among the lawyers and in the negative way to those that diverge from the commonly accepted rules. This process of reading and responding to the opinions certainly serves maintaining the standard of the professional legal culture. Llewellyn solved the problem of subjectivity and views of judicial reasoning but did not solve the problem of lack of uniformity of judicial decisions - adjudications. However, the lack of uniformity is - according to Mautner - inevitable in any case. The culture is created by individuals, and that always means a range of options. Another American thinker, James Boyd White, also defined the law applied by the courts as a specific cultural system. In this approach, judging/adjudication is a process of a certain discourse that allows to clarify and explain the various normative options (whereas the opponent presents his or her own options). In this sense, the courts apply a “creative rhetoric” understood as a process of discourse, in which all arguments are presented and considered in the cultural context, and hence, the dispute leads to an acceptable solution. Such a procedure of reaching a legal decision is a collective process of building the community. However, the normative context of this type of decision requires a special discourse.

Finally, the most sociological model of the relationship between the law and culture is the approach of Pierre Bourdieu. It is based on three key terms - concepts: *Habitus*, *Capital*, and *Field*. The *Habitus* is a set of categories by which the individual perceives his or her situation in the context of everyday life. It is a structure of the mind on the one hand,

and the set of habits, expectations, and inclinations related to the individual on the other. It has its subjective and objective contexts and it is regarded as reliable and stable. Acting within the Habitus is characterized by simple reactivity and low reflectivity. The second category is the Capital. In this concept, as in the economical sciences, the individuals possess a variety of resources, which they must seek on the one hand and which are useful for achieving their objectives, e.g. power, position, etc., on the other hand. Therefore, they possess a certain capital: economic (such as cash, etc.), cultural (knowledge, skills), social (prestige, reputation, connections), symbolic (social recognition, respect due to the possession of other forms of capital). These forms of capital are interchangeable and transferable (e.g. the economic capital may be converted into the cultural and social one, and subsequently the cultural capital again to the economic one). The third category is the Field, i.e. the context within which the individual undertakes the activity. The aim is to gather social or other capital and “to achieve success in a specific field”. This is the Habitus that defines the Fields in which the individual acts and the measures it considers worth applying. The nature of the Field is stable but hierarchical and when acting the individual must engage in two types of conflicts: external one to keep the Field and prevent its capture, and internal one to collect and distribute the Capital available in the Field.<sup>21</sup>

Analyzing legal culture as understood by Bourdieu, Mautner shows that it works in a specific Field – the Legal Field. Essentially, lawyers share the same legal Habitus - it also distinguishes them from non-lawyers. That Habitus determines their forms and preferences of activity. Their conflicts include both the conflicts between lawyers representing clients, and in this way gathering the Capital, but also arguments between judges and law professors about different opinions and approaches. The concept of Bourdieu is interesting insofar as it was developed within the European legal system. Nevertheless, it is a concept of the legal culture treated as an integral part of the Pierre Bourdieu's concept of culture – it is in fact not an autonomous approach but more so a mutation of the general system with respect to the Legal Field.<sup>22</sup>

What is particularly striking in the attitude to the history of the numerous concepts of legal culture? It is the treatment of the historical phenomena not as an objective social, economic, or political reality, but as a certain intellectual construct that aims to “complete and justify the concept”. This is a purely instrumental approach: the possible phenomena from the past serve to strengthen and justify the shape of the contemporary reflection. Obviously, it has nothing to do with any incorrect establishing of facts from the past, but it is about such matching of contexts and descriptions of the past that will provide an *a priori* documentation of the given thesis. Interestingly, this applies both to approaches that describe the legal culture as a predominantly historical phenomenon and to those that treat historical description as supplemental reasoning. This is also accompanied by far-reaching “presentism” as an attitude in the study of the phenomena from the past. Obviously, what is meant by far-reaching presentism is not of the magnitude that might be seen as a methodological error by historical sciences, but more so a careful search for the past equivalents of the contemporary social phenomena. It is difficult to think of describ-

<sup>21</sup> MAUTNER, M. Three approaches to Law and Culture. *Law Review*. 2011, Vol. 96, p. 860.

<sup>22</sup> *Ibid.*, p. 866.



ing the phenomena from the past without the use of modern conceptual apparatus. It is obvious that there must be a descriptive language understandable to the recipient. However, extremely synthetic and abstract judgments relating to the past phenomena similar to culture - especially as the concept itself is extremely vague and ambiguous as it has been mentioned - can be misleading in the study and description of the legal culture insofar as one may combine events from the distant past with characteristics which they did not show or reconstruct facts that probably did not occur.

In view of the above considerations, the concept of legal culture from the perspective of legal and historical sciences should also be examined, in particular in the context of the approach to the Polish legal culture against the discussed background.

#### IV. THE LEGAL CULTURE AND THE HISTORY OF LAW – THE POLISH CASE

The first surprise could be the observation that, despite the enormous attention and emphasize on the importance of the German historical school in almost all textbooks on the history of law<sup>23</sup>, none of them follows the reflection of the historical school. Analyzing and specifying the subject as well as the research scope of the history of law, in particular the history of Polish law presented in the most recent textbooks, it is emphasized that the history of law exceeds the purely normative level including its role in the history of culture<sup>24</sup>; nevertheless, a broader reflection on the culture of law as an independent and separate research subject of the historical sciences is missing. The literature raises the matters related to the transformation of law and its understanding. The issues concerning the social system as a base for the development of the state forms and the formation of law, and as a reference for the various legal institutions e.g. the principles of the marriage law are also described extensively, particularly by the books on the history of Polish state and law. Among the discussed topics are also those dealing with jurisprudence and legal professions; however, without any indication of the context of legal culture, which might be thus formed. Only the latest textbook by W. Uruszczak includes a separate chapter devoted to the culture of the law of the old Polish era.<sup>25</sup> It describes the characteristics of the historic Polish legal culture; yet, without an attempt at defining the very concept.

Moreover, in most textbooks on the history of law, the narrative essentially focuses not on different aspects of law and legal culture, but in a way naturally discusses mostly the formal acts – the historic sources of law (codified or later statutory). The only exception is the history of political and legal doctrines, which, however, results from the characteristics of the subject. Presenting the structure of courts and social system serves merely as an introduction to describing the law and its evolution, principally by showing the transformation of legal and political institutions; however, on the basis of the preserved historic sources of law – the formal legal acts. Remarks that could be applied to legal culture, such as attitudes toward the law, the wording and manner of reconstructing the content of the

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<sup>23</sup> SÓJKA-ZIELIŃSKA, K. *Historia prawa*. Warsaw 1998, p. 249; PŁAZA, S. *Historia prawa w Polsce na tle porównawczym*. Krakow 2002, p. 44; OLSZEWSKI, H., ZMIERCZAK, M. *Historia doktryn politycznych i prawnych*. Poznań 1994, pp. 208–212.

<sup>24</sup> URUSZCZAK, W. *Historia państwa i prawa polskiego*. Warsaw 2010.

<sup>25</sup> URUSZCZAK, W. *Historia państwa i prawa polskiego*. Warsaw 2010, pp. 185–186.

preserved historic sources, are clearly of secondary importance. It is difficult to object against it – it results from the adopted and accepted methodological model of the historical and legal sciences. It should be noted, however, that this model is a kind of “historical positivism” – the observation of legal phenomena primarily from the same perspective as the nineteenth-century doctrine of positivism and legal formalism did: the history of law regarded primarily as the law contained in the books whereas the law contained in the books perceived as the most important source of law and jurisprudence. Certainly, this is an excellent model with regard to the period from the mid 1800s, when the assumptions of positivism and the great codifications actually tried to reduce the law in Europe, including Poland, to the formal acts of positive law. A different research approach that considers the legal culture as a separate subject of study and focuses on other aspects, e.g. the attitudes towards the law in the historic Republic of Poland is, however, present. For the sake of fairness, it should be noted that there were attempts before the war at tackling these problems within the scope of the history of law, see S. Estreicher.<sup>26</sup> Also, after the war, some scholars such as A. Vetulani<sup>27</sup>, M. Sobolewski<sup>28</sup>, S. Grodziski<sup>29</sup>, or H. Olszewski were interested in the issue. More attention was paid to the political culture of the former nobility and the topic – very much related due to the form of the system – in a sense prevailed over the issues of legal culture.

The most recent work that extensively discusses the historic legal culture is the book by S. Grodziski.<sup>30</sup> The extensive introduction includes discussion on the phenomenon of legal culture and the term in itself. However, no attempt is made at coining a separate notion of legal culture within the research field of the legal history branches. The author uses the generally known definitions of K. Pałeczki<sup>31</sup> and A. Podgórecki<sup>32</sup>. The paper, excellent in itself, aims at describing the evolution of legal culture on the former Polish territory and presenting its specific features such as the class character and the civic nature of the legal culture of the nobility. In the Polish legal literature, including in particular both the mere jurisprudence and, more broadly, social sciences as well as the history of law, the terms legal culture and lawyers’ culture were used interchangeably until recently (as S. Estreicher and A. Vetulani did). The more recent generation of historians of law has predominantly supported the position that the lawyers’ culture constitutes a part of the legal culture in a broader sense.<sup>33</sup> Lawyers’ culture in this approach is a characteristic feature of the professional environment of lawyers as a professional group and concerns the manner in which judges, prosecutors, and attorneys-at-law perform their functions. In contrast, legal culture is defined as individual and collective attitudes towards the law that are present in the society – i.e. the broad understanding of law: as a source of normative regulation, the content of the specific legal norms delimiting the extent of freedom and prohibition,

<sup>26</sup> ESTREICHER, S. *Kultura prawnicza w Polsce XVI. Kultura staropolska*. 1932.

<sup>27</sup> VETULANI, A. *Z badań nad kulturą prawniczą w Polsce piastowskiej*. Wrocław-Warsaw-Kraków-Gdańsk 1976.

<sup>28</sup> SOBOLEWSKI, M. *Polska kultura polityczna i prawna w dawnych wiekach. CPH*. 1983, Vol. XXXV, No. 2.

<sup>29</sup> GRODZISKI, S. *Z badań nad kulturą prawną Galicji. Historyka*. 1979, Vol. IX, p. 127 ff.

<sup>30</sup> GRODZISKI, S. *Z dziejów staropolskiej kultury prawnej*. Kraków: Universitas, 2004.

<sup>31</sup> PAŁECKI, K. *O pojęciu kultury prawne. Państwo i Prawo*. 1974, No. 2, pp. 73–74.

<sup>32</sup> PODGÓRECKI, A. *Prestiż prawa*. Warszawa 1966, pp. 179–180.

<sup>33</sup> GRODZISKI, S. *Z dziejów staropolskiej kultury prawnej*. Kraków: Universitas, 2004, p. 10.

but also attitudes towards the state justice system and its institutions or, in broader terms, the state apparatus that is based on the law. Similar definitions describe the legal culture as “the entirety of symbolic legal actions of a community at a specific time” or “the entirety of practices and values related to acceptance, evaluation, criticism, and implementation of the legal system in force”.<sup>34</sup> Studying legal culture in this sense is important for many areas of cognitive research – and for the history of law in particular. It is emphasised that this is interdisciplinary research in its nature, which allows the selection of different research methods, as well as taking a broader and comparative perspective. From the perspective of legal historical sciences, the research on legal culture carried out in the framework of the sociology of law allows presenting the process of acceptance of norms in a variety of environments and the arising of legal awareness. It provides the opportunity of studying the evolution of broader opinions related to legal institutions, and the development of social assessment processes, which influences the interactions within the society and the approach to the external environment, resulting in the formation of attitudes (including the ones such as: xenophobia, fanaticism, fundamentalism, intolerance, etc.). In contrast, studies of legal culture conducted from the perspective of the history of law – without formulating their own definitions, but using the methodology of the legal historical sciences – provide means to show the social perception of law in different eras, determine the conditions that favor the development of the legal system and its specific features in the past and the phenomena and factors that proved unfavourable to the development of the legal order. Regarding the legal culture from a historical perspective, in particular, allows the identification of three specific areas: the culture of shaping the law, the culture of applying the law, and the culture of observing the law.

From the perspective of the history of law, the culture of shaping the law includes an extremely wide range of phenomena from philosophy, through the political conditions of the state and social system, to religion and moral beliefs dominant in a given society. The compliance of the legislator’s actions – intentional and conscious or intuitive – with the beliefs accepted by the society in the above areas affected the durability and assessment of the legislator’s actions. It applies in particular to the assessment that was established as a role model by the historical sources. Legal historical studies show even a myth-making power of the social transfer of knowledge about the historic law (and thus the ideals and founding myths of the “legal culture” in individual countries emerged, such as: e.g. the Roman law with regard to many countries of the Western Europe, and the statutes of Casimir the Great in relation to the law of the old Republic of Poland or, more broadly, to the Polish legal culture). In a sense, the general “law of the old Poland” was at times presented in relation to the nineteenth-century social awareness on the former Polish territory or, more broadly, in the literary and historiographical sources of the Polish culture, almost as an image of the lost paradise, which, as it might be guessed, was far from reality. This myth-making role of the culture of law, especially in the context of its creation, is interesting in that the legal historical research does not confirm that the sources of the historic legislation, both Polish and other, demonstrated the extraordinary qualities that are attached to them in the common belief. For instance, the Roman law is such a multifaceted

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<sup>34</sup> PODGÓRECKI, A. *Prestizj prawa*. Warszawa 1966, pp. 179–180.

phenomenon – shaped as a system of law in the historic Roman Empire for nearly 1000 years and then for the next 1500 years during the so-called reception of the Roman law in many Western European countries - that it may provide justification to different and even contradictory statements and concepts. Similarly the Statutes of Casimir the Great are an excellent, yet typical of the fourteenth century, attempt at codifying the common law in the Central Europe – which at the same time is not free from flaws and imperfections. A similar conclusion may be drawn with regard to the entire “old-Polish law”. But it is not about the reality and the conformity with the facts, but about the myth of the “legislative perfection” preserved in the legal culture of a given community, which is also the “founding myth” of the legal system and culture. Among other characteristic elements of the culture of law formation - significantly different from the contemporary one – it is worth indicating a different attitude to the mechanism of law formation and to the sources of law that changed with time and societal transformations. Principally, until the eighteenth century, the monarch’s power and its scope of competence was not considered in terms of separation of powers, in particular as set out by Montesquieu, whose concept of separation of powers changed the modern understanding of legislation and the rules of law-making quite thoroughly. Even if one accepts the implicit legislative competence of the crowned and sovereign monarch who acts autonomously or along with subjects representing certain social classes, this did not mean the acceptance of legislative interference in every aspect of the law. Where regulation referred to religious principles or where the “old custom of the ancestors” ruled, the admissibility of interference through legislation was extremely strictly limited and for a long period reduced to “codifying the eternal custom” (transition from the “pure” and non-codified common law to the codified common law) or to removing the contradictions in the existing common law or completing it. Also for a considerably long period, i.e. at least until the fifteenth century, in the event of a conflict between a rule contained in the codified law and practice of a given community, the priority of the law application was given to the non-codified yet *de facto* observed custom over its codified version. Moreover, the lack of clear separation of the legislative competence of various bodies from their other tasks meant that the legislation was extremely dispersed between various entities.<sup>35</sup> Since the competence to legislate constituted only a part of the general jurisdiction of an authority or body, the king or subsequently the parliament tended to be the lawmaker mainly in the field of land law that applied primarily to the distinguished class and political nation i.e. the nobility. At the same time, the municipal authority or, at times, the chief-owner of the city acted as the legislator for the townspeople and towns, while for the subjects of the noble, royal, or church estates, the legislator was often the owner-master of the village. Thus, the myth of the “Great Codifications” so strongly present e.g. in the current European legal culture is nothing new or extraordinary.

The culture of law application, if separated as it is done nowadays, included another fundamentally different realm. It began in determining the position of the law-maker and the attitude to law of the very legislator. A particular characteristic of the old-Polish legal culture, which was shared by few European countries until the eighteenth and nineteenth

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<sup>35</sup> URUSZCZAK, W. *Historia państwa i prawa polskiego*. Warsaw 2010, pp. 156–182.

centuries, should be noted here - namely, the principle “*lex est in Polonia rex*” recognised from the sixteenth century, which applied even to the monarch - the legislator, and which meant that all entities, even the monarch himself, are bound by the properly established law. A vast majority of European countries with the absolute-state system referred to a different principle: “*princeps legibus solutus*”, which allowed the monarch to legislate but put himself above the law.<sup>36</sup> Therefore, he was not bound by the law that he himself created – as a consequence, he could change and modify it - but he could also suspend its power with respect to certain individuals based on individual grace and privilege. Moreover, one of the most interesting research issues relating to a specific law is that of the culture of law application, primarily due to the dominance of the common law, often non-codified or codified only to a small extent, until the eighteenth century combined with a rather limited range of statutory law that was created by the legislator and the high level of illiteracy, which resulted in the fact that the everyday culture was one of the spoken and not of the written word. Although the constitution of the law by the legislator was known as a mechanism of law creation in Poland since the late Middle Ages, as it has been mentioned, and since then the written sources of law were used, the general codification of law and the belief that only statutory law is the law became common only in the nineteenth century. Thus, the modern “model of law application” related to the legal positivism and based on the interpretation i.e. exegesis of the content of a normative act may not be applied to a more remote past than the mid nineteenth century.

The culture of law observation understood as the respect towards legal norms and the relationship between legal norms with other systems of social life regulation is a field of research with the broadest perspective and at the same time one practiced not only by historians of law, but, in a broader sense, by the general historiography. While the creation or application of the law can often be considered a field of research particularly predestined for historians of law, it is difficult to imagine a historian interested in the political history or in social or economic life that would not refer to the sphere of law governing the discussed issue and to its perception. It is worth noting that the modern research conducted by historians - based on the analysis of less frequently used sources and taking into account other perspectives or research comparisons than the traditional historiography - refuted or verified many traditional myths preserved in the image of the old law or system. One of such contested myths is the perception of the law of the historic Polish Republic as an inefficient mechanism and one poorly fit to govern a modern state - especially with regard to the old-Polish parliamentary and self-government tradition allegedly dominated by an inefficient *Sejm*, paralyzed by *liberum veto* and the lack of efficient royal power or administration, which was apparently leading to a political disaster. It is emphasized that even if the image may be accepted, it is true only with respect to the late eighteenth century. Instead, forgetting that it had been an effective and efficient governance model for the precedent three hundred years distorts its correct perception. As a result, this image predominantly reflects the frustration of the nineteenth-century social elites of the former Polish territory that was preserved in the traditional historiography and culture rather than a fair description of the past phenomena. Similarly, the more recent re-

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<sup>36</sup> SÓJKA-ZIELIŃSKA, K. *Historia prawa*. Warsaw 1998, p. 67.

search on the judicial law undermine the vision of the former Polish Republic as a lawless country with ineffective justice system due to lack of strong central government and lack of respect for the legal norms.<sup>37</sup> The characteristics that may be examined through historical sources of the old Polish legal culture include the specific features of certain elements of its origin. The first one is the clash of the local traditions with the Christian culture coming from the South and West that radiated to the North and East. This led to the development of an original form, which from the outset was different from most Western European countries, yet similar to other Central European ones. In its further development, its specific features arise that result from the functioning on the cultural and civilization frontier. In the first place, it was the border between the Latin – Catholic and Byzantine – Orthodox cultures, and further the exposure to the Islamic culture or paganism which maintained a strong position for a long time in this part of Europe. A third, extremely peculiar, factor was related to the two discussed above. The feudal system, very characteristic of the legal and social Western European model, reached the Polish territory considerably late and had a weak impact on the social structure. Apart from the present western Polish lands (i.e. generally speaking, Silesia and Pomerania), which since the thirteenth and fourteenth centuries belonged in various forms to the political framework of the Holy Empire and not to the Kingdom of Poland, the reception of the feudal law institutions was limited. For instance, the possession of the land by the nobility – the knights, that was absolutely essential for the social system was not based on the feudal system, but on the free (“allodial”) ownership and direct dependence on the monarch. Similarly, the expansion of the monarchs’ sovereignty to the east from the source area in which the state and legal system was formed, and towards the communities representing a different cultural and civilization environment inevitably led to an encounter with different models and to assuming many of them. The intertwining of these factors granted specific and distinctive features to the old-Polish legal culture already since the Middle Ages.<sup>38</sup>

One of the specific features that was revealed during the further development of the old-Polish legal culture was the process of making the class social system an exclusive one, in which the old-Polish legal culture gradually “became” a closed class culture restricted to merely one social class, i.e. the nobility. Solely this class, formed in the system of land law, retained a national and civil character. Paradoxically, the land law, which gradually became an exclusive class law of the nobility i.e., in the most optimistic scenario, it applied to 8-10% of the country population, was also a system in which the political and social system of the country was born. Legal culture of other classes lost its national and social status, becoming an increasingly local (“parish”) culture without nationwide aspirations and impact. Its servility and specific passive attitude towards the orders received from the authorities who had the exclusive right to represent the public interests was combined with sabotaging of some of these orders that were perceived as detrimental to the fundamental interests and moral laws. The old Polish system of social classes manifested also other characteristic features compared to the Western European model. In addition to the

<sup>37</sup> GRODZISKI, S. *Z dziejów staropolskiej kultury prawnej*. Kraków: Universitas, 2004, p. 141 ff.; URUSZCZAK, W. *Historia państwa i prawa polskiego*. Warsaw 2010, p. 211 ff.

<sup>38</sup> BARDACH, J., LEŚNODORSKI, B., PIETRZAK, M. *Historia ustroju i prawa polskiego*. Warsaw: PWN, 1999, pp. 137–143, pp. 256–259; SZCZANIECKI, M. *Powszechna historia państwa i prawa*. Warsaw: PWN, 1997, pp. 75–84.

strict emphasis on the distinct character of the nobility and building increasingly stronger formal barriers and the overriding principle of equality (*de facto* fictional for the most part), great importance was attached to the separate class identity of the townspeople and rural population. At the same time, participation in a specific “law” (legal system) and related privileges became the criterion of the class identity. Another interesting feature affecting the exclusiveness of the legal culture was the different origin and sources of each of these sub-systems: the land law was seen as the “original” one that was derived from the local common law. At the same time, the municipal law, although applied in the towns subject to the Polish king for centuries, was seen as foreign in terms of its origin (the Magdeburg or “German” law) as it was initially brought and applied as a charter by the settlers and immigrants of foreign origin. In many ways, the rural law was perceived similarly even though it was applied by the vast majority of the population. An extreme consequence of this approach was the virtual reduction of the old-Polish law and its history by the nineteenth-century history of law and historiography in general to the mere land law. The municipal law was long regarded as inferior and secondary due to its alleged “foreign” nature associated with its origin. At the same time, the study of the rural law and legal culture related to this part of the legal system encountered difficulties among others due to the state of the preserved sources as well as difficulties in presenting the old-Polish history as one referring to the state and social history represented by the nobility. This approach has been changing very slowly as the most recent research directions develop that take into consideration social classes other than the nobility.<sup>39</sup>

The fall of political independence is undoubtedly one of the crucial factors that influenced the history of the Polish legal culture. The historic Polish legal culture with its advantages and disadvantages was shaped within the state and legal system of the former Republic of Poland. The historic legal system of Poland was related to the state in which it was created and formed. Usually, the end of a state sooner or later means the end of the legal system connected with this state. Paradoxically, in many territories, the historic Polish legal system survived longer than the political existence of the former Republic. In the territories captured by Russia, the historic Polish legal system survived until the codification reforms of 1830–1840. The process of replacing the old law with new legislation in the remaining territories of the former Republic occurred faster – until the first decade of the nineteenth century. In case of the Polish legal culture, this was a dual process. On the one hand, it meant the replacement of the old-Polish legal system with a new one – in simple terms, Austrian, Prussian, or Russian as well as French respectively. On the other hand, it consisted in the replacement of the old-Polish legal system – which was not only conservative but also to a large extent based on common law whereas its codifications and statutes were archaic as well: for the most part they were edited in the sixteenth century (Lithuanian Statutes, Prussian Correction, etc.) – with a system reminding modern models of the contemporary systems of law, i.e. those based solely on the statutory law with codifications drafted according to the principles of the modern legislative technique. The Polish legal culture survived. With few exceptions, most historic sources of law and codifications were published in Polish, compliant to the requirements of the nineteenth-century

<sup>39</sup> PEKSA, W. Polska kultura prawna. *Leksykon socjologii prawa*. Warsaw: C. H. Beck, 2013, p. 201 ff.

legislation. In addition, for the most part of the nineteenth century, justice administration institutions were operating with Polish as the official language (e.g. in the Congress Kingdom of Poland, the Free City of Krakow, and the Kingdom of Galicia and Lodomeria, i.e. the Cisleithanian part of the Austro-Hungarian Monarchy that enjoyed a considerable autonomy). Legal education in Polish was functioning as well. Moreover, the Polish legal language and legal literature in the national language as well as customs developed - phenomena of importance to the legal culture. A very distinctive and unusual feature of this nineteenth-century Polish legal culture was a kind of “domestication” and assumption of the French civil legislation of the Napoleonic period. After the loss of autonomy and relative independence of the Kingdom of Poland, the French law, adopted in the Duchy of Warsaw, translated and applied in Polish, in a symbolic way expressed the distinctness of the Polish lands from the rest of the Russian Empire until 1918. In addition, according to the contemporary jurisprudence, it represented a higher level than the Russian codification attempts in the nineteenth century. Therefore, efforts were taken to maintain it in force also as a monument of the Napoleonic era, a peculiar cause of pride, and a way to maintain the connection with the French legal culture. Great codifications implemented on the Polish territory in the nineteenth century and further legislation constituted also an important vehicle of social change with regard to the law - such as introducing the principle of formal equality before the law, general codification, the subsequent constitutional system of government, legalism of the operation of public authorities, the modern judiciary, etc. As a consequence, at the outset of independence in the early 1900s, the system was regarded as the Poland’s own and binding legislation that laid the foundations for the Polish legal culture. Another breakthrough, i.e. the creation of an independent state, was undoubtedly important and it contributed to the reconstruction of a fully separate and distinct Polish legal culture in the new, reborn Republic of Poland. But it was not a revolutionary change. On the one hand, the Polish legal culture was restored as a legal culture associated with the state and Polish national legal system while remaining a fully European legal culture. It resulted both from maintaining thriving relationships with the Western European countries and the knowledge of the changes that occurred in their legal systems, and, primarily, from the codification that remained unfinished until 1939 as well as the unification of the legal system. The work of the Codification Committee appointed by the state authorities disseminated the achievements of the European legal culture while implementing many of its elements in Poland. On the other hand, the legal order in force on the Polish lands until 1946 was based on the legislation constituting the major historic sources of the European law. The importance and impact on the European legal culture of the Napoleonic Civil Code (Code Civil), BGB (Buergerliche Gesetzbuch), or ABGB (Allgemeine Buergerliche Gesetzbuch), in force until 1946 in Poland, was not limited to the countries in which they were issued. The work on the unification and full codification of law for the Polish state in its new borders is attributable already to the period after 1945. This date also launches a new chapter in the history of the Polish legal culture. This chapter remains open. Even though the change of 1989 brought about a new quality, the premise of continuation and continuity of the legal system of the era preceding the turn was assumed.



## V. CONCLUSION

The concept of a division within the legal sciences (or jurisprudence) was established in the very traditional way – and it may be a subject of a criticism<sup>40</sup>. The legal history approach to the description of the chronology of the transformation of legal systems, legal institutions, laws, legal traditions and so on, is a descriptive presentation of how the legal phenomena was changing over time. The legal history is focused on the explaining of the origin and effect of single events and wider processes, as well as on the development and transformation of legal institutions and social order. We argue that sociology of law is blind without legal history, on one hand, and the legal history investigations are simply useless without a socio-legal research, on the other hand. It is known that our organization of social order is - at least to some extent - the consequence of our systematic knowledge about human behavior. It is subsequently describe on the basis of a number of types of knowledge including historical research. All people live in social order, but the shape and structure of that order is a consequence of what we know about them.<sup>41</sup> The knowledge of the functioning of a man in his social environment only in the present time is inadequate. There is a need to take into account what has already happened, and how it has evolved through the centuries. Sociologist are disappointed that not only more or less amorphous vision of social reform, but also systematically collected data are ignored - like the experience of Plato, who - as a philosopher and a political schemer - was twice expelled from Syracuse. Widely propagated “platitudes” are used only to legitimize the political decisions - they are not rooted in systematic knowledge gathered by sociologists. The legal historians, in turn, often make the mistake of purely formal approach to the historical sources, without considering the constantly changing social context. And without taking on account the differences in the social order changing throughout the ages - in particular without consideration how the attitude towards the legal system and social order has been change in modern society in the last two centuries. As the result, similar concepts - the concept of “legal culture” is a good example - are used in different contexts of meaning in different disciplines of the legal science.

Moreover a knowledge accumulated by different disciples of the legal science and jurisprudence - as the sociology of law as the legal history - could be a useful instrument of government policy. For example this knowledge gives legislator (lawmaker) the instruments of a proper preparation of legislation. However, it is necessary to take into account a variety of contexts and circumstances - including those associated with the field of interest of different disciplines of the legal science.

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<sup>40</sup> In the same way PODGÓRECKI, A. *Sociology of law*, PW “Wiedza Powszechna”, Warszawa 1962, p. 190.

<sup>41</sup> In the same way FRIESKE, K. *Nauki społeczne w służbie spraw publicznych – polskie tradycje (Social science in the service of public affairs – Polish traditions)*, p. 10. Online 22. 08. 2016 [2016-08-22] Available at: <https://www.parp.gov.pl/files/74/81/194/4981.pdf>.