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Monocentrism and Multicentrism as Legal Theories in the Global Era

Abstract

The article describes two opposing theories of legislation and jurisprudence in the global age: multicentrism and monocentrism. The first one claims that a new legal system at the supra-state level is emerging, which must take into consideration varied legal traditions. The second one stresses that certain fundamental principles must be shared today by all people. It seems that the ultimate goal of jurisprudence is to create a system of laws that reconciles multitude and diversity with unity.

1. Preliminary remarks

The aim of this article is to discuss phenomena which have either emerged or been magnified in legislation and jurisprudence at the supra-state level in the globalized world. The starting point of the discussion is a comparison between the fundamental characteristics of international law in the traditional understanding and global law. Historically, it was generally accepted that international law: (1) sought to prevent conflicts and resolve existing conflicts between the states with due consideration given to the aspirations and power of conflicting parties; (2) applied to relations between states, not above the level of states; (3) considered states to be sovereign bodies holding the status of legal entities; (4) was instituted by sovereign states endowed with equal rights; (5) reduced (through treaties, conventions, declarations, international customs, legal principles) the freedom of action of individual states – with their consent; (6) laid claim to being objective and universal, i.e. had a number of formal standards and attributes including generality, consistency, neutrality and equal treatment of different entities; (7) was tough in that its regulations (agreements, treaties) included provisions about military and political sanctions in place for non-compliance; (8) derived the force necessary for ensuring compliance with the law from states that were sole holders of military power, sole law-makers and sole enforcers of the law.[1]

[1] Cf. M. Koskenniemi, *Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations,* in: M. Bayers (ed.), *The Role of Law in International Politics,* Oxford: OUP 2001, pp. 17–34; W. Brugger, U. Neumann, S. Kirste, *Rechtsphilosophie im 21 Jahrhundert*, Frankfurt/Main: Suhrkamp 2008.

Global laws contradict international laws in a number of aspects. Globally effective laws exist alongside international laws and increasingly replace them. Concisely put, the general characteristics of global laws are as follows: (1) they arise in the process of autonomization of laws towards national states; (2) they do not always take into account the aspirations or power of individual states; (3) they restrict the extent of sovereignty of states; (4) their objects and subjects extend beyond states, and also encompass other institutions, organizations and citizens; (5) they confine the freedom of action of states and other legal entities, often without their will and consent; (6) they do not lay any claim to being internally consistent or neutral; (7) they are often soft or semi-hard, in that non-compliance does not result in military sanctions; (8) their soft or semi-hard character is not defined in a hard-and-fast manner. Consequently, global laws encompass soft instruments (authority, public opinion, psychological pressure, etc.), and semi-hard instruments (economic and political pressure and sanctions, without the use of military force).[2]

2. Multicentrism

The theory of multicentrism claims that globalization age has seen the emergence of a multitude of legislative and judicial bodies which are vested with independent powers and which pursue their respective legal activities independently. Their scopes of competence frequently overlap. They create different, competitive laws variously regulating the same phenomena or adjudicating differently on the basis of the same laws. Multicentrism has its roots in differences in the interpretation of values, legal principles and fundamental laws by individual bodies and institutions. The position opposes the hierarchical vision of law and its perception as a consistent and closed system. It also contrasts with the concept assuming clear divisions in terms of objective scopes of activity between different institutions and legal authorities. Multicentrism occurs both within states and at the supra-state level. The problem is definitely present in Poland, which is best evidenced by conflicts about the scope of competence and interpretation of laws arising between the Supreme Court, Supreme Administrative Court and the Constitutional Tribunal with regard to such important issues as vetting (lustration) or privatization.[3] Judicial multicentrism is particularly popular, both as a theory and in practice, in the USA and UK because judges in these countries have a broad authority to interpret the Constitution and also due to the continued important role of the customary law.

According to the doctrine of global multicentrism, the supra-national legal system is decentralized, as there is no central legislative body establishing superior laws for all the entities, no central tribunal with overriding jurisdiction and no administrative body vested with the highest executive powers. There are multiple law-making institutions and the laws they lay down often fail to coexist properly, sometimes overlapping and at other times conflicting. Multicentrism applies to the domains of legislation and jurisdiction.

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[2] Cf. R. Koehane, *International Institutions and State Power. Essays in International Relations Theory*, Boulder: Westview Press 1989; J. Nye, *Soft Power: The Means to Success in World Politics,* New York: Public Affairs 2004.

[3] Cf. E. Łętowska, *Multicentryczność współczesnego systemu prawa i jej konsekwencje*, [Eng. *Multicentrism of the contemporary system of law and its consequences*], Państwo i Prawo, 2005/4, pp. 3–11.

Laws are set up by many different types of law-making authorities. These include: (a) traditional international institutions, i.e. bodies established by states and controlled to a greater or lesser degree by states, e.g. ASEAN; (b) hegemonic states (e.g. USA); (c) institutions and organizations which were originally established by states but have since then moved out of state control and currently exert an influence on states, e.g. global financial institutions (the World Bank, International Monetary Fund, World Trade Organization) or the World Health Organization; (d) extra-governmental and private organizations, corporations, arbitration institutions, e.g. the International Chamber of Commerce, Food and Agriculture Organization, World Intellectual Property Organization, International Labour Organization, Organization for Economic Cooperation and Development, etc.; (e) management networks; (f) supra-state political communities such as the European Union. Extra-state organizations and institutions operate in a number of countries, but their operations are independent of state control. All the laws they enact apply both to their members and other entities.

Global laws are made in different ways: in the form of *opinio iuris*, practices followed in state actions on the international arena, legal customs, traditions for settling matters arising on the international agenda, proposals or decisions adopted by organizations, international institutions, and states. Furthermore, they concern directly citizens and residents of states without being transposed into national laws, which makes them effective and binding on individuals. Many theoreticians claim that individual rights have a superior status to the principle or sovereignty of states and state laws.[4]

The multitude of competing (and relatively independent) tribunals, courts, and legal commissions is, in turn, an important argument for judicial multicentrism. The institutions exercise their functions and rights over individuals, communities, churches, corporations, and other institutions, frequently adjudicating differently in similar matters.

The *status quo* thus leads to a lack of legal certainty. Consequently, conflicts arise, multiple interpretations are offered and legal instability ensues. We are living in an age of multiplicity of legal orders which overlap and cross-cut one another. The law has ceased to be homogeneous and consistent, and there are conflicts between different laws which are not resolvable on the basis of official national and international laws. What this shows is that the unity of law has collapsed, resulting in multidimensional "scattering" of legal frameworks. The law thus performs two opposing functions. On the one hand, it remains a medium that mediates between cultures, ethnic groups, communities, corporations, etc., and helps in the resolution of possible conflicts arising between them. On the other hand, it seeks to protect particular interests and thus becomes a constituent of particular cultures, groups, corporations, etc. Particular laws, in turn, become non-equivalent and non-comparable. To corroborate this thesis, see the current conflicts regarding same-sex marriages between EU laws and legal frameworks in place in a range of EU Member States (Poland, Ireland, Lithuania), the International Covenant on Economic, Social and Cultural Laws, and the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Such conflicts cannot be resolved in an objective manner acceptable to all the parties concerned on the foundation of the laws in place and by existing adjudicating authorities.

[4] R. McCorquodale, *The Individual and the International Legal System*, in: M.D. Evans (ed.), *International Law*, Oxford: OUP 2006, pp. 307–333.

The status of ownership in European countries and other states is regulated simultaneously by customary law, case law, positive national and international laws, corporation law, market law, family law, banking law, tax law, stock exchange law, and many others. It is thus impossible to reconcile decisions issued on the basis of such diverse laws. Consequently, there is a growing body of diverse and incommensurable legal regulations, interpretations, and decisions.[5]

3. Monocentrism in the theory of law

Monocentrism is a concept asserting that multicentrists overestimate the role of multitude and diversity of law in the global age. Monocentrists maintain that the central trend observed nowadays consists of processes of worldwide adaptation and unification of laws rather than their diversification. Furthermore, monocentrists believe that adaptation and unification processes will determine the shape of the law and judicial decisions globally in the long-term perspective. While monocentrists agree that the number of agencies and institutions specializing in laws pertaining to specific spheres of social life is currently on a rise, they question the thesis that there is a growing number of competitive law-making and jurisdiction centres which issue contradictory laws and legal decisions on the same matters. They believe that the apparent diversification is only temporary in nature. In actual fact, though, both legislation and jurisdiction exhibit a trend towards greater harmonization.

The arsenal of arguments to support monocentrism is quite extensive. Attention is drawn to the role of jurists, experts, and specialists in the creation and interpretation of law. Lawyers, technocrats, managers, scholars, and specialists create epistemic communities which exert an increasingly significant impact on global law and national laws. They share common values, problems, knowledge, and contacts. They create the legal climate by issuing opinions, exercising their competence, and ascribing meanings to observed phenomena. They prepare contracts, treaties, expert opinions – and assess risks. They have become independent of state interests and have formed a relatively uniform international community.[6]

There are also loose, informal judicial and legal networks emerging and spreading horizontally above state boundaries. The process is aided, on the one hand, by the establishment of new global and regional judicial tribunals and, on the other hand, by the improved flow of information and increasingly close contacts between judges. Judges, especially in democratic states, regularly communicate to receive advice and resolve their doubts regarding the interpretation of laws, usually in aspects relating to the human rights law and economic laws. In addition, they set up judges' organizations or informal platforms of agreement. Meetings and arrangements of this kind enhance the judges' independence of governments and pressures from outside the legal domain. In 1993, the federal Judicial Conference even established a dedicated institution, the Committee on International Relations, to organize the exchange of judges between states. As a result, no respectable judge nowadays can afford to pass decisions that contradict global or international laws, or standards governing the interpretation and implementation of laws that are universally recognized in the international legal world.

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[5] M. Zirk-Sadowski, M. J. Golecki, B. Wojciechowski (eds), *Multicentrism as an Emerging Paradigm in Legal Theory,* Peter Lang 2009.

[6] A. Antoniades, *Epistemic Communities, Epistems and the Construction of (World) Politics*, Global Society, 2003/1.

What has emerged is the concept of global legal opinion, with legal systems and practices worldwide becoming increasingly unified.

In addition to horizontal platforms of cooperation, there are also vertical influences and interrelations. Legal circles and international tribunals seek to align the jurisdiction and legislation of individual countries with their adopted standards. For example, the European Court of Human Rights (ECHR) develops principles, laws, and standards (e.g. the postulate to abolish capital punishment) which are followed by national legislators and courts despite the fact that the ECHR has no formal authority over them. In this context, it is apt to mention international tribunals and courts: the International Court of Justice (the judicial organ of the UN, established in 1945), the Sub-Commission on the Promotion and Protection of Human Rights (the main subsidiary body of the Commission on Human Rights) and other institutions resolving complaints lodged by states, corporations and individuals. Other organs and institutions make themselves bound by their decisions.[7]

The discussion above was centred on judicial networks. Similar networks, however, are also found in the field of legislation and are, arguably, even more important than judicial networks. An example of such networks in economy is the Bretton Woods system, a monetary management system which establishes rules pertaining to credits and loans, and otherwise regulates the international economy. One of the largest networks pertaining to the banking and economic legislation has evolved around the Basel Committee on Banking Supervision founded in 1974. Such networks exist outside the international legal system regulated by the UN or other organizations grouping states. What is important, however, is that they have a greater influence on global life than individual countries.

Legal networks are supported by political networks created worldwide in the form of regional and supra-regional organizations and institutions. Some are associations of states. Others exist independently of states and have a specific focus of activity such as environmental protection. Involvement in the operations of a network increases the scope of an individual entity's possibilities due to the direct access to databases, programmes, regulations, technologies, and control measures.[8]

Monocentrism also differs from multicentrism in terms of interpretation of the roles of organizations and institutions in legislative and judicial processes. Monocentrists underscore that such entities typically operate within a defined legal framework which is shared by all the members. An important factor here is the overriding role of the United Nations. Based on treaties and practices of action, the UN was granted a set of superior powers over states and other institutions. Even though the UN consists of member states, it has an autonomous status. The General Assembly of the United Nations – with the acceptance of the United Nations Security Council (and the UNSC itself) – is empowered to establish some of the most important global laws.

Interestingly, not all entities are treated equally. Some states, institutions, and organizations are, if not formally (though this also happens) then in actual practice, privileged over others. As a rule, privileged treatment is given to large countries, members of the Security Council. Global laws are in place regardless of the will of states and other entities. Countries which are not permanent members of the Security Council

[7] W. Talbott, *Which Rights Should Be Universal?,* Oxford: OUP 2005.

[8] D. Shelton (ed.) *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, New York: OUP 2000.

have limited sovereignty because they must comply with laws which were passed without their input – or abide by laws enacted by majority vote of the General Assembly. However, members of the Security Council, too, are required to conform to laws that are recognized as fundamental for the entire humanity, such as laws governing human rights. In 1966, all the states were given the obligation of their positivization. Owing to the fact that human rights laws exist above national boundaries, citizens emancipate themselves from state authorities and intra-state laws. In this way, human rights laws have acquired a universal dimension. The same attributes have also been ascribed to the so-called humanitarian rights laws (regulating such issues as the treatment of prisoners of war, civilians and women during military conflict) and laws governing environmental protection.

It is important that there are certain rules in place concerning the international legitimization of political (and other) actions through compliance with legal principles including race equality, human rights, freedom from enslavement, and democracy. Global legal principles and laws are typically less precise than traditional international laws, and more flexible in operation. Laws for combating terrorism can be given as an example here. They are frequently amended, supplemented and adapted to local conditions. They define general parameters and indicate directions – or broad rules – for the resolution of cases. In this sense, they map out directions for tough state laws. At the same time, they can be used by large powerful political entities and bent to their interests.

Still, many global and international laws acquire an increasingly precise form. They concern, in particular, humanitarian laws regulating the status of prisoners of war, civilians during wars, tourists, immigrants, and refugees. The laws are in force by virtue of custom (or convention) or *ius cogens*.

Global laws apply, on equality basis, to states along with other entities such as organizations, institutions, companies, corporations, and individuals. They are all obligated to conform to laws that are recognized as globally valid, and they may be held accountable for their violations. The mediation of states in the implementation of fundamental global laws is superfluous.[9]

The acceptance of global legal principles and laws takes place under the influence of public opinion, international political climate, and pressures from international organizations and institutions which monitor and supervise compliance with human rights laws. Those that do not meet the required standards, at least formally, are subject to pressure exerted by the society, citizens' movements, organizations, and institutions of various types which create a specific atmosphere around deviations from acceptable standards. The situation has led to the emergence of a supra-national civil society composed of several dozen thousands of international non-governmental organizations. The most important of them are: Greenpeace, Amnesty International, Human Rights Watch, Médecins Sans Frontières, Transparency International, and International Red Cross. In a way, they perform the role of global public conscience, putting pressure on governments and different institutions. They also played a central role in the adoption of the Convention on the Rights of the Child in 1992, the Declaration on the Elimination of Violence Against Women in 1993, the Convention on Biological Diversity in 1992, or the Kyoto Protocol to the United Nations Framework Convention on Climate Change in 1997. The International Red Cross has had an impact on the

[9] T. Dunne, N.J. Wheeler (ed.), *Human Rights in Global Politics*, Oxford: OUP 2001.

development of humanitarian legislation, e.g. the 1997 antipersonnel mine-ban treaty. Trade unions have had a say in the establishment of labour law. All the law-making initiatives, whether or not named above, go in the same direction.

Extra-governmental organizations create standards and criteria of action regarding ecology, democratization and human rights. Their regulations comply with other provisions laid down by other organizations and institutions.

In addition to the globalization of legislation, an interesting phenomenon observed in globalization of the legal field is the globalization of legal rights and powers. It takes a number of forms. One of them consists of the extension of some legal orders beyond the boundaries delineated by tradition or the existing international law. Typically, countries seek to expand their jurisdictions concerning selected types of actions beyond their boundaries, to cover citizens of other states. This is the policy followed by the USA. The country prosecutes and brings to justice weapons and drug dealers, or terrorists, outside US boundaries – claiming that such actions are undertaken to defend America's vital interests. Since today's crimes are global in nature, the traditional understanding of boundaries of jurisdiction is thought to have become obsolete. Consequently, every state has the right to try criminals who pose a threat to the existence of communities or violate universal laws (cf. the case of Chile's dictator Pinochet arrested in the UK in 1998).

Monocentrists agree that the globalization era has witnessed an extension of the objective scope of laws. By establishing successive new types of laws, it is attempted to overcome emergent challenges related to social problems including environmental damage, famine, terrorism, restrictions of freedom in the family and religious communities. This extension entails the need to create specialist laws and institutions specializing in different areas of social life (in different regimes of the application of laws). The resulting situation is a pluralism of systems of legal norms. Such pluralism, however, may not be a justification for multicentrism for two basic reasons. Firstly, the phenomenon has been known for ages (e.g. canon law has always been independent of state law). Secondly, it does not need to lead to legal conflicts because relatively clear boundaries have been drawn between different aspects of social life and areas of application of different legal regimes.

4. Conclusions

The discussion presented above implies that monocentrism is becoming the dominant paradigm in law and in philosophy of law in the current globalization age. The implication, however, should neither obscure today's legal problems, nor lead to oversimplifications in the understanding of global laws. I am positive that monocentrism is essentially the dominant doctrine at the level of the highest principles of law and fundamental norms. This, however, is the domain of soft or semi-hard laws discussed above. Soft laws include political and legal declarations (e.g. the Universal Declaration of Human Rights of 1948), memoranda, resolution, ordinances, legal opinions, rules governing prioritization of certain laws (e.g. precedence of written over unwritten laws), moral standards followed or required by the public opinion, customary laws, legal precedents, etc. The global system of laws accepts a range of laws which variously concretize legal principles and fundamental laws. The scope of concretization is limited by compliance with the spirit and letter of legal principles and fundamental laws. Nevertheless, as one goes

down from the general level, and takes into account more concrete laws (especially their interpretations and applications in the judicial system), there is an increasing number of disputable cases, conflicts, discrepancies, or even contradictions in the application of what is theoretically shared, i.e. the commonly accepted clauses of law. Multicentrism is, in particular, well justified in the theory of economic law, where subjective beliefs and interest play a major role. The selection of laws applied to business activity and their interpretation – as well as claims to the establishment of a system of laws fostering economic development – is a strongly debated issue. There is an increasing number of legislative and judicial organs coming into existence in this area of law, while existing differences are effectively impossible to overcome, particularly between entities (legal centres) with a strictly economic profile and units (legal centres) representing the public (or civil) sphere – or even the domain of the state. Organizations and institutions of diverse types compete for the establishment of binding economic laws and for the valid interpretation and application of existing legal frameworks. Depending on their nature, various legislative and judicial entities employ different competitive strategies.

For example, the IMF and the World Bank enforce compliance with the rules of the free market by threatening non-compliant entities with sanctions such as refusal to grant credit or increased interest rates. Such laws are regarded as non-juridical, which essentially means that they are not binding in the traditional sense (i.e. under pain of military actions). The use of military force is considered the last resort.[10] Sometimes signatories are not under any direct obligations but are rather expected to conform to standards on a "should" basis. Naturally, not all entities abide by these laws. States, but also other entities, protect themselves against them by imposing their own sets of obligations. For example, they may require that credit policies take due account of environmental protection factors, or call for freedom of financial management by the states, etc. Vigorous efforts instituted by environmental organizations have forced the World Bank to include appropriate environmental provisions in their policies and withdraw from a number of environmentally hazardous projects, e.g. Polonoroeste (a road-building programme in Brazil's Amazon) or the construction of the Sardar Sarovar Dam on the Narmada River in India. In another example, the Montreal Protocol on Substances that Deplete the Ozone Layer is an instrument promoting reduced emissions of chemicals that harm the ozone layer, however not all states seem to be concerned about the problem.

In addition to economic legislation and jurisdiction, another area justifying multicentrism is the domain of customary laws. They come into existence as a consequence of regular actions that are neither integrated into statutory laws nor codified into treaties or agreements. They are, nevertheless, accepted (implicitly or explicitly) as binding. In this respect they correspond to Hart's secondary rules.[11] They concern, primarily, the responsibility of legal entities for their actions – and their powers. They dominate in a number of objective areas including environmental protection, human rights, maritime regulations, different types of transfer, Internet usage, customs, and morality. At this point, due note should be taken of *lex mercatoria*, i.e. a body of customary rules and practices for the resolution of conflicts arising during the transfer of goods and services. They are commercial laws existing independently of local and state laws. Known already in Antiquity as merchant laws, they have recently recovered their former influence.

[10] Cf. I. Clark, *International Legitimacy and World Society*, Oxford: OUP 2007, pp. 38–49.
[11] H.L.A. Hart, *Pojęcie prawa*, [Eng. *The Concept of Law*], PWN, Warszawa: PWN 1998, pp. 116–130.

Even though they are private in nature, they are respected by states. Their impact is based on the power of persuasion, tradition, and pressures exerted by commercial entities. They are used, among other areas, in commercial arbitration.[12]

Summing up, unconditional commitment to either of the two major paradigms in the theory of global law seems one-sided and lacking in justification, as there are clearly tendencies of both types existing in today's world. Having stated that, it must be realized that the current age is a time of revolutionary changes. A new legal system is emerging, which must take into consideration and tolerate varied legal traditions rooted in tradition, culture, and religion. It is not possible to create a system of laws that would be closely bound, precise, and universally applicable across the globe. Certain fundamental principles, however, must be shared by all people if peace and cooperation are to be preserved. Hence the ultimate goal is to create a system of laws that reconciles multitude and diversity with unity.

[12] M. Byers, *Custom, Power and the Power of Rules*, Cambridge: CUP 1999.

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