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## CONTEMPORARY MULTIDISCIPLINARY LEGAL THEORIES AND THE “WORLD STATE”\*

*The scientific nature of a theory or theories is tested for very different reasons, such as insufficiently developed methodological apparatus, obvious partiality and insufficiency, small probability, ethical unacceptability of the results, etc. The latest theories represent a special object of attention. Since there is a large number of various multidisciplinary legal theories today, only those most intriguing ones will be presented and commented upon, those that are used in order to communicate results that compel serious questioning of their scientific value or point at the goals which are contained in their deeper layers as less noticeable or undisclosed.*

*The contemporary multidisciplinary theories are interesting and challenging. They are also useful, at least because they force today's jurists to wake up and get out from the daily routine created by the satisfaction with what has already been achieved. But, we shall still have to wait for some more serious scientific results of these theories, unless it happens that they (together with the presented theories) become forgotten in the meantime like any other thing that falls out of fashion.*

Key words: *Legal theory. – Multiculturalism. – Constitutionalism. – Communitarianism. – Feminism.*

At the end of the 20<sup>th</sup> and the beginning of the 21<sup>st</sup> century, the state and law are increasingly being studied in a more multidisciplinary

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manner. Thus the conditions have been created for a “big opening up” of consolidated schools and trends, and for a significant thematic expansion of the legal interest towards the topics and areas that were usually outside the interests of lawyers. In addition to the traditional topics from the theory of justice to the legal science, and from the theory of norm to the theory of organization, there is an increased affirmation of the studies of the constitutionalism as a distinctive theory of law, feminist studies, critical legal studies, new institutionalistic theories, multiculturalism, communitarianism, sociological-anthropological legal pluralism, all the way to the functionalistic and informatics legal theories, including bioethics with bio-jurisprudence and the movement of law and literature.<sup>1</sup>

## 1. PRESENTATION OF THE LATEST MULTIDISCIPLINARY LEGAL THEORIES

### 1.1. Critical Legal Studies Movement

During the 1980's, a Critical legal studies movement was founded in the USA with the goal to fully critically examine the legal phenomenon. The criticism of the members of this movement was particularly aimed towards the legal practice that relies on liberalism, acts formalistically, shows strong tendency towards objectification, strives towards inadmissible universality and applies law as a form of economy.

As opposed to the American realism, which today may be encountered more in a museum than in real life, the members of this movement considered law to be a myriad of social rules. For this reason, they directed their interest towards finding a new way for their interpretation and application. According to them, “law is a political means” that exists in order to achieve interests of the group, party or class that creates it. That's why “the rich and powerful use the law as a coercion instrument with the aim to preserve their existing position within the social hierarchy.”<sup>2</sup>

The fact that this is a proper movement and not a legal school is shown by its members Roberto Magabeira Unger, Duncan Kennedy, Robert J. Gordon, Morton Horwitz, Catherine A. MacKinnon, Jacques Derrida and others, who otherwise belong to different streams of thought within the American realism, Marxism and their “post-culturalistic criticism.” Some members of this movement consider law to be an ideology, others see it as a result of a class struggle, while the third group apply “deconstruction” as a method in order to analyse law and justice, justice and force, force and law.

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<sup>1</sup> D. M. Mitrovic, *Legal Theory*, Belgrade 2007 (in Serbian).

<sup>2</sup> G. Vukadinovic, *Theory of the State and Law II*, Novi Sad 2007 (2008), 85 (in Serbian).

The deconstruction method represents a recognizable feature of the Jacques Derrida's study. This essentially psychological and respective method has quickly been accepted as useful when the examining of the subject of the research should be used to remove one's own perplexity in front of the mists that enfold the newly-emerging forms of the dominance over people. The point of support lies in Derrida's position that "violence is not outside the legal order, it stands in the very foundation of law."<sup>3</sup> With further application of the deconstruction method, Derrida shows that law is no longer a logical and coherent system, but rather a product of a game of meanings ("the glass bead game") that is not determined in terms of time.

Yet, the main representative of this movement is Roberto Magalheira Unger who, in his *Knowledge and Politics*, first developed a round-ed-up "personality theory," wanting then also to develop a "positive theory" that would influence the change of the existing society. In it, Unger formulates "the ideal of the community with *organic groups* that will overcome the system of dominance. The management of the activities of these groups and the prevention of imposing one to the others will be done by the *state* that should be at the world level."<sup>4</sup>

## 1.2. Feminist Jurisprudence

Within the Critical legal studies movement, but also outside of it, there have been feminist studies created and developed as well with their *feministic jurisprudence* and different trends (*feminism differences*: Francis Elisabeth Olsen; *cultural feminism*: Carol Gilligan; *radical feminism*: Catherine A. MacKinnon; Scandinavian school *Women's Law*: Tove Stang Dhal, etc.).<sup>5</sup> At the legal plane, this trend first had as its goal achieving an equal social treatment of women, which was done through reformist demands to formally abolish discrimination of women in comparison with men. The objective of the next step was to attain a special social treatment for women aimed at establishing essential equality among men and women through the mutual respect of their respective differences. At the purely theoretic plane, however, the feministic studies are very varied in their themes and go from "the recognition of the role of law as an instru-

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<sup>3</sup> J. Derrida, "The Force of Law", *Deconstruction and the Possibility of Justice*, New York 1992 (transl. Novi Sad 1995), 54.

<sup>4</sup> G. Vukadinovic, 88.

<sup>5</sup> To mention for example C. Mackenzie, *Toward a Feminist Theory of the State*, Cambridge, MA. 1989; J. Christman, "Feminism, Autonomy and Self-Transformation" *Etics* 99/1995; M. Friedman, "Feminism, Autonomy and Emotion", *Essay on the Work of Virginia Held* (ed. J. G. Haber), Landham MD 1998; M. Fricker, J. Hornsby, "Feminism in Ethics: Conceptions of Autonomy", *The Cambridge Companion to Feminism in Philosophy*, Cambridge 2000.

ment capable of bringing benefits to women to the critics of the gender character of the legal norms built upon the predominantly male forms, categories and values, thus being unable to be the reflection of the vision and interests of the woman.”<sup>6</sup> Numerous feministic analyses of the society have been made on this basis in order to show the groundlessness of the liberal idea of universality and neutrality of the law and point at the unfounded notion of the gender and functional character of women from the man’s perspective. Moreover, numerous so-called “feministic theories of the state and law” have been created, although contemporary most developed countries with their law have long ago stopped considering themselves gender-neutral or gender-committed, but have not given up the pretensions towards some kind of the universality of law. Why would it be the case with the Theory of the State and Law, which certainly has not been created for any gender reasons?<sup>7</sup> Perhaps, because it commits their authors less.

### 1.3. Economic Analysis of Law

The Economic Analysis of Law school, known also as the new *Chicago Law School* (as opposed to the old one that was developed during the period prior to the WWII with the aim to bring back the trust in the power of the market forces: Paul H. Douglas, Frank H. Knight, Henry Schultz, Jacob Viner, Milton Friedman and others), was oriented at methodological issues. Its aim is to highlight a close relationship between economics and law, and particularly to demonstrate to the legislative and judiciary bodies the significance of their legal solutions in the light of the economic consequences they create.

Starting from the assumption that law reflects the logic of economics, i.e., that it rests on the economic principles, this school analyzes the legal norms in the regulations and court decisions using the economic reasoning. It “particularly examines whether the legal solutions contained in the regulations and individual decisions are such that they enable optimal distribution (allocation) of the economic sources and means (resources)” used in order to increase the level of the social prosperity and, as a conclusion, proposes that the legal institutes should be adjusted to that goal. These institutes should be created in such a manner as to instigate the economic optimum. The economics analysis school also explains the coercion forms in different systems of law or in different parts of the same system of law (legal, case law, etc.). Since this is an Anglo-Saxon

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<sup>6</sup> G. Fassò, *Storia della filosofia del diritto I-II*, Bologna 1966–1968 (transl. Belgrade - Podgorica 2007, 685).

<sup>7</sup> D. M. Mitrovic, 15–18.

school, its interest is primarily focused on the judge as the creator of law.<sup>8</sup>

The ideological instigators of the Economics Analysis of Law are Ronald Coase, Richard Posner and Guido Calabresi. Ronald H. Coase, one of the founders of the school and the Nobel Prize laureate for his economic researches, has pointed out that a judge must be ready to seriously analyze the economic consequences of his/her decisions on the economy at large, and not only the necessary costs of conducting a court proceeding. Coase's basic theory is that economic activity should be the ultimate arbitrator in the court proceeding of the decision-making.<sup>9</sup>

The most important representative of this school is Richard Allen Posner. By starting from the notion that "economics-loaded law represents the basis for a positive theory on the most promising legal domain," Posner is trying to subject law in its entirety to the economic analysis, setting up as the first task of law "the maximum increasing of wealth and not the creation of a support for a welfare state." According to him, the assistance to social security programmes is nothing more than a "robbery".<sup>10</sup>

Posner's philosophy is even more painted with pure pragmatism devoid of all ethical behaviour, for he refuses to accept "any more significant role of the moral theory in the legal studies".<sup>11</sup> On the other hand, by giving in to the exaggerations of economism, some other representatives of this school have even claimed that law and legal science as a whole may be brought down to economics and economic science, thus getting closer to the version of Marxism of the Soviet early period theory.

The Economics Analysis of Law, based on the principles of behaviourism, normativeness, descriptivism and evolutionism, has approached law in a pragmatic way, justifiably pointing at frequently neglected economic consequences of the creation and enforcement of legal rules. But, just like any other exaggeration, it has fallen into reductionism by instrumentalizing law, by bringing it down to the level of economics or, even by making it equal to economics. With such unnatural unilateralism, it completely switched off from its scope other numerous sides, particularly the value, ethical and humanistic goals of law, reducing everything to rationality and efficiency ("economic machine", "economistic violence") aimed at "maximizing the benefit" or at least "Pareto improvements" in the name of a possible prosperity of the projected "post-industrial societies".

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<sup>8</sup> K. Jones, *Law and Economy*, Burlington, MA 1983; D. M. Hausman, M. S. McPherson, *Economic Analysis, Moral Philosophy and Public Policy*, Cambridge 2006.

<sup>9</sup> R. Coase, *Essays on Economics and Economists*, Chicago 1994.

<sup>10</sup> R. Posner, *The Problematics of Moral and Legal Theory*, Cambridge, MA. 2002, 227–228.

<sup>11</sup> G. Vukadinovic, 83.

The economic analysis school has raised what concerned citizens pay attention to on a daily basis to the level of science in a provocative and humanly unacceptable manner. It seems that the “achievements” of such teaching are the enactment of obviously “unjust” laws (for instance, the latest law on employment in France which places (“redistributes”) the burden of costs to the poorer or unemployed layers of citizens), “surprising” verdicts for the “powerful,” setting up of private prisons or, even, “the spirit of the text” of the Bologna Declaration.<sup>12</sup>

#### 1.4. Constitutional Legal Theories

The crisis of the legal positivism has not lead only to the creation of new natural law legal theories of Radbruch, Dworkin, Finnis, Fuller and others or to completely new feministic theories, but also to the new constitutional theories (new constitutionalism) which are distinctive legal theories that differ from legalistic theories. Their best known representatives are Robert Alexy and Carlos Santiago Nino. While legalistic theories have allegedly been brought down to traditional iuspositivism, constitutionalistic theories are more aimed towards the study of increasingly more complex normative composition of the contemporary constitutional systems. That is why they put the problem of ethical correctness of law on the first place, almost at the very centre of their study, maintaining that in this way they sufficiently confirm that they cannot be brought down to current law in its positivistically determined formal contexts. Their recognizable feature is linked to the introduction of ethically relative contents into law which reflect legally established principles and inherent rights of an individual. At the level of a constitutional and political system, however, constitutionalistic theories advocate the establishment of a decisive role of the law-maker in the area of the enforcement of constitutional principles and the same role of judges when executing these principles. In fact, the role of the law-maker and judges in these theories is so much stressed that the judges may, for instance, reach decisions that are contrary to the laws, in which the teachings of these theories remind of the teachings of the free law creation school.<sup>13</sup> But, their basic goal is different, since in the numerous variants of these theories their members wholeheartedly advocate justification of a voluntary constitutionalization of a secession as an agreed (consensus-based) form of separation which (due

<sup>12</sup> It is possible that the application of such teaching has lead to the current monetary and financial crisis in the most developed countries, since it is impossible that the state authorities have not monitored the activities of the respective financial institutions and have not noticed a clear danger of short- and long-term consequences. Could it be concluded from this that there is currently yet another large redistribution of the social wealth (in fact, *an international robbery*) over all insufficiently protected social strata of the contemporary states in line with Shakespeare’s thought from *Titus Andronicus*: “Suum quique is our Roman justice. /The Prince takes indeed what is his” (Act I, Scene I).

<sup>13</sup> G. Fassò, 669–676.

to the agreement of the mother state) should be differentiated from a unilateral secession.<sup>14</sup>

Although of a small scientific value, constitutionalistic legal theories are not of a small political value, since they may be used as a convenient “scientific” foundation for new globalistic political doctrines and ideologies.

### 1.5. Multicultural Legal Theories

Among the new teachings or the latest interpretations of the existing teachings on human liberties and rights, going from individual and ethical<sup>15</sup> to post-modernistic social and political ones,<sup>16</sup> special place is held by multicultural theories. When they study in factual and descriptive terms a certain type of society in which different cultural groups live, these theories are primarily subject of interest of sociologists and legal sociologists. When they are used to mark in normative terms a legal and political ideal towards whose realization a state should strive for using law and education as its instruments, then they become predominantly the subject of interest of political and social, and legal philosophers.<sup>17</sup>

Multicultural theories examine the relations that concern an individual or collective identity of a person and different social groups that demonstrate their characteristics more and more openly by referring to an established “third” or some even newer generation of human liberties and rights. This has come into being thanks to the influence of the social and political philosophy in the West, where autonomy and law were first linked with the new interpretations of the old teachings on “the self” (*Identity and Conceptions of the Self*), and then also with completely new teachings on the so-called “collective identity.” At that point, the collective identity is usually developed from an individual identity and put into wider moral and political contexts. Thanks to such an approach, law has also started to be comprehended as a means for regulating relations that

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<sup>14</sup> M. Jovanovic, *Constitutionalizing Secession in Federalized States: A Procedural Approach*, Utrecht 2007, ix-xix and 14–46.

<sup>15</sup> D. Gauthier, *Morals by Agreement*, London 1986; L. Howorth, *Autonomy: An Essay in Philosophical Psychology and Ethics*, New Haven 1989; T. Hill, *Autonomy and Self-Respect*, New York 1991.

<sup>16</sup> R. Young, *Autonomy: Beyond Negative and Positive Liberty*, New York 1986; T. Christiano, *The Rule of Many: Fundamental Issues in Democratic Theory*, Boulder, Colorado 1988 (1996); S. White, “Political Theory and Post Modernism”, *Political Theory*, 18, 1/1991; J. Crittenden, *Beyond Individualism: Reconstructing to Liberal Self*, New York 1992; J. Christman, “Liberalism, Autonomy and Self-Transformation”: *Social Theory and Practice* 27, 2/2001.

<sup>17</sup> G. Fassò, 707.



concern a widely understood right to an individual and collective (autonomous) identity (Gerald Dworkin).<sup>18</sup>

The basis for an individual and collective identity lies with new liberal teachings on “neutral state” and “the policy of difference,” put together with the teachings on durable, inherent, collective (“group differentiated”) rights which – once they are recognized – become acquired, which means that they may no longer be limited or abolished. A special problem is how to solve the relation between the tasks of a liberal state and the application of the teaching on collective rights, since liberalism lies on freedom and individualism, while this is not the case with collective rights that are based on the idea of equality.<sup>19</sup> For this reason, it is pointed out in these theories that a man is an autonomous being in comparison with the others who is not interested in some metaphysics-based law, but only in that which enables him to present himself in the light of his essentially individual racial, religious, gender and other differences. And these differences are seen as his autonomous individual or collective identity.

When it comes only to the collective autonomous identity, multicultural theories make a clear distinction between collective (joined) exercising of individual rights (for instance, labour rights in case of a strike of employees) and the exercising of collective rights whose legal rightful owner is some collective, the essence of which as an “autochthonic population” comprises distinctive features of social groups established on the basis of racial, gender, ethnical, homosexual or even handicap characteristics. These collective rights differ from the common rights of associated individuals primarily because they are “given” as such, because they are not created through the association of individuals, but by the very existence of the collectives which are gradually and eventually granted “the right to exist” and “the right to (internal and external) self-determination”.<sup>20</sup> And while most of the countries even today very cautiously recognize the right to existence for the so-called “ascriptive groups,” there is a small number of countries (in which there is a protection stemming from the right to such self-determination) where it is considered that such value is

<sup>18</sup> G. Dworkin, *The Theory and Practice of Autonomy*, Cambridge – New York 1988.

<sup>19</sup> For example R. Dahl, *Democracy and Its Critics*, New Haven-London 1989; A. Lijphart, *Democracy in Plural Societies: A Comparative Exploration*, New Haven 1977; J. Rawls, *Political Liberalism. The John Dewey Essays in Philosophy*, 4, New York 1993, and *Justice as Fairness: A Restatement*, Cambridge, MA. 2001; S. Holmes, *Passions and Constraint: On the Theory of Liberal Democracy*, Chicago 1995; J. Christman, *States and Citizens*, Cambridge 2003 and *Autonomy and the Challenges to Liberalism*, Cambridge, MA. 2005; T. Iversen, *Capitalism, Democracy and Welfare*, Cambridge 2005; C. Wolfe, *Natural Law Liberalism*, Cambridge 2006.

<sup>20</sup> M. A. Jovanovic, *Collective Rights in Multicultural Communities*, Belgrade 2004, 141–151 (in Serbian).



becoming a basis for the development of “alternative constitutional contexts,” where “those who have the right to self-determination are granted autonomy to a considerable degree”.<sup>21</sup> These groups also have the right to declare what kind of state protection they require, after the state has previously asserted its position with regards to that issue. And it is precisely within this context that new possibilities have been found for the expansion of the multiculturally recognized law to the sphere of the autonomous collective identity.

The best known representatives are Charles Taylor, who is considered to be one of the founders of this theoretically heterogeneous school, Will Kimlicka, Christine M. Korsgaard, Ian Brownlie and Christian Tomuschat.<sup>22</sup> Still, a special place belongs to Joseph Raz,<sup>23</sup> Hart’s student and heir. His thought, that moves within a scope from the philosophy of moral, via the philosophy of law, all the way to the political philosophy, finds its unity in the notion of the “philosophy of practical mind” or “practical philosophy” which is opposed to the neutralism of the liberal tradition and affirms a special version of the so-called “multicultural liberalism” taken as “normative regulation” that “justifies promotion, encourages progress of cultural minorities and demands respecting of their identity.” Such Raz’s “multicultural choice” is based on the values of the “idea of freedom” (according to which “freedom and the development of an individual depend on their full belonging to a cultural, living and respected group”) and the “idea of the pluralism of values” (which consists of recognizing the values of different cultures created on any basis whatsoever, even if they are mutually in discord.).<sup>24</sup>

### 1.6. Communitarian Legal Theories

Multicultural theories are very close to communitaristic theories that particularly stress community, identity and freedom as values, that is, a society as a community joined together through the same values. Such an approach has necessarily lead to a criticism of multicultural theories which, according to the communitarists, as central thought put the ideas

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<sup>21</sup> A. Cassese, *A Self-Determination of Peoples – A Legal reappraisal*, Cambridge – New York 1995, 351–352. Quoted according to: M. A. Jovanovic, *Collective Rights in Multicultural Communities*, 150.

<sup>22</sup> I. Brownlie, *Rights of Peoples in International Law*, Oxford 1988; C. Tomuschat, *Self-Determination in a Post-Colonial World*, Dordrecht 1993; Ch. M. Korsgaard, *The Sources of Normativity*, New York 1996; C. Taylor, “Invoking Civil Society” in: C. Taylor, *Philosophical Arguments*. Cambridge, MA 1995, 204–224 (transl. Belgrade 2000); V. Kimlicka, *Multicultural Citizenship: A Liberal Theory of Minorities Rights*, Oxford 1995.

<sup>23</sup> J. Raz, *Practical Reason and Norms*, London 1975; *The Morality of Freedom*, Oxford 1986 and *Ethics in the Public Domain. Essays on the Morality of Law and Politics*, Oxford 1994.

<sup>24</sup> G. Fassò, 710.

of liberalism and individualism supported by the “atomized” vision of a civic society. The best known representatives of the communitarian school of thought (Michael Voltzer, Alasdair MacIntyre, Mike Sandel, Amitai Etzioni) deal with the political issues related to the citizens, organization of a society and nation as a phenomenon.<sup>25</sup> For instance, according to Voltzer (“liberal communitarian”), “the area of justice is a society in which there is no social property that serves as a means of domination”.<sup>26</sup> This means that the area of justice is surely to be found where it is either unimportant or unattainable. Noticing the contradiction, Voltzer makes social justice relative by making it dependent on the social circumstances or the cultural milieu of the society. But, can we talk about justice then?

### 1.7. Socio-Anthropological Legal Pluralism

At the beginning of the 1960's, after two decades of calm, a *re-newed interest in the legal pluralism* rose among the representatives of a contemporary sociology of law, particularly among those of its American supporters who had studied sociology of organization and anthropology of law. Among them, a special place is held by William Evan, Karl Llewellyn and Adamson Hoebel.

According to William Evan,<sup>27</sup> a well known American sociologist of law and organization, in order to comprehend a distinctive social composition of law that is derived from the notion of a legal system, one should renounce the etatistic approach according to which law is linked to the state and its coercion. In his opinion, the composition of a legal system comprises two necessary and sufficient conditions: plurality of legal norms and the role of the bodies of the main authorities in the state adjusted to these norms. These conditions for determining the pluralism of a legal system are supplemented by the measurements of jurisdiction and democracy. It is through their combining that a distinction may be made between the democratic systems of public and private law, and the undemocratic ones. Nonetheless, their division is relative, since undemocratic systems may become democratic and *vice versa*. Evan's school of thought explains the modern needs of the interventionism-inclined state, but at the same time it criticises the extremes in the way of its functioning, depicted in the overstated etatism and individualism.<sup>28</sup>

<sup>25</sup> M. Sandel, *Liberalism and Limits of Justice*, Cambridge – New York 1982; *A Short History of Ethics*, New York 1998 (1996); A. Etzioni, *The Third Way to a Good Society*, London 2000; M. Voltzer, *Spheres of Justice*, New York 1983.

<sup>26</sup> M. Voltzer, 16.

<sup>27</sup> W. M. Evan, “Public and Private Legal System”, *Law and Sociology. Exploratory Essays*, New York 1962.

<sup>28</sup> G. Vukadinovic, 159–160.

According to Karl N. Llewellyn<sup>29</sup> and E. Adamson Hoebel, American legal sociologists-anthropologists who separately studied social authority without the state (anthropology and anatomy of social conflicts), i.e., the pluralistic authority (freed from the etatism of positivistic legal theories), it is wrong to bring down the entire primitive law to the so-called “group law.” It is also wrong to bring down modern law to individualistically comprehended state law, when in fact it is the new social pluralism, that is adjusted to the requirements of the contemporary and increasingly more globalized society, which is more and more prominent in contemporary law.

Other contemporary legal writers also determine new legal pluralism in different ways. For some (Max Gluckman and Paul Bohannan)<sup>30</sup> it is characteristic to point out the idea on the existence of a myriad of different legal orders within the same order, i.e., “co-existence of different norms or legal systems in the same or complementary political and legal fields.” Such sociologically painted legal pluralism is seen and determined as a “legal medley” created by a dedicated crossing and depositing, as a phenomenon of “superlegality,” as “a dynamic process of uneven and unstable combination of legal systems,” which can be conveniently used to explain a supernational development of the system of law of the European Union. Others (such as Jean Wanderlinden) determine pluralism as an application of different legal mechanisms within the same order and in the same situations. Such legal pluralism relates to the integral parts of the system of law: legal institutions, branches or areas, on the basis of which numerous types of legal systems can be differentiated (parallel and integrated, cumulative and isolated, desired and committing, imposed and agreed upon, etc.). According to Wanderlinden, the system of law always aims at establishing the “unity of law” and “the material and psychological homogenization of social groups.”<sup>31</sup> Yet, this unity is “unjustified and unjust,” since the unique system of law “does not ensure justice or the efficiency of law,” but the predominance of the ruling group or a balance of equal social groups. The third group simplifies the legal pluralism and brings it down to *non-etatistic dualism* between the so-called “infra-law” (based on the beliefs, folklore or even vulgar forms of behaviour) and increasingly globalized contemporary state law. According to Jean Carbonnier, legal pluralism shows that the system of infra-law (rules of subculture, including there even the rights of children) exists not only outside, but also inside the general system of the state law, even

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<sup>29</sup> K. Llewellyn, E. A. Hoebel, *The Cheyenne Way. Conflict and case Law in primitive Jurisprudence*, Oklahoma 1941.

<sup>30</sup> M. Gluckman, *The judicial process among the Borotse of Northern Rhodesia*, Manchester 1955; P. Bohannan, *Justice and Judgement among the TIV*, London 1957.

<sup>31</sup> G. Vukadinovic, 161–162.

when the old legal rules have been formally abolished by the state.<sup>32</sup> Following Carbonnier's anthropological observations and suggestions, Norbert Rouland, the most significant contemporary French sociologist-anthropologist, has developed his idea of legal pluralism (by studying early Roman and early autochthonic laws in the eastern provinces of the Roman state) with the objective to explain the political and legal goals of the former colonial states and the incredibly diverse pluralism that was to be come across in the then colonized societies. The most important result of his study is the conclusion that the Roman *ius gentium* was created in order to resolve the pluralistic problem of a myriad of legal systems applied among the subjugated nations.<sup>33</sup> This conclusion particularly benefits the advocates of the modern super-national and international integrations, since it is obvious that all of the societies are integrally and essentially pluralistic, as was also the case with their laws.<sup>34</sup>

## 2. REVIEW OF THE PRESENTED MULTIDISCIPLINARY LEGAL THEORIES AND THEIR SCIENTIFIC ACHIEVEMENTS

The multidisciplinary theories that have been shown in brief with the critic commentaries are aimed towards three topics: law, justice and state. Their goal is to prove that a society should be brought to the final phase of the world state with a civic society through deconstruction,<sup>35</sup> what is openly advocated by Roberto Magabeira Unger when he claims that law and the world state are the means for preventing the establishment of domination among the so-called "organic" social groups.

### 2.1. Law

When it comes to law, a special attention should be drawn to four novelties and remarks. One novelty will be the consideration of a possibility of constitutionalization of the so-called secessionist clause in the liberal-democratic states. But this is not establishing of a legitimate scientific interest, but rather its criticism, since the acceptance of that novelty and its possible introduction into the constitutions would require the creation of completely new notions of the state and state regulation. And if such recon-

<sup>32</sup> J. Carbonnier, *Sociologie juridique*, Paris 1978.

<sup>33</sup> G. Vukadinovic, 162–163.

<sup>34</sup> B. Dupret, "What is plural in the law? A praxiological answer," *Égypte/Monde arabe*, 1/2005, 159–172, M. Sharifi, "Justice in many rooms since galanter: de-romanticizing legal pluralism through the cultural defence," <http://www.law.duke.edu/journals/lcp>, last visited Dec. 2008.

<sup>35</sup> D. M. Mitrovic, "Law in the light of the theory of chaos and the legal theory", *Annals of the Faculty of Law in Belgrade (Anali Pravnog fakulteta u Beogradu, in Serbian with summary in English)* – *Anali PFB* 1–3/1997, 139–149.

struction was done, it would be in place to ask a question whether it is then a state at all.<sup>36</sup> It is no coincidence that the contemporary constitutional and political science in the world calls such “states” – “uncompleted.” Therefore, constitutionalistic theories contain a danger of breaking up current states by legitimizing secessionist clauses, despite the fact that civilized separation is always better than uncivilized joined life or uncivilized separation. It is no coincidence that even in the most developed liberal-democratic states of the federal type there is no right to *nullification* (giving up by nullifying an act, through a veto from a member-state), or a right to *secession*. The prohibition of these rights is not a coincidence. The prohibition of nullification (usually formulated in the form of the so-called protective clause) represents a measure against dissolution in complex unique states that are, as a matter of rule, created through a merger. It consists of the prohibition of a member-state vetoing decisions of the federation bodies. The prohibition of secession represents an additional protection of the state against an arbitrary separation, i.e., a unilateral disintegration of any part of the federal state by its member-states.

The next novelty and remark is that in the presented theories the contents of the rule of law (*Rechtsstaat*) is more and more “diluted” by linking it to the widest existence and respect for human liberties and rights in the multiculturalistic or communitaristic sense of meaning (Charles Taylor, Joseph Raz, Mike Sandel, Michael Voltzer and others), or that the legal state is more and more openly denounced and considered to be superfluous, since it stopped long ago being able to answer to the new technological, informatic, legal and social challenges,<sup>37</sup> owing to which the state of emergency is sometimes opted for that could at some moment of crisis grow into a regular state of a large number of states or a possible World State.<sup>38</sup>

The latest socio-anthropological theories conveniently follow upon these theories and through studying ancient societies and laws or the legal pluralism in the contemporary laws they try to disclose the common denominator that would serve as a scientific solution or a basis for explaining and justifying the current super-national organising,<sup>39</sup> as is the case since 1992 with the European Union or since 2005 with the newly-founded North-American Union.

<sup>36</sup> M. Jovanovic, *Constitutionalizing Secession in Federalized States: A Procedural Approach*, Utrecht 2007, M. Jovanovic, S. Samardzic (eds.) *Transition and Federalism – East European Record, Federalism and Decentralisation in Eastern Europe: Between Transition and Secession*, Zurich – Vienna 2007.

<sup>37</sup> D. M. Mitrovic, “Legal state as a legal thought and as a legal experience,” *Analiz PFB*, 1–2/1993, 173–183; See also *Legal state – the origin and future of an idea*, Belgrade 1991 (in Serbian).

<sup>38</sup> J. Lynch, *Age in the Welfare State*, Cambridge 2006; M. Deflem, *Sociology of Law*, Cambridge 2008.

<sup>39</sup> D. M. Mitrovic, *Autonomous right*, Belgrade 2007, 51–55 (in Serbian).

The fourth novelty, that is, the fourth remark of a purely methodological character should be added to the afore-said and this remark consists of the intellectual concentration on the imagined goal in accordance with which these theories are shaped up, and not *vice versa*, therefore, in the substitution between the initial assumptions. The characteristic example is Posner's school of thought devoid of ethics and morality, feministic teaching owing to unnecessary exaggeration (can there be feministic theory of state and law at all?, since the determination of the notion of state and law, as it has been said, is outside and above the gender-determined understandings and teachings) or the exaggeration of some multiculturalistic schools of thought on the right of ascriptive groups to enter into contracts with the state, as for instance with Christian Tomuschat, the final consequence of which would also include the right to a feudalistic establishment (territorial and political autonomy) on the basis of gender or sexual affiliation of the members of such groups (which is insulting at least for the national minorities or religious confessions as traditional heirs of such a right). The entering into such a hypothetical collective agreement would additionally lead to the notion of particularity of the state and social organization, which could easily turn into a means for the destruction of the current or future states. If the external and internal borders of the states should be re-drawn, the widely applied teaching on collective rights in a liberal state, supported by the constitutionalistic teaching on the secessionist clause in the federal state even if only of the liberal-democratic type, represents an exceptionally powerful means to achieve the prediction of the former UN Secretary General (Butros Butros-Ghali), who announced in the last decade of the previous century that by the year 2050, this organization would have around 400 member-states.

## 2.2. Justice

It is characteristic for the presented theories that they make justice relative, all the way to the distortion of the idea of the natural law. For instance, Michael Voltzer, first the one who continued and then the critic of the ideas of John B. Rawls<sup>40</sup> and Ronald M. Dworkin, starts from the

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<sup>40</sup> In his famous work *A Theory of Justice*, John Rawls determines "contractualness" as a convenient method for determining the principles of justice. Justice, Rawls points out, can be established only through a contract. This contract is relative and hypothetical since it stems from the "original position of justice." It is the result of a unanimous acceptance by "uninterested rational individuals," provided that they "consciously choose from the position of justice." And "as soon as the original contract is entered into and the veil of ignorance is removed, people are no longer in the position of mutual lack of interest. The reason why they are allowed to follow their selfish interests, and nothing else beyond the veil of ignorance, is that this veil imposes individual choices in such a way that it ensures meeting of the *basic requirements of justice*, no matter what the decisions are like of those who choose provided they are rational." In a social state created in such a manner, Rawls maintains, entering into some new contract among people may be



social pluralism as the basic area of the social justice and correctly challenges Rawls's claims by pointing out that individuals are not just isolated primary subject, since the understanding of justice depends on the history and culture of each society.<sup>41</sup> But, Voltzer's understanding of justice can also not be accepted, since justice in his school of thought gets relative and diluted to the point of being unrecognizable, which opens up a proper question: what is justice in his teaching, and what is law? This, of course, is no coincidence, since by making the justice relative it provides a false halo of justice for the current law.

The most serious critic of Rawls's natural-law school of thought was Amartya Sen. In his work "Development as Freedom," not only did he criticize Rawls's way of looking at the distributive social justice, for such justice necessarily aims towards balanced distribution of resources and goods, but also his neglect of the ethical dimension of the man that does not come down only to interests and their purpose. In that way – Sen points out – Rawls does not pay attention to the circumstances in which an individual lives (it is one thing, for instance, to have a bicycle in China, and quite another to have it in one of the countries with the high standard of living, etc.).<sup>42</sup>

### 2.3. State

As far as the state is concerned, a particularly prominent criticism is the one of the notion of sovereignty and advocacy for the world state.

The change regarding the concept of sovereignty as an absolute feature of the state authority occurred only in the 19th century owing to the increased affirmation of the modern school of thought on national sovereignty and the legal state. Also, at the end of the 19th century a question was raised concerning the sovereignty in a complex state. This question was answered in such a way that even today it is the federal state that is considered as sovereign and not its members. Still, since the first half of the 20th century, sovereignty again started to be openly denounced or made relative as a decisive characteristic of the state. It was particularly Leon Duguit who negated sovereignty, establishing instead of it the

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achieved only through their "negotiations" and "consensus," provided that they adhere to "three separate norms" used to regulate the *institutions of a just society*: "biggest possible equal liberties" norms, "fair equality of opportunity" norms and "giving priority to the least well-off" norm (*the principle of difference*)." Rawls thinks that in this way "justice becomes the first virtue of the social institutions" of a just society. When these rules are just, they establish a basis for legitimate expectations." But, when the "bases of these requirements are uncertain, so are the borders of the liberties of people." See: J. Rawls, *A Theory of Justice*. Cambridge, MA. 1971 (revised 1999).

<sup>41</sup> M. Voltzer, 16–19 and on.

<sup>42</sup> A. Sen, *Development as Freedom*, Belgrade 2002, 521–524 and on (transl. in Serbian).



notion of public function and service. After him, this was done by other French authors (for instance, Edgar Morin and Georges Gurvich). Even today, some authors maintain that sovereignty should be discarded for it does not correspond to the new social reality, since it has shown great perniciousness through history as a cause of many wars. A characteristic example is the one of Neil McKormick who, taking into account the contemporary European integrations as a model field for his research, concludes that Europe has entered the area of “post-sovereignty”.<sup>43</sup> However, to discard the notion of sovereignty means to neglect its central role in the legal and political science. This has forced other authors to examine the possibilities for the reshaping of the notion of sovereignty in order for it to be able to respond to the new challenges (instead of discarding it or abolishing it in the science). *The theory of constitutional pluralism* has been created on these grounds and according to this theory the states are not the only places in which sovereignty may be found. The relation among the states should be *heterarchical*, and not hierarchical, since the modern circumstances require the abandonment of the unique and absolute sovereignty as something “zero sum game” for the benefit of a dialogue and adjustment among the constitutional authorities of different states (Neil Walker). On the basis of this, other authors, such as David Held, have concluded that states will not weaken due to the loss of their external sovereignty. On the contrary, thanks to this they will strengthen their internal sovereignty!,<sup>44</sup> since there are always tasks that are exclusively of the internal character, i.e., that fall under the exclusive competence of the state (in line with yet another compromise school of thought on the *domaine réservé*), because of which nobody, not even the international community, is allowed to interfere with these purely interior state

<sup>43</sup> N. MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth (Law, State, and Practical Reason)*, Oxford 2002 particularly insists on truly noticeable changes that have led to the weakening of the sovereignty of the European Union members and on that occasion he refers to the fact that through the founding agreements the member-states have passed a large part of their sovereign authorities to the European Union (because of which they cannot autonomously regulate a number of issues that used to fall under their exclusive competence), that former state borders physically have disappeared (despite the precisely determined areas of the present member-states), that a unique European citizenship has been created, that there is an ongoing creation of a unique European system of law, etc. Yet, the fact that sovereignty does not belong to history is reflected in the recent example of England which, on the occasion of the enactment of the first Constitution of the European Union, did not even want to hear that something would be put into it that would interfere with its national sovereignty. And, since the Constitution was adopted in March 2005, the citizens of two European Union member-states through referendum refused to accept it. This forced other member-states to postpone the organization of their respective referendums, which led to the adoption of the Constitutional Agreement (Berlin Declaration) of the European Union in June 2007, instead of the European Union Constitution.

<sup>44</sup> D. Held, “Changing Contours of Political Community”, *Global Democracy*, London 2006, 26.

affairs.<sup>45</sup> Such Held's teaching on the sovereignty, together with the similar teachings of other authors, represents a certain theoretical preparation for the situation in which the positions on the imminence of the loss of the national sovereignty and the necessity of giving up national interests could easily turn into claims on the need to reform former national sovereignties into a new "cosmopolitan sovereignty" whose title-holder would be the World Federal State with a universal ruler as some kind of a Hellenistic version of the "spirited law".<sup>46</sup>

When it comes to the world state, it should be pointed out that the idea of the world state is just a little younger than the idea of the state, for it was necessary first to come to the notion of the state in order to be able to think about the world state as an idea that embodies the entire humanity arranged under one common political authority. This idea has been consistently spreading from the ancient cosmopolitan beginnings (starting with the kinic and stoic schools) to the present day.

Already according to Marcus Aurelius, the world state represents a "holistic vision of the universe and the mankind in it, in which the universe, God, nature, truth, law, ratio and man are closely interlinked into a cosmic order."<sup>47</sup> Eighteen centuries after this most famous Roman emperor-stoic, Bertrand Russell also advocates for the same idea, but he explains the establishment of the World State with practical reasons, finding in it "the main medicine against wars" and "the primary world interest linked with the survival of the human race". The World State or the "Superstate" should be, according to Russell, sufficiently strong "to be able to resolve all the disputes among nations in accordance with the law," since only it "can be achieved after different parts of the world become so closely linked that no part can be indifferent to what is happening in any other part of the world".<sup>48</sup> And while the ancient and medieval teachings used to determine the World State as a universal monarchy modelled after the Roman Empire, the presented multidisciplinary theories determine the World State as a modern republican and democratic world state with the federal state arrangement, i.e., as the *world federation of states*. But, remembering the several-thousand-year long state and legal tradition, and particularly the form of the Roman Empire, one may wonder: if a small

<sup>45</sup> V. C. de Visscher, *Théories et réalités en droit international public*, Paris 1960, 281 and on.

<sup>46</sup> G. Poggi, "Cosmopolitanism and Sovereignty", *Political Restructuring in Europe: Ethical Perspectives*, London 1994, 89 and on. See also: R. Glossop, *World Federation? A Critical Analysis of Federal World Government*, Jefferson 1993.

<sup>47</sup> M. Aurelius Antoninus, *The Communings With Himself*, London 1961, VII, 9. A. Gajic, *The Idea of the World State – Legal, Political, and Philosophical-Legal Aspect*, PhD thesis, Novi Sad 2008, 60 (in Serbian).

<sup>48</sup> B. Russell, *The Prospect for Industrial Civilisation*, London 1923, 16. Quotation according to A. Gajic, 98.

world Leviathan is created once, will it not grow up and develop to the proportion that surpasses the gloomy anticipations of George Orwell in his novel “1984”.

The idea of the World State, as it may be observed, represents a favourite topic of the presented multidisciplinary theories, only developed to the final limits, which requires the examining of its permanent elements: space, population and authority. And since we are still talking about the state, only this time about the world state, it should therefore have all the elements of the statehood, which means that one only needs to notice and examine their features in comparison with the present typical states.

First of all, the World State would have for its realm the entire three-dimensional world space. It would, therefore, change its shape from the upside-down cone with an irregular base into a regular sphere with the centre in the geometrical middle of the Earth. As such, the World State would not have its external state borders. Instead of them, there would be only internal administrative borders between the members of the world federation. And this means that the spatial reach of such world authority would spread until the factual borders of its power. The World State would encompass the entire humanity, i.e., all the inhabitants of the planet who would be subjected to its authority and hence would be obliged to respect the world legal order. All its citizens would have the world citizenship, and in the case of its federal organization, also the “quasi-citizenship” of the federal members (dual citizenship). With this, for instance, the need for the current differentiation between citizens on one side and foreigners and expatriates on the other would cease, but not the need to determine the conditions for the acquisition and termination of the citizenship (including there the possible appearance of the so-called “global expatriates”). The most interesting thing with the establishment of the World State is that there would be a renewal in the affirmation of the idea of the state authority and state sovereignty that would be exercised over all the inhabitants and in the entire state space. This would, for instance, make the institutes of asylum, extradition, etc., obsolete, if not even impossible. Moreover, the World State would dispose with all the attributes of sovereignty in their purest form. It would be fully independent, for no competitive authority of any other state would exist. Also, it would be superior, for it would dispose with the same such state authority supported by the world federal armed forces, which means that in the earth proportions it would be absolutely factually and legally unlimited, like some kind of Hobbs’ “mortal god” or, like with Hegel, at least “something earthly divine”. It could without any legal limitations enact universal mandatory regulations, while it would legally answer to no one, thus becoming “legal god” in its purest sense of meaning (“dominus et deus”). And this means that the law it is creating would also become like some

kind of “less perfect divine law” (*lex divine*). Also, such state could not be internationally recognized by anybody, nor would it be necessary any longer, which means that at the moment of its creation, using the model of a social agreement, all states would voluntarily (or those few disobedient ones through coercion) transfer to it all of their external state authorities. Its rule would be limited only by the physical and social reasons, and these physical limitations would not relate to the state borders that would no longer exist. Although unique, the sovereignty of the World State would not be monolithic, but, like in the modern federations, split between itself and the federal members which would to a certain degree keep the given interior sovereignty. Also, by using the thousand-year-old state and legal tradition, the federalized World State would be ready to be separated from the civic society that would “with its out-of-state position, with the existence of free public opinion and other out-of-institution forms of association, represent not only an autonomous sphere of social life outside the reach of the state authority, but also an essential dam against the comprehensiveness of such sovereign state and totalitarian tendencies that could appear in it over time”,<sup>49</sup> which would give a new impetus to the contemporary autonomous views. Such optimistic picture, as it has been mentioned, was developed by Roberto Megabeira Unger in his book “Knowledge and Politics” when he sets “the ideal of a community with *organic groups* that will overcome the system of dominance. The management of the activities of these groups and the prevention of imposing ones to the others will be done by the *state* that should be at a world level,” which in his opinion means that the task of the modern doctrine on the state is “to examine the sense that could be used to resolve the conflict between the idea of a small group and the idea of the universal republic”.<sup>50</sup>

Although activities aimed at the creation of the World State have been with us for a long time,<sup>51</sup> this is still a social utopia, but this time with a possibility for it to be really realized thanks to the *globalization*, the instrument which cropped up “out of nowhere” and almost “omnipresent in less than a decade”.<sup>52</sup> This clearly shows that many experts and

<sup>49</sup> A. Gajic, 17.

<sup>50</sup> R. M. Unger, *Knowledge and politics*, New York 1976 (transl. Zagreb 1989), 324 and on.

<sup>51</sup> For instance, on the occasion of the fiftieth anniversary of the foundation of the United Nations in 1995, a proposal of a special UN Commission for global management entitled “Our Global Management” was adopted and this proposal represents a direct reason for the review of the UN Charter in this direction.

<sup>52</sup> As a reminder, terms “globalism,” “globalization” or “mondialism,” along with other derived or similar expressions, have been created and used in academic discussions during the last two decades of the 20th century in order to denote an increasingly stronger action of the unifying factors in the modern world. Shortly after, they became an integral part of the numerous doctrines’ and ideological positions’ vocabulary. Also, different posi-

laymen see in the strengthening of the globalistic aspirations a serious or the greatest threat to democracy in the modern liberal societies.<sup>53</sup> Many others, however, see in the globalization a road towards the establishment of the World State which should be advocated by all means available. Between these extremes, there is a simple truth: today's development of the most developed societies has not been made possible either by the church, or the politics, or the rule of the contemporary states or corporations, but by *technology* in the widest possible sense of meaning: from a wheel to a pencil to a computer and virtual engineering of every possibly conceivable system. But, its possibilities have been tamed today and only partially utilized. Therefore, it is no longer reasonable to ask whether to get to the world state, which imposes itself technologically (whenever it does get created), but rather to what kind of the world state: whether to get to the state where *needs* will rule (since technology is already making that possible now) or to the state where *profit* will rule, as is the case now (since the current monopolistic exploitation and distribution of goods allow it).

It seems that in the near future state laws will increasingly act within the frameworks of the super-national state orders, since the "legal pluralism of the international type feeds upon etatistic law, just as equally as upon the sovereign rule",<sup>54</sup> all until one possible moment in which the super-national orders would melt into a universal order of the World State, no matter how it may be envisaged.

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tions concerning globalization as a social process have led to further divisions to the so-called "sceptics" (who decline the existence of globalization as a social process), "globalists" (who in globalization see a desirable change that leads to the expansion of the ideology of neoliberalism and market economy), "superglobalists" (who consider globalization to be an objectively planetary process), "antiglobalists" (who focus only on the undesirable consequences of the globalization process) and "transformationists" (who study globalization in a comprehensive and balanced manner). D. Ronald, *National Diversity and Global Capitalism*, Ithaca 1996; A. Giddens, *The Third Way. The Renewal of Social Democracy*, London 1998; N. Chomsky, *Profit over People: Neoliberalism and Global Order*, New York 1999; C. Boggs, *The End of Politics*, New York 1999.

<sup>53</sup> In addition to the present example of the European Union, the existence of the same globalistic intents is confirmed by the agreement (which is not of trading nature, as one may think) signed in 2005 (but not publicized to the American people and not ratified in the US Congress) on the foundation of the North-American Union (*Security and Prosperity Partnership of North America /NAU/*) with the future unique monetary unit "amero." This agreement put its signatory members (USA, Canada and Mexico) under obligation to renounce their state sovereignty. Thus, for instance, the current US Constitution from 1787 will become obsolete in the foreseeable future, as well as the constitutions of Canada and Mexico. Also, there is a plan to set up similar super-national creations (African Union and Asian Union). All of them should at one moment, jointly, unify under One World Government, i.e., under the World State, which St. John the Theologian speaks of in an apocalyptic way in the final writing of the Scriptures entitled "The Revelation." See: D. Simic, *The World Order*, Belgrade 1999 (in Serbian).

<sup>54</sup> N. Viskovic, *Theory of State and Law*, Zagreb 2001 (2006), 129 (in Croatian).

### 3. OTHER MULTIDISCIPLINARY LEGAL THEORIES

Other modern multidisciplinary legal theories are no less interesting, although they are aiming in a different direction. A special position is held by the system, cyber and bioethical theories, including the Law and Literature Movement, which will not be particularly commented here.

#### 3.1. Supertheory of the Systems and Cyber Jurisprudence

Among the modern theories, a special place is taken by the “super-theory” of the systems by *Niklas Luhmann*, who created his well-known system theory of law starting from the notion of “normative expectation”. For Luhmann it represents a “form of orientation used by the system to “feel” the contingency of its environment with regards to itself and taken over as its own, as uncertainty, in the process of its own renewal”.<sup>55</sup> It is particularly the physical force of the state that represents an undeniable reason for the establishment of the “normative expectation”, the increasing of which (thanks to the role of the state) “acquires the shape of law”.<sup>56</sup> Luhmann determines it in the following way: “Law is a system regardless of which variant of the stratified definition of the system we may choose. It is a whole comprised of elements, legal regulations, linked with the requirement of mutual uncontradiction. As a whole, law is separated from its setting, clearly marked by the system borders, with proportionately high degree of autonomy. This autonomy rests on the foundations of the rule of law, that is, on the condition that each legal regulation derives its legality from another legal regulation and thus, in that logical sequence, all the way up to the basic norm – the valid constitution. Law is also self-referent, since the legal system refers to itself and particularly to its unity through a postulate of proportionate permanence, i.e. legal security, economy condition, ideal of justice”.<sup>57</sup>

Luhmann also examines the reflexivity of law, which consists of the procedural, and the legal and moral parts. The aim of the first part is to provide the answer to the question what procedure is used against which legal norms are created, while the aim of the second part is to provide the answer to what kind of legal norms may be created at all.<sup>58</sup>

The law expressed in the form of legal norms is linked with the “reaction through disappointment” in case of its violation. It entails the

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<sup>55</sup> N. Luhmann, *Soziale Systeme, Grundriss einer allgemeinen Theorie*, Frankfurt am Main 1984, 364 and on. More in G. Vukadinovic, *Luhmann's “supertheory” of the systems*, in: *The Theory of Law I*, Petrovaradin 2001, 487–495 (in Serbian).

<sup>56</sup> J. Habermas, *Theorie des kommunikativen Handelns*, Bd. II, Frankfurt am Main 1981, 263.

<sup>57</sup> E. Pusic, *Social Regulation*, Zagreb 1989, 11–12 and 16 (in Croatian).

<sup>58</sup> N. Luhman, *Rechtssoziologie*, I, Hamburg 1972, 99 and 188.



application of physical force which is the result of the reaction of the state owing to an individual's "disappointment" caused by a failed normative expectation. This reaction happens in two ways: by interpreting the deviant action, and then through a demand for a sanction and its application. Nevertheless, the force is not applied always in the same way, which means that the rationalization of law also does not happen in a uniformed manner. In the early phases of its development, law had to confirm itself in each newly-created case through a demonstration of force. With the passage of time, the force has been centralized in the form of the state monopoly, while law has gotten centralized in the form of decisions supported by the state force as the final means of coercion.

The second best known representative of the system theory, Alfred Geirer, also uses the notion of expectation to explain the creation of social and legal regulations which is a necessary consequence of the scarcity and human inter-dependence which at the level of consciousness get the form of uncertainty (*metus et indigentia*) owing to "existential uncertainty in scarcity" or "powerlessness of consciousness with regards to the information necessary in order to survive." For this reason, according to Geirer, the basic features of consciousness are "integration of the past, present and future, self-reference, and the arrangement of behaviour." The mentioned elements of consciousness determine the man with regards to the world and himself, bringing into connection the interest-inspired motives and the behaviour of each individual. These elements are manifested as "complex sub-systems of consciousness." "Normative sub-system of consciousness" is also like that and it serves from the very beginning for the neutralization of the uncertainty "which is one of the main problems in the passage to consciousness in general".<sup>59</sup>

The system theories of law of Luhmann and Geirer are further developed into even more modern theories, the goal of which is to create and examine cyber models of law, taking into account the effect of the social factors on the behaviour of the legal models. For this reason, in science they are also called *political-cyber legal theories* or *cyber models of jurisprudence*, which entails "*an arranged whole* (structure), which is *built on the basis of certain criteria* (functions) and which *is not subject to certain disturbances* (influences or challenges of the environment) that come from the social surroundings." According to their best known advocate Karl W. Deutsch, "law provides, that is, ensures that the social system accepts the political system." This acceptance and adherence to the laws (legality) in a political system depend on to which extent "there are ways along which an individual may get quick and correct orders".<sup>60</sup>

<sup>59</sup> A. Geirer, *Die Physik des Leben und Seele*, Munich – Zurich 1985, 233. See: E. Pusic, 109, 139, 149 and 156.

<sup>60</sup> G. Vukadinovic, 250–251.



### 3.2. Bioethical Legal Theory

The abandonment of the meta-ethical researches around the middle of the last century did not mean the end in the interests related to moral forms and issues, but rather it first lead to the transition “from the meta-ethics to the normative ethics,” and soon afterwards also to the researches in the “applied ethics” (environmental ethics, business ethics, and bioethics).

The term “bioethics” (“the ethics of life” or “the ethics of everything living”) was first used in 1971 by American Van Ransselaer Potter in his book “Bioethics. A Bridge to the Future,” indicating by it a science whose goal is to improve the quality of living. As such, it is rather “a cluster of multidisciplinary researches, discussions and procedures” the objective of which is “to explain or resolve the issues of ethical character” created through the application of technological innovations, than some new ethics or a cultural movement. Bioethics deals with questions such as: “When does life begin? When and until when can we talk about ‘personality’ or ‘human life’? How much autonomy has an individual got in determining his own life and death? When to continue with the life-support, and when to terminate it? When to protect the mother, when the foetus or, even, the embryo in the tube? Where are the limits of the curing and which are the limits of the humane and inhumane experimenting?”<sup>61</sup>

The best known representative of the bioethical school of thought in the legal science and philosophy is Italian Francesco D’Agostino. Inspired by the Roman-Catholic teachings, he criticizes the dismemberment of the man which in science abolished its essential core (turning him into a “medley of phenomena” and “the being on the other side of phenomenon”) and finds in law a “relational human experience, a system of defence of inalienable prerogatives of a person in its reality of a subject in a relation”.<sup>62</sup> These inalienable prerogatives, according to D’Agostino, rest on four main bioethical principles. The first one is the principle of defence of the physical life which sanctions its integrity (since the corporal life is “basic value of a personality”). This is further developed into the principle of freedom and responsibility which entails, for instance, that a sick person is treated as a personality, but also a moral responsibility of a physician to refuse all morally unacceptable procedures (the issue of euthanasia, etc.). The third principle is the principle of wholeness which, for instance, allows an intervention into the physical life of persons if it is truly necessary for saving the whole of “body-psyche-spirit.” Finally, the fourth principle is the principle of sociability and assistance which obliges each individual to live while participating in the realization of the lives of others. With the afore-mentioned principles, D’Agostino set the foundations of “biojurisprudence” whose goal is to set the limits of the man’s freedom to interfere with the life’s processes.

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<sup>61</sup> G. Fassò, 705.

<sup>62</sup> *Ibid*, 706 and on.

### 3.3. Law and Literature Movement

We should also mention an interesting relationship between law and literature which has, particularly in the USA, acquired the form of an entire multidisciplinary-based movement called precisely like that: “*law and literature* movement.” The goal of this movement is to research in a multidisciplinary way the relationships between literary works and legal theory and practice, since law, as a cultural property and social fact, has been undoubtedly present in literature since long ago.<sup>63</sup> And law itself feels the need to observe itself in the spiritual creations coming from the pen of the most talented thinkers who have chosen literary instead of legal creativity, but could not help noticing the significance of law and leaving their inscriptions about it.<sup>64</sup>

## 4. CONCLUSION

Different novelties which contain the presented latest multidisciplinary theories with selectively expressed remarks, are not the only novelties, or the remarks for that matter, but what is common with all of these theories is the same methodological shortcoming consisting of a randomly selected number of elements (like, for instance, in the teaching of Michael Voltzer) or assumptions (for instance, in the teachings of the Chicago Law School, multiculturalists or feministic jurisprudence). To each such selection, at least the same number of other equally important as-

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<sup>63</sup> D. Vrban, *Sociology of Law*, Zagreb 2006, 16 (in Croatian). See also: V. D. Schwanitz, *The Theory of System and Literature; new paradigm* (translation), Zagreb 2000, 222–228.

<sup>64</sup> As a literary topic, law appeared from the first time in the antiquity texts of Sophokles (497/6–406/5 B.C.), Petronius Gaius Arbiter Titus (1st century) and others. This is also the case in the Middle Ages, particularly in the drama pieces of William Shakespeare (1564–1616: *The Merchant of Venice*, *Titus Andronicus*, *Coriolanus*, *Hamlet*, *Macbeth*, in his historic dramas, etc.) as well as in the 19th and 20th centuries in the realistically inspired literature, from Honoré de Balzac, Charles John Huffam Dickens, Fyodor Mikhaylovich Dostoyevsky or Gustave Flaubert to Jules Verne: *Paris in 20th century*, Albert Camus: *The Stranger*, Franz Kafka: *The Trial*, *The Castle*, Aldous Leonard Huxley: *Brave New World*, Yevgeny Ivanovich Zamyatin: *We*, George Orwell: *1984* and others. All of them are dominated by the topics related to human destiny and judiciary, justice and altruism, political repression, identity, social conformism, gender, sex and others, which makes them a valuable material for looking at law from a completely different angle of rationality. D. M. Mitrovic, “William Shakespeare on the State and Law,” *Anali PFB*, 1–2/1990, 95–118 and “Law, Justice and Mercy in the Dramas of William Shakespeare,” *On Justice and Righteousness*, Belgrade 1995, 243–253 (in Serbian); E. V. Gemmette, *Law in literature: An annotated bibliography of law related works*, New York 1998; R. Posner, *Law and Literature*, Cambridge, MA. 1998; P. J. Heald, *Guide to law and literature for teachers, students and researchers*, Athens, GA 1998; V. M. Feeman, A. Lewis, *Law and Literature*, Oxford 1999.

sumptions, elements or properties may be added, which is a remark that also relates to some contemporary natural science teachings (for instance, the teachings of Lon L. Fuller or John M. Finnis, who will not be the subject of this work). As if it has been forgotten that a correct scientific assumption must start from what has already been scientifically proven or at least objectified, and not from what is the result of one's own observation of the permanent or unavoidable in the human nature and society, since this observation is extremely volatile, and hence, relative, which also makes it scientifically unimportant. And only when the unimportant has been discarded, can arguments be derived and judgements can be passed, and they show that the stated teachings can hardly stand the test of their scientific statements in the methodological and epistemological sense of meaning, as has been properly noticed by Karl Popper when he claims that behind the universal words and their meanings there is a much more important problem: "the problem of universal laws and their truthfulness; i.e., the problem of regularity". And that also sets quite different "intellectually important goals" such as the formulation of the problem, attempt to set up theories that would resolve the formulated problems and the critical consideration itself of the mutually contradicted theories. These goals enable the researcher to take as a scientific position only such critical position "which does not search for verification, but for key tests that could rebut the theory that is being tested, without ever being able to definitely confirm it".<sup>65</sup>

Other significant remarks stem from the stated basic methodological and epistemological remark, and these are: *relativity* with regards to the value sense or justification (for instance, of the justice and the role of the law-maker and supreme court when legitimizing secessionist clause), obvious *unacceptability* of the final scientific claims owing to their untruthfulness (in Popper's sense of the strictest testing of scientific positions): for instance, creation of some forms of territorial autonomy on the basis of racial, gender or sexual characteristics or determination of the state and its organization contrary to their nature and purpose, or *unethical conduct* and *exaggeration* (as in the case of the Chicago School of Economics or different feministic theories and schools of thought) that lead to unilateral approach when the scientific positions are developed consistently and until the end. But, the political benefit from the claims stated in these theories that are used to propose, proclaim as final or justify socially dubious projects about which members of the society have not been properly informed, is more than obvious. It is not difficult to notice that the latest sociological and anthropological teachings, and only

<sup>65</sup> K. Popper, *Unended Quest; An Intellectual Autobiography*, New York 1976 (transl. Belgrade 1991), 26, 29–30, 48. See also: D. M. Mitrović, "Can Law be Comprehended: What is Law?", *Anali PFB* 1–2/2002, 85–108.

partially or indirectly the system-cyber and bioethical theories, complement wonderfully and support other presented theories which in a somewhat self-proclaimed and utopian manner deal with the resolving of contemporary legal and social issues. Yet, the most interesting is the *inconsistent* position of the most important multidisciplinary theories with regard to the ethical problems which are either excluded, where the positivistically directed scientific apparatus has been developed and reliable within its limits, or over-exaggerated, where such scientific apparatus is insufficient or lacking, or they are made relative, when the results do not coincide with the goals set in advance. This reveals two faces of Janus of the presented multidisciplinary theories, which have obtained a strong impetus at the very end of the “dispersed” 20<sup>th</sup> century and the same type of the beginning of the 21<sup>st</sup> century. One side of that face represents the damage inflicted on the science and the society by well-paid “academic scribblers” or “hired publicists,” as such persons were called by Charles Right Mills.<sup>66</sup> The other side, however, represents an encouragement in terms that not all the representatives of these theories have opted for such kind of “bread-winning,” but are truly engaged in a great legal and social experiment that is currently going on. Still, the idea persisted to separate what was natural according to the gender features, to join and equalize what was unnatural or ascriptive with the natural and traditional features, to make a state renounce the right to its own existence, to bring down individuals or social groups to subjects that should behave strictly in accordance with the economic formulas, etc. Such dissolution of the traditional notions, values and forms may serve as an important foundation for political doctrines and practice, the goal of which is a new redistribution of power that would be controlled in the future by one world government supported by the global law order. Perhaps due to their value neutrality or practical ethical direction the system-cyber and bioethical theories are more valuable for the achievement of the global harmony and the rule of law as a desirable goal in the foreseeable future, since they have a respect for what is common for all (existence of organization and system, application of information technologies, right to dignified life and death, humane medical treatment, etc.) without imposing self-proclaimed “most important” social values and formulas.

The contemporary multidisciplinary theories are interesting and challenging. They are also useful, at least because they force today’s jurists to wake up and get out from the daily routine created by the satisfaction with what has already been achieved. But, we shall still have to wait for some more serious scientific results of these theories, unless it happens that they (together with the presented theories) become forgotten in the meantime like any other thing that falls out of fashion.

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<sup>66</sup> Ch. R. Mills, *The Power Elite*, New York 1960, 284–285.