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THE ORIGIN OF LEGAL PLURALISM: TOWARDS A NEW THEORY OF HUMAN RIGHTS LAW

The purpose of this article is to clarify the essence of legal pluralism, which is a prerequisite for adopting legal pluralism in human rights law. This is particularly important because the use of the term «legal pluralism» in human rights law varies from one proponent to another, making it difficult to specify what legal pluralism is in the first place. This article identifies the roots of the concept of legal pluralism by tracing the origins of the debate on legal pluralism to answer the question: what should be included in the «legal order» when discussing legal pluralism? The study on the origin of legal pluralism shows that non-state legal orders were always the subjects of the discussion, deducing that it is natural that those non-state legal orders become the object of legal orders in the study of legal pluralism in human rights law discipline.

In this study, legal pluralism is considered not only from a theoretical and legal point of view but also from a historical and legal point of view, which can enrich any scientific work. In legal doctrine, the research category appeared relatively recently, about 50 years ago, which was the logical result of the collapse of the colonial system and the emergence of the need for newly independent states ensuring the coexistence of historically established norms of ordinary law with colonial law, distributed by metropolises. Evidence was provided regarding the change in the concept of legal pluralism over time.

Key words: legal pluralism, human rights, law, state, freedom.

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Құқықтық плюрализмнің пайда болуы: адам құқықтары құқығының жаңа теориясына қарай

Бұл баптың мақсаты – адам құқықтарындағы құқықтық плюрализмді қабылдаудың қажетті шарты болып табылатын құқықтық плюрализмнің мәнін нақтылау. Бұл әсіресе маңызды, өйткені адам құқығында "құқықтық плюрализм" терминін қолдану бір жақтаушыдан екіншісіне қарай өзгереді, бұл бірінші кезекте құқықтық плюрализмнің не екенін анықтауды қиындатады. Бұл мақалада құқықтық плюрализм тұжырымдамасының тамыры анықталады, сұраққа жауап беру үшін құқықтық плюрализм туралы пікірталастың бастауы байқалады: құқықтық плюрализмді талқылау кезінде "Құқықтық тәртіп" ұғымына не қосу керек? Құқықтық плюрализмнің пайда болуын зерттеу көрсеткендей, мемлекеттік емес құқықтық тәртіптер әрдайым талқыланатын тақырып болған, демек, бұл мемлекеттік емес құқықтық тәртіптер адам құқықтары пәніндегі құқықтық плюрализмді зерттеу кезінде құқықтық ережелердің объектісіне айналуы табиғи нәрсе.

Бұл зерттеуде құқықтық плюрализм тек теориялық және құқықтық тұрғыдан ғана емес, сонымен қатар кез келген ғылыми жұмысты байыта алатын тарихи-құқықтық тұрғыдан да қарастырылады. Құқықтық доктринада зерттеу категориясы салыстырмалы түрде жақында, шамамен 50 жыл бұрын пайда болды, бұл отарлық жүйенің ыдырауының және жаңа тәуелсіз мемлекеттерге қажеттіліктің пайда болуының логикалық нәтижесі болды, бұл тарихи қалыптасқан әдеттегі құқық нормаларының метрополиялар таратқан отарлық құқықпен қатар өмір сүруін қамтамасыз етеді. Уақыт өте келе құқықтық плюрализм тұжырымдамасының өзгеруіне дәлелдер келтірілді.

Түйін сөздер: құқықтық плюрализм, адам құқықтары, құқық, мемлекет, бостандық.

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**Происхождение правового плюрализма:
на пути к новой теории права прав человека**

Цель этой статьи – прояснить сущность правового плюрализма, который является необходимым условием для принятия правового плюрализма в праве прав человека. Это особенно важно, поскольку использование термина «правовой плюрализм» в праве прав человека варьируется от одного сторонника к другому, что затрудняет определение того, что такое правовой плюрализм в первую очередь. В этой статье определяются корни концепции правового плюрализма, прослеживаются истоки дебатов о правовом плюрализме, чтобы ответить на вопрос: что следует включать в понятие ‘правовой порядок’ при обсуждении правового плюрализма? Исследование происхождения правового плюрализма показывает, что негосударственные правовые порядки всегда были предметом обсуждения, из чего следует, что вполне естественно, что эти негосударственные правовые порядки становятся объектом правовых предписаний при изучении правового плюрализма в дисциплине права прав человека.

В данном исследовании правовой плюрализм рассматривается не только с теоретической и юридической точки зрения, но и с историко-правовой точки зрения, которая может обогатить любую научную работу. В правовой доктрине исследовательская категория появилась относительно недавно, около 50 лет назад, что стало логическим результатом распада колониальной системы и возникновения потребности в новых независимых государствах, обеспечивающих сосуществование исторически сложившихся норм обычного права с колониальным правом, распространяемым метрополиями. Были представлены доказательства изменения концепции правового плюрализма с течением времени.

Ключевые слова: правовой плюрализм, права человека, право, государство, свобода.

Introduction

The adoption of legal pluralism in human rights law has gained momentum in recent years (Provost 2013; Corradi 2017). Underlying this is the recognition that human rights law is regulated by various legal orders, including national, international, and regional international law, which do not necessarily function in coherence. This recognition is premised on the diffused understanding that law includes only those laws that derive from states, on which the debate on legal pluralism in human rights law is based (as an example, see Besson, 2014). However, this raises the question why the laws do not include non-state law in the discipline of human rights law, when individuals and groups who hold human rights live according to various norms, whose source is not always of a state. For example, some schools of Islamic law, an example of a non-state legal order, hold that the Islamic headscarf must be always worn, while according to French national legal norms this must be removed in public (*S.A.S. v. France*, 2014). Muslim women living in France and subject to the above-mentioned interpretations of Islamic law must choose which of these conflicting norms to follow. This situation shows that state and non-state legal norms clash within the individual and thus there is a great possibility to include non-state law in the context of human rights law (in this case, religious freedom).

If we refer to the origins of legal pluralism, we can see that the arguments in legal pluralism are based on the premise of law that does not originate from states (non-state law). This article refers to the origins of legal pluralism to identify its basic elements as a precondition for adopting legal pluralism in human rights law. This will make it clear that it is natural to include non-state law among the elements of legal pluralism when structuring human rights law through legal pluralism. The article first refers to the various usage of legal pluralism in human rights law discipline, raising the question of what legal order may be included in the discussion of legal pluralism in human rights law (Materials and Methods), then reviews the historical development of legal pluralism in anthropology and sociology (Results), and finally discusses the essential element of legal pluralism (Discussion).

Materials and methods

Definitions of legal pluralism are so diverse that there are as many definitions as theorists. Some of its definitions and explanations in the context of international human rights law include: “the establishment of boundaries between normative

systems" (Quane 2013: 680); "the recognition of differing legal orders within the nation-state, to a more far reaching and open-ended concept of law that does not necessarily depend on state recognition for its validity" (International Council on Human Rights Policy 2009: 6); "the conception of different legal spaces superimposed, interpenetrated and mixed" (Santos 1987: 297-8); "not all legal norms applicable in a given legal order ought to be regarded as validated by reference to the same criteria and hence as situated within a hierarchy, and that, accordingly, some normative conflicts may get no legal answer as a result" (Besson 2014: 171). There are several key elements here concerning the definition of legal pluralism: the autonomy of legal orders; the non-hierarchy between legal orders; and the expansion of the scope of law and consequent incorporation of non-state law into the definition of law. Attempting the most general and tentative definition, legal pluralism can be said to be a position and principle that acknowledges the existence of multiple legal orders within a single legal space (Merry 1988: 870; Michaels 2009: 245). However, from this definition, it is not clear which legal order exactly can be recognised as a legal order. Therefore, even if one tries to analyse contemporary legal space using legal pluralism, it is unclear which legal order to be studied. In order to clarify this, questions must be answered, such as what qualifies as a legal order, how autonomous this legal order must be, and whether laws must be in conflict for a legal space to be pluralistic.

This paper cannot answer all these questions, but identifies the roots of the concept of legal pluralism by tracing the origins of the debate on legal pluralism to answer the following question: what should be included in 'legal order' when discussing legal pluralism?

The article discusses the most pressing issues related to legal pluralism, namely, features of sources of law in states such as the existence of legal Pluralism, the historical prerequisites for forming legal pluralism, and several other questions. Arguments are given regarding the positive and negative practice of legal pluralism in different countries of the world. The role of legal pluralism in resolving legal conflicts and restoration of Justice. Conclusions are drawn about the need to study the concept of legal pluralism further and study the influence of this institution on the legal systems of states.

The scientific novelty of the work-analysis of foreign scientific literature on legal issues of pluralism, as well as in the identification of positive and negative factors of legal pluralism in modern conditions of development of various state's legal systems.

Results

Historical Overview of Legal Pluralism

Historically, anthropology first deepened the study of legal pluralism from the 1950s onwards. There, the influence of suzerain law (the law of colonial ruler/state) on colonial local law was investigated, with the latter considered subordinate to the former (Griffiths, 1986). Merry refers to such studies as studies of 'classic legal pluralism'. The study of 'classic legal pluralism' is limited to the colonial context, where different legal orders existing in the same legal space are mutually disconnected. However, the research focus of legal pluralism in anthropology has shifted from the colonies to the advanced industrial countries since the 1970s and 1980s, with Merry referring to the latter as 'new legal pluralism'. 'Classic legal pluralism' has been replaced by 'new legal pluralism' but left a legacy to the latter in three ways: it analysed the interaction between multiple normative orders that differ fundamentally in their underlying conceptual structures; it pointed to the historical elaboration of customary law; and it described the dialectics between multiple legal orders (Merry, 1988: 872-3; see also Ramstedt, 2016; Berman, 2012: 46-7).

According to Merry, 'new legal pluralism' shows the following characteristics (Merry, 1988):

- legal orders are not hierarchically related, but each legal order is often semi-autonomous. That is, it acts within the framework of another legal field but is not completely dominated by that legal field;
- the interaction between legal orders is interactive and they influence each other;
- legal orders also include many informal normative orders, and such legal subgroups arise not only in colonial societies but also in advanced industrialised countries.

As seen from the above, legal pluralism includes informal norms in the definition of law (Tamanaha, 2008) and discusses the relationship between the legal orders constituted by and including such norms interacting with each other.

As such Merry summarised the discussion of legal pluralism in anthropology, whereas according to Twining, legal pluralism in anthropology and sociology of law up to the mid-1990s can generally be called 'social fact legal pluralism' and is characterized by the following features (Twining, 2010):

- in every multicultural society (i.e. in most societies today), legal pluralism is omnipresent;
- most of its research focuses on sub-state phenomena in a single country;
- research focuses on relatively small communities and groups such as individuals, families and tribes in any multicultural society;
- no attention has been paid to issues such as commercial and economic law, migration, governance structures, criminal law and human rights;
- much of the research is concerned with the relationship and interaction between state legal orders and non-state legal orders, and is in close proximity to weak state-centrism (a position that discusses not only state law but also non-state law as constituting legal pluralism, but views legal phenomena in terms of state law);
- recognition of legal pluralism does not mean that state law is unimportant, that state law is diminished, or that liberal democracy, human rights and the rule of law are denied;
- the relationship between co-existing legal orders (interlegality) is not restricted within a relationship of conflict and competition. The relations may be symbiosis, subsumption, imitation, convergence, adaptation, partial integration, avoidance, subordination, repression, or destruction.

Thus, 'social fact legal pluralism' is a descriptive and empirical position barely making normative arguments, based on the existence of a non-state legal order, which shows that two or more autonomous or semi-autonomous legal orders coexist in the same period and in the same space. These legal orders then present a relationship of interlegality in which they do not merely clash but interact in various forms of symbiosis or partial integration (Santos 1987; Asano 2018: 33-8). And legal pluralism is an omnipresent phenomenon in all societies, including advanced industrialised countries.

Discussion

«Social fact legal pluralism» and «new legal pluralism» are concepts that, although different in terminology, in approximate proximity. As mentioned above, the research targets of «new legal pluralism» and «social fact legal pluralism» were small domestic communities and industrialised countries, while «global legal pluralism», which emerged from the 1990s onwards, is different in this respect (Michaels 2009). The emergence of «global legal pluralism» can be divided into two trends: the trend to add globalisation as a new element to previous studies of legal pluralism in anthropology and sociology, and the trend from legal theory, which starts from global law and adds legal pluralism to it. The former expands the research focus of legal pluralism, which had previously dealt only with relatively small areas, to the global sphere. In practice, however, the research is not so much concerned with the globe as with sub-global areas such as empires, diasporas, alliances, or regions (Twining 2010: 205). The latter is the result of a combination of legal pluralism and global law that legally explains global phenomena, such as the autogenous global trade law. There, the law is autogenous, the centre of law-making shifts to transnational actors rather than states, and law is considered to have an institutional basis rather than being embedded in local communities as in 'classic legal pluralism' (Michaels 2009: 247). Whichever current it follows, legal pluralism discussed in legal disciplines dealing with transnational issues, such as comparative law, private international law, and public international law, is referred to as 'global legal pluralism'. Michaels suggests that, after 'classic legal pluralism' and 'new legal pluralism', there comes legal pluralism in a transnational space beyond specific states and communities, which is termed 'global legal pluralism' (Michaels 2009: 245; Krisch 2019: 698-9).

Thus, legal pluralism has counted not only states but also non-state actors such as religious groups, tribes and global corporations as law-making actors, and has made the legal orders created by non-state actors as well as by state actors its object of study. Two or more autonomous or semi-autonomous legal orders coexist in the same space at the same time, and this coexistence is expressed by the relationship of interlegality, in which the legal orders involved not only clash but also interact in various ways, such as symbiosis and partial integration.

It can be seen from the summary so far that legal pluralism consistently encompasses informal norms, i.e., non-state norms, within the law as well as deals with the issue of relations between related legal orders. Some discussions of legal pluralism in international law and human rights law develop the argument that only official law, i.e., state-derived norms, are law, but this ignores the roots of legal pluralism and leads to confusion. It is understandable that words often take on a meaning that is divorced from their original meaning in the course of their use, and that there is a deterrent effect in jurisprudence against over-broadening the definition of 'law'. However, given that legal pluralism is originally consistent in that it includes non-state law, it is questionable whether, in the field of jurisprudence, this element can be excluded to

form the content of legal pluralism. This suggests that it would be more reasonable to confirm that legal pluralism is primarily a concept that includes non-state law, even in the field of jurisprudence including human rights law.

Conclusion

From the above examination, it is possible to obtain a tentative answer to the question of this paper, "what should be included in the 'legal order' when discussing legal pluralism?": all legal orders consisting of laws, including informal norms. Such legal orders include religious legal orders, tribal legal orders, and legal orders created by international corporations. If every norm is a law, then an infinite number of legal orders can emerge. In practice, we would look at actual situations where different normative interactions are observed and examine whether the norms in question can be seen as law holding a legal order. This raises another question how a normative interaction can be defined, which is partly answered by the observation above regarding interlegality, but this is to be further studied in another article. In regards of how to recognise a legal order, there is also a view as noted above that what has an institutional basis is a legal order. While this controls the possibility of an infinite range of laws, it would still not be necessary to a priori exclude the possibility that potentially any norm can be seen as law.

According to Tamanaha, legal pluralism by the fact that numerous uncoordinated and partly similar legal acts that regulate certain areas of life coexist, but they are seriously different. This the fact leads to the fact that the problem arises about the priority of certain legal norms, which, ultimately, can lead to the onset of potential conflicts between individuals society as a whole (Tamanaha 2008)

Such uncertainty about the applicability of legal norms, especially in difficult situations can create opportunities for certain categories of people or social groups of economic and political nature to use their rights to achieve their goals.

In turn, the current negative situation will certainly create difficulties for state institutions that lose their monopoly on the exercise of power.

The existence of legal pluralism raises questions about the authority of state-approved legal norms. Our research once once again, the problem of legal pluralism leads us to the conclusion that we need more.

The concept of legal pluralism, and a detailed study of the positive and negative Experiences in the implementation of legal pluralism in the modern world, influenced by the process of globalization. As we showed in this article, pluralist approaches exist in modern countries, especially those at the crossroads. Location the need to move away from unilateral consideration of many phenomena of legal reality we consider it proven.

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