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**STATELESS LAW? THE FUTURE OF THE DISCIPLINE**

**ECOLOGY OF LAW: TOWARDS A PURER LEGAL ENVIRONMENT<sup>1</sup>**

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<sup>1</sup> This is the working title of the paper.

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## Introduction

For some time now, the notion “law” is no longer identified only as the rules enacted by the state to govern a certain community. Due to the rapid development of science, technologies and significant social changes, the perception of law as a “uniform and monopolistic” set of rules enacted by the state nowadays is experiencing a collapse.

Scientific and social development increases the awareness of the global society towards many social, environmental and technological phenomenons. Moral and legal questions concerning the global community nowadays, in the beginning of the twentieth century could have hardly been imagined. Due to the ever changing latest data, the society continuously is altering its attitudes towards a variety of issues and its expectations towards the law are changing accordingly. The state is no longer in a position only to command the obedience and loyalty of its citizens through enacted legal norms. The state has to “earn” the support of the community by meeting and fulfilling the societal needs through the normative qualities of its policies and institutions. In case the state fails to accomplish the community’s expectations, it most likely will receive respective demands from both national and global level.

In addition, recent transnational spread of capital and the formation of global markets entail the replacement of previously fragmented national economies. Sovereign states are experiencing increased difficulties in supplying regulatory and redistributive public goods and establishing and enforcing property rights in the face of relatively open trade, rapid information-technology advances, and considerable financial deregulation.<sup>2</sup> Furthermore, complex economic, humanitarian, health, and environmental problems no longer heed the artificial boundaries imposed by states. Economies of the states have become subordinate to international power more than to state regulation. International problems are often too complicated to be effectively resolved by individual national governments.<sup>3</sup> Since the middle of the twentieth century new regimes of law have spread into spheres that previously fell within the province of the state, for instance, human rights, environmental law and trade law. Furthermore, the rules enacted by intergovernmental organizations and transnational corporations at the moment have a huge impact on the national legal systems. Such intensified changes in commerce, migration, technology and culture are the precondition of the law becoming “borderless.”

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<sup>2</sup> Ip, E. C, *Globalization and the future of the law of the sovereign state*. International Journal of Constitutional Law. 2010.

<sup>3</sup> Ip, E. C, *Globalization and the future of the law of the sovereign state*. International Journal of Constitutional Law. 2010.

The vanishing of the boundaries between national legal systems is clearly visible through the increased citation of judgments and adoption of legal doctrines from international and foreign courts by domestic judges in a number of countries. This demonstrates the varied role of law which is no longer limited to the territory and no longer depends only on the will of a certain state. The states are becoming more and more adaptive to global advancements and changes. The boundary between national and supranational laws becomes blurred. Thus, law becomes *stateless*.

However, the attempt of the state to be innovative and to go in step with the global social, technological and etc. advancement, result in the negative consequences – the law becomes overregulated or suffers from excessive and poor regulation, leading to legal crisis. *Unpredictability, indeterminism, chaos*. These words characterize the point where the modern law is at. At the moment the explicitly expressed societal needs every so often are driven by certain pragmatic interests. Never before the society had such a wide array of means of communication contributing to the spread and entrenchment of certain stereotypes of the thinking in the public opinion. The contemporary situation of law causes ambiguous feelings: on one side, modern law can be distinguished by exceptional achievements, for instance, the protection of human rights; on the other hand, law is suffering from a high scale of pollution which leads to incomprehension of law. The operation of powerful instruments of the formation of public opinion trying to achieve utilitarian, consumer-oriented, pragmatically simplified objectives are likely to cause inescapable critical situations in law which may result in consequences to legal values and the fundamental precepts of law. The ongoing processes demolish the foundations of the existing legal tradition which most likely will die out.

The afore-specified changes unsurprisingly encourage the reflection not only on the specific traditional legal categories such as, responsibility, family, consent, causation and etc. but also require the reconsideration of the law in its entirety. The law must continue to grow and develop in a changing society and this growth is an objective phenomenon. Nevertheless, the question how to decide what changes are necessary remains unanswered. This presents intriguing issues for scholarly and judicial debate, making this area particularly well suited to introduce new ideas and ways of thinking about law and its future. It is the time to acknowledge that, due to the attempt to regulate most part of the recently emerged spheres of the life, the law suffers excessive and poorly written regulation. That is to say, law becomes polluted with ill-considered, drastically pragmatic, quickly developed and scarcely applicable legal acts, i.e. we are facing serious ecological issues of law.

When talking about the ecological issues of law, it is impossible to show such objective evidence as melting icebergs, disappearing forests, the lack of the unpolluted drinking water and etc. while discussing the environmental problems, nevertheless the ecological problems of law exist. This way the solutions to problem of the being in step with changing reality are becoming problems on their own. This trend is evident, for instance, in cybercrime prevention when the overextension of criminal law in cyberspace jeopardizes civil liberties, our privacy, freedom of expression, freedom of association and fair trial.<sup>4</sup> In order to stop the afore-specified negative trends, it is essential to talk about a new concept – the *ecology of law*.

The evolution of law is an objective and rationally explicable factor. It is impossible to control the growth. The reality is complex, multilayered and the contemporary law regulates it fragmentally by making errors. Hence, in order to turn the evolution of law to the right direction, it is important to purify and understand the principles, the fundamental precepts of law. Ecology of law is the precondition for the cognition of such basic principles.

The goals of this paper are the following: (i) to define tentatively the ecology of law as a scientific category; (ii) to distinguish the fundamental principles of the ecology of law as a new phenomenon in legal sphere; (iii) to analyse the possible role of the ecology of in the process of the decision making in legal sphere.

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<sup>4</sup> Završnik, A. *Towards an Overregulated Cyberspace: Criminal Law Perspective*. Masaryk University Journal of Law and Technology: [http://mujlt.law.muni.cz/storage/1301856811\\_sb\\_04-zavrnsnik.pdf](http://mujlt.law.muni.cz/storage/1301856811_sb_04-zavrnsnik.pdf).

## The Notion and the Importance of the Ecology of Law

As it was stated in the introduction, law is no longer identified as the legal acts of the sovereign and the perception of law stretches further than to a system of binding norms sanctioned and secured by the state. As Harold J. Berman put it, law is a living process of allocating rights and duties and thereby resolving conflicts and creating channels of cooperation.<sup>5</sup> The will of the legislator is no longer identified as the only source of law. The sources of law are considered to be the reason and conscious of the community, its values, customs and habits.

Nowadays values or a set of value orientation are considered to be a significant part of law. Of course, it must be acknowledged that the approach to values as a part of the legal system by and large depends on the prevailing conception of law and the effort to identify the fundamental values of law usually is only schematic at best. However, according to legal doctrine, it is possible to distinguish the fundamental precepts of law:

1. Live honestly.
2. Harm nobody.
3. Treat all persons with respect due to them.<sup>6</sup>

The value of honesty attaches to basic commandments against deceiving, breaking promises, or acting in breach of trust or of good faith. The value of freedom from harm starts with protecting life itself, and physical security from bodily injury or bodily confinement, and from harms to reputation, emotional security, and environmental quality. The value of respect for persons means that all persons have as their due certain basic elements of respect. This is the subject matter of the human rights law and can be tracked through instruments like United Nations Universal Declaration on Human Rights, the European Convention of the Human Rights and Fundamental Freedoms and etc.<sup>7</sup>

The afore-deployed standpoint leads to the situation when the decisions of the courts both on national and supra-national are based not only of the enacted legal norms but also on certain values, i.e. the application of existing legal norms is no longer satisfactory and justice has become one of the essential criterions when evaluating the quality of the decision. The importance of justice and other values undeniably should be considered as a major achievement of the evolution of law. Rightly the courts' reasoning or the content of the law are considered

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<sup>5</sup> Berman, H. J. *Law and Revolution. The Formation of the Western Legal Tradition*. Harvard University Press, Cambridge, Massachusetts and London, England, p. 5.

<sup>6</sup> MacCormick, N. *Rhetoric and the Rule of Law. A Theory of Legal Reasoning*. p. 115.

<sup>7</sup> MacCormick, N. *Rhetoric and the Rule of Law. A Theory of Legal Reasoning*. p. 115.

to be the main properties while evaluating the quality of the legal rules and court decisions. However, nobody is talking about the quantity of laws and how it affects the quality of the entire law. In the contemporary situation when dozens of new legal norms are being enacted, it is the time to discuss the question of how the quantity of legal acts may affect the quality of court decisions and whole process of legislation. It is the time to assess whether the content, value orientations of law will soon be steeped in the quantity of legal forms. This situation when the fundamental precepts of law are blanket out by the quantity of legal acts will inevitably lead to a serious legal crisis.

On the other hand, it is impossible to expect that in such a fast-moving modern world of scientific, technological and industrial innovation and even radical social changes the law should remain intact. Undeniably the world is developing and inevitably the new spheres of reality arise and must be regulated. The law while trying to reflect important social changes and technological developments, attempts to regulate these newly emerged processes and phenomenons. However, the afore-specified efforts result in the pollution of the legal environment. The assumption that we are able to control this process is a mere illusion. However, despite the difficulties to control the contemporary process of law-making both on national and international level, the process of the pollution of law still must be addressed by introducing a new concept – the ecology of law.

The more laws are being released, the more attention must be given to the ecology of law. Talking about the ecology of law as a scientific category, first, it is important to define the concept of ecology. Ecology is defined as a science, investigating the relationships of organisms with the living environment; the interaction between living nature and inanimate nature.<sup>8</sup>

The development of the ecology of law as a new study is determined by several factors. They can be divided into two groups:

1. Factors arising from the specifics of the modern state of law, its forms of being, an individual approach to it.
2. Factors that are formed in the field of science, reflecting the perception of environmental problems.

The first group of factors is related to the dissatisfaction that occurs after the evaluation of the conditions of existence of law. This is the reaction to the processes of the development and practice of modern law. The factors mentioned in the second part are scientific ones. This

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<sup>8</sup> *Tarptautinių žodžių žodynas*. Ed. Kvietkauskas, V. 1985. p. 128.

reflects the objective requirement to understand the laws (trends) of the world. Science after reaching a certain level of knowledge of the field aims to manifold, to extend the achievements of allied sciences industries. Such education as a specific human activity in the field of internal potential of “self-development” encourages the search for truth, which in turn is an important formation factor of the scientific knowledge about the ecology of law. Thus, the investiture of the independent scientific discipline status to the ecology of law (with specific characteristic of the investigation, specific methodology for the analysis and etc.) is based on certain purely scientific assumptions.

Ecology of law and environmental ecology have much in common. It can be reasonably argued, that a person by providing disharmony to the nature, by subverting it while irrationally using natural resources, inevitably approaches the limit, after which he/she will lose the ability to control the situation or to avoid any negative alterations. Something similar is happening in legal sphere. Never before has a human had such a large arsenal of powerful communication tools, have had the opportunity to widely disseminate and consolidate public opinion certain views, thinking stereotypes. The use of powerful measures of public opinion formation while seeking utilitarian, consumer-oriented goals, might lead to inevitable critical situations in law and at the same time to have negative affect on the fundamental precepts of law. The trends of the pollution of the legal environment surrounding the human, the increasingly perceived indifference and inertia towards the law, the commercialization of law, and penetration of the technical spirit depersonalizing the law – all the factors encourage thinking about the prospects of law.

Since the categories of the pollution of law and the pollution of the environment while discussing the notion of the ecology of law are similar, it is important to note, that the solutions to both issues have certain analogies, i.e. the philosophical foundations of the solutions to the natural environmental problems may be applied to law. Environmental law is based on the intergenerational equity which raises the question of how to preserve and transmit over long periods humanity’s main assets including human capital, infrastructure, social and political institutions, cultural assets including scientific and technical knowledge, important non-renewable resources, and earth’s wildness and beauty.<sup>9</sup> Intergenerational equity-based environmental protection, due to the development of knowledge, is difficult to achieve. In regard to distant generations, knowing their circumstances, technologies, needs, and

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<sup>9</sup> *The Philosophical Foundations of International Law*. Eds. Besson, S.; Tasioulas, J. 2010. p. 456.

preferences is mostly impossible.<sup>10</sup> The same situation occurs with law. Since we do not know what expectations and objective needs the future generations would have, we cannot predict how much particular aspect of regulation would be needed.

Although in the sphere of the environmental protection it is hard to predict which resources future generations will need, it is clear that humans will definitely need their earthly home, i.e. we cannot pass the earth for future generations ruined.<sup>11</sup> The environment should be in the condition so that human beings could normally live. The afore-specified ideas are also applicable to law. As legal system is one of the environments surrounding human beings, it is essential to leave it in a condition that would be appropriate to perform the civil circulation. Nevertheless, the distinguishing of the crucial features of the law is an extremely complicated task especially at the moment when we are facing only the very beginning of the development of the ecology of law and the guidelines of the understanding of this process are only being created.

Probably the first step to the successful discussion and understanding of the principles of the ecology of law is the acknowledgement that law is facing ecological problems. The pollution of law is evident in a variety of ways: by enacting all-inclusive new legislation and attempting to foresee every step of the a certain course of events; by releasing new court decisions which are contrary to the fundamental precepts of law and which are not appealed; by designating laws to regulate new scientific, industrial spheres or new social phenomenon and etc. without understanding them; enacting laws without analysing how the new regulation would correlate with the whole legal system; enacting laws which are based on purely pragmatic interests and etc. The greatest danger lies in the fact that once the negative effects become real functioning legal factors, later on they affect on-going legal processes by creating preconditions for the reproduction of the detrimental factors in the same negative role. In addition, taking into account the modern state of the art, such events can take rapid acceleration dynamics.

The above-described situation presupposes the necessity of the development of a new phenomenon – the ecology of law. At the moment we face the very beginning of the development of this phenomenon. However, even at this primary phase it is necessary to define the main landmarks and parameters of the ecology of law. The formation of the theoretical foundations and methods of the analysis the ecology of law, including but not limited to, concern the following questions:

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<sup>10</sup> *The Philosophical Foundations of International Law*. Eds. Besson, S.; Tasioulas, J. 2010. p. 457.

<sup>11</sup> *The Philosophical Foundations of International Law*. Eds. Besson, S.; Tasioulas, J. 2010. p. 457.

1. The formulation of the definitions and concepts relevant to the ecology of law.
2. The identification of the basic principles of the ecology of law, analysis of its forms of occurrence and methods.
3. The examination of the environmental patterns and mechanisms in the evolution of law.
4. Analysis of the concrete manifestations of the ecology of law.
5. Analysis of the prospective effect of the ecology of law on the evolution of law.

The analysis of the afore-specified subject-matters contribute to a deeper understanding of the ecology of law, which likewise the economy and law or psychology of law, enrich the perception of the evolution of law and prevent the law from being more polluted. The growth of the legal consciousness is one of the preconditions to keep to ecological balance in the legal sphere. In other words, the analysis of the afore-specified questions, would contribute to the creation of the public eco-consciousness, which would preserve the fundamental precepts of legal environment in the face of the contemporary evolution of law.

## **The Ecological Mechanisms of the Legal Activities**

The exercise of the legal activities is the universal precondition of the functioning and the development of law. The content and form of the legal activities determine the ecological state of the legal environment; it reveals the nature of one's participation in the fostering of the fundamental legal precepts and values. The conditionality of legal action, the forms of the existence of the legal action, patterns that characterize it, constitute an important aspect of the whole topic of the ecology of law.

In the context of this paper legal activities can be defined as targeted activities of a person while meeting its organizational and moral needs. Legal action is based on the relation "interest – reason (motive) – purpose". In this context, interest is defined as the objectively existing need; reason (motive) is the main stimulus encouraging a person to perform certain actions; purpose is what the person seeks to achieve while performing specific actions.

The ecology of the legal activities directly depends on the following of the fundamental precepts of law. The legal activity is characterised as the pursuit of the clarity and security. Still, the keeping of clarity and security is a very difficult task, because the law cannot be unified, levelled – every person thinks and feels differently, has his/her own point of view. The diversity of law is the reflection of complexity of human nature. It is a constant dispute about human existence, an endless search of the forms of expression. Legal activity is incompatible with simple reproduction, the repetition of the old, the following of the obsolete canons or blindly pursuing to conform to the ever-changing social tendencies, to any technological or scientific development without analysing their effect on the fundamental values protected by law. The creative nature of the legal activities determines the unpredictability of the result and the non-existence of the linear relationship between the expenditure of the legal activity and the results. Nevertheless, inconsiderate legal activities while enacting new laws or adjudicating may lead to a serious legal crisis.

While conducting the processes of the ecology of law, attention to self-regulation mechanism should be drawn. The execution of the legal process leads to the existence of self-regulatory mechanisms which stipulate the nature and the form of the course of the legal processes. The effectiveness of the self-regulatory mechanisms determines the degree of the realization of the ecological criteria in the legal activities because it helps to avoid overregulation.

The functioning and development of the legal culture, as well as, the legal activities are closely connected with the human factor. Humans not only adapt themselves to the world, at the same time they adapt the world to their needs. This process is perfectly visible nowadays when, due to the ever changing reality, humans struggle to achieve respective reforms in legal sphere. At the moment, humans clearly determine the intensiveness and directions of the legal processes. The development of law only depends on their intellectual and cognitive abilities, as well as, on their interests. Such actions of the human determine the quality and ecological potential of the law.

At the same time self-regulation in the execution of the legal activities should not be considered to be unlimited. Due to the fact that the legal activities are based on the scheme “interest – reason (motive) – purpose”, the self-regulation may also become too pragmatic and deny the fundamental precepts of law. Therefore, the human should be regarded as the central figure in the legal activities, as well as, in the ecologization of law process. This process of ecologization of law must begin from the human. Only a prudent, mature and free personality is able to take responsibility for the future of law, critically rethink the existing situation and the proximate interaction with law. Only this way it is possible to realise the ecological imperative in the legal activities.

### **Abstract**

For some time now, the concept law is no longer identified only as the rules enacted by the state governing a certain community. Due to the rapid development of science and technologies, as well as, significant social changes, the perception of law as a uniform and monopolistic set of rules introduced by the state nowadays is experiencing a collapse. The global community is changing continuously its attitudes towards a variety of issues. Therefore, its expectations towards the law are changing accordingly. The state is no longer in a position only to command the obedience and loyalty of its citizens through enacted legal norms. By contrast, the state has to “earn” the support of the community by meeting societal needs through the normative qualities of its policies and institutions. In case the state fails to fulfill the community’s expectations, it most likely will receive demands from the respective subjects both, on national and global level. The intensified global pressure, which contemporary legal systems are facing, is the precondition of law becoming stateless. Still the attempt of the state to go in step with the global advancement, result negatively – law suffers from excessive and poor regulation. By and

large the law is becoming fragmental, orientated to utility and not to consistency and continuity. This process of law becoming more and more polluted with ill-considered, drastically pragmatic, quickly developed and scarcely applicable legal acts inevitably leads to an ecological crisis in legal sphere. When discussing ecological issues of law, it is impossible to demonstrate melting icebergs or disappearing forests as it is usually done while analysing issues of natural environment, nevertheless, law is facing serious ecological problems. One of the proposals to address the pollution of law is the introduction of a new concept – the ecology of law which contributes to a better understanding of the contemporary evolution of law. The main objective of this paper is to present a tentative notion of ecology of law as a novel scientific category in the studies of the global evolution of law. The paper offers primary ideas as the basis for taking further steps to analyse the concept of the ecology of law.