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## Connections of biojurisprudence with other currents of jurisprudence

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ROMAN TOKARCZYK

## Connections of biojurisprudence with other currents of jurisprudence

*Związki jurysprudencji z innymi nurtami jurysprudencji*

### DIVERSIFICATION OF JURISPRUDENCE

**A**mong many scholarly disputes, there is also a dispute going on about the name that includes both the theoretical and practical aspects of law. Four main names compete with one another: ‘philosophy of law’, ‘theory of law’, ‘science/studies of law’, and ‘jurisprudence’. The first two terms are clearly confined to denoting that which is theoretical in law. The other two, on the other hand, have greater ambitions: they aspire to embrace the whole of problems related to law. The Polish term ‘*prawoznawstwo*’ (science/studies of law, expertness in law) is found only in Polish, therefore its importance is rather limited in the more and more necessary international communication between lawyers. For these most important reasons, the most suitable remaining term to denote the theoretical and practical contents of law will be ‘jurisprudence’.<sup>1</sup>

The term ‘jurisprudence’ with its international reach derives from Latin *ius, iuris* – law and *prudens, prudentia* – wisdom. Established in the culture of common law, the name refers to two main trends of jurisprudence – analytical (analytical jurisprudence) and normative (normative jurisprudence). The analytical trend mainly examines the ontology of law or the answer to the question what law is, while the normative trend is concerned first of all with the axiology of law, i.e. the question and answers about what good, just and equitable law should be like. Jurisprudence takes into account all aspects of law: historical (historical jurisprudence), sociological (sociological jurisprudence), economic (economic jurisprudence), and critical (critical jurisprudence). Jurisprudence as a whole, i.e. embrac-

<sup>1</sup> See R. Tokarczyk, *Filozofia prawa*, 10th ed., Warsaw 2009, p. 38.

ing all law cultures, develops especially owing to disputes over the values of law, held first of all between proponents of jurisprudence of the natural law on the one hand and the jurisprudence of legal positivism on the other.<sup>2</sup>

The term 'jurisprudence' in the contexts of discussions of life as the prevalent and prenorm is, however, less appropriate than the term 'biojurisprudence'. While the former has already been firmly established in legal thought and practice, the latter is only on the way to become so, not without considerable difficulties. Therefore, while discussing the relations between various trends of legal thought and the category of life, we still cannot avoid the term 'jurisprudence', but we should already use the better term 'biojurisprudence'.<sup>3</sup> The meaning of the internally diversified whole of jurisprudence obviously depends on the meaning of its individual constituents: views, conceptions, ideologies, doctrines, schools, and trends. All jurisprudence is usually divided into three classical groups: the natural law, legal positivism, and legal realism, and the most recent group, not yet classical. We shall not characterize these groups in detail here, we shall only remind their essence and attitude to the category of life so that we can define their relations with biojurisprudence.

Both jurisprudence and biojurisprudence have their own ontologies, epistemologies, axiologies, and methodologies. Let us first remind their philosophical essence in jurisprudence so that it can be connected with the essence of biojurisprudence.

Ontology, as a department of philosophy, here of jurisprudence, also called the science of being, or metaphysics in Catholicism, investigates the essence of existence of specific manifestations of reality, in our case – law.<sup>4</sup> Scholars who regard the existence of law as self-evident omit its ontology, unlike scholars who first explain what they believe law is. Proponents of jurisprudence as the natural law reduce the ontological aspect of law to a specific understanding of nature; those espousing legal positivism – to the manifestation of law-making power; those supporting legal realism – to social facts in its sociological trend or to mental experiences in its psychological trend. These trends in jurisprudence that reduce the ontology of law to one definite feature of the existence of being are opposed by jurisprudence's pluralist trends. In the light of the pluralist ontologies of law,

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<sup>2</sup> In the 20<sup>th</sup> century the greatest role was played by the dispute between H. L. A. Hart, the English representative of legal positivism, and L. L. Fuller, the American advocate of the natural law. Hart accepted the 'minimum of the natural law', while Fuller became even more strengthened in his natural law position. See *inter alia*. R. Tokarczyk, *Prawa wierne naturze. Krytyka doktryny Lona Louvois Fullera*, Lublin 1980, p. 130.

<sup>3</sup> For more on this subject, see R. A. Tokarczyk, *Biojurisprudence. Foundations of Law for the Twenty-First Century*, Lublin 2008.

<sup>4</sup> See e.g. W. Stróżewski, *Ontologia*, Cracow 2004; J. Wróblewski, *Problem ontologicznej złożoności prawa*, [in:] K. Opalek, J. Wróblewski, *Prawo. Metodologia. Filozofia. Teoria prawa*, Warsaw 1991.

investigated on many levels and/or in different aspects, the goal at hand is to offer comprehensive and at the same time integral, integrative, and comprehensive explanations of the manifestations of its (law's) existence.<sup>5</sup> These manifestations always have the existential, subject-based, subjective aspect called *ius* and the objective, object-based aspect termed *lex*.

Epistemology, as a department of philosophy useful for jurisprudence, also called gnoseology, or the theory of cognition, is concerned with cognitive processes and results. Cognitive processes are based on perceiving, recalling, evaluating, judging, reasoning and inferring. Their result is knowledge of a philosophical character, which is not verifiable, and of a scientific nature dependent on verification.<sup>6</sup> The analogon of truth in jurisprudence is the bindingness or unbindingness of law. However, the truth of the logical value of norms is the object of dispute between cognitivists, who see it (the truth) there, and non-cognitivists, who do not.<sup>7</sup> In the processes of the application of law it is necessary to refer to values outside law – especially such as justice and equity, and its internal values, mainly such as legality and correctness, which taken together settle its truth. Truth in jurisprudence also frequently derives from legal fictions and presumptions within the limits of admissibility of evidence. The cognition of law usually consists in combining the empirical with the rational within the boundaries between extreme realism and extreme idealism. The epistemological uniqueness of jurisprudence is manifested in the answers to the questions who? [what? how? why?] gets to know law that show at the same that there is no definite enough distinction between ontology, epistemology, axiology and methodology in jurisprudence. A dispute whether there is one correct settlement of a legal case is going on between those who accept one of three possibilities: it exists and can be attained; it exists but it cannot be always attained; it is only the settlement that gives it the features of correctness.<sup>8</sup>

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<sup>5</sup> In the 1970s, Polish philosophers and law theorists, chiefly K. Opalek, A. Peczenik, G. L. Seidler, and J. Wróblewski, used the formula of 'the level of studying law' to demonstrate the complexity of law. See e.g. A. Peczenik, *Plaszczyzny badania prawa*, "Państwo i Prawo" 1968, fasc. 2. At about the same time, J. Hall, the American philosopher of law, attempted to attain a similar goal through his concept of integrative jurisprudence. See J. Hall, *Foundations of Jurisprudence*, Indianapolis, Kansas City, New York 1973, especially Chapter Six *Towards An Integrative Jurisprudence*. A special issue of the "Hastings Law Journal" 1981, vol. 32, no. 6, was devoted to this concept. It also contains an article authored by me. Moreover, see R. Tokarczyk, *Prawoznawstwo integracyjne Jerome Halla*, "Studia Nauk Politycznych" 1983, no. 4.

<sup>6</sup> For a general overview, see e.g. J. Woleński, *Epistemologia*, vol. 1–2, Cracow 2000–2001. For the epistemology of law, see *inter alia* R. Guastini, *A Sceptical View on Legal Interpretation. Analisi et Diritto*, Roma 2005.

<sup>7</sup> The dispute was described *inter alia* by T. Pietrzykowski, *Etyczne problemy prawa*, Katowice 2005, p. 35 *et seq.*

<sup>8</sup> For more, see A. Arnio, *The Rational as Reasonable. Treatise on Legal Justification*, Dordrecht–Boston–Lancaster–Tokyo 1987.

Axiology, as one of the main departments of philosophy, also called the theory of values, co-constitutes the axiology of jurisprudence.<sup>9</sup> Both in philosophy and in jurisprudence there is an ambiguity of value as the good, and an ambiguity of quality as the good, the subject, and culture – always, however, in the sense of something valuable and desirable, contrasted with evil or something not valued and rejected. The axiology of jurisprudence concerns first of all such aspects of law as the making, binding force, interpretation, application and observance of it. The axiology of law-making is defined by the objectives recognized as values by the legislator who represents the authorities of a specific socio-political system. The axiology of the binding force of law bases it on such crucial values of jurisprudence as, principally, justice, equity, and legality, differently understood, however, by its (jurisprudence's) main trends: natural law, legal positivism and legal realism. The axiology of the interpretation of law consists in choosing particular evaluations and non-legal norms, depending of a legal culture, but mostly moral and religious ones. The axiology of the application of law manifests itself in justifications for the choice of the normative grounds for the application of law, legal presumptions, and in narrowing the margins of decision. The axiology of observance of the law by citizens and state agencies justifies this by the values of legal norms, and when it fails to discern them, it allows for civil disobedience, which is defined, however, in an objective rather than subjective way. Each legal culture is distinguished by its uniquely characteristic, common and fundamental values.<sup>10</sup>

Methodology, or science of methods, is the fourth department of philosophy, indispensable to all sciences, including jurisprudence.<sup>11</sup> A scientific method consists in cognitively understanding, explaining and determining the results of something, here – the results of the existence and operation of law. The object – law and research objectives – law-making, interpretation, application and observance of law determine the nature and choice of methods of studying law. Each trend in jurisprudence is distinguished by its own methods of the investigation of law: the natural law mainly by the methods that enable the cognition of values; legal positivisms by the methods of linguistic, logical, and mathematical analyses; legal realism – by the empirical methods of sociology and psychology. From gen-

<sup>9</sup> For a general overview, see e.g. A. Siemianowski, *Człowiek a świat wartości*, Gniezno 1993. In relation to the axiology of law, see *inter alia* Z. Ziemiński, *Wstęp do aksjologii dla prawników*, Warsaw 1990; P. Dutkiewicz, *Problem aksjologicznych podstaw prawa we współczesnej polskiej filozofii i teorii prawa*, Cracow 1996.

<sup>10</sup> For a broader treatment, see R. Tokarczyk, *Współczesne kultury prawne*, 9<sup>th</sup> ed., Warsaw 2008.

<sup>11</sup> For a general overview, see e.g. J. M. Bocheński, *Współczesne metody myślenia. Podręcznik mądrości tego świata*, Cracow 1992; J. Sztumski, *Wstęp do metod i technik badań społecznych*, Katowice 1994. For the methodology of law, see *inter alia* Z. Ziemiński, *Metodologiczne podstawy prawoznawstwa*, Warsaw 1974.

eral methodology jurisprudence borrows the methods of hermeneutics, rhetoric, argumentation theory, linguistic analysis, and others. Jurisprudence therefore uses many research methods, its most characteristic being the methods of the linguistic and logical study of legal texts, necessary especially in the so-called dogmatics of law. In all legal sciences, comparative methods are used, which are explained by comparative law.<sup>12</sup>

## THE OUTLINE OF BIOJURISPRUDENCE

The main elements of the subject of biojurisprudence are its name, ontology, axiology, epistemology, and methodology.

I coined the name ‘biojurisprudence’ from the Greek word *bios*, which denotes life, and from the Latin word *iurisprudentia*, which expresses legal knowledge or even wisdom.<sup>13</sup>

Taking into consideration the natural rhythm of all of life, especially human life – birth preceded by conception, life, and death, I have distinguished three segments of biojurisprudence: biojusgenesis, biojustherapy, and biojusthanatology.

Biojusgenesis as the word composed of *bio* – life, *ius* – law, and ‘genesis’ – origins, covers the first period of life from conception to birth, discussed from the

<sup>12</sup> More broadly, see R. Tokarczyk, *Komparatystyka prawnicza*, 9<sup>th</sup> ed., Warsaw 2009.

<sup>13</sup> On the name and subject of biojurisprudence see R. A. Tokarczyk, *Biojursprudencja. Nowy nurt jursprudencji*, Lublin 1997 (text in Polish, Russian, French, German and English). It was sent to the XVIII World Congress of the International Association for Philosophy of Law and Social Philosophy, held in August 1997 in Buenos Aires. Moreover, the text was published as separate articles: *Biojursprudencja: New Current in Jurisprudence*, “Acta Juridica Hungarica” 1995/1996, 37, no. 1–2; *Biojursprudencja – nowy nurt jursprudencji*, “Nauka” 1996, no. 2; under the same title in “Annales UMCS”, Sectio G, vol. XLIII, 1996; [in:] *Badania zmian i relacji międzykulturowych w Europie oraz jej pograniczach*, (ed.) K. J. Brozi, Lublin 1997; “Lo Staniero” 1997, May; “The Finnish Yearbook of International Law” 1997; [in:] *Pravo i sovremennost*, Minsk 1998; *Biojursprudenz. Eine Richtung der Jurisprudenz – Grundriss der Problematik*, [in:] Jan C. Joerden (Hrsg.): *Der Mensch und seine Behandlung in der Medizin. Bloss ein Mittel zum Zweck?* Springer Verlag, Berlin, Heidelberg, New York 1999; [in:] *Zmiany społeczne a zmiany w prawie. Aksjologia, konstytucja, integracja europejska*, (ed.) L. Leszczyński, Wyd. UMCS Lublin 1999; “Dialogue and Universalism”, vol. 10, no. 7–8, 2000, including the *Commentary* by W. J. Wagner; *Tezy i hipotezy o przedmiocie biojursprudencji i bioprawa*, “Annales UMCS”, Sectio G, vol. 46, 1999; *Biojursprudencja – le nouveau courant de la jurisprudence*, [in:] *Konstytucyjny ustrój państwa. Księga Jubileuszowa Profesora W. Skrzydło*, Wyd. UMCS Lublin 2000; *Biojursprudencja eksponentem życia w jursprudencji*, [in:] *Filozofia. Dialog. Uniwersalizm. Księga dedykowana Profesorowi Januszowi Kuczyńskiemu*, (ed.) J. L. Krakowiak, W. Lorenc, A. Miś, Warsaw 2001; *O potrzebie rozwijania nowej jursprudencji*, “Kwartalnik Historii Nauki i Techniki” 2002, 47, no. 1; *Biojursprudencja i bioprawo odpowiedzią na potrzeby ochrony życia w XXI wieku*, “Doctrina” 2004, no. 1; *Prawo do życia i jakość życia jako fundamenty biojursprudencji*, [in:] *Prawo do życia a jakość życia w wielokulturowej Europie*, (eds.) B. Sitek, G. Dammacco, M. Sitek, J. J. Szczerbowski, Olsztyn–Bari, Poland–Italy 2007, vol. I. Also published in Italian.

normative standpoint, especially religious and moral, but mainly from the point of view of law called here biolaw: the law of life. In previous jurisprudence and the law based on it, the legal protection of this stage of human life was based on the legal fiction, called *nasciturus*, adopted from Roman law. According to it, the interest of the conceived child is treated as the interest of the child already born (*nasciturus pro iam natu habetur quotiens de commodis eius agitur*). Because of the highly developed and still developing techniques and technologies that may artificially interfere in the natural processes of the first stage of life, the legal fiction *nasciturus* is no longer adequate. The need for new normative regulations, recognized and described by biojurisprudence for biolaw, is even compelled by genetic engineering, eugenics, and medically assisted conception and birth – procreation and prenatal diagnostics. The most mature manifestation of biojustgenesis in biolaw is the right to being born as the legal institution, which organizes the formerly scattered norms of life protection from conception to birth into one normative whole.

Biojustherapy, as the word composed of *bio* or life and ‘therapy’ or medical treatment, covers the vast area of problems of the protection of life and enhancement of its quality, especially human, plant and animal life, from its birth until its death. The domain of biojustherapy comprises many highly controversial issues. They include highly significant problems of transplantation of some cells, tissues and first of all organs in order to enhance the quality of and to save human life and the life of other living species. Some problems facing justherapy are caused by some forms of sexuality: homosexuality, bisexuality and probably mainly transsexuality. There are many normative difficulties, of interest to biojustherapy, arising from drug addiction, alcoholism and HIV infection as the cause of the Acquired Immune Deficiency Syndrome (AIDS). The normative aspects of population policy are characterized by highly specific demographic features. They are associated with the problems of contraception, sterilization, and castration both in humans and in animals. Other specific features characterize practical applications of psychiatry. Ecologism, as a vast current of thought, comprising, apart from ecolaw, *inter alia* ecotheology and ecoethics, largely co-defines the grading scale and value hierarchy of biojustherapy. The fullest interpretation of biojustherapy in biolaw is the right to life, gradually extended but with great adversities, from the right to life of the humans to the right to life of the animals as far as to the right to life of all animate nature.

Biojusthanatology, as the word made up of *bio* or life and ‘thanatology’ – the science of dying, is concerned with regulating the end of human life – his death, and, by analogy, the death of other animate species. While traditional biojurisprudence and the law based on it basically know one concept of death – biological death, biojurisprudence and biolaw already use many definitions of death: bio-

logical death, brain death, cerebrospinal, and sociological death. Each of these kinds of death can raise a number of doubts, which require, nevertheless, rather unambiguous religious and moral judgments as the basis for legal regulations. These doubts are mainly as to who, when, where, and on what conditions and for what ends, decides about the unnatural death of man. Biojusthanatology provides value judgments and biolaw suggests the most appropriate regulations possible of abortion, euthanasia, suicide, cases of absolute necessity, self-defense, death penalty, killing people in war, as well as killing animals and destroying the flora. A hypothesis is becoming more and more plausible that biolaw will have to use many definitions of death adjusted to its diverse actual states. The static definition of death, so far used in jurisprudence and law, gives way to the dynamic definition of death described by biojusthanatology and recommended by biolaw to be used in legal practice. The crucial legal institution developed by biojusthanatology for the needs of biolaw, is the right to death.

This tripartite division of biojurisprudence is justified by difference in the quality of life, the scope and substance of its normative protection, described by biojusgenesis, biojustherapy, and biojusthanatology.<sup>14</sup> It by no means conflicts with the need for a comprehensive or holistic view of man in the global aspects of long-term consequences of human endeavors to protect the increasingly long human life having higher and higher quality. Quite the opposite, by recognizing the diversities of the protection and quality of life, this division makes it possible and easier to find such overall presentations.<sup>15</sup> Nor does it reduce human life to physical life, to some narrow biologism, because, in its search for evaluations and justification of value hierarchies, biojurisprudence takes into comparative account both religious and moral judgments and values. Owing to this, it can combine the evaluations and values of man's physical life with the evaluations and values of his spiritual life – psychical, rational, and social. What the norms of biolaw

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<sup>14</sup> A similar division of content was used by J. L. Dolgin, D. Shepherd, *Bioethics and Law*, Aspen Publishers 2005. See also J. Menikoff, *Law and Bioethics: An Introduction*, Georgetown University Press 2002; B. J. Spielman, *Bioethics in Law*, Totowa–New Jersey 2007. The American scholars, when using the terms Bioethics and Law or Bioethics in Law, do not unequivocally show the profoundest sense of this subject, unlike the term 'biojurisprudence'. See also W. J. Wagner, *Remarks on Roman Tokarczyk's Article "The Subject Matter of Biojurisprudence and Biolaw"*, "Dialogue and Universalism, 2000, vol. 10, no. 7–8.

<sup>15</sup> My article *Biojurisprudence: A New Current in Jurisprudence* was published by the Finnish journal "The Finnish Yearbook of International Law" 1996. Having read only this one text, without knowing the broader explication of the concept of biojurisprudence in my book *Prawa narodzin, życia i śmierci*, Juha-Pekko Rentto, a Finnish law professor of law, failed to see the holistic treatment of human life in it. Idem: *Biojurisprudence? A Comment to Professor Tokarczyk, "Recent Developments and State Practice"*, Helsinki 1999. See also the comment by another Finnish law professor: Jan Klebbers, *Biojurisprudence?*, "Religion, and Human Rights. An International Journal", Helsinki 1999, no. 20.



can recommend to the life of human body should be determined above all by the norms concerning the human spirit: psyche, reason, and socialization. This belief is well established and fairly convincingly justified in the tradition of the natural law thought, mainly, however, in Western legal cultures. A comprehensive discussion of biojurisprudential issues even demands therefore that we take into consideration the problems concerning the sense of human life – religious, moral, and legal. Religions see this sense in the salvation of the soul, morality – in beneficence, law – in justice. The norms of biolaw combine these three senses into an axiological whole.<sup>16</sup>

### THE JURISPRUDENCE OF THE NATURAL LAW

Out of the classical trends of jurisprudence, the jurisprudence of the natural law is closest to the assumptions of biojurisprudence. This close relation is most clearly seen in the ontology and axiology of the jurisprudence of the natural law and in biojurisprudence, whereas it is not found in their epistemologies and methodologies. The epistemology of the jurisprudence of the natural law focuses on the cognition of the theoretical aspects of the value of law, while biojurisprudence also takes into account its practical aspects because of the needs of biolaw. The methodology of the jurisprudence of the natural law is essentially confined to methods of rational, often speculative deduction, unlike biojurisprudence, which recognizes the cognitive and practical usefulness of all methods, all trends in jurisprudence, if they serve the cognition of the prevalue and prenatal of life and biolaw.<sup>17</sup>

In its most general interpretation, the ontology of the natural law jurisprudence understands the natural law as a rational-psychical fact, derived from the knowledge of the nature of man, society, the world, and divinity.<sup>18</sup> This fact exists in the nature of all thinking people and forms the evaluations that bind them, regardless of the evaluations and the binding force of the law made – statutory and case law. A specific understanding of nature gives rise to the main imperatives of the natural law, most often relating to the protection of human life, procreation, work, communication, formation of communities, or broadening one's knowledge. Bio-

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<sup>16</sup> The main inspiration for the rise and development of biojurisprudence is still bioethics. The subject of bioethics has developed extraordinarily, entering social, natural, and medical sciences. For those who study bioethics, the actually indispensable work is *Bioethics Research Guide*, <http://www.11.georgetown.edu/quides/bioethics.cfm>. The outline of the whole of bioethical problems is contained in *The Encyclopedia of Bioethics*, edited by S. G. Post, vol. I–V, 3rd ed., New York 2004.

<sup>17</sup> The most insightful explanation of various aspects of the jurisprudence of the natural law was offered by E. Wolf, *Das Problem der Naturrechtslehre. Versuch einer Orientierung*, Karlsruhe 1959.

<sup>18</sup> Thus presented in e.g. R. Tokarczyk, *Filozofia prawa, op. cit.*, p. 163 *et seq.*

jurisprudence, rather than use the too ambiguous concept of nature, employs the more lucid concept of life, consciously discerning and distinguishing its various aspects: rational and emotional, individual and group ones in their many different cross-sections of society. While the jurisprudence of the natural law plays a subservient role in the making, interpretation, application and observance of law, the biolaw, developed upon biojurisprudential assumptions, aims at replacing the current law.<sup>19</sup>

The axiology of the jurisprudence of the natural law seeks to formulate sets of hierarchically structured values of law. At the top of this hierarchy, it places the value of human life like biojurisprudence does. According to their common thesis, one should seek in human life the sources of all other values and confirmation of the value of human life itself since human life determines the existence of other values. In both these trends of jurisprudence the value of man's life as an individual and species has an intrinsic nature, without needing to be supported by any other values. For that reason, in biojurisprudence, the value of life is a prevalue or a primal value, which needs no justification but is necessary for the justification of other, secondary values. The value of human life is determined by rationally selected goals on the way of communication with other people.<sup>20</sup>

According to the natural law jurisprudence, the sanction of the natural law, as a consequence of contravening its imperatives, is implemented, as it were, by itself, in a natural way. It consists in threats to the physical and mental health of a human individual as well as to the proper functioning of human communities and organizations. Violation of the imperatives of the natural law does unavoidable damage to the nature of man, society, and nature. This general thesis can be, as it were, illustrated with the examples of natural sanctions provoked by the violation of particular imperatives of the natural law. In the light of biojurisprudence, however, the sanction of biolaw, although most frequently it also has the character of natural sanction, requires the activity of the agencies of justice, nevertheless. To people with a not yet developed normative consciousness, the natural sanction of the jurisprudence of the natural law can even be imperceptible. The sanction of biolaw cannot fail to be noticed by every person because it is shown by an appropriate agency of justice.<sup>21</sup>

<sup>19</sup> For more, see R. Tokarczyk, *Prawa narodzin, życia i śmierci. Podstawy biojurisprudencji*, 8<sup>th</sup> ed., Cracow 2006.

<sup>20</sup> Thus presented in R. Tokarczyk, *Global Meaning of Values and Norms of Biojurisprudence*, [in:] *Values and Norms in the Age of Globalization*, (ed.) Ewa Czernicka-Schuppe – “Dia-Logos”, Bd./Vol. 9, Peter Lang, Frankfurt am Main–Berlin–Bern–Bruxelles–New York–Oxford–Wien 2006, p. 397 *et seq.*

<sup>21</sup> General remarks on legal sanctions see *inter alia* J. Hall, *op. cit.*, p. 101 *et seq.*; also J. Śmiałowski, *Pojęcie i analiza sankcji prawnej*, “Zeszyty Naukowe Uniwersytetu Jagiellońskiego” 1962, fasc. 9.

The jurisprudence of the natural law assumes a dualism of law – the existence of man-made law alongside the natural law. Biojurisprudence unifies law, taking into account the critical elements of the ontology and axiology of the natural law. According to the jurisprudence of the natural law, the natural law is a higher law, superior to man-made law, of which it is the source and measure of evaluation. By situating biolaw on the level of possibility of the rationalized freedom of human life adjusted to morality and often to religion, biojurisprudence no longer needs to assess biolaw on any scales of superiority or inferiority. The natural law is independent of the state's law-making activity, whereas biolaw would be dependent on it but at the same time conditioned by the decisions of bioethical boards or councils. The former has the character of the unchangeable, everlasting and universal law, the latter – has the nature of the changeable, repealable law, universal within the limits of the prenorm of good life. According to the jurisprudence of the natural law, and biojurisprudence, an unjust, unfair and bad law is not a law (*Lex iniusta non est lex*).<sup>22</sup>

Under the jurisprudence of the natural law, life is first of all protected externally, as it were, mainly by the man-made law. Biojurisprudence protects life by itself through biolaw and aims at improving its quality internally, as it were, thanks to the inclusion of life as the prevalue into its (biojurisprudence's) values and norms, which are at the same time their prenorm. The protection and improvement of the quality of life in the man-made law depends not only on the imperatives of the natural law, which is not always accepted and not everywhere. Biojurisprudence and biolaw based on it themselves elevate the protection and improvement of the quality of life to the highest axiological status, without resorting to external intervention. The knowledge of the often intellectually sophisticated jurisprudence of the natural law restricts the range of its practical usefulness. The contents of the prevalue and prenorm of life are obvious to any rational man as beneficial in the light of biojurisprudence.

#### THE JURISPRUDENCE OF LEGAL POSITIVISM

Unlike the jurisprudence of the natural law, the jurisprudence of legal positivism is only partially useful for biojurisprudence in the area of its ontology, epistemology, axiology and methodology. Legal positivism has developed since the nineteenth century in several varieties. In most cultures in the world it retains its prevalence in legal thought and practice as the basic instrument of the lawyer's work. It arose and became established as classical legal positivism in a critical response to the jurisprudence of the natural law and the German historical school,

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<sup>22</sup> The criteria for the evaluation of law were explained by *inter alia* H. Jankowski, *Prawo i moralność*, Warsaw 1968.

first in the version of English analytical jurisprudence and the jurisprudence of concepts in Continental Europe. It then underwent fairly significant evolutionary changes, under the influence of Herbert L. Hart's critical positivism, Hans Kelsen's normativism and Ronald Dworkin's distinction between hard, exclusive positivism and soft, inclusive positivism. According to the assumptions shared by all versions of the jurisprudence of legal positivism, the only real law, called positive law, is man-made law: statutory and case law. The statute and precedent as the only sources of law have the absolute binding force to lawyers who strictly apply the law. To maintain this strict absoluteness in the processes of interpreting the law, we should reason on the basis of algorithmic logical syllogisms, bearing in mind the separation of law from morality.<sup>23</sup>

The ontology of the jurisprudence of legal positivism leans towards the substantialist understanding of law, but empirical, inductive, realistic and naturalist rather than speculative, deductive, unrealistic and metaphysical as in the jurisprudence of the natural law. In its ontology, biojurisprudence accepts, albeit with many reservations, the ontology of the jurisprudence of legal positivism, while it appreciates the ontology of the natural law jurisprudence more in its axiology. The reservations voiced by the ontology of biojurisprudence apply to John Austin's conception of hard positivism, which limits the existence of law to the commands of the sovereign, obligating the addressees of the law to absolutely observe it in normative terms, regardless of its content. The ontology of biojurisprudence resembles the ontology of soft positivism when it places the social acceptance of law above the commands of the sovereign. However, unlike the ontology of soft positivism, biojurisprudence develops its ontology on the basis of the syncretism of religious, moral and legal contents, emphasized in the distinction between sacral, moralist and legalistic law cultures. If the law reflects the character of the culture in which it is binding, the society finds it easier to accept it than the law (not expressing this culture) of the arbitrary command of the sovereign.<sup>24</sup> Until the so-called pure theory of law (*Reine Rechtslehre*), also called Kelsen's normativism, was formulated, the co-authors of the jurisprudence of legal positivism allowed ontological hybrids consisting in the co-existence, in law, of the content of real law with the content of unreal duties. Following Kant, and having strictly separated the sphere of the being of law from the sphere of the duties of law, Kelsen limited its ontology to the latter sphere. This distinction, however, makes little difference for biojurisprudence, which assumes the inseparability of

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<sup>23</sup> For more, see *inter alia* J. Stelmach, R. Sarkowicz, *Filozofia prawa XIX i XX wieku*, Cracow 1998; K. E. Himma, *Legal Positivism*, [in:] *IVR Encyclopedia of Jurisprudence, Legal Theory and Philosophy*, 2005 [www.IVR-enc.info](http://www.IVR-enc.info)

<sup>24</sup> Thus expressed by R. Tokarczyk, *Współczesne kultury prawne*, 8<sup>th</sup> ed., Warsaw 2010, p. 60 *et seq.*

being and duty in biolaw, stemming from the prevalue of life as the prenorm of biolaw at the same time.

When discussing Kelsen's ideas, we should compare his conception of basic norm (*Grundnorm*) with the conception of prenorm in biojurisprudence. In either case the issue is the validation or legitimacy of the whole legal system by means of some supreme norm or the norm of norms, and its axiological source. The *Grundnorm*, inspired by Kant's philosophy, is, Kelsen holds, the necessary transcendental-logical condition for the making, binding and application of positive law, regardless of its objective value.<sup>25</sup> The prenorm of biojurisprudence is, admittedly, the necessary logical condition for the making, binding and application of biolaw but with an immanent character, which is self-evident to any rational man. The prenorm of biojurisprudence, by its obviousness, can more easily make the law's addressees observe the law than Kelsen's concocted *Grundnorm*. Moreover, the prenorm of biojurisprudence is conducive to the integration of jurisprudential trends because none of them challenges the value of life as the prenorm in biojurisprudence at the same time. The current trends in jurisprudence failed to find common starting assumptions, therefore their further disquisitions only deepen the already existing differences between them. Biojurisprudence perceives in the prevalue and prenorm of life the starting assumptions that are acceptable to all trends of jurisprudence.

The epistemology of the jurisprudence of legal positivism is based on its basic thesis about the separation, especially axiological, of law and morality, unlike the jurisprudence of the natural law and biojurisprudence, which recognize their interrelationships. While in the jurisprudence of legal positivism, inconsistency between law and morality does not decide about the content and binding force of law, in the jurisprudence of the natural law and biojurisprudence such consistency between those two is a necessary condition. According to the jurisprudence of legal positivism even an unjust and/or unfair law is a law if it comes from a legitimate and competent law-maker; the jurisprudence of the natural law and biojurisprudence do not allow unjust and/or unfair law at all. Pilloried by criticism, the seemingly axiologically neutral formalism of classical legal positivism was weakened by later concessions agreeing that at least some minimum of fundamental values in law would be taken into account. This is probably most clearly visible in Hart's minimum content theory of the natural law in positive law. The epistemology of the jurisprudence of legal positivism in its hitherto evolution has come closer to or grown distant from the epistemology of the jurisprudence of the natural law and biojurisprudence. It has grown most distant in Kelsen's normativism.

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<sup>25</sup> H. Kelsen, *Reine Rechtslehre*, Wien 1960, p. 208 *et seq.*

In the contemporary trends of the epistemology of jurisprudence there are four identified relations between law and morality. The first perceives ethical and legal axiological nihilism when it denies the existence of any relations whatsoever between them. The second explains ethical-legal axiological reductionism when it sees the connections between law and morality but it raises doubts as to their necessity and purpose. The third justifies ethical-legal normativism, recognizing the existence of not necessary but desirable connections between law and morality. Finally, the fourth propagates ethical-legal essentialism consisting in the recognition of the necessity for such connections.<sup>26</sup> The jurisprudence of legal positivism remains within the scope of the first three relations, while the jurisprudence of the natural law and biojurisprudence invariably accept the fourth relation. Biojurisprudence, rejecting here the cognitive usefulness of the jurisprudence of legal positivism, discerns it, however, in the achievements of English analytical jurisprudence and the jurisprudence of concepts in Continental Europe. When introducing new concepts, biojurisprudence must, to some justified extent, draw on earlier reflections. In this respect, biojurisprudence is close to Hart's view that it is more important to know how a specific concept is used in the language of a particular legal culture than explain what it is, in isolation from such a culture.

The axiology of the jurisprudence of legal positivism leans towards formalism, which downplays the importance of material contents in law to the point of the total elimination of them in extreme normativism (from this standpoint). If, according to this axiology, law is not in any necessary relation with morality, the analysis of legal concepts can claim to be axiologically neutral, thus resembling the analyses of natural and exact sciences. This axiology assumes that only descriptions can have a rational and scientific character, whereas evaluations in defining values are always filled with emotionality depriving them of a scientific nature. In the light of the jurisprudence of legal positivism, only formal, structural and logical aspects of law can have a rational and scientific character but the values contained in it cannot. The only value that all versions of the jurisprudence of legal positivism can accept is security understood as the feeling of persons living under a legal order based on positive law. Security, regarded as the supreme value, is supported by the principle of equal treatment of all persons: procedural equality and justice. For the sake of the formally understood security of the people, one can violate other values of material equality and justice. In Hart's critical positivism, axiology expanded, however, to include fundamental material values, especially such as life, freedom, property, which together ensure the survival of

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<sup>26</sup> More extensively, e.g. R. Dworkin, *Biorąc prawa poważnie* [translated from *Taking Rights Seriously*], Warsaw 1998; H. L. A. Hart, *Pojęcie prawa* [translated from *The Concept of Law*], Warsaw 1998.

the people living in a community. The axiology of beginnings of the jurisprudence of legal positivism evolved from the axiological ambiguity of law, close to the jurisprudence of the natural law and biojurisprudence, to axiologically unequivocal normativism, very distant from them, to the present-day ambiguity of this kind again.<sup>27</sup>

The methodology of the jurisprudence of legal positivism is conditioned by the tendency to make the study of law scientific, in the sense of the possibility of verifying or disproving its results. On the one hand, this should be a strictly scientific method, while on the other, a specifically legal method. The jurisprudence of legal positivism discerned and developed such a method in the formal-dogmatic method, consisting mainly in linguistic analysis of legal concepts on the basis of formal logic with its pattern of syllogistic thinking. The method aspires exactness typical of exact sciences and empiricism characteristic of natural sciences. This methodological duality is justified by the ontological duality of law consisting of both real empirical facts and of duties connected with the ideal world. Critics of the formal-dogmatic method explain that the pattern of syllogistic thinking is methodologically anachronistic, persisting only in the outmoded versions of the jurisprudence of legal positivism. For in this syllogism, its major premise comprises norms with an axiological sense, minor premise – propositions in the descriptive logical sense, while the conclusion embraces both norms, evaluations, and propositions. This is at variance with the basic assumption of the jurisprudence of legal positivism about the need to separate being from oughtness, description from evaluations, values from norms.<sup>28</sup>

The methodology of biojurisprudence employs various methods useful for the cognition, making, interpretation, application, and observance of biolaw. Therefore, the formal-dogmatic method is neither under- nor overrated in biojurisprudence. However, there are closer connections between the methodology of biojurisprudence and the conception of the methodology of legal positivism proposed by Ronald Dworkin. This American law theorist maintains that law consists of rules and standards, which are divided into principles and policies. Principles are evaluations that describe rights of individuals, while policies are evaluations that describe particular goals of human communities. Both the former and the latter do so in more or less concrete or abstract terms. They are only seemingly part of the non-legal sphere of culture because there is only one right answer to a legal case being adjudicated, despite diverse legal and non-legal determinants of the decision.<sup>29</sup> The similar is true for biojurisprudence, which, however, shows various determinants of the right answer to a case more clearly and precisely, discerning them first of all in the combinations of sacral, moral and legal contents:

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<sup>27</sup> See J. Stelmach, *Współczesna filozofia interpretacji prawniczej*, Cracow 1999, p. 31 *et seq.*

<sup>28</sup> See *ibidem*.

<sup>29</sup> R. Dworkin, *op. cit.*

the norms, principles, institutions, and branches of biolaw. In biojurisprudence the right answer to a specific case is determined by taking into consideration in this decision that which I call the dominant feature of the legal culture to which a particular case being adjudicated belongs. In the context of biojurisprudence open to many different methods, even the conception of Dworkin's methodology, hanging between legal positivism and the natural law, is rather feeble, the more so are basically one-dimensional methodologies of other versions of the jurisprudence of legal positivism.

### THE JURISPRUDENCE OF LEGAL REALISM

Legal realism developed in the first half of the twentieth century as an internally diversified, classical trend of jurisprudence as a critical response to the metaphysical speculativeness of the jurisprudence of the natural law and the idle formalism of the jurisprudence of legal positivism. Realism is evident here in the relationships between jurisprudence and sociology and psychology.<sup>30</sup> Taking only the main trends of legal realism into consideration, we should observe that connections with sociology characterize the School of Free Law, American legal realism and Scandinavian legal realism, while connections with psychology are characteristic of Leon Petrażycki's psychological theory of law. The common assumptions of the whole jurisprudence of legal realism include: the aforementioned criticism of earlier classical trends of jurisprudence; empiricism and pragmatism in understanding law as an actual fact, with emphasis placed on its sociological and/or psychological aspects; the treatment of law as first of all the result of judicial activity; attribution of the main determinants of judicial decisions to non-legal factors, sociological and/or psychological; confinement of scientific research to factors affecting the decisions of judges, taking into account the most important social goals realized by laws striving to be as effective as possible; rejection of the identification of law with the law in books for the law in action. The assumptions of the jurisprudence of legal realism are of great importance to biojurisprudence, especially to the understanding of human psychic life and of the societal life of various social groups.<sup>31</sup>

The ontology of the jurisprudence of legal realism is characterized by naturalist ontological monism, which perceives the being or existence of law only in empirically discernible sociological and/or psychological facts. This is the ontology of substantialist, materialist understanding of law that runs counter to ide-

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<sup>30</sup> Philosophy explains realism in the sense of the objective existence of reality transcendental to the cognitive subject. Legal realism, however, notices the existence of 'real law' only after it has been interpreted and applied by the judge.

<sup>31</sup> The introduction to the jurisprudence of legal realism was compiled by J. Stelmach and R. Sarkowicz, *op. cit.*, p. 85 *et seq.*



alist, abstract ontologies. Like hermeneutics, it recognizes the beginning of the existence of law from the moment of its interpretation. In the School of Free Law (*Freirechtslehre, Freirechtsbewegung*) ‘real law’ is the judge-made law, based on different norms as in biojurisprudence, not only, therefore, on legal norms. American legal realism identified the existence of law with the law of the common law culture – the living judge-made law. The psychological theory of law reduced the ontological sense of legal norms to psychic experiences – attributive emotions as opposed to moral imperative emotions.<sup>32</sup> Scandinavian legal realism was more theoretical and academic than American empirical-pragmatic realism: in its conceptions it combined the psychological with the sociological in the ontology of law. The ontology of all the three trends of the jurisprudence of legal realism is useful for the ontology of biojurisprudence, which, it appears, provides a more comprehensive explanation of the essence of the being of psychic and social life.

The epistemology of the jurisprudence of legal realism determines the limits of cognition and application of law by the cognitive, interpretive and decision-making possibilities of the judge.<sup>33</sup> It grants law a scientific character only after metaphysical, natural-law influences have been removed from it and the positivist-law view of the duality of being and duty in law has been abandoned. It gets to know only the empirical aspects of the living law that have variable practical importance measured by the law’s efficacy. The lawyer, especially the judge, is endowed here with the abilities of a social engineer. By learning the regularities of social life co-shaped by the regularities of psychic life, the lawyer can appease quite frequent conflicts of general social interests with the interests of human individuals. The School of Free Law confined the results of the cognition of law to description, while biojurisprudence does not want to give up getting to know also duties in law. In its epistemology, American legal realism rejected, on principle, the metaphysical assumptions of the natural law and the formalist assumptions of legal positivism. In its ‘revolt against formalism’ it replaced the duality of being and duty by the duality of the living law in action and the dead law in books. In the psychological theory of law, the method of observation of man’s own inner self or self-observation is sufficient, unlike the acceptance of many methods by biojurisprudence, regarded as useful in getting to know the emotional essence of

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<sup>32</sup> [...] we shall also understand as law, in the sense of a separate class of real phenomena, the ethical experiences whose emotions have an attributive character. We shall, however, call all other ethical experiences, i.e. experiences with exclusively imperative emotions, moral phenomena to be included in morality...’, L. Petrażycki, *Teoria państwa i prawa*, vol. I, Warsaw 1959–1960, p. 72 *et seq.*

<sup>33</sup> “The case to be heard by the judge is ‘a stimulus to which the judge reacts in order to make a good (just) decision. This reaction is an irrational, intuitive, or emotional hunch, [...] hunch jet tip-toe faculty of mind, a kind of imagination or intuition that is characteristic of good lawyers’ [...]”. J. C. Hutcheson, *Judgment Intuitive*, Chicago 1938, p. 21.

law. Scandinavian legal realism utilized the epistemology of both American legal realism, and the psychological theory of law, thereby best approximating the epistemology of biojurisprudence out of all varieties of legal realism.

The axiology of the jurisprudence of legal realism sees the main value of law in its role as the tool, instrument, or means for attaining the specific goals of a human individual and society. Biojurisprudence goes even further here: while not challenging the value of the instrumental importance of law, it sees its fundamental value in the possibility of protection and improvement of the quality of human and social life. In the light of the axiology of legal realism, shared by the axiology of biojurisprudence, the instrumental value of law is confirmed by its efficacy in organizing social life, arranging the co-existence of human individuals, and in mitigating and eliminating conflicts between the interests of individual life and the interests of social life. However, while the axiology of legal realism accepts efficacy only as a criterion for the assessment of the value of law, in the axiology of biojurisprudence the role of such criteria is also played, apart from efficacy, by wisdom, utility, economy, and by such obvious criteria as justice and equity. The law-job, as Llewellyn, the American legal realist put it, often requires the resolution of difficult cases, in which it would be difficult to be content with only one criterion for the assessment of the value of law.<sup>34</sup>

The methodology of the jurisprudence of legal realism treats first of all common sense and intuition as the most empirical and pragmatic method useful in legal practice. Legal realism is also based on the methods of sociology and psychology of law, but more when it is the subject of academic lectures than in judicial decisions. In legal practice, animated by the assumptions of legal realism, in the interpretation and application of the law concerning the psychic life of a human individual, what is most useful is intuitive and rational introspection, while in the case of social life – the aforementioned common sense. On the other hand, the general and particular methodologies of psychology and sociology are indispensable in the processes of cognition, and, to a lesser extent in the light of the jurisprudence of legal realism, in the processes of interpretation and application of law. All methods of logical, hermeneutic, linguistic etc. sublimation in legal practice based on the assumptions of legal realism, are pushed into the background.<sup>35</sup> All the aforementioned methods of the jurisprudence of legal realism find their proper places in biojurisprudence.

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<sup>34</sup> K. Llewellyn, *Brumble Bush*, New York 1969, p. 12.

<sup>35</sup> According to P. Heck, the judge cannot satisfactorily understand the needs of life if he uses logical constructs only. The task of legal knowledge is to facilitate the judge's work and prepare the grounds for right decisions by analyzing legal norms and their corresponding life situations. Therefore one should openly accept the methods of investigations of life and its evaluation. See P. Heck, *Begriffsbildung und Interessenjurisprudenz*, Tübingen 1932, p. 4; as presented by G. L. Seidler, *Doktryny prawne imperializmu*, Lublin 1959, p. 179 *et seq.*

## OTHER TRENDS OF JURISPRUDENCE

Other jurisprudential trends have not gained and probably will not, apart from biojurisprudence, gain such great importance as its classical trends: the natural law, legal positivism and legal realism, therefore they are considered non-classical trends. The history of jurisprudence has known its many non-classical trends, which are, however, less important with regard to the goals of biojurisprudence. On account of these goals it is enough only to mention the currently best-known, contemporary non-classical trends of jurisprudence. These include especially legal hermeneutics, analytical legal philosophy, legal argumentation theory, legal rhetoric, and economic analysis of law. All these trends of jurisprudence are characterized by a distinct one-sidedness as compared with the classical jurisprudential trends. While the classical trends have all the constituent elements, more or less developed, of overall jurisprudence – ontology, epistemology, axiology, methodology – the non-classical trends are essentially confined only to one of these elements. Nevertheless, because of the integrative goals of biojurisprudence, we should take them into consideration, but, obviously, only to a justified extent and degree.<sup>36</sup>

The term hermeneutics derives from Greek *hermeneutike*, denoting explication, explanation, understanding and interpretation. Legal hermeneutics derives from the assumptions of philosophical Biblical and philological hermeneutics, which now aspires to the status of the universal hermeneutics of all social sciences. Two trends of this universal hermeneutics developed: epistemological, whose main purpose is to interpret texts until they are understood, and ontological, which gives understanding the sense of being. In jurisprudence Artur Kaufmann's epistemological-ontological conception of legal hermeneutics stands out: it argues that it is only interpretation that creates the law, therefore there is no 'pre-interpretation' law. A similar epistemological-ontological duality is characteristic of all currents of legal hermeneutics. Furthermore, its common assumptions emphasize the crucial importance of understanding, linguistic expression of law and the course of reasoning based on the structure of the hermeneutic circle as a sequence of reasonings where what precedes determines what follows but on a feedback basis. Legal hermeneutics, giving the interpreting commentator the freedom to interpret within reason, opens for him wide possibilities of interpretation that are also necessary in biojurisprudence. It does not need to descend into interpretive relativism if it confines itself to interpreting specific cases and problems, without aspiring to some absolutist universalism.<sup>37</sup>

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<sup>36</sup> I have based my discussion mostly on the work by J. Stelmach, R. Sarkowicz, *op. cit.*, p. 199 *et seq.*; also J. Stelmach, *op. cit.*, p. 47 *et seq.*

<sup>37</sup> Presented differently by J. Stelmach, *op. cit.*, Cracow 1999, p. 85.

Analytical legal philosophy, associated with legal positivism, legal hermeneutics, legal argumentation, and sometimes identified with English analytical jurisprudence is, contrary to these names of it, a group of special methods of legal analysis rather than some developed philosophy. It arose in the general philosophy, in which common-sense and conceptually refined analyses developed from its very beginnings. With regard to analysis, general philosophy rejected metaphysics and systemicity as the conditions for the vitality of knowledge, confining itself to seeking appropriate methods of analysis of the phenomena investigated, mainly, however, of concepts evaluated by objective and realistic results. General analytical philosophy, developed by many thinkers, is internally diversified, regardless of the 'degree of formalization of the analytical method' – from the widespread soft analysis of colloquial language to fairly rare 'hard' mathematical-logical analysis. Out of many methods of philosophical analysis, four are worthy of special note: explication, paraphrase, presupposition, and case-based argumentation. Explication is the transformation of a less strict concept (*explicandum*) into a more strict concept (*explicatum*). A paraphrase establishes the correlations of paraphrasing or translating the words of philosophy into the words of logic. A presupposition is the same part of the content of an affirmative sentence and a negative sentence. Case-based argumentation is a kind of reasoning by analogy. In legal interpretation, also accepted by biojurisprudence, general analytical philosophy inspired, in several countries, the development of analytic methods of jurisprudence, especially the exegesis of legal terms, legal institutions, justifications for legal practices and legal consequences of the choice of specific social goals. The evaluations of the importance of analytical philosophy of law, point, however, to the limited character of practical applications of strictly formal logical methods, the more so of mathematical methods, in the processes of interpretation and justification of law. But this philosophy belongs to the favorite games played by lovers of speculativism.<sup>38</sup>

The theory of legal argumentation has as its object the argumentation of someone who argues in favor of something (proponent) in order to convince the opponent (respondent) and/or the audience being convinced. Argumentation is an indispensable constituent of every legal discourse and adjudication of almost every legal case, especially the so-called difficult cases. Based on the general theory of argumentation, developed from ancient times, the theory of legal argumentation draws on many sources, especially logic, rhetoric, eristic, dialectics, and hermeneutics, taking also into account the specific nature of legal vocabulary, terms, propositions, rationality, justice and equity. Two theories of legal argumentation merit closer attention: those of Chaim Perelman and Robert Alexy. On the foun-

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<sup>38</sup> For more, see J. Woleński, *Z zagadnień analitycznej filozofii prawa*, Cracow 1980, p. 44 *et seq.*

datations of ancient rhetoric and on the basis of research on the logic of norms, Perelman and his associate L. Olbrechts-Tyteca presented the new legal rhetoric, which was to ensure efficacy in legal disputes before particular and/or universal audiences. In the case of a particular audience the issue is argumentative efficacy, which they called persuasion, while with a universal audience the point is the validity of argumentation, defined as conviction. In the new legal rhetoric, the truth or falsity of argumentation are of secondary importance, while what comes to the fore is rationality, persuasiveness, significance and effectiveness because of the expectations of the open and tolerant audience, sometimes yielding to opposing arguments.<sup>39</sup> The new legal rhetoric does not have a distinct character of a procedural or material theory, hence it came up for criticism. The theory of legal discourse, advanced by Alexy, has the characteristics of a rational, analytical, normative, empirical and pragmatic theory. It requires that the participants in the discourse should not contradict themselves; that they should defend only what they themselves believe in; that they should properly define the subjects under discussion; and avoid ambiguity of expressions. The measure of the efficacy of discourse is the justification (*Rechtfertigung*) of legal decisions, especially judicial ones.<sup>40</sup> The two theories find their place in biojurisprudence as the methods of moderate epistemology seeking the 'golden mean' between extreme cognitive relativism and extreme cognitive absolutism.

A procedural theory of justice is that example in contemporary jurisprudence, which shows that contemporary philosophy of interpretation leans more towards procedural than material ideas. This is a theory useful for biojurisprudence, only, however, in connection with substantive theories of justice, which clearly define values, first of all life in all its aspects. It was already Aristotle who started the development of the procedural theory of justice with his distinction between distributive justice and retributive justice. The modern idea of social contract, Kant's idea of practical reason, and also his idea of the categorical imperative are regarded as some expression of the procedural theory of justice. On the basis of the idea of social contract, John Rawls developed his conception of procedural justice, applying it not so much to subjects as institutions and behaviors. Robert Nozick, when discussing procedural justice, focused his attention on the legitimacy of the individual who holds possession of some specific good. In J. Habermas's consensual theory, the issue is first of all to reconstruct the procedural rules that determine the processes of rational communication. Less clear conceptions of procedural justice were also offered by N. Luhmann and A. Kaufmann. There is no doubt about the usefulness for jurisprudence of the procedural theory of justice,

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<sup>39</sup> See especially Ch. Perelman, *Logika prawnicza. Nowa retoryka* [translated from *Logique juridique. Nouvelle Rhetorique*, 1970], Warsaw 1989.

<sup>40</sup> For more, see R. Hexy, *Theorie der juristischen Argumentation*, Frankfurt am Main 1991.

like other procedural conceptions, because it suspends the continuity of the ongoing and possible disputes over the axiological and ontological justifications of its (jurisprudence's) key concepts, evaluations, and norms (e.g. truth, justice, and equity). Prone to mainly ontological relativism, the procedural theory of justice, when defining the content of material justice, especially when it becomes the only one, may legalize even injustice: therefore, it can view formally correct security as the supreme value of the law. How dangerous this pathology of jurisprudence is, can be inferred from the experience of the Third Reich.<sup>41</sup>

The economic analysis of law developed in the latter half of the twentieth century, mainly owing to the results of studies by the Chicagoan School. Its representatives discerned the ontological essence of law in four economic objectives: efficacy of the proper distribution of goods, resolution of economic conflicts, enhancement of prosperity, and ensurance of a minimum of economic effectiveness.<sup>42</sup> The economic analysis of law, while not narrowing the analysis of law down to the sphere of duty, falls, however, into ontological one-sidedness, confining the law's essence to economic factors. This analysis points arbitrarily only to the economic criterion as the norm of the binding force, values and application of law. In this analysis, the interpreter of law and the applier of law, especially the judge, have their freedom to make decisions highly restricted by economic factors. Instead of using the typically legal methods of reasoning, interpretation, and application of law, he is induced to make use of exclusively economic methods.<sup>43</sup> The comparative study of the assumptions of economic analysis of law and the assumptions of biojurisprudence reveals first of all the ontological one-sidedness of the former sharply contrasting with the ontological, epistemological, axiological and methodological versatility of the latter.

As a side-note to the outline of non-classical trends of jurisprudence, one can formulate remarks pertaining to the doubts about and fears of what is new in jurisprudence, and thereby also embracing biojurisprudence.<sup>44</sup> Doubts and fears like that often stem from the lack of sufficient philosophical knowledge among lawyers in the areas of ontology, epistemology, axiology and methodology of jurisprudence. The fear of what is 'new', 'competitive' and 'not established' often makes one stick to the 'old', 'non-competitive' and 'established'. A certain influence on these choices is exerted by the proverbial conservatism of lawyers, which

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<sup>41</sup> See footnote 23.

<sup>42</sup> The main work of the Chicagoan School was published by R. Posner, *Economic Analysis of Law*, 4<sup>th</sup> ed., New York 2003. R. Posner and F. Parisi are also co-editors of the *Economic Approaches to Law Series*.

<sup>43</sup> See J. Stelmach, B. Brożek, W. Załuski, *Dziesięć wykładów o ekonomii prawa*, Warsaw 2007; R. Tokarczyk, *Jednostronność ekonomicznej analizy prawa*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2007, no. 4.

<sup>44</sup> *Ibidem*, p. 187 *et seq.*, especially the part *Lęki podstawowe*.

is greater among European lawyers than among more dynamic US lawyers. The high degree of difficulty and complexity of some new trends of jurisprudence, clearly discernible in biojurisprudence, may discourage conservatives and lazy people. Divergences of views on the fundamental values of jurisprudence, overcome by biojurisprudence with the prevalue of life, lead to disputes already at the starting point of all considerations. Therefore they make it impossible to arrive at jointly accepted norms, whereas the prenorm of life allows this in biojurisprudence. The reforms of the system of legal education are regrettably lagging far behind the theoretical achievements of jurisprudence. This lagging behind is even greater in the generally rather opportunist legal practice, even in liberal democratic countries.

### *PRO FUTURO*

Biojurisprudence, taking the needs of the twenty-first century into consideration, lays the intellectual foundations for the practice of making and applying law. It sees the essence of these foundations in life as the natural and obvious prevalue: the source and goal of all other values, which is the same as the prenorm – a general framework that shows the limits to other branches of law. The fact that it sees both the prevalue and prenorm in life relieves biojurisprudence of speculative difficulties that beset other trends of jurisprudence without effects.

The general assumptions of biojurisprudence await to be developed in greater detail. First, we should thoroughly review the existing terms in legal language and professional lawyers' language. Many of these terms have lost their original meanings owing to the spread of exceptional biotechnological and biomedical achievements throughout jurisprudence. They are no longer adequate to define what they seemingly define. When searching for appropriate terms, we should constantly bear in mind life as the prevalue and prenorm. In the light of biojurisprudence, all law is biolaw, which, according to the natural course of life, is divided into three branches characterized by biojusgenesis, biojustherapy and biojusthanatology.<sup>45</sup>

The three branches of law deal with the three main spheres of life: public life, private life, and intimate life. They certainly do not exhaust the whole of these life spheres because law should regulate only that which needs to be regulated by law. If moral or religious regulations alone were sufficient, law would be entirely unnecessary. Apart from the spheres of life that are regulated either simultaneously or exclusively by law, morality and religion, there are vast spheres of life where any regulation by any norms whatsoever is superfluous.

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<sup>45</sup> Various benefits of learning and practicing biojurisprudence in particular branches of law, both domestic and international, are recognized by the eminent Professor of Law Aleksandr Merezko of Kiev, *Biojurisprudentsia – novyi napriam v suchastii nauchi prava*, "Yuridichesky Zhurnal 2008, no.1, p. 136 *et seq.*

Since all norms, legal norms in particular, apply directly or indirectly to specific spheres of life, it is by all means justified to use the name 'biolaw' instead of 'law'. The term 'biolaw' alone can keep reminding us about that which is its object, pre-source, prevalue and prenorm. This conviction is confirmed in legal language – the language of legal texts, and in the language of professional lawyers: that of lawyers' circles, legal scholars and lawmakers in the growing number of countries, yet only in the area directly connected with bioethics. Biolaw, however much it owes to bioethical inspirations, should not be entirely determined by bioethics apart from setting the boundaries of bioethical axiology, which is indispensable.

Contrary to established views, the original sources of law or rather biolaw now, are by no means custom, contract, precedent or law-making, which are secondary to law, but the necessity of normativizing the life of human individuals and their co-existence in different communities. Custom is therefore a manner of human coexistence, established by long-lasting repetition in a social group: this manner resembles habit in the behavior of human individuals. Contract denotes at least two consistent declarations of will by individuals or groups of people for the purpose of constitution, change, or cessation of norms of their relations in a specific area of a particular segment of social life. A precedent is a decision of a state agency, especially a court decision, concerning an actual rather than abstract case arisen from the life of an individual or/and from a human group, which (the decision) can be a model for adjudicating similar cases in the future. Making law (biolaw) consists in creating general norms by an authorized state agency or any other law-making body for anticipated cases arisen from the life of individuals and/or the co-existence of a human group, which, however, may never arise.

Biojurisprudence, when creating the intellectual foundations for biolaw, proposes a new look at such concepts as 'legal norm', 'legal provision', 'legal act'. In the light of biojurisprudence, we should give up futile speculations on the essence of legal norm and legal provision and their interrelations. This would be possible if we accepted the obvious truth that a legal norm is a statement, though constructed in terms of legal provisions, yet both this norm and this provision should first of all truly reflect the fragment of the life of an individual and/or a human group to which they apply. It is life that should be *prius* (go before), while its normative regulation should be only *posterius* (follow) rather than the way round. Distinguishing in the structure of the legal provision an antecedent, a consequent, and a norm-making functor as elements that correspond to a hypothesis, a disposition, and a sanction in the structure of the legal norm is so obvious from the standpoint of common sense and unnecessary for legal practice that it could be at least marginalized if not altogether disregarded. Also the legal act and its related



concepts occupy more room in present-day jurisprudential discussions than they deserve.

The present-day trends in jurisprudence unjustifiably narrow down the circles of legal entities to the concepts of natural and legal persons, which also await their proper definitions. These circles should be widened to include some animals on the basis of the concepts of legal capacity and legal power of attorney. The principle of respect for all life, so much emphasized in ecologism and only partly taken into account in the law on environmental protection, demands rejection of speciesism, i.e. assigning different normative status to beings on the basis of their species membership. Some animals deserve protection in the normative sphere because they do not differ from some natural persons – people deprived of the capacity to enter some legal transactions, whose interests are represented by their attorneys. Biojurisprudence therefore asks a question, to which it expects an answer from biolaw, why the aforementioned legal entities continue to be treated differently in comparison with some animals.

In biojurisprudence, a legal-biological relation is one between the aforementioned legal entities based on the norms of law-biolaw, whose purpose is to regulate a specific scope of social life. Typical legal relations in present-day trends of jurisprudence are classified as civil law relations, public law or administrative law relations, and mixed relations. According to biojurisprudence they should be termed as relations regarding civil life, public life or administrative life, criminal life, and regarding life that combines all these features. On the basis of these scopes of life, different branches of law are, fairly conventionally, distinguished. These include constitutional law, administrative law, civil law, family law, labor law, or financial law. In accordance with the assumptions of biojurisprudence, these branches should be called branches of life: constitutional, administrative, civil, familial, financial or labor life, etc. The name alone of a branch of law should remind us that law is only a means to attain specific ends defined in a particular scope of life, rather than an autonomous value. The fundamental division of these branches prompts a distinction between the branch of normative protection of life and the branch of normative improvement of life quality.

The system of biolaw, present-day law systems, is created by all biolaw/law regulations relating to life protection and improvement of the quality of human life, and the lives of some animal species. Relations between individual units of legal regulations in the biolaw system – norms, provisions, principles, branches – are determined by the character itself of life and co-existence. They are thus distinguished by the natural processes and manifestations of life, which is essentially different from the character of bonds imposed by the present-day conceptions of law. In biolaw, the hierarchy of branches of biolaw loses its importance as compared to the present-day law, because biolaw appreciates the value of not only

the life of human individuals but also that of some animal species and specific kinds of plants. The diminishment of the importance of this hierarchy harmonizes perfectly with the messages of ecology, liberalism and democratism. In biolaw, strivings for the internal consistency of the law system, entirely unrealistic in the present-day law systems, no longer have greater theoretical importance until contradictions are eliminated in life itself, mainly in social life, regulated by biolaw. Biojurisprudence also exposes the strivings, even grotesque, for the completeness of law or for filling the gaps in law. The millennia-long experience of the systems of statutory law, aspiring to internal consistency and completeness, showed that this could never be attained.

The processes of applications of biolaw are definitely closer to the culture of common law than the culture of statutory law. The common law culture restricts the irrationality of the culture of statutory law, both in the processes of making and applying law. While in the culture of statutory law we are dealing with two long and usually complicated processes – first those of making and then applying law, in the culture of common law, law-making is at the same time the application of law and the other way round. While in the culture of common law there is as much law as there are cases actually arisen in life, in the culture of statutory law, often unconnected with real life, despite the huge maze and growing avalanche of constantly new laws being passed, one has never found statutory law full, sufficient, or complete. The case law of the common law culture is characterized by the virtue of permanence, whereas the law of statutory law culture always lags behind the processes of life that occur faster than even the fastest amendments to this law.

Biojurisprudence simplifies and clarifies the issues of interpretation of law, unnecessarily complicated in the practice of applying statutory law. It simplifies the issue because the underlying sense of all law can be reduced to the protection of life and improvement of its quality. This sense can be seen by any prudent person, therefore it is almost unnecessary to know speculative legalistic argumentation and complicated legal interpretations that are more useful for idle speculations by legal theorists than legal practitioners. Biojurisprudence clarifies the issue because linguistic and logical legalistic argumentations and interpretations of law, described in the trends of contemporary jurisprudence, especially legal positivism, obscure more than elucidate that which they try to elucidate. If, even for a moment, we shake off the impression of the seeming learnedness of legalistic argumentation and interpretation of law, we will easily notice their verbalism, pretentiousness, and lack of connection with the realities of life. Biojurisprudence refers unpretentiously to the principle of self-evidence wherever it can be applied.

Finally, biojurisprudence allows us to perceive the multi-aspect nature of biolaw better than even the present so-called multi-level or integrative conceptions of it. According to biojurisprudence, the multi-aspect nature of biolaw is evidenced,

entirely naturally and obviously, by the spheres and contexts of life, in which it arises and is applied. The multi-level and integrative conceptions of the investigation of law, however, are abstract like the law of statutory law culture, and they are unconnected with the realities of specific manifestations of life that are regulated by law or awaiting such regulation. In the investigation of law, biojurisprudence appreciates both the influence of nature and culture. Taking into comparative account in biolaw the religious, moral and legal contents of different cultures of the world, biojurisprudence draws extensively on comparative law and contributes considerably to its development.

Comparative studies of world cultures show the overwhelming prevalence of cultural determinants over genetic determinants, both in relation to the protection of life of humans and animals and to killing them. While the protection of life expresses the instinctive will (rationalized in humans) of almost all animate beings to survive, killing them is determined by culture. Wars, genocide, terrorism, murders, while raising fears for the survival of animate beings, strongly emphasize the value of life as the prevalue. Individuals, both humans and animals, are always driven by their instinct for survival. However, the survival of species is governed by other laws, first of all the law of the so-called lesser evil. For survival of a species, the principle of self-evidence, adopted by biojurisprudence, admits of sacrificing the lives of specific individuals of this species. According to biojurisprudence, killing individuals outside one's own species, especially animals by breeders and hunters, is justified only by the necessity to obtain food. Hunting practiced only for pleasure is a manifestation of sophisticated axiological primitivism and brutality, which flagrantly violates both the prenorm of the value of life and the prenorm of life protection. Throughout the evolution of world cultures, which ecologism emphasizes most clearly, there are clear tendencies to minimize or even entirely eliminate killing.

## STRESZCZENIE

W sporze o nazwę – obejmującą zarówno teoretyczne, jak i praktyczne strony prawa – konkurują ze sobą przede wszystkim cztery nazwy: „filozofia prawa”, „teoria prawa”, „prawoznawstwo” i „jurysprudencja”. Nazwy te w kontekście rozważania życia jako prewarłości i prenormy są jednak mniej odpowiednie niż nazwa „biojurysprudencja”. Gdy te inne nurty utrwaliły już swoją obecność w myśli i praktyce prawniczej, biojurysprudencja dopiero do tego zmierza.

Zarówno wspomniane cztery nurty myśli prawnej, jak i biojurysprudencja mają własną ontologię, epistemologię, aksjologię i metodologię. Biorąc pod uwagę naturalny rytm życia, szczególnie życia człowieka, w biojurysprudencji wyodrębniłem trzy jej segmenty: biojuszgenezę, biojusterapię i biojustanatologię.

Poza tradycyjnymi nurtami myśli prawnej, jurysprudencja prawa natury jest najbliższa założeniom biojurysprudencji. W odróżnieniu od prawa natury, jurysprudencja pozytywizmu prawne-

go jest tylko częściowo przydatna biojurysprudencji. Metodologia biojurysprudencji posługuje się różnymi metodami przydatnymi poznawaniu, tworzeniu, interpretowaniu i stosowaniu prawa – bioprawa. Założenia jurysprudencji realizmu prawnego mają duże znaczenie dla biojurysprudencji, szczególnie pojmowania życia jednostki ludzkiej i życia społecznego różnych grup ludzkich.

Biojurysprudencja, uwzględniając potrzeby XXI wieku, kładzie podwaliny myślowe dla prawa tego wieku – bioprawa.