Leon Petrażycki and a pluralism of the sources of law

Assistant professor **Michał PENO**[1]

Abstract

The article pertains to the issue of decentralisation (and democratisation) of sources of law and reconstruction of the concept of sources of law. Models of thinking or categories adopted in jurisprudence oftentimes constitute a manifestation of a repression that is stronger than the classic legal sanction. This is because they necessitate flattening of the social reality image, which tends to be richer than the corresponding law. The aim of this article is to indicate that the scarcity of law stems solely from thinking habits and solutions adopted unquestionably by jurisprudence. This is also the case for the concept of sources of law. The positivist idea that law is created and imposed on citizens by the centre in power (the state, the court) remains relevant, even if there are more than just one centre. At the same time, the concept of sources of law, defended by jurisprudence, excludes any actual displays of pluralism, thus preventing bottom-up law-making processes (perhaps except for soft law of unclear legal status) and recognising their role in the legal system or the legal order of a given state. Pluralism of sources of law is one of the elements of theory of law formulated by Leon Petrażycki. If we assume that the standard positivist model of sources of law is the currently binding one, Petrażycki's concept provides an alternative that allows us to indeed recognise and include into the notion of law all these rules that are in fact something more than morality, habit or custom in view of addressees, while maintaining the integrity and efficiency of law and traditional ways of understanding law in countries of the Enlightenment tradition.

Keywords: *sources of Law; Petrażycki; theory of law; age of pluralism; integration.*

JEL Classification: K10, K38

1. Introduction

The aim of the article is to provide a critical view of the standard, i.e. positivist model or concept of sources of law in the context of the idea of decentralisation and democratisation of sources of law[2]. It seems that centralistic vision of law, in the light of which law is formed in a top-down process, with the state, the court, etc., playing the leading role, in this sense – law which is being taken in the exclusive possession of a narrow group in power, is a form of

[1] Michał Peno - Department of Philosophy of Law and Legal Theory, Faculty of Law and Administration, University of Szczecin, Poland, michal.peno@usz.edu.pl.

[2] Democracy is understood intuitively, according to a standard modern philosophical concept. Cf. Ian Shapiro, *The Moral Foundations of Politics* (New Haven-London: Yale University Press 2003), pp. 212–229.

domination (at least in Europe) of the group with decision-making powers and access to knowledge, over all those who are not part of the majority for various reasons or simply the group represented by the ruling elites. This is primarily a significant restriction of any vision of law that is an alternative to the mainstream vision. This affects the situation of various subgroups or communities living as part of a state community. In the legal awareness and practice there is a concept of soft law, as well as many supranational regulations. However, could there be law centred on human – citizen, that would at least partially reflect original needs of various minorities in a broad sense? It seems that in diversified and pluralistic societies we deal *de facto* with a kind of a union of minorities with their own models of good life, cooperating with one another (like Jewish community within states such as Poland before 1939). A theory of law developed by Leon Petrażycki, the founder of the Polish theory of law who acted in the turn of the 20th century, can serve as an alternative for the traditional vision of law. The said theory assumes a kind of pluralism of sources of law and reflects (at the time when it was founded) richness and diversity of Central and Eastern European societies, combining both a certain objection against centralistic authoritarian power and rules of mutual respect of cohabiting people and groups.

In general, there are broadly two questions raised by the paper: (1) what is law? and (2) what ought the law contain? The author focuses on (1), investigating an alternative account of what makes something law. Some of the argument pulls in the direction of (2), though.

Until recently, despite some critical movements or trends, jurisprudence was unable to break some models of thinking (at least in Europe). Obviously, significant non-positivist concepts of sources of law were formed (for instance, the influential American concept developed by Ronald Dworkin[3]). Nonetheless, unifying (in the sense of morality, culture, etc.) centre would always come first (if not the state, at least the court or a judge). However, the situation appears to change for many reasons, making way for a legal (not sociological or philosophic *per se*) analysis and reform of the concept of sources of law. On the one hand, there is a specific historical compulsion stemming from social processes and transformations, while on the other, jurisprudence seems increasingly susceptible to arguments supporting a shift in the paradigms and models of thinking. The key arguments are those originating in the social context of science and its responsibility. The multitude problems of contemporary societies struggling with various phenomena stemming from their ethical pluralism, multiculturalism and a number of other reasons quite well identified in social sciences is easy to see. These challenges create the background or a context for the science understood in sociological terms (as a group of scientists). All these factors that stem from the scientists' environment lead to an automated though supervised change as the response to the exhaustion or the crisis of existing research programmes. Jurisprudence is one of social subsystems. Some statements or even fundamental

[3] Ronald Dworkin, *The Model of Rules*, „University of Chicago Law Review" 14 (1967): pp. 14-46.

assumptions are considered unquestionable and obvious, yet only until a certain "critical point" or "climax" is reached – a report on the functioning of law, a new trend in science or philosophy, radical social or political transformations appears.[4] The change results partially from a sound reflection on cognitive motifs, yet to a great degree it is a response to external stimuli[5]. Perception of these stimuli is a significant cause of self-criticism. *Prima facie* factors of the change are ideological or political, in essence, most criticism pertains to philosophically (or ethically) substantiated arguments or has a methodological nature. Others pursue scientification of law or a research paradigm shift (e.g. postmodernism)[6].

Importantly, the criticism of the standard concept of sources of law must not be perceived as a return to defending of the statement that aside from law, human behaviour or course of social phenomena are actually affected also by other type of normative systems (e.g. moral or religious principles), which at times are superior to law. Moreover, it is not an attempt to restore the idea of natural law (*ius naturale*) or normative (cosmological) dimension of the law of nature (*nomos*). The point is, alternative sources should be included in the canon of sources of law as *par excellence* sources of law. The inclusion must be actual and take place in the course of a certain process that should be commenced from spotting the problem.

2. The standard concept of sources of law

In jurisprudence, a standard model of sources of law was developed. A legal system, i.e. a set of elements characterised by specific structural features (consistency, orderliness, completeness), is composed primarily (or exclusively) of rules (norms). A system of sources of law (i.e. sources of rules included in the legal system) is determined by a concept of sources of law (this concept determines the system of sources of law). This concept contains a set of directives applied in setting up a specific system of legal rules (legal norms) or a legal system as a set of these norms.[7] Directives that pertain to a system of sources of law indicate which facts the law-making should be linked to (answers the question what is law), but

[4] For example, abolitionism (to which criminal claimants belong), as a way of thinking in the science of a criminal law (or criminology), was born in the 1960s and 1970s, with the emergence of a Marxist critical trend in social sciences. It, in turns, was associated with a wave of social changes initiated in the 1960s. See: Nils Christie, *Conflicts as Property*, „The British Journal of Criminology" 1 (17) (1977): pp. 1-15.

[5] See: Ulrich Beck, *The Reinvention of Politics Towards a Theory of Reflexive Modernization*, in: U. Beck, A. Giddens, S. Lash, *Reflexive Modernization: Politics, Tradition and Aesthetics in the Modern Social Order* (Stanford: Stanford University Press 1994), pp. 14-18; Anthony Giddens, *The Consequences of Modernity* (Cambridge: Cambridge University Press 1990), pp. 38 – 39.

[6] Cf.: Karl Popper, *The Sociology of Knowledge*, in: *The Open Society and Its Enemies*, Vol. 2: Hegel, Marx, and the Aftermath (Princeton: Princeton University Press 1966), pp. 212ff.; Ulrich Beck, op. cit., pp. 16-17.

[7] See: Stanisław Czepita, Sławomira Wronkowska, Maciej Zieliński, *Założenia szkoły poznańsko-szczecińskiej w teorii prawa [Foundations of the Poznań–Szczecin School in Legal Theory]*, „Państwo i Prawo" 2 (2013): pp. 3-16. Cf. Andrei Marmor, *Philosophy of Law* (Princeton: Princeton University Press 2011), pp. 35ff.

also determine the content and structure of the legal system. The concept of sources of law is justified in jurisprudential views, oftentimes reflected in the very rules (norms) of the system that pertain to sources of law. Therefore, the role of jurisprudence in co-creating or co-establishing law as a system of rules (norms) is significant, to say the least[8]. At the same time, jurisprudence rarely goes beyond certain framework known only to itself, i.e. the said standard model of sources of law (naturally inspired by legal positivism). In the light of the standard model of sources of law, sources of law are considered to be only specific types of facts (facts that form law). These would be, in particular, legislative acts exercised by competent authorities of the state, but also legislative materials, common law (case law), custom law or contract law (particularly in international law). In turn, sources of law have only historical meaning in the case of jurisprudential views (i.e. works of glossators and commentators, or opinions of scholars).[9]

The problem lies in the fact that jurisprudence continues to perceive and examine sources of law in the very same way where the key point of reference is jurisprudence itself or, in fact, a belief originating in jurisprudence (or in scientists or legal doctrine) that law should be seen rather from its creator's viewpoint, i.e. the state, and not from that of law addressee, i.e. the citizen. This is reflected in a 19th-century statement according to which only those who have enough power to limit someone else's will can formulate meaningful imperatives.[10] A critical observation of sources of law can be found in commonly known arguments quoted by the critical law school (CLS, a trend in critical law studies) or social criticism *per se*.[11]

Maintaining *status quo* in exploring the possible sources of law has some historical causes that need not be quoted in full.[12] Hannah Arendt provides an accurate argument that the foundation of the modern jurisprudence in which the notion of law has gained the fundamental and inherent value (instead of righteousness, nature of things or nature itself, virtues) is related to the activity of enlightenment thought, particularly the philosophical legacy of Immanuel Kant.[13] Duty, even if justified in the human mind, and its absolute fulfilment has become

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[8] Aleksander Peczenik, *Scientia Juris. Legal Doctrine as Knowledge of Law and as a Source of Law* (Dordrecht: Springer 2005), pp. 3-17.

[9] John H. Merryman, *The Civil Law Tradition. An Introduction to The Legal Systems of Western Europe and Latin America* (Stanford: Stanford University Press) 1969, pp. 20-25; René David, John E. C. Brierley, *Major Legal Systems in the World Today. An Introduction to the Comperative Study of Law* (London: Stevens & Sons 1985), pp. 94ff.

[10] Ernst R. Bierling, *Juristische Prinzipienlehre*, I, Freiburg 1894, pp. 29ff.; Rudolf von Ihering, *Der Zweck im Recht*, I, Leipzig 1877, § 11.

[11] See: Alan Hunt, *The Theory of Critical Legal Studies*, Oxford Journal of Legal Studies 1 (6) (1986): pp. 2-45; John Stuart Russel, *The Critical Legal Studies Challenge to Contemporary Mainstream Legal Philosophy*, „Ottawa Law Review" 22 (1) (1986): pp. 1-22.

[12] See: Judy S. Krauss, *The Limits of Hobbesian Contractianism* (Cambridge: Cambridge University Press 1993), pp. 2-46.

[13] Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press 1998), pp. 28ff.

over decades a synonym of law (traditionally, terms 'legal norm' and 'imperative in the field of law' were used interchangeably in German legal tradition)[14].

The need for organising the concept of sources of law and its tasks and roles results from, among others, the concept of an inclusive society adopted and commonly accepted in modern philosophy of law, which creates conditions for including mechanisms strengthening a complete reflection of needs and expectations of all social groups[15] into the public area or the state area. In turn, control provided by recognition of a given source as a law-making fact is related to the possibility of contents being assessed by courts and the upholding of the thus formed regulations (norms) as law. The state has to forgo to some extent its exclusive right to make law. It does not seem to be a problem, since the role of a custom or legal provisions (understood as rules resulting from values, particularly in axiological approach) are considered integral elements of the legal system. Not to mention the role of law experts and specialists in the process of interpreting (oftentimes in a creative manner) legal texts.[16]

Here, it is assumed that contemporary democracies are built around the idea of consensual civil cooperation, thought as a rule, it is not individuals who make themselves heard (as in the model developed by Jean-Jacques Rousseau), but groups of people organised around a certain vision of good life.[17] The discourse that serves as the foundation of democracy should include all those interested in making social or political decisions. However, in practice (as experience shows – e.g. black marches in Poland or Polish actions taken by the Committee for the Defence of Democracy), interest groups are the ones who enjoy influence,

[14] See: Ernst R. Bierling, *op. cit.*, pp. 2 ff.; Rudolf von Ihering, *op. cit.*, § 11; Leon Petrażycki, *Teoria prawa i państwa w związku z teorią moralności*, Tom II [*Theory of Law, State and Morality*, Vol. II] (Warszawa: PWN 1960), pp. 57-60; Lorraine Daston and Michael Stolleis, *Nature, Law and Natural Law in Early Modern Europe*, in: L. Daston, M. Stolleis, *Natural Law and Laws of Nature in Early Modern Europe Jurisprudence, Theology, Moral and Natural Philosophy* (Farnham: Ashgate 2008), pp. 1-12.

[15] Cf.: Will Kymlicka, *Multicultural Citizenship* (Oxford: Clarendon Press 1995), pp. 11, 80, 189; Charles Tylor, *The Dynamics of Democratic Exclusion*, „Journal of Democracy" 4 (1998): pp. 143-156.

[16] Interestingly, Leon Petrażycki found his place among sources of law for legal expertise regarding contents (interpretation) of a legal text. He notices that the role of legal scholars is to solve complex and difficult legal matters on commission of courts or administrative bodies, or even private entities. He puts particular focus on expert opinions prepared for courts. Such opinions are of scientific character and their weight is determined by the accuracy of the conclusion or the authority of the scholar or scholars responsible for statements provided in such an expert opinion. However, in reality, this kind of expert opinions become binding for the court and *de facto* serve as the basis for solving a specific case. Given the complexity of both social relations and the subject of legal regulations (which might pertain to technical, economic, nature-related or social matters), or the quantity and unclear wording of a legal text itself, the judge remains not so much the 'mouth' of a legal act as the 'mouth' of an expert opinion. It is fictitiously assumed that the court knows the law and that it is the judge (the court) who makes a legal evaluation, and not the expert. Symptomatically, this role of a legal doctrine is also mentioned by a modern-day theoretician of law Aleksander Peczenik. See: L. Petrażycki, *op. cit.*, s. 416-420 and A. Peczenik, *op. cit.*, pp. 3ff.

[17] Charles Tylor, *The Politics of Recognition*, in: A. Gutmann (ed.) *Multiculturalism* (Princeton: Princton University Press 1994), pp. 25-74.

mediating the social dialogue and thus becoming a link between the individual and the state.[18]

One could believe that the theory of recognition (*Anerkennung*) constitutes a determinant of research on society conducted in social studies, philosophy, jurisprudence or political science. This theory, which is based on Kant's thought, presupposes that all subjects should be treated with the same amount of respect and their interests should be given the same consideration. An individual's reason and moral good which he or she follows require that one recognises freedom of every other reasonable individual. This excludes dominating others and imposing (under coercion) one's own ideals or a vision of good life on others.[19] In this context, two questions come to mind. First, how to make another person's freedom to fulfil his or her ideals, values or way to live real (as far as he or she does not impose these ideals into others under coercion). In turn, the second question is related to assessing ideals imposed on others with undisputable use of coercion (to some extent as used by J. S. Mill, i.e. coercion as a physical force and influence of the public opinion or some protected models/schemes of living), models or schemes of functioning in certain social systems.[20] In this sense, imposing the positivist (classic) concept of sources of law and similar vision of law are an unacceptable coercion, since they are considered *ex cathedra* exclusive and dominating, and thus imposing specific law without any regard for pursuits of other individuals or groups, which can add significant value to central legislation. Allowing access to law making to these individuals or groups who (for various reasons) cannot play the role or participate in democratic mechanisms (democratic law-making processes) requires that the facts that best reflect needs of these individuals or groups are considered sources of law (as law-making facts).[21]

Against this background it can be seen that according to the legal positivists there would merely be a community under the force of the law. We have to distinct also an ethical community, which bounds are based on virtues and not merely on legal sanctions. Thus, there are two notions of community, which has to be taken account. First the community of those sanctioned by law, second the community of those sharing an ethical ideal, which can also be religion, ethnical community etc. There might be ethical communities that bear their own normative claims. Especially it can be a problem if the relation to ethical communities is not

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[18] Cf. Onni Hirvonen, *Democratic institutions and recognition of individual identities*, Thesis Eleven 1 (134) (2016): pp. 28-41; Cass R. Sunstein, *Naked Preferences and the Constitution*, „Columbia Law Review" 7 (84) (1984), pp. 1689-1732; Cass R. Sunstein, *Interest Group in American Public Law*, „Stanford Law Review" 1 (38) (1985): pp. 29-87.

[19] Axel Honneth, *Moralischer Entwicklung und sozialer Kampf. Sozialphilosophische Lehren aus dem Fruhwerk Hegels*, in: A. Honneth, Th. McCarthy and C. Offe (eds.), *Zwischenbetrachtungen. Im Prozess der Auflarung* (Frankfurt am Main: Suhrkamp 1989), p. 549; Johann Gottlieb Fichte, *Das System der Sittenlehre nach den Prinzipien der Wissenschatslehre* (Hamburg: Felix Meiner Verlag GmbH 1995), pp. 153ff.

[20] Will Kymlicka, *op. cit.*, pp. 11ff.

[21] Cf.: Neil Walker, *The Idea of Constitutional Pluralism*, „Modern Law Review" 3 (63) (2002): pp. 317-359.

reflected. How can sanctions from the standpoint of the community of law against the ethical community be justified? How can claims of different ethical communities be regarded? Law, it turns out, is just one source next to others for dealing with such conflicts. The understanding of social norms remains incomplete; i.e. it's necessary to reflect on social pathologies or whether institutions harm and exclude individuals. We would just have to think of a notion of community that is more open, self-critical with regard to possible exclusion and based on care for the harmed without forcing them to adjust to a given social norm. In short, one would have to think about community in the first place in terms of interpersonality and rules that create a frame of interpersonal relations within the society and the state (and the law).

More so, it is difficult to justify maintaining the standard concept of sources of law with only a reference to a certain vision of *ordo iuris*, as it has changes and is constantly evolving, and at present, remains in a kind of a stage of disintegration, eclecticism, and possibly a certain decay. What is more, there is no reason for this order to be imposed on anyone as long as it does not pose a threat to societies persisting as a community of citizens enjoying equal rights.

3. The alternative – Leon Petrażycki's theory of law

The concept of law, including the sources of law, proposed by Leon Petrażycki may serve as a valuable alternative for the standard vision or concept of sources of law. Petrażycki's concept takes due account of the postulate of a certain pluralism of sources of law as values. Its application may constitute a way to implement democratic or civil mechanisms and to cover within their scope all systems and ways or visions of good life that were eliminated or pushed beyond the area of scientific interest due to the application of the classic concept of sources of law. It is particularly important to mention that these sources involve statements of moral or religious authoritative figures or their attitudes or papers that have an immense influence on the behaviour of representatives of various minorities or culture groups. This concept has brought to light a space that is to be arranged by the contemporary jurisprudence not on a methodological level or with respect to ontological assumptions on the actual designator of the term 'law', but on the level of the concept of sources of law as a theoretical legal construct.

Legal realism represented by Petrażycki acknowledges the complexity of legal phenomena, including their pluralistic nature that can be determined in empirical studies.[22] From the perspective of theory of law, pluralism does not have to be taken into account solely when a certain ontology of law is accepted – law as

[22] See: Urrastabaso U. Ruiz, *Legal Positivism, Legal Realism, and Legal Pluralism*, in: U. U. *Ruiz, Modern Societies and National Identities. Legal Praxis and the Basque-Spanish Conflict* (Cham: Palgrave Macmillan 2017), pp. 63-87; NicholasW. Barber, *Legal Realism, Pluralism, and their Challenger*, in U. Neergaard, R. Nielsen (eds.), *European Legal Method. Towards a New European Legal Realism?* (Copenhagen: DJOEF Publishing 2013); Oxford Legal Studies Research Paper No. 76/2012 (SSRN: https://ssrn.com/abstract=2188249, access 10.08.2018).

sui generis of a social phenomenon or fact. Here, it should be enough to break this historical model of thinking about law that imposes this specific concept of sources of law.

In general, legal reality is far more complex than any concept or theory examined individually. For this very reason, it is important that alternative views opposing the mainstream perspective are taken into consideration, both with regard to identifying research problems and directions or methods for solving them. The programme postulate of pluralism, but also that of realism, in understanding sources of law does not mean supporting the trend of legal realism. It pertains to rejecting openly counter-factual idealisations included in the standard model of sources of law and adjusting it to the social reality of the 21st century. It was Petrażycki who aptly identified a category of varieties of positive law unknown or not recognised by contemporary jurisprudence.[23] However, certain methodological explanations are required, which anticipate the right examination of sources of law. Petrażycki considers positive law in line with his concept of legal experiences as imperative-attributive experiences, a notion that covers much more than those normally covered by jurisprudence when discussing law as *ius positivum.*[24] Thus, "positive law" has a broader scope in Petrażycki's theory of law than in the positivist jurisprudence. Still, this issue can be considered not from the perspective of Petrażycki's realistic-naturalistic assumptions (law as a fact – a mental experience), but from the view of a relation between the classical approach to law in legal positivism and the non-positivist approach.

Legal positivism, as a type of approach to law, excluded international norms or norms not secured by the coercion of the stronger will (i.e. sanction), or norms of natural law (as in the well-known works by John Austin) from the field of interest of jurisprudence, even from the scope of the notion of "law" in the proper sense of the word.[25] This does not mean that, for instance, moral norms should be considered law, including this normative element into the framework of the definition of law as in natural-legal concepts (or the Greek notion of *nomos*).[26] Still, it is hard not to agree with Petrażycki on the coercion to act in a specific manner experienced by many, which is related to a belief that certain rules are in force (normative facts, as Petrażycki used to call them), accompanying not only law stemming from facts recognised by jurisprudence.[27] The strength of belief in certain rules being in force, seemingly outside the law, or the very judicial practice (to follow the footsteps of the integral philosophy of law) must make one wonder on the sources of law. Naturally, Petrażycki did not connect law in the traditional legal sense with law as an imperative-attributive experience that is a certain real

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[23] Leon Petrażycki, *op. cit.*, p. 398.

[24] James Bernard Murphy, *The Philosophy of Positive Law. Foundations of Jurisprudence*, (New Haven: Yale University Press 2005), pp. 15-29.

[25] John Austin, *The Province of Jurisprudence Determined* (London: Prometheus Books 1832), Lectures I, VI.

[26] Michel Gagarin, *Writing Greek Law* (New York: Cambridge University Press 2008), pp. 33-36, 64, 91.

[27] See: Leon Petrażycki, *op.cit.*, pp. 304ff.

phenomenon.[28] However, there is no significant reason not to consider not to regard also some law-making facts that fall beyond the standard concept of sources of law, in line with Petrażycki's remarks (observations) as sources of law understood as a normative fact (a law-making fact, i.e. one that forms the law, as a certain conventional activity resulting in a certain legal text, such as an act of law[29]). In this sense, we can talk about sources of norms that are not addressed by jurisprudence or that are not recognised in this field, but could be considered sources of law, and even significant sources of law from the social perspective or from the view of judicial practice.

Further remarks shall pertain not to the ontology of law, but to the philosophically grand aspects of Petrażycki's thought well-fit into the model of law as a linguistic phenomenon (a set of rules or norms as certain statements formed by a legislator in any sense, issued in the form of legal texts by competent entities). Basing his assumptions on specific realistic-psychological research positions, Petrażycki expressed a stance that was critical of the mentioned standard positivist concept of sources of law.[30] It can be said, that he postulated pluralism of sources of law. This view on pluralism has not only a factual dimension (i.e. reflects the complex social reality), but primarily a philosophical-ethical dimension. For pluralism constitutes inclusion of 'new' sources of law into the research scope of jurisprudence, and acts as a significant element of participatory democracy, recognition of the multitude of equal values of all groups or subgroups that cooperate with each other under the framework of modern states-communities.[31]

By seeking actual designators of the term 'law' in legal provisions and by being deeply inspired by the philosophical positivism of Auguste Comte, legal positivism has moved completely away from all sources of law that seemed excessively peasant-based (which brings German historical school to mind) or 'non-scientific'. Hence, the source draws a pejorative term *kadi justice* applied to a kind of law that is not modern, as it is not systematised and, in principle, not useful in the view of bureaucracy, which was to some extent ideologically justified by legal positivism.[32] Petrażycki summarises the positivist approach by stating that the groundless nature of the positivist doctrine could not go unnoticed by the positivists, if only they would like to step outside the narrow circle of their models

[28] See: Bartosz Brożek, *The Emotional Foundations of Law: on Petrażycki's Legal Theory*, „Rivista di filosofia del diritto" („Journal of Legal Philosophy") 2 (2014): pp. 279-288; Kazimierz Opałek, *The Leon Petrazycki Theory of Law*, „Theoria" 27 (1961); pp. 129-150.

[29] It may also be a judicial right - a precedent court decision, or sanctioning a custom, i.e. a decision of a court based on a customary norm, in a given case.

[30] Leon Petrażycki, *op. cit.*, pp. 398-422.

[31] Cf. Robert E. Goodin, *Reflective Democracy* (Oxford: Oxford University Press 2003); Baudouin Dupret, *Legal Pluralism, Plurality of Laws, and Legal Practices*, „European Journal of Legal Studies" 1 (1) (2007): pp. 246-268.

[32] Max Weber, *Economy and Society* (Guenther Roth & Claus Wittich eds.), (Berkeley: University of California Press 1968), pp. 813-814; David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, „Wisconsin Law Review" 27 (3) (1972): p. 720.

of thinking related to the vision of society, the state and law, and look on the example of law in Islamic countries or the Jewish law.[33]

The need for formulating the concept of nonstandard sources of law is justified by cultural context in broad sense, particularly the classic model of law-making and its relation to religious, social, customary or moral beliefs. When it comes to these kinds of beliefs, particularly religious beliefs, one has to pay attention to at least two aspects of their functioning. One is that non-legal beliefs (those that extend beyond the scope of traditional legal positivism) must be shared by individuals and that decisions must be made in line with these beliefs. The other aspect is that political decisions and decisions with great social implications must be made based on 'non-legal' beliefs.

In this sense, reflections on the sources of law combine various issues. These include the matter of the so-called defence by means of culture, the degree to which different systems of social control (e.g. Islam) or traditionally European (Judeo-Christian) values are recognised. In accordance with an important assumption, today states should not (and also have no obligation to) reserve the right to exclusiveness when it comes to law-making (legislative exclusiveness), while the complexity of social phenomena and the citizens' autonomy (freedom) regarding their choice of axiological reference groups demand that the state (the government) takes on the role of a partner in the public or legal discourse. The problem of discursive (procedural) concepts lies in the fact that the postulate of this philosophical direction (particularly the oeuvre of the critical Frankfurt School, in particular that of Jurgen Habermas but also other non-positivist and discursive approaches of Robert Alexy) is very hard to fulfil efficiently, particularly when the role of non-state entities is limited in law-making, deciding on the type of sources of law, etc.[34] This state is maintained by constitutionalism that indeed reaches far back to the mid-20th century schemes (thus, positivist ones with elements of legal-natural reflection manifested in the idea of human dignity and similar constructs of human rights philosophy), although at present, it seeks new paths of development. Democratic mechanisms are not currently capable of cover effectively the diversity and complexity of interests and values of all social groups in the area of representative democracy, not to mention (due to various reasons) those excluded from civil participation.[35]

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[33] L. Petrażycki, *op. cit*, p. 421.

[34] Cf. Jürgen Habermas, *Vorstudien und Erganzung zur Theorie der kommunikativen Handels* (Frankfurt am Main: Suhrkamp 1984), pp. 160, 174 ff.; Robert Alexy, *Theorie der juristischen Argumentation - Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung* (Frankfurt am Main: Suhrkamp 1983), pp. 33-38, 262- 273, 356ff..; Chaim Perelman, *Justice, Law and Argument* (Boston: D. Reidel Publishing Company 1980), pp. 73ff.; Alius Aarnio, Robert Alexy, Aleksander Peczenik, *Grundlagen der juristishen*, in: R. Alexy and W. Kravietz (eds.), *Metatheorie juristischer Argumentation* (Berlin: Duncker & Humblot 1983), pp. 42 ff.; Raymond Geuss, *The Idea of a Critical Theory*. Habermas & the Frankfurt School (New York: Cambridge University Press 1981), pp. 17ff.

[35] Cass R. Sunstein, *Naked Preferences and the Constitution*, „Columbia Law Review" 7 (84) (1984): pp. 1689-1732.

Thus, Petrażycki formulates a *sui generis* postulate of pluralism in thinking of sources of law, and also actual appreciation and equality of legal traditions other than the strictly European one. These traditions include the legal way of understanding statements of religious or moral authoritative figures.[36] The reason for this internal censorship and isolation, which is visible particularly in relatively homogeneous countries of Eastern or Central Europe, lies for instance in the way of teaching law at university departments as the result and cause (through ongoing rebuilding of schemes) of a negative and relatively conservative in this regard attitude of legal doctrine. However, the actual role of this type of sources of norms derived from statements (normative ones, which formulate obligations) of religious and ethical authoritative figures (founders of religions, prophets, saints, fathers of the church) is at present not less significant than in the times of Petrażycki.

The scope of recognition of alternative (among others, the ones mentioned above) sources is determined by many factors and cannot be subject to further considerations in this paper. Nonetheless, it should be stressed that these issues do not have a content-substantive nature (the matter does not lie, hence, in the content of norms, i.e. their compliance or non-compliance with recognised or protected values), but formal conditions for creating a successful, really effective participatory democracy that is egalitarian and open to diverse values and equal (although different) ways of leading a good life. Only by broadening or opening the catalogue of sources of law can the postulate of recognising the other be fulfilled, i.e. perceiving oneself in that which is different, and which should be the foundation of all aspects or manifestations of if not a cooperation, then an ordinary civil coexistence.

According to Petrażycki, in law that has become strictly connected to religion, statements of high religious authority figures serve as normative facts of far greater weight than state legislation, customs or judiciary practice. The said figures include key prophets and founders of various religions, as well as their most dedicated disciples. For instance, Muhammad's statements that can be found in both oral and written records are the most important sources of law that acted as the foundations for the developing Islamic law, while Christ's statements served as the most authoritative normative facts in the development of Christian law. These statements were given much significance in the Middle Ages also in areas of secular law such as international law, state law and even civil law (to some extent). The said statements were also used to ascertain or justify certain laws.[37]

This source of law is connected to the law of examples of religious authoritative figures, models of conducting oneself. This pertains to deeds (understood as actual deeds performed in the past, reported in oral or written sources) of people who built up authority understood as binding models of expected behaviour in similar cases. As Petrażycki states, a given rule or model of behaviour becomes legally binding, i.e. becomes law in force, since an entity with a special authority behaved in accordance to the said model (in the Orthodox

[36] Leon Petrażycki, *op. cit.*, pp. 421ff.
[37] *Ibid*., pp. 421-422.

Church, some norms are derived from the way Apostles conducted themselves, i.e. from certain facts).[38] Here, it is ought to note that in the Middle Ages, rules derived from the Holy Scripture were considered the letter of law, while opinions justified in the Scripture were found superior to *communis opinio doctorum*.

At first, it is very difficult to reconcile the mentioned sources of law with the modern legal tradition and constitutional orders of European states. This pertains in particular statements made by religious authoritative figures, etc. However, the thing is not to consider making these statements sources of law superior or even equal to classic positivist law-making facts (such as rule-making or common law, etc.), for here, the aim is on the one hand to allow these sources of law to be referred to as the basis for settling a dispute or a case by the court and formulating binding rules or even legal principles on this basis (with active part of the court), while on the other hand, the systematisation and control of these sources of law that could have become too distant at present to serve as a part of a modern (West European) legal tradition or culture, yet return with factors of a different (yet valuable) culture. The question that requires an answer is, should these added values be put to use? It can be assumed that by subjecting these sources of law to scientific systematisation and by applying them in specific situations one could ensure certain stability of social relations. In this way, a tool could be formed to allow one to authoritatively determine collision (noncompliance) between strict norms of positive law and other sources of law, e.g. statements or models of religious authoritative figures. Consequently, some solutions or regulations could be given effect, while negating others as noncompliant with the fundamental values behind a given legal system (e.g. constitutional norms). This is a good way to follow in pursuit of a balance, as it is just in the sense that it allows each interested party to be heard.

4. Final remarks

Jurisprudence is facing a challenge of opening up the standard concept of sources of law and expanding the catalogue of sources of law (at least as a research subject, but also as a basis for more radical transformations). The opening of the concept of sources of law is an objective that can be considered with regard to three aspects. First, in methodological-cognitive aspect that pertains to making these alternative sources of law the subject of jurisprudential studies. Therefore, the legal discourse should be opened to alternatives and allow for the possibility of radical changes in how law is understood. Second, in the aspect of public administration practice, judicial practice or the practice of state authorities that pertain to the issue of recognition and application of sources of law different than the standard ones. Both these aspects generate problems which can nonetheless be solved, since some influence in these areas was gained by non-positivist concepts

[38] *Ibid.*, pp. 423-424.

of law (e.g. Ronald Dworkin's or Robert Alexy's concepts).[39] Third, in political aspect, since it is state governments who decide whether a space for law that transcends the positive law in the classic sense in the existing legal framework or legal institutions.

When shaping the form of the concept of sources of law, one can promote or hinder recognition of another human being, of his or her autonomy, freedom, value system or ways for a good life. Therefore, concepts of sources of law determine whether formal conditions for actual civil cooperation and democratic participation will be formed. The more open the concept, the more inclusive society (community, the state), and the more it takes due account of others' interests, particularly in regard to various minorities.[40] The core task is not to rebuild the concept of participatory democracy,[41] but to fulfil the postulate of democratisation of law, sources of law, knowledge of law in a broad sense, etc. Without a thorough analysis of the concept of sources of law and its radical re-wording, forming a civil society faces currently insurmountable obstacles.

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[39] See: Matthias Klatt, *Robert Alexy's Philosophy of Law as System*, in: M. Klatt, *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford: Oxford University Press 2012), pp. 1-24; Ronald Dworkin, *Natural Law Revisited*, „University of Florida Law Review" 2 (1982): pp. 165-188; Klaus Füßer, *Farewell to 'Legal Positivism': The Separation Thesis Unraveling*, in: R. P. George (ed.), *The Autonomy of Law: Essays on Legal Positivism* (Oxford: Clarendon Press 1996), pp. 119-162.

[40] Cf. Onni Hirvonen, *op. cit.*, pp. 28-41.

[41] Klaus von Beyme, *Die politischen Theorien der Gegenwart. Eine Einführung* (Wiesbaden: Springer 2000), pp. 234-269.

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