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Artur Kozak's Juriscentrist Concept of Law: a Central European Innovation in Legal Theory

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Abstract

Artur Kozak (1960–2009) was one of the most original and innovative philosophers of law to emerge from the so-called 'middle generation' of Polish post-War jurisprudence. Kozak's principal achievement was to break away from the analytical paradigm of legal theory, dominant in the in Poland at the time, and engage legal theory in a fruitful dialogue with contemporary sociology and philosophy, including such currents as social constructionism or postmodernism. To name his original theoretical project, Kozak coined a new term – 'juriscentrism' (*juryscentryzm*), consciously evoking Richard Rorty's concept of ethnocentrism. Juriscentrist legal theory was mainly focused on providing legitimacy for the newly gained power of the legal community in a post-socialist society, but its theoretical resonance is universal. Kozak's premature death made it impossible to complete the theoretical project of juriscentrism, nonetheless he managed to elaborate its main tenets, including the concept of juristic discretionary power and a juriscentrist concept of law. Kozak's legacy in contemporary Polish legal theory is particularly visible in Wrocław, where not only the post-analytical paradigm in Poland is the strongest, but also the first Polish school of critical legal theory has recently emerged.

Keywords

Artur Kozak – juriscentrism – concept of law – Polish legal theory – legitimacy

• • •

There are researchers who seek to find their place in the existing academic world, and researchers who build their own world. Artur belonged to the second group.

ANDRZEJ BATOR¹

• • •

He was an example of a jurist-humanist, characterised by absolutely vast areas of interest.

LIDIA GERINGER DE OEDENBERG²

• • •

To open up new paths, one has to have the intellectual courage of the sort that Kołakowski and Kozak had.

TOMASZ STAWECKI³

• •
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1 Introduction

The year 2019 marked the 10th anniversary of the premature death of one of Poland's most original and inspiring legal theorists – Artur Jan Kozak.⁴ Kozak's principal achievement was to break away from the analytical paradigm of legal theory, dominant in the post-War period, and engage Polish jurisprudence in a dialogue with sociology and philosophy, including such currents as social constructionism and postmodernism. To name his original theoretical project,

¹ Andrzej Bator, "Artur Kozak (1960–2009)," 8 *Państwo i Prawo* (2009), 113–115, at 115.

² Lidia Geringer de Oedenberg, "Wspomnienie" [Recollection], in Maciej Pichlak (ed.), *Profesjonalna kultura prawnicza* [Professional Juristic Culture] (Scholar, Warsaw, 2012), 15–16, at 15.

³ Tomasz Stawcki, "Przedmiot, założenia i zadania filozofii prawa oraz teorii prawa według Artura Kozaka," [The Object, Assumptions and Tasks of Philosophy of Law and Legal Theory According to Artur Kozak] in Pichlak (ed.), *Profesjonalna, op.cit.* note 2, 17–36, at 25.

⁴ Kozak used only his first name in publications. For the second name see "dr hab. Artur Jan Kozak (nie żyje)" [Dr. habil. Artur Jan Kozak (deceased)], in *Nauka Polska*, available at <https://nauka-polska.pl/#/profile/scientist?id=23206&k=mojqjv>.

Kozak coined a new term – ‘juriscentrism’ (*juryscentryzm*), consciously evoking Richard Rorty’s concept of ethnocentrism. Juriscentrist legal theory was mainly focused on providing the legitimacy for the newly gained power of the legal community in a post-socialist society, but its theoretical resonance is universal. Kozak’s premature death made it impossible to complete the theoretical project of juriscentrism, nonetheless he managed to elaborate its main tenets, including the concept of juristic discretionary power and a juriscentrist concept of law.

The present paper is conceived as a first presentation of Kozak’s intellectual accomplishments to an international audience.⁵ Hence, it cannot hope to encompass all aspects of juriscentrism, and neither can it be conceived as comprehensive. To provide some background, the paper will start from a brief presentation of Kozak’s academic biography and his academic output (section 2). Then I will provide a succinct introduction to his theoretical system – juriscentrism (section 3), before presenting in greater detail one selected aspect of juriscentrism, namely its highly innovative concept of law (section 4). The rationale behind selecting one, narrowly defined element of juriscentrism – the concept of law – is that of presenting to the readers Kozak’s colorful and imaginative way of reasoning and arguing, which distinguishes him from most contemporary legal theorists, especially of the analytical school. Finally, section 5 will conclude by highlighting Kozak’s innovativeness and significance for the development of new currents of legal thought in Poland.

2 Kozak’s Academic Career and Scientific Development

2.1 *Academic Career*

In both the private and academic spheres, Artur Kozak’s life was connected to the city of Wrocław in South-West Poland, the historical capital of the region of Silesia. It is here that Kozak was born on 11 January 1960, and here that he died prematurely from a cardiac arrest in 2009.⁶ In 1978 he began studying

⁵ For this reason, I have ensured that all 35 published works of Kozak are referred to here.

⁶ The biographical data on Kozak are based on: Bator, “Artur Kozak,” *op.cit.* note 1; Andrzej Bator, Joanna Helios and Wioletta Jedlecka, “Historia Katedry Teorii i Filozofii Prawa,” [History of the Chair of Legal Theory and Philosophy of Law] 100(2) *Przegląd Prawa i Administracji* (2015), 575–586, 579–580; “dr hab. Artur Jan Kozak (nie żyje),” *op.cit.* note 4; “Zmarł prof. Kozak, wykładowca UO” [Professor Artur Kozak, a professor of the University of Opole, has passed away] *Gazeta Wyborcza – Opole* (25 February 2009), available at <http://opole.wyborcza.pl/opole/1,35086,6319949,Zmarl_prof__Kozak__wykladowca_UO.html>.

administration at the Bolesław Bierut University of Wrocław, as it was called between 1952 and 1989,⁷ but he switched to legal studies, which he concluded in 1983 receiving the title of Master of Laws (*magister prawa*). His master's thesis was entitled *Prognosis and its role in creating the law* and was supervised by Professor Stanisław Kaźmierczyk.⁸

Directly after his studies he worked, for a short period, as a trainee prosecutor (*aplikant prokuratorski*) in the District Prosecutor's Office for Wrocław-Centre. However, in 1984 he embarked upon an academic career, becoming a research assistant at the Department for the Theory of State and Law at the Faculty of Law and Administration of Bierut University. His PhD was supervised by Professor Stanisław Kaźmierczyk⁹ and he defended it successfully on 16 January 1995, at the age of 35. The next year Kozak became employed as lecturer (*adiunkt*) and started working on his habilitation dissertation, which he published in 2002. On this basis, he received, on 30 September 2002, the title of *Doctor habilitatus* in law, at the age of 42. Following conferral of the *venia legendi*, Kozak was first called to the professorship at the University of Opole in 2005, and in 2008 – at the University of Wrocław. He was also a professor of law at a private school of management¹⁰ in Leszno, a town in the Wielkopolska region, not far from Wrocław. Although not a legal practitioner himself, Kozak gained first-hand knowledge of legal practice due to his being married to a legal advisor (*radca prawny*).¹¹

In 2008, Kozak promoted his first – and unfortunately only – PhD student in the person of Dr Maciej Pichlak.¹² Kozak's premature death meant that he did not manage to receive Poland's highest academic title – the title of

7 The name was introduced by Resolution no. 291 of the Council of Ministers, 35 *Monitor Polski* (1952), item 511 and changed back to University of Wrocław by Act of 29 May 1989, 34 *Dziennik Ustaw* (1989), item 184.

8 Professor Stanisław Kaźmierczyk (*1935) headed the Department of Legal Theory and Philosophy of Law at the University of Wrocław between 1998 and 2005, when he became professor emeritus. See Bator, Helios and Jedlecka, *op.cit.* note 1, 577.

9 Bator, Helios and Jedlecka, *op.cit.* note 1, 579.

10 At the Chair of Law, Wyższa Szkoła Marketingu i Zarządzania w Lesznie [Higher School of Marketing and Management in Leszno]. See "dr hab. Artur Jan Kozak (nie żyje)," *op.cit.* note 4.

11 Geringer de Oedeberg, "Wspomnienie," *op.cit.* note 2, 15.

12 Pichlak's PhD dissertation, entitled *Argument z zamkniętego systemu źródeł prawa. Studium teoretycznoprawne* [Argument from the Closure of the System of Legal Sources: A Study in Legal Theory] was defended on 30 June 2008. It was reviewed by Professor Włodzimierz Gromski (Wrocław) and Professor Marek Zirk Sadowski (Łódź). See "dr hab. Artur Jan Kozak (nie żyje)," *op.cit.* note 4.

professor¹³ – conferred by the President of the Republic, which he definitely deserved. His last book, published posthumously in 2010,¹⁴ was actually intended to be presented as his ‘professorial book’ in the procedure leading to the conferral of the title of professor. He was working intensively on it during the last months before his death.¹⁵ One cannot but agree with Andrzej Bator, who stated that at the time of his premature death at the age of 49, Artur Kozak ‘probably still had the best period of academic activity ahead of himself’.¹⁶

2.2 *Academic Accomplishments and the Evolution of Scholarly Interests*

2.2.1 Overview of Academic Accomplishments

Kozak’s academic accomplishments comprise¹⁷ three scholarly monographs, one edited volume, 22 contributions to edited volumes, two journal articles, one case-note, two book reviews, and one scholarly translation. He was also co-author of a legal dictionary, which, since his death, has been published in many new editions and has become not only a standard text in legal teaching, but also a reference point for legal scholars.¹⁸ Finally, Kozak published one newspaper article on the competences of legal advisors and gave one academic interview. In the following sections I will briefly present Kozak’s academic accomplishments in chronological order, dividing them into four periods: the young Artur Kozak (section 2.2.2), Kozak’s PhD and immediate aftermath (section 2.2.3); Kozak’s habilitation (2.2.4); and Kozak’s academic interests after his habilitation (2.2.5). Although in the case of many scholars a chronological presentation could seem artificial, in the case of Kozak it makes sense as his views

13 During the socialist period, the Council of State (*Rada Państwa*) appointed both extraordinary and ordinary professors for life. After 1989, it is up to the universities to appoint ordinary and extraordinary (university) professors, but the ‘title of professor’ is conferred by the President of the Republic following an evaluation of a researcher’s work and is a legal prerequisite of being appointed an ordinary (full) professor by a university.

14 Artur Kozak, *Myślenie analityczne w nauce prawa i praktyce prawniczej* [Analytical Thinking in Legal Science and Juristic Practice] (Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław, 2010, edited by Maciej Pichlak).

15 Bator, *op.cit.* note 1, 115.

16 *Ibid.*, 113.

17 See Maciej Pichlak, “Wykaz publikacji naukowych Artura Kozaka” [A List of the Scholarly Publications of Artur Kozak], in Pichlak (ed.), *Profesjonalna, op.cit.*, note 2, 212–216.

18 See latest edition: Andrzej Bator, Włodzimierz Gromski, Stanisław Kaźmierczyk, Artur Kozak and Zbigniew Pulka, *Wprowadzenie do nauk prawnych. Leksykon tematyczny* [Introduction to the Legal Sciences: A Thematic Lexicon] (5th ed., Wolters Kluwer, Warsaw, 2016).

and research focus evolved over time, reacting to the new challenges brought about by the legal and political environment.

2.2.2 The Young Kozak: A Reader and Translator of Pashukanis

Kozak's initial academic interests focused on Evgeny Pashukanis – actually, his first scholarly article, published in 1988, was devoted to Pashukanis's views on the essence of law.¹⁹ This academic interest continued in the next year, when Kozak published a review of a recent translation of Pashukanis into Polish, and published his own translation of Pashukanis's paper concerning Marxist legal theory²⁰ and the construction of socialism.²¹ Writing in retrospect, Kozak noted that his youthful research on Pashukanis was important for his later academic development because

Firstly, the realist perspective adopted by Pashukanis heavily impacted upon my later research interests, focused rather on the empirical, rather than the analytical side of the problems of legal theory. Secondly, in Pashukanis's works I encountered, for the first time, a gap, typical for legal theory, between its cognitive importance, on the one hand, and its practical utility, on the other. [...] [Pashukanis's] conception did not support legal practice in any way. Rather to the contrary [...]. In Pashukanis's output one can clearly see the dissonance between the requirements following from the standards of social sciences on the one hand, and the requirements of legal practice, on the other.²²

Indeed, as it will become clear in section 3, Kozak's juriscenrist legal theory was conceived of as an apology for legal practice, in sheer opposition not only to critical legal theory, but also to the approach proper of the social sciences which adopt, *ex officio*, an external point of view on legal phenomena.

19 Artur Kozak, "Poglądy Jewgenija B. Paszukanisa na istotę prawa" [The Views of Evgeny B. Pashukanis on the Essence of Law], 24 *Przegląd Prawa i Administracji* (1988), 5–17.

20 Jewgenij B. Paszukanis [Evgeny B. Pashukanis], *Marksistowska teoria prawa i budownictwo socjalizmu* [Marxist Legal Theory and the Construction of Socialism], translated by Artur Kozak, 41–42 *Colloquia Communia* (1988–1989), 263–269.

21 Artur Kozak, "Recenzja: J.B. Paszukanis, *Ogólna teoria prawa i marksizm*, Ossolineum, Wrocław 1989" [Book review: E.B. Pashukanis, *General Theory of Law and Marxism* (Wrocław: Ossolineum, 1989)], 25 *Przegląd Prawa i Administracji* (1989), 238–242.

22 Artur Kozak, "Próba autorekonstrukcji drogi badawczej, czyli Artur Kozak o własnym dorobku" [An Attempt at Auto-Reconstructing the Research Path or Artur Kozak on his own Research Output] (ed. Maciej Pichlak), in Pichlak (ed.), *Profesjonalna, op.cit.* note 2, 185–186.

2.2.3 Kozak after the Post-Socialist Transformation – Focus on Legal Interpretation

It is worth emphasizing that Kozak's academic career started in 1984, five years before the transformation, but his most important works were published after 1989, in capitalist and democratic Poland. As Tomasz Stawecki rightly points out, Kozak was aware (although he did not mention it explicitly) that the works of Polish legal theorists writing in times of actually existing socialism, such as Jerzy Wróblewski, Zygmunt Ziemiński or Jan Woleński, being shaped "in a completely different political, economic and cultural reality are not persuasive as they were before, they do not give answers to phenomena and experiences of the last quarter of century"²³ following the socio-economic transformation from state socialism to capitalism.

Kozak's post-1989 academic input focused initially on legal interpretation. His PhD dissertation was entitled *Understanding of Law in the Theory of Interpretation*, and following its successful defense in 1995 (when Kozak was 35) he published it, in a shortened form, two years later.²⁴ Kozak's PhD dissertation took an original vantage point, and his main research focus was on reconstructing the often tacit concept of law which is "the condition of the logical coherence of the views put forward" by Polish theories of legal interpretation.²⁵ In his book, Kozak's understanding of the concept of 'theory' was influenced by Nietzsche, Dilthey, Husserl and Heidegger: he defined it as the practice of providing legitimacy to a given social practice. The conclusion of the research was critical of Polish legal theory, which Kozak accused of being inadequate for its purpose of legitimizing legal practice. As Andrzej Bator remarked, Kozak's PhD concluded the period of his academic formation and opened his mature academic activity.²⁶

23 Stawecki, *op.cit.* note 3, 20.

24 Artur Kozak, *Pojmowanie prawa w teorii wykładni* [The Understanding of Law in Theory of Interpretation] (Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 1997). Dr Maciej Pichlak drew my attention to the fact that many parts removed from the original PhD thesis, especially those concerning transcendental philosophy (mainly Fichte) were later placed, in unchanged form, in his last book on the *History of Normativity*, posthumously published (by Pichlak) in 2001 as Kozak, *Myślenie*, *op.cit.* note 14.

25 Kozak, *op.cit.* note 22, 187.

26 Bator, *op.cit.* note 1, 114.

2.2.4 Kozak's Other Research Prior to His Habilitation

Apart from the issues of legal interpretation (a primary interest²⁷) which gave rise to Kozak's doctoral dissertation, this Wrocław philosopher of law pursued four other essential research topics:²⁸ a critique of the instrumental concept of law,²⁹ which Kozak perceived as a threat to law's autonomy;³⁰ issues associated with the sources of law, especially in the context of the binding force of the Constitutional Court's³¹ interpretive decisions³² (contested by the Supreme Court in what is sometimes referred as the 'war of courts'³³); the relationship between general jurisprudence and legal practice;³⁴ and finally a critique of the traditional concepts of legal practice, which led him to elaborate on the

27 *Ibid.*

28 Kozak, *op.cit.* note 22, 190–196.

29 Artur Kozak, "O granicach socjotechniki poprzez prawo" [On the Limits of Social Engineering Through Law], 4 *Ruch Prawniczy, Ekonomiczny i Socjologiczny* (1994) 92–96; Artur Kozak (ed.), *Instrumentalizacja prawa* [Instrumentalisation of Law] (Kolonia Limited, Wrocław, 2000).

30 Artur Kozak, "Autonomia praktyki prawniczej a tezy interpretacjonizmu" [The Autonomy of Legal Practices and the Theses of Interpretationism], in Włodzimierz Gromski (ed.), *Autonomia prawa* [The Autonomy of Law] (Kolonia Limited, Wrocław, 2001) 134–151.

31 On the emergence of the Polish Constitutional Court in the transformation context see e.g. Adam Sulikowski, "Government of Judges and Neoliberal Ideology: The Polish Case," in Rafał Mańko, Cosmin Cercel and Adam Sulikowski (eds.), *Law and Critique in Central Europe: Questioning Past, Resisting the Present* (Oxford, Counterpress, 2016), 16–31; Aleksandra Kustra-Rogatka, "The Polish Constitutional Court And Political 'Revolution' After 1989: Between the Continuity and Discontinuity of the Constitutional Narrative," 6(2) *Wroclaw Review of Law, Administration and Economics* (2016), 62–93.

32 Artur Kozak, "Glosa do uchwały TK z 7 marca 1995 r., W 9/94" [Case Note on Constitutional Court Resolution of 7 March 1995, Case W 9/94], 3 *Przegląd Sejmowy* (1995), 294–301; *idem*, "Rodzaje wykładni prawa w uchwałach Trybunału Konstytucyjnego" [The Types of Legal Interpretation in the Resolutions of the Constitutional Court], in Stanisław Kaźmierczyk (ed.), *Z zagadnień wykładni prawa* [Selected Issues of Legal Interpretation] (Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław, 1997), 51–68.

33 For a discussion (in English) of the 'war of courts' in Poland see Rafał Mańko, "'War of Courts' as a Clash of Legal Cultures: Rethinking the Conflict between the Polish Constitutional Tribunal and the Supreme Court Over 'Interpretive Judgments,'" in Michael Hein, Antonia Geisler and Siri Hummel (eds.), *Law, Politics, and the Constitution: New Perspectives from Legal and Political Theory* (Peter Lang, Frankfurt am Main, 2014), 79–94.

34 Artur Kozak, "Prawoznawstwo między 'techne' i 'episteme'. Uwagi w związku z pracą M. Zirk-Sadowskiego *Prawo a uczestniczenie w kulturze*" [Jurisprudence Between *Techne* and *Episteme*: Comments Connected to the Work *Prawo a uczestniczenie w kulturze* by M. Zirk-Sadowski], 3–4 *Ruch Prawniczy, Ekonomiczny i Socjologiczny* (1999), 269–278; Andrzej Bator, Włodzimierz Gromski, Jacek Kaczor, Stanisław Kaźmierczyk and Artur Kozak, "Relacje między teorią i dogmatyką prawa" [The Relations Between Legal Theory and Legal Dogmatics], in Zygmunt Tobor (ed.), *Teoria prawa. Dogmatyka. Praktyka stosowania*

topic of lawyers' discretionality in 1999.³⁵ Continuing his previous interests in legal interpretation, Kozak published papers on the formulation of a legal text and the certainty of its interpretation,³⁶ and on the concept of the 'rational legislator' in judicial discourse.³⁷

2.2.5 Kozak's Habilitation Thesis on the Limits of Lawyers' Discretionary Power – Laying the Foundations of Juriscentrism

Soon after obtaining his PhD in law, Kozak's research focus moved to a specific aspect of legal interpretation, namely the discretionary power of lawyers. He introduced the concept in 1999, and three years later published his habilitation dissertation on the *Limits of Lawyers' Discretionary Power*,³⁸ in which he put forward the first complete picture of the juriscenrist theory, which perceives law as an institutional phenomenon.³⁹ The main claim of the monograph was revolutionary: Kozak argued that lawyers' discretionary power actually does not exist, because as participants of a well-established institutional practice they are almost fully bound by the extra-textual conventions of that practice, passed on by legal tradition and maintained as part of legal culture. The alleged discretion is perceived only by external observers, who do not know the legal world from the inside, but once one switches to the internal point of view, the scope of discretion is marginal. Hence, the 'limits' of lawyers' discretionary power, mentioned in the book's title, are posed by the institutional world of law in itself. It was also in this book that Kozak introduced the term 'juriscenrism', consciously drawing on Rorty's 'ethnocentrism'.

prawa [Legal Theory, Dogmatics, Adjudication] (Wydawnictwo Uniwersytetu Śląskiego, Katowice, 2004).

35 Artur Kozak, "O pojęciu prawniczej władzy dyskrejonalnej" [On the Concept of Lawyers' Discretionary Power], in Leszek Leszczyński (ed.), *Zmiany społeczne a zmiany w prawie. Aksjologia, Konstytucja, integracja europejska* [Social Change and Legal Change: Axiology, the Constitution and European Integration] (Wydawnictwo UMCS, Lublin, 1999), 249–259.

36 Artur Kozak, "Sformułowanie tekstu prawnego a pewność jego rozumienia" [The Formulation of a Legal Text and the Security of Its Understanding], in Henryk Rot (ed.), *Prawo i prawnictwo wobec zmian społecznych* [Law and Jurisprudence Towards Social Change] (Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław, 1990), 50–60.

37 Artur Kozak, "Charakterystyka kategorii 'racjonalny prawodawca' w sądowym stosowaniu prawa" [A Characteristic of the Category of 'Rational Law-Maker' in the Judicial Application of Law], in Marek Zirk-Sadowski (ed.), *Filozoficzno-teoretyczne problemy sądowego stosowania prawa* [Philosophical and Theoretical Problems of Adjudication] (Wydawnictwo Uniwersytetu Łódzkiego, Łódź, 1997), 128–135.

38 Artur Kozak, *Granice prawniczej władzy dyskrejonalnej* [The Limits of Lawyers' Discretionary Power] (Kolonia Limited, Wrocław, 2002).

39 Kozak, *op.cit.* note 22, 196.

2.2.6 Scholarly Interests after Habilitation – Bringing The Theory of Juriscentrism to Maturity

Following his habilitation, Kozak developed his theoretical project, especially by proposing three models of legal practice⁴⁰ and putting forward a reinterpreted concept of law's homeostasis.⁴¹ He also paid attention to the cultural embeddedness of interpretive decisions,⁴² the crisis of law's foundations,⁴³ and wrote two papers concerning the theoretical aspects of the role of lawyers in the European project.⁴⁴ He continued to pursue his earlier interests in legal interpretation, writing about pro-constitutional interpretation of statutory law⁴⁵ and putting forward a 'moderately conventionalist' concept of a judicial decision.⁴⁶ Two of Kozak's articles were published posthumously – one

40 Artur Kozak, "Trzy modele praktyki prawniczej" [Three Models of Legal Practice], in Jerzy Stelmach (ed.), 2 *Studia z filozofii prawa* [Studies in the Philosophy of Law] (Wydawnictwo Uniwersytetu Jagiellońskiego, Krakow, 2003), 143–158.

41 Artur Kozak, "Homeostaza prawa" [Law's Homeostasis], in Joanna Helios (ed.), *Autonomia prawa ze stanowiska teorii i filozofii prawa* [Law's Autonomy from the Perspective of Legal Theory and Philosophy of Law] (Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław, 2003), 145–162.

42 Artur Kozak, "Reguły interpretacji kulturowej a reguły dokonywania czynności konwencjonalnej" [The Rules of Cultural Interpretation and the Rules of Performing Conventional Acts], in Wioletta Jedlecka (ed.), *Kompetencja ze stanowiska teorii i filozofii prawa* [Competence from the Perspective of Legal Theory and Philosophy of Law] (Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław, 2004), 151–168; *idem*, "Kulturowy fundament decyzji interpretacyjnej" [The Cultural Foundation of Interpretive Decisions], in Adam Sulikowski (ed.), *W poszukiwaniu podstaw prawa* [In Search for Law's Foundations] (Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław, 2006), 31–48.

43 Artur Kozak, "Kryzys podstawności prawa" [A Crisis of Law's Foundations], in Olgierd Bogucki and Stanisław Czepita, *System prawny a porządek prawny* [The Legal System and the Legal Order] (Wydawnictwo Naukowe Uniwersytetu Szczecińskiego, Szczecin, 2008), 29–57.

44 Artur Kozak, "Niedoceniona wspólnota – prawnicy a integracja europejska" [The Under-rated Community: Lawyers and European Integration], in Jacek Kaczor (ed.), *Teoria prawa europejskiego* [Theory of European Law] (Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 2005) 155–168; *idem*, "Deficyt demokracji a integracja europejska" [Democratic Deficit and European Integration], in Elżbieta Kozerska and Tomasz Scheffler (eds.), *Aksjologiczne i praktyczne aspekty integracji europejskiej* [Axiological and Practical Aspects of European Integration] (Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław, 2007), 87–98.

45 Andrzej Bator and Artur Kozak, "Wykładnia prawa w zgodzie z Konstytucją" [Legal Interpretation in Conformity with the Constitution], in Sławomira Wronkowska (ed.), *Polska kultura prawna a proces integracji europejskiej* [Polish Legal Culture and the Process of European Integration] (Zakamycze, Krakow, 2005), 43–66.

46 Artur Kozak, "Umiarkowanie konwencjonalistyczna charakterystyka orzeczenia sądowego" [A Moderately Conventionalist Characteristic of a Judicial Decision] in Łukasz

on lawyers' discretion⁴⁷ and another on the 'corporate order' of regulated professions.⁴⁸

At the time of his death Kozak was working on his third book – which was to be his professorial dissertation, but his premature death made its publication impossible. Kozak's working title for the book was *History of Normativity*,⁴⁹ and at the time of his death it was left unfinished – Kozak was still planning to write a number of additional chapters⁵⁰ to develop his theory. It was edited and posthumously published by Kozak's only disciple – Maciej Pichlak – on the basis of files left on Kozak's computer. This book, an unfinished work, was written in the aftermath of Poland's first experience with a populist government questioning the rule of law (2005–2007) and can be seen as Kozak's reaction to those events.⁵¹ In its published form, the book is composed of three parts – part one deals with "Analytical problems and the structure of legal knowledge," part two with the "History of normativity," and unfinished part three "On a certain project of analytical legal theory." For obvious reasons, the book does not contain conclusions which the author did not manage to write.

Błaszczak (ed.), *Wokół problematyki orzeczeń* [Issues of Judicial Decisions] (TNOiK, Toruń, 2007), 163–185.

- 47 Artur Kozak, "Dylematy prawniczej dyskrecjonalności. Między ideologią polityki a teorią prawa" [Dilemmas of Lawyers' Discretionality: Between the Ideology of Politics and Legal Theory], in Wiesław Staśkiewicz and Tomasz Stawecki (eds.), *Dyskrecjonalność w prawie* [Discretion in Law] (LexisNexis, Warsaw, 2010) 58–80.
- 48 Artur Kozak, "Prawniczy rzut oka na problemy ładu korporacyjnego" [A Lawyers' Point of View of Problems of Corporate Order], in Paweł Jabłoński et al. (eds.), *Perspektywy juryscentryzmu* [Perspectives of Juriscentrism] (Prawnicza i Ekonomiczna Biblioteka Cyfrowa, Wrocław, 2011), 13–21.
- 49 Bator, *op.cit.* note 1, 115 (in Polish: *Historia normatywności*).
- 50 Bator, *op.cit.* note 14, 7. However, Pichlak expressed the view that although the work is unfinished, "the Author had only very little left to do in order to make it ready for publication – only the 'last polishing'" (Pichlak, "Nota" *op.cit.* note 14, 17–19, at 17. Nonetheless, Pichlak admits that "[a]n attempt to give the work a closed form would require its integration and developing the author's essential thoughts" and admits that the two latter chapters of the book, left only in preliminary notes, were to deal with competence norms and the rational legislator, and were to have an applicatory character (*ibid.*).
- 51 Maciej Pichlak, "Aporie teorie, paradoksy praktyki. O wewnętrznych napięciach w obrębie juryscentryzmu" [Aporias of Theory, Paradoxes of Praxis: On the Internal Tensions within Juriscentrism], in Pichlak (ed.), *Profesjonalna*, *op.cit.* note 2, 59–74, at 68, specifically refers to the conflict between the Law and Justice government and the judiciary, especially the Constitutional Court. For more detailed discussion on this conflict, see Sulikowski, "Government of Judges," *op.cit.* 28–29. See also Adam Sulikowski, "The Return of Forgotten Critique: Some Remarks on the Intellectual Sources of the Polish Populist Revolution," in this issue.

2.2.7 Kozak in the Context of Polish Legal Theory

There is no doubt that Artur Kozak was a very original thinker who broke away from many of the well-established schemata of Polish legal theory. As Andrzej Bator remarked:

Artur Kozak's way of theorizing diverged from the standards shaped in Polish legal theory. He stood out from the environment dominated by an analytical approach because he believed that it is not scientific methodology which is the most important source of inspiration in legal cognition, but rather the sociology of knowledge. If law is – as he thought – an element strongly integrated with social practice, or even shaped by it, that fact cannot be neutral for jurisprudence. Legal science cannot be determined by its explanatory function, but should also be oriented towards the legitimization of law and the grounding of the existing or proposed social order.⁵²

Also Tomasz Stawecki, a legal philosopher from Warsaw, underlined Kozak's divergence from Polish traditions of doing legal theory:

[...] one has to admit that against the various currents of legal philosophy in Poland [...] Kozak's way of thinking and epistemological approach were rather unusual [...] He roamed the fields of philosophy of language and philosophical anthropology, philosophy of culture, philosophy of literature and many others with absolute ease. In this sense Kozak broke away from the bad customs of Polish academia to keep to one's "box," make dozens of methodological caveats so that, God forbid, one does not "tread on somebody else's toes," so as to avoid any critique.⁵³

Kozak's theoretical project – juriscentrism – is, as Maciej Pichlak rightly stressed, a "unique proposal" in legal theory,⁵⁴ even if it draws inspiration from various currents of philosophical and theoretical thought. This originality is due to a radical change of perspective:

A change in the language and optics – notes Pichlak – allows us to notice and name qualitative new problems. Juriscentrism is not, therefore, the 'enunciation of old fragments in new words,' the recycling of outdated

52 Bator, *op.cit.* note 1, 114.

53 Stawecki, *op.cit.* note 3, 24–25.

54 Pichlak, *op.cit.*, note 51, 61.

and well-known theses in a new clothing. By changing the way in which we speak about the legal reality, juriscentrism changes what we can notice in that reality.⁵⁵

Although Kozak, during his lifetime, “did not belong to the pantheon of contemporary legal theory and philosophy of law,”⁵⁶ his originality and theoretical courage to “open up new paths”⁵⁷ definitely make him stand out against the background of Polish post-War legal theory. In the following two sections, I first attempt to provide a concise outline of his legal theory – juriscentrism, without, however, any claim to comprehensiveness (in section 3), before providing a somewhat more detailed analysis of Kozak’s concept of law (in section 4).

3 A Brief Overview of Kozak’s Juriscentrist Legal Theory

3.1 *The Theoretical Foundations of Juriscentrism*

In contrast to the programmatically aphiloosophical and autonomous approach of analytical legal theory,⁵⁸ Artur Kozak decided to build his theoretical program on a solid and remarkably broad foundation of various currents of philosophy and sociology.⁵⁹ Already in his first monograph he clearly stated that “adopting one or another philosophical approach is of paramount significance for [...] the way of understanding law and its possible practical consequences.”⁶⁰ However, it must be kept in mind that his approach to these foundations was utterly creative: he did not consider his task to be the ‘reconstruction’ of the views of philosophers, but rather treated their concepts as the building blocks of his own theory.⁶¹ As Stawecki points out, referring to Zirk-Sadowski’s famous differentiation of legal theory as being built either “from

55 *Ibid.*

56 Bator, *op.cit.* note 50, 7.

57 Stawecki, *op.cit.* note 3, 25.

58 Cf. Andrzej Bator, “Post-Analytical Theory and Philosophy of Law. New Problems, New Research Perspectives?” in Andrzej Bator and Zbigniew Pulka (eds.), *A Post-Analytical Approach to Philosophy and Theory of Law* (Peter Lang Verlag, Berlin, 2019), 11–38, at 13, at 16.

59 Stawecki, *op.cit.* note 3, 21–22, 24–25. According to Bator these sources of inspiration were “quite eclectic” (Andrzej Bator, “Czy prawo może być praktyką partykularną? W związku z koncepcją juryscentryzmu” [Can Law Be a Particular Practice? Some Comments in Connection to the Conception of Juriscentrism], in Pichlak (ed.), *Profesjonalna, op.cit.* note 2, 37–58, at 38).

60 Kozak, *op.cit.* note 24, 10.

61 I would like to thank Dr Michał Stambulski for drawing my attention to this aspect of Kozak’s approach.

law towards philosophy” or “from philosophy towards law,”⁶² Kozak’s approach combined the two ways of doing legal theory.⁶³

Kozak’s extra-legal sources of inspiration for building his highly original theory can be grouped under three main headings. These are, firstly, philosophical interpretationism (grounded in Kant, Fichte and Marek Jan Siemek⁶⁴); secondly, Berger and Luckmanns’ sociology of knowledge; and thirdly, Richard Rorty’s program of ‘liberally ironical’ ethnocentrism.⁶⁵

The first pillar of juriscentrism was elaborated mainly in Kozak’s second book on *The Limits of Jurists’ Discretionary Power*. Despite not being a trained philosopher, in this monograph Kozak provides a coherent and insightful account of what he dubs the ‘unfinished anti-Cartesian revolution.’⁶⁶ As it is well known, Descartes placed the main emphasis on the cogito, the subject, putting him – as Kozak said – on a ‘seesaw’ with the object of cognition. The subject object relationship, typical for modernist philosophy, was questioned by the epistemic and linguistic turns in the philosophy of language and epistemology. However, for Kozak this ‘anti-Cartesian revolution’ remains unfinished,⁶⁷ and he criticized such authors as Stanley Fish for “welding the seesaw to the side of the subject of cognition.”⁶⁸ What Kozak means by this colorful metaphor is that the subject of cognition (the *cogito*) becomes liberated from the object of

62 Marek Zirk-Sadowski, *Wprowadzenie do filozofii prawa* [An Introduction to the Philosophy of Law] (LEX, Warsaw, 2011), 19.

63 Stawecki, *op.cit.* note 3, 20.

64 Cf. Paweł Jabłoński, *Polskie spory o miejsce filozofii w teorii prawa* [Polish Disputes Regarding the Place of Philosophy in Legal Theory] (Prawnicza i Ekonomiczna Biblioteka Cyfrowa, Wrocław, 2014), 75.

65 Pichlak classifies the theoretical sources of juriscentrism similarly, however, instead of emphasizing ethnocentrism he prefers to speak of “‘faith in law’ as an axiological orientation”, Maciej Pichlak, “Artura Kozaka cierpliwość wobec prawa,” [Artur Kozak’s Patience Towards the Law] (2014) 3(1) *Filozofia Publiczna i Edukacja Demokratyczna* 226–242, at 228. See also Karol Staśkiewicz, “Trzy źródła juryscentryzmu – filozofia prawa Artura Kozaka” [The Three Sources of Juriscentrism: Artur Kozak’s Philosophy of Law], 1 *Archiwum Filozofii Prawa i Filozofii Społecznej* (2019), 79–93. Staśkiewicz’s typology of Kozak’s sources of interpretation enumerates; interpretationism (Kant); a theory of institutionalisation of human agency (Berger and Luckmann, Gehlen); the internal point of view (Hart).

66 Stawecki, *op.cit.* note 3, 26–29.

67 As Stawecki points out: “A manifestation of the ‘anti-Cartesian turn’ is the ‘interpretationism’ propagated by Kozak, making the object of cognition dependent on its subject. It questions the possibility of taking a purely passive, purely imitative approach in the act of cognition. Also, the classical conception of truth (so-called representationism) is questioned” (Stawecki, *op.cit.* note 3, 27).

68 Instead, Kozak proposed to “bind the world and the individual, the subject and object of cognition into one epistemic relationship,” as Pichlak explains (Pichlak, *op.cit.* note 65, 232).

cognition and gains an unprecedented freedom. This freedom, according to Kozak's original and innovative⁶⁹ narrative, is perhaps less dangerous in the case of literary interpretation, but is unacceptable in the case of the judge-*cogito* who can invent legal norms as he wishes. However, there is no return to the *status quo ante* – we cannot claim that the judge's interpretative freedom can be constrained by legal texts (statutory law made by the legislative power). Hence, there is a need to look for a different limiting factor and Kozak finds it in the judge's socialization as lawyer.⁷⁰

This brings us to the second pillar of juriscentrism – the sociology of knowledge of Peter L. Berger and Peter Luckmann. Their work on *The Social Construction of Reality*, published in Polish translation in 1983, provided Kozak with the necessary tools to tame the juristic *cogito* within the pen of the legal community. Following Berger and Luckmann (but strikingly without any attempts at referring to Bourdieu or Luhmann⁷¹), Kozak posited that the 'institutional sub-world of law,' as he called it, is an independent and parallel social universe, creating its own symbolic universe and providing its own interpretations – constructions – of social reality. This legal sub-world is parallel to other ones, such as, notably, the economic, political and religious ones, and it should give up any claims of superiority over them. Each sub-world lives in its own universe and understands the world in its own, specific way. Hence lawyers' claims to power in society cannot be based on the legal sub-worlds' claim to cognitive, ethical or any other superiority, but may only be made by resorting to the idea metaphorically captured in Teubner's anecdote about the khadi's 12th camel. In effect, lawyers are capable of solving other people's disputes because they filter them through their own categories and by resorting to law's purely formal values. The solutions given by lawyers to economic or

69 Stawecki, *op.cit.* note 3, 28.

70 The need for institutionalisation as a limit to judicial discretion is a consequence of Kozak's acceptance of anti-representationism, whereby judgments about the world cannot be verified by reference to some external reality, but rather only evaluated within a given institutional sub-world in which they were generated. See Pichlak, *op.cit.* note 65, 232. Therefore, while the first theoretical foundation of Kozak's project (the anti-Cartesian revolution of interpretationism and anti-representationism) destroys the traditional views on the limits of lawyers' discretion, the second theoretical foundation of institutionalism (inspired by Berger and Luckmann) builds a new and more solid basis for legal practice. The third element, ethnocentrism, consolidates the theory and provides it with a strong axiological element.

71 Dr Pichlak drew my attention to two facts: firstly, that at that time Kozak simply did not know Bourdieu's writings and, secondly, that in all likelihood he intentionally did not refer to Luhmann, rejecting the latter's programmatically external approach to the law – something so much at odds with the project of juriscentrism.

political disputes are cognitively incomprehensible to individuals inhabiting other sub-worlds; at the same time, however, they are not the product of an individual lawyer's whims, but of the legal sub-world as such, with its specific legal culture, legal tradition and legal methodology.

As Pichlak notes, the category of an institution occupies a central place in juriscentrism, to the extent that 'institutions seem to be the only entity which is real'.⁷² If law's authority in society is to be defended, lawyers must become 'patriots' of the legal world, i.e. they must adopt a juriscenrist approach.⁷³ This brings into play the third pillar of Kozak's concepts, namely Richard Rorty's ethnocentrism.⁷⁴ When we give up the universality of the values of our Western societies, we should not – goes Rorty's argument – give up defending them. Kozak justified the introduction of the term 'juriscenrist' and his reference to Rorty in the following words:

It seems that the new model of legal practice [...] could be best described by the adjective 'juriscenrist.' This term consciously refers to Rorty's conception of ethnocentrism as the foundation of truth. Rorty, accepting that the reality of cultural objects does not have a strictly extracogitational character (the first thesis of interpretationism) searched for their justification in the social forms of human existence, in culture produced by society in the network of internal and external interactions and shaping individual members of society in a manner functional to the needs of the entire whole (the second thesis of interpretationism). One can think in a similar way about contemporary Western legal systems.⁷⁵

For Kozak, the 'center' of law, in line with "juriscenrist" was to be found in the institutional structure of law, i.e. in legal culture.⁷⁶ Thus, as Pichlak rightly points out, juriscenrist is a variation of ethnocentrism, whereby lawyers are treated

⁷² Pichlak, *op.cit.* note 65, 229.

⁷³ For more details about the believer vs. expert in law see section 3.3 below.

⁷⁴ As Pichlak points out, Rorty borrowed this term from the anthropologist William Sumner, who used it in the sense of using one's own culture to evaluate other cultures. Pichlak, *op.cit.* note 65, 227–228. For a broader context of pre-Rorty use of the concept of ethnocentrism, see Bator, *op.cit.* note 59, 48–49.

⁷⁵ Kozak, *op.cit.* note 38, 138.

⁷⁶ *Ibid.*, 139.

[...] as participants of a specific cultural community, equipped with its own language, conceptual framework, as well as a cognitive and axiological system linked to them. Acceptance of this ‘categorical equipment’ is, at the same time, a necessary condition of belonging to the legal community.⁷⁷

Having presented the three main sources or pillars of juriscentrism, I will now attempt to briefly outline its main tenets.

3.2 *The Main Tenets of Juriscentrism*

Juriscentrism can be conceived as a holistic legal theory, i.e. one which attempts, at least in its design, to provide a comprehensive interpretation of legal phenomena. On the other hand, we have to keep in mind that at the time of Kozak’s death juriscentrism was still a work-in-progress, and its author was unable to complete it. Nonetheless, the works that he left behind allow a fairly complete and consistent picture of the juridical world to be reconstructed. In the following paragraphs I will limit myself to reconstructing juriscentrism *as a legal theory*, rather than elaborating on its various intellectual inspirations, especially the philosophical and sociological ones, which I have mentioned in the previous section. This reconstruction is intended as a succinct synthesis, rather than an in-depth presentation. In order to give readers more flavor of Kozak’s specific way of reasoning and arguing, in section 4 I have provided a more detailed account of one selected aspect of juriscentrism, namely the concept of law.

The most important aspect⁷⁸ of juriscentrism is its sociological approach to law, treated as one of many ‘institutional sub-worlds.’ Lawyers create their own institutional world which exists in parallel with other worlds, such as those of politics, economy, religion or culture.⁷⁹ This aspect of Kozak’s theory can be compared to similar classifications of the plural facets of social reality put forward by Pierre Bourdieu (the legal field),⁸⁰ Niklas Luhmann (the legal system)⁸¹

77 Pichlak, *op.cit.* note 65, 228.

78 Tomasz Stawecki identified three essential aspects of juriscentrism: the metatheoretical one, concerned with the “structure of legal knowledge,” the reflexion on the “nature of law as a social phenomenon” and the third one concerning the “character of legal practice” (Stawecki, *op.cit.* note 4, 18). My presentation of Kozak’s thought is loosely inspired by Stawecki’s order of exposition.

79 Kozak, *op.cit.* note 38, 139.

80 Pierre Bourdieu, “La force du droit. Éléments pour une sociologie du champ juridique,” 64 *Actes de la Recherche en Sciences Sociales* (1986), 3–19.

81 Niklas Luhmann, *Introduction to Systems Theory* (Cambridge, Polity Press, 2013); *idem*, *Law as a Social System* (Oxford University Press, Oxford, 2004).

or Alexandre Kojève (the legal phenomenon).⁸² However, Kozak's 'sub-world' cannot be mechanically equated to Bourdieu's 'field', Luhmann's 'system' or Kojève's 'phenomenon', even if the catalogue of such areas of social life (partly) overlap. Kozak's approach is definitely based on Berger and Luckmann's concept of 'institutional worlds' and puts a great emphasis on the social construction of legal reality (*qua* reality for lawyers). In Kozak's own words:

It is highly probable that for lawyers analyzing legal phenomena from an internal point of view the basic method [...] are enunciations predicating existence, not meaning [...] From the point of view of an internal, autonomous theory, in this behavior of lawyers we find the presence of an intra-institutional world [...]. [S]uch a world cannot be questioned. It can only be analyzed.⁸³

The treatment of the legal world as a socially constructed institutional sub-world, parallel to other ones, has paramount consequences for the entire theory of juriscentrism. It presupposes that lawyers enter into conflicts with other institutional sub-worlds, such as those of politics, economy or religion, which perceive the same situations and relationships through entirely different categories. In line with his anti-Cartesian interpretationism, Kozak argues that social facts are the product of sub-worlds, and do not precede them:

[...] the law acts through a socially shaped institutional structure which produces a specific, professional semantics. Thanks to this semantics it can ascribe specific cultural meanings to other elements of social worlds, thereby creating an intra-institutional reality. The reality of law rests upon the reality of culture, generated by society.⁸⁴

This has further consequences for legal interpretation which, in line with interpretationism, is treated by juriscentrism as creative (from an external point of

82 Alexandre Kojève, *An Outline of the Phenomenology of Right* (Lanham, Rowman & Littlefield, 2007).

83 Kozak, *Myslenie*, *op.cit.* note 14, 84. See also Kozak, *op.cit.* note 38, 140: "Lawyers, who have at their disposal esoteric knowledge may [...] represent the social existence of law. This existence occurs not only through the interpretation of the legal text, in which the law is constituted, but also through the construction of a specific institutional world, the structure of objects whose reality is obvious and available only to subjects shaped in a specific regime of legal education."

84 Kozak, *op.cit.* note 14, 103–104.

view), but at the same time as cognitive (from an internal point of view).⁸⁵ In the words of Paweł Jabłoński, juriscentrism was “based on the assumption that legal culture plays a transcendental role, being foundations of the way lawyers think.”⁸⁶

Concerning lawyers as social actors, Kozak emphasized their dependence on the legal sub-world:⁸⁷

Social institutions are durable fragments of social practice, where human action is repetitive and foreseeable. They [...] shape human individuals as elements compatible with the existing institutional order [...] Institutions are more durable than people active in them. They collect and systemise the experience gained by generations of actors and transmit it to further generations [...] Any view on the outside world is usually a crowning of a complicated chain of reasonings, inferences and premises. Institutions hide part of those chains [...] [C]ognition is facilitated within institutions in that institutions hide part of the chain of reasonings leading to the solution of the problem faced by the actor [...] [W]e feel relieved from making a rational choice between available alternatives because the behavior ‘demanded from us’ by the institution seems to be the only ‘natural,’ rational and [...] fair.⁸⁸

Thus, a central tenet of juriscentrism is the “essential binding of the lawyer by standards of conduct accepted in the institutional community which limit the sphere of lawyers’ discretion,” especially in the field of legal interpretation.⁸⁹ As a consequence of this essential and fundamental relationship between the

85 Kozak, *op.cit.* note 38, 141.

86 Paweł Jabłoński, “Pytanie o prawo w kontekście konfliktu między hermeneutyką podejrzeń i hermeneutyką zaufania” [The Question Concerning the Law in the Context of the Conflict Between the Hermeneutics of Suspicion and the Hermeneutics of Trust], in Pichlak (ed.), *op.cit.* note 2, 93–108, at 102.

87 Stawecki pointed out that Kozak’s vision is based on a national legal community and would not provide a viable explanation for the functioning of lawyers in transnational situations or in the EU (Stawecki, *op.cit.* note 3, 33). While this is true, it does not, in my view, constitute a valid critique of Kozak’s theory – one could point, on the one hand, to the existence of emergent transnational or supranational legal communities, and on the other hand, to the difficulties of transnational legal dialogue where the lack of a common legal culture poses a true challenge. This would rather corroborate than disprove Kozak’s theoretical approach.

88 Kozak, note 25, 173–174.

89 Pichlak, *op.cit.* note 65, 236. This entailed that Kozak was opposed to postmodernism, which he criticized for overemphasizing the role of the subject-interpreter. In Pichlak’s words: “Postmodernism [...] does not notice [...] that interpretive games are never free

lawyer and the legal sub-world, on the one hand, and the legal sub-world and other sub-worlds, on the other, juriscentrism provides for a strong ethical program, which Kozak summarized by the opposition between a 'believer' in law and a legal 'expert':

We have [...] the choice between a lawyer consciously affirming the internal reality of the law and a lawyer consciously questioning it. Because I like to think about the law as a form of secular religion, I will refer to the first as a 'Believer,' and to the latter as an 'Expert' in law. The difference between them is analogical to that which exists between a theologian and religion studies scholar, or – even more appropriately – between Christian and Muslim experts on the Bible and Koran. The Believer and Expert work on exactly the same set of artefacts, but have an entirely different approach to their cultural context, i.e. to the legal tradition, to unwritten principles and tacitly accepted values. The former takes an affirmative approach to them as to a significant and important whole, whereas the latter is skeptical about them – he uses them selectively and instrumentalises them with regard to a different universe of meanings.⁹⁰

Lawyers as social actors are, therefore, bound by the institutional reality of law which drastically reduces their discretionary power:

I do not understand the autonomy of [legal] practice as freedom to create norms [...] but on the contrary – as its enslavement, but enslavement to specific rules, present only in institutional contexts specific for legal practice [...] I am in favor of the hypothesis that [the categorial center of legal thought] in Western culture lies in the formal aspect of law, whereas aspects related to its content (substance) have a secondary character [...] To sum up: within the scope in which a lawyer is active, subjecting himself to the limits of the intra-institutional reality, one cannot consider his acts to be free, and therefore – as exercising power *vis-à-vis* other participants of legal relations [...] From an intra-institutional perspective the scope of our [i.e. lawyers'] discretion may turn out to be [...] much narrower than it is usually accepted.⁹¹

because the subject and object of interpretation are both to the same extent social constructs" (Pichlak, *op.cit.* note 65, 237).

90 Kozak, *op.cit.* note 47, 68.

91 Kozak, *op.cit.* note 38, 158–160.

Thus, from a juriscenrist perspective the issue of lawyers' discretionality is only apparent, visible only from an external (non-legal) perspective.⁹² This approach has far-reaching ethical consequences – the ethics of juriscenrism reduces the role of the individual lawyer and moves the emphasis towards the legal community and the legal culture nurtured by it.⁹³ The guarantee of law's rationality rests within legal culture,⁹⁴ and therefore is effectively maintained by lawyers themselves, rather than by external (e.g. political) factors. As a result, the main commands formulated by the ethics of juriscenrism towards lawyers include maintaining the legal culture,⁹⁵ building social trust in law as an institution,⁹⁶ and maintaining the "myth [of] a lawyer following iron, indisposable rules imposing upon him a certain necessary outcome."⁹⁷ A crucial element of legal culture is the paradigm of legal interpretation which

[...] on the one hand protects us from the arbitrariness of individual lawyers, and on the other hand does not allow the political conjectures, guiding actual law-makers, to be reflected in legal practice.⁹⁸

Concerning the relations between law and other sub-worlds, Kozak openly defended law's autonomy and opposed its instrumentalization:

Lawyers have always enjoyed a certain autonomy *vis-à-vis* politics. This is because the ruler, externalizing his will into a text, lost control over it. A royal edict was no longer the will of the ruler, but a product of this will, belonging to the world of writing and subject to the rules governing that world. [...] No-one can control a text, not even its author. This is the most profound reason for the autonomy of law and independence of lawyers *vis-à-vis* politics. But one may control those who read the text. And this is the most profound reason for the conflict between the world of politics

92 *Ibid.*, 160; Pichlak, *op.cit.* note 65, 237.

93 Przemysław Kaczmarek, *Tożsamość prawnika jako wykonawcy roli zawodowej* [The Identity of a Lawyer as Professional Role Performer] (LexisNexis, Warsaw, 2014), 103.

94 *Ibid.*, 106–107.

95 Paweł Skuczyński, *Status etyki prawniczej* [The Status of Legal Ethics] (Lexis Nexis, Warsaw, 2010), 307.

96 Kaczmarek, *op.cit.* note 93, 108. Cf. Jabłoński, *op.cit.* note 86, 101.

97 Bator, *op.cit.* note 59, 46.

98 Kozak, *op.cit.* note 38, 152.

and the world of law. Every law-maker who wishes to influence social relationships directly by his will has to ensure the obedience of lawyers.⁹⁹

In describing law's social function, Kozak referred to Teubner's metaphor of the khadi's twelfth camel,¹⁰⁰ as a "foreign, external element added to a conflict which the parties understand, but cannot solve."¹⁰¹ This way the legal sub-world can offer other sub-worlds something which they do not have and are unable to produce themselves: a set of purely formal, intra-legal values which allows conflicts to be solved, regardless of their substantive basis.¹⁰² The importance of law as a conflict solving discourse is particularly acute in contemporary times, which are characterized by rising ethical pluralism and subjectivisation of experience.¹⁰³ However, Kozak believed that only an autonomous law can fulfil any functions towards the remaining sub-worlds, and a non-autonomous law would simply make no sense.¹⁰⁴

Law's specificity, based on formality, is the basis of its autonomy, which must be protected from other sub-worlds, especially the political one, as it is also the chief source of law's legitimacy.¹⁰⁵ Thus Kozak readily emphasized the opposition between the *ius* of legal culture, binding upon lawyers,¹⁰⁶ and the *leges* produced by the political legislator:

One can agree with the skeptical view that the text of the law is not sufficiently binding on us. But we are bound by conventions, according to which we determine the consequences of that text. [...] And those conventions are not accidental [...] [t]hey are the product of centuries-long experiences of our legal culture and in a postmodern society [...] they are the only *ius* towards which we can turn ourselves, faced with the chaotic and short-sighted creation of *lex* by contemporary politics.¹⁰⁷

99 Kozak, *op.cit.* note 14, 208–209.

100 Gunter Teubner, "Alienating Justice: On the surplus value of the twelfth camel," in David Nelken and Jiří Přibáň (eds.), *Consequences of Legal Autopoiesis* (Dartmouth, Aldershot, 2001) 21–44.

101 Kozak, *op.cit.* note 38, 141.

102 Kozak, *op.cit.* note 14, 155.

103 Pichlak, *op.cit.* note 65, 238.

104 Pichlak, *op.cit.* note 51, 67. This reveals a certain proximity to the concepts of Kojève, referred to above, although the difference seems to lie in the importance of autonomy as a constitutive element (Kojève) or as a necessary precondition for the fulfilment of social functions (Kozak).

105 *Ibid.*, 68.

106 For a more detailed analysis of Kozak's concept of *ius* see section 4 below.

107 Kozak, *op.cit.* note 14, 248.

Faced by the choice between political *lex* and juridical *ius*, lawyers should always follow the latter:

The legislator [...] [m]ay [...] enact whatever he wishes and what suits his political needs, but autonomous courts [...] will apply only that what fits into the acceptable, culturally shaped model¹⁰⁸

As Andrzej Bator explains, in Kozak's juriscentrism

[...] the demonopolisation of power exercised over the legal order does not mean that Parliament shares its political power with the lawyer, but rather signifies a depoliticization or limitation of the political character of law.¹⁰⁹

One can agree with Bator's interpretation of Kozak, and conclude that the project of juriscentrism, as a new political philosophy of law, was aimed both at moving the juridical world away from the world of politics, and masking (or neutralizing) the dimension of the political within law.

Far from discussing all aspects of juriscentrism, in the preceding paragraphs I have attempted to provide a brief outline of its main tenets. As has already become evident, juriscentrism – as is suggested by its name – is a 'law-centred' legal theory, and therefore an affirmative if not even apologetical one. I will discuss this aspect in more detail in the next section, also providing an insight into Kozak's understanding of the essence and functions of legal theory, philosophy of law and legal deontology.

3.3 *Juriscentrism as an Affirmative Legal Theory*

3.3.1 Kozak's Notion of Philosophy of Law, Legal Theory and Deontology of Law

Kozak redefined, in a highly innovative way,¹¹⁰ the concepts of the 'philosophy' and 'theory' of law, proposing to identify three fields of general jurisprudence:¹¹¹ the philosophy of law, theory of law and deontology of law, and within theory of law he differentiated between internal and external theory.¹¹² For Kozak, the philosophy of law is

¹⁰⁸ *Ibid.*, 149.

¹⁰⁹ Bator, *op.cit.* note 59, 40.

¹¹⁰ Stawecki, *op.cit.* note 3, 21 and 24.

¹¹¹ Cf. Jabłoński, *op.cit.* note 64, 75–76.

¹¹² Kozak, *op.cit.* note 14, 52–69.

[...] the main negotiator representing the juristic point of view *vis-à-vis* politics, economy, religion, mass media etc. [...] The philosophy of law in the strict sense of the word is identified by the way of providing answers, and not the way of posing questions. We can speak of it only there, where philosophical questions are answered by a jurist, embedded within a perspective characteristic of legal practice and adopting an affirmative approach towards it.¹¹³

As such, the philosophy of law is part of philosophy in general,¹¹⁴ understood as a social practice comparable to

[...] a village idiot asking various people strange, inappropriate questions. To put in other words, it is a 'badly educated person' in the Aristotelian sense, i.e. a person who does not know what questions should not be posed [...] By posing [...] questions in its particular language [philosophy] forces [...] answers which are at least partially mutually translatable.¹¹⁵

Whereas in Kozak's terms the philosophy of law provides external legitimacy to law¹¹⁶ by answering, from an internal, legal point of view general questions posed by philosophy to all social practices, and thereby is directed from the law towards other institutional worlds (*ad extra*),¹¹⁷ legal theory, in his

113 *Ibid.*, 52–53. Cf. Stawecki, "Teoria," *op.cit.* note 4, 21.

114 An opposite interpretation of Kozak was proposed by Stawecki, "Teoria," *op.cit.* note 4, 22, according to whom "Kozak underlines that philosophy of law cannot be [...] treated as part of general philosophy." It seems that the difference between my understanding of Kozak and Stawecki's understanding lies in the fact that I stress Kozak's emphasis upon the fact that the philosophy of law answers a set of generalized questions (posed by the 'village idiot'), whereas Stawecki underlines the fact that answers can be provided only from an internal perspective. He writes: "One has to understand deeply the functioning of law, 'be inside it,' and not conduct divagations from a comfortable distance. The philosophy of law is a form of legal knowledge, analogous to philosophy of science." Jabłoński, in turn, emphasizes that in his second monograph (*Granice*, *op.cit.* note 38), Kozak proposed that the questions in philosophy of law be posed by the legal philosopher, whereas in his third and posthumous one (*Myslenie*, *op.cit.* n. 14), he moved the task of questions to the general philosopher (Jabłoński, "Pytanie," *op.cit.*, note 86, 103).

115 Kozak, *op.cit.* note 14, 54.

116 Jabłoński, *op.cit.* note 86, 103.

117 A further task of philosophy of law in Kozak's understanding is the construction of "transcendental structures for legal theory" (Paweł Jabłoński, "O filozoficznym reprezentowaniu prawa: komentarz do metateoretycznych rozważań Artura Kozaka," [On the

understanding, is directed towards the legal phenomenon itself (*ad intra*).¹¹⁸ Kozak differentiates two perspectives of legal theory – internal and external.¹¹⁹ As a shorthand, I will refer to them as ‘internal legal theory’ and ‘external legal theory’, respectively. External or ‘integrational’¹²⁰ legal theory perceives legal phenomena through the lens of a non-legal paradigm, and it belongs to a different practice.¹²¹ The claims produced by an external legal theory are rarely useful for legal practice as such.¹²² External or integrational legal theory (in the sense of ‘external integration’¹²³), includes such fields as the sociology of law, psychology of law or economic analysis of law, as well as critical legal theory. The program of an external legal theory is based on questioning and disenchanting the legal practice from an external perspective.¹²⁴ Kozak explains the difference between external legal theory and the philosophy of law in the following words:

Whereas the philosophy of law is the mouth through which legal practice explains its stance to the social environment, external legal theory is the mouth through which that environment speaks to legal practice.¹²⁵

In contrast to external legal theory, internal legal theory “preserves the categorial and axiological autonomy of the practice from which it grows.”¹²⁶ Thus, internal legal theory is a theoretical practice undertaken from within the legal sub-world. It

[...] does not question the existing reality of law. For this reason, it is a foundation of the categorial independence of legal practice, for it is here

Philosophical Representation of Law: A Commentary to Artur Kozak’s Metatheoretical Discussions], in Jabłoński et al. (ed.), *op.cit.* note 48, 173–187, at 176).

118 As Stawecki explains, the philosophy of law “analyses the conditions of the existence of reality, whereas legal theory consciously locates itself in the *epistemic perspective* and analyses that reality itself” (Stawecki, *op.cit.* note 3, 22, emphasis in the original).

119 Kozak, *op.cit.* note 14, 59.

120 *Ibid.*, 59.

121 *Ibid.*, 59–60.

122 *Ibid.*, 59.

123 Jakub Łakomy, “Pojęcie integracji zewnętrznej nauk prawnych” [The Concept of External Integration of Legal Sciences], in Mirosław Sadowski and Piotr Szymaniec (eds.), *Prace prawnicze, administratywistyczne i historyczne* [Papers on Law, Administration and History] (Wrocław: Katedra Doktryn Politycznych i Prawnych WPAiE UW, 2009), 52–65.

124 Kozak, *op.cit.* note 14, 60.

125 *Ibid.*, 60–61.

126 *Ibid.*, 60.

that the institutionally generated world is divided into what is real and what is unreal.¹²⁷

Whereas philosophy of law – the juridical world's mouthpiece in its relations *ad extra* – provides law with external legitimacy (as perceived by members of other institutional sub-worlds), the internal theory of law provides it with its internal legitimacy,¹²⁸ by reproducing, preserving and developing the *ius*, the juridical world's inner legal culture¹²⁹ which guarantees its consistency, continuity and ongoingness. Finally, Kozak identified the deontology of law which, in his project, should cover

[...] not only the traditionally understood (practical) philosophy of law, but also legal ethics. Any tool can be used in various ways. For any tool, including those which are offered by law, there must exist guidelines on their proper use. Every tool must be accompanied by a certain deontology, ethics, ethos or something of this kind [...] Human beings must provide themselves with an answer concerning their own destiny, and that answer is always outside them. Leaving aside the debates concerning the sources of such an answer [...] its form is always the same: it is a norm of conduct which follows from wisdom, not knowledge.¹³⁰

Thus, a juriscenrist deontology of law – complementing its philosophy and theory – is a form of legal wisdom, which has no necessary link to knowledge.¹³¹ Legal deontology is the field of the “internal, purely juridical axiological structure, which takes the place of the old *ius*. It is a necessary element of the institutional autonomy of law.”¹³² One of the challenges of contemporary legal deontology is, according to Kozak, the need to find a compromise between the order (consistency of judgments) and individualized justice.¹³³ Kozak does not

127 *Ibid.*, 62.

128 Cf. Stawecki, *op.cit.* note 3, 22–23, who highlighted the legitimizing functions of internal legal theory in juriscenrism.

129 A slightly different interpretation is provided by Stawecki, *op.cit.* note 3, 23, who underlines that internal legal theory should have as its object “[legal] practice itself, and not what regulates that practice.” I cannot fully agree, as the juriscenrist *ius* (inner legal culture of the juridical) is, according to Kozak, precisely what regulates the legal practice. And, if I understand Kozak's concept of internal legal theory correctly, its object is precisely the development of *ius*, i.e. the extra-textual limits on lawyers' discretionary power.

130 Kozak, *op.cit.* note 14, 65.

131 *Ibid.*, 66.

132 *Ibid.*, 67.

133 *Ibid.*, 68–69.

provide a ready-made recipe for how to solve this tension, but issues a *caveat* that “[t]he wisdom of applying the law may not, of course, ignore the social environment, but its point of departure must be an autonomous axiology of law.”¹³⁴

3.3.2 Juriscentrism as a ‘Post-Postmodern’ Defense of the Juridical

In Kozak’s own words, the aim of his project was to “gather what is left after the postmodern conflagration and make an attempt to answer the question ‘what shall we do now?’”¹³⁵ This ‘post-postmodern’ approach would serve to construct an internal, autonomous and positive (as opposed to negative or critical) legal theory which could uphold and legitimize a vision of ‘law after postmodernism’ characterized by individualism, institutionality (emphasis on the institutional world of law), defense of subjectivity (understood as holding rights and duties and being capable of responsibility), deliberation (in the Habermasian sense) and the principle of precaution (in the Pascalian¹³⁶ sense).¹³⁷

The entire juriscentrist project can be summed up, in the words of Paweł Jabłoński, as “an attempt to defend law from postmodern flux and the fall of authorities that it entails.”¹³⁸ Adam Sulikowski, Poland’s leading critical legal theorist, goes even further and emphasizes that:

[...] juriscentrism is an attempt at the defense of [...] the lawyers’ *status quo*, and more precisely, of a certain belief about that *status quo*, popular in contemporary jurisprudence, from the postmodern critique it is facing. In order to enter into a defensive dialogue, A. Kozak accepted certain

¹³⁴ *Ibid.*, 69.

¹³⁵ Kozak, “Postponowoczesna koncepcja prawa” [A Post-Postmodern Conception of Law], in Mateusz Błachut (ed.), *Z zagadnień teorii i filozofii prawa. Ponowoczesność* [Selected Issues of Theory and Philosophy of Law: Postmodernity] (Kolonia Limited, Wrocław, 2007), 65–84 at 65.

¹³⁶ In Kozak’s own words: “Conscious of the possible differences of opinion as to what is valuable and what is not, we should act in a way so that as few values as possible are infringed. (...) In a post-industrial society it is a normal situation that (...) conflicts over ideas and values cannot be solved. In the majority of such situations I stand, therefore, before various versions of Pascal’s wager I wonder (...) what damage would be caused if one of the parties was wrongfully considered to be right. If it is impossible to find a solution eliminating all risks, I need to find a solution which eliminates the greater danger.” Kozak, *op.cit.* note 135, 84–85.

¹³⁷ *Ibid.*, *passim*.

¹³⁸ Jabłoński, *op.cit.* note 86, 101.

theses attached to the postmodern perspective, using them, however, in a way not very compatible with the spirit of postmodernism.¹³⁹

Sulikowski also adds that:

[...] juriscentrism, aware of the meaning of philosophical transformations and the legitimacy of the resulting critique of jurisprudence, postulates the submission to legal institutional imperatives, the dampening of the impact of other institutions, and treating the nebulous and chaotic set of legal texts, increasingly heterogeneous 'doctrine of law', and the increasingly political interpretation as the 'divine system'; that is, keeping faith despite the destruction of its intellectual justifications.¹⁴⁰

Maciej Pichlak, prefers to describe the juriscentrist approach to the juridical world as characterized by 'patience towards the law', indicating that:

[...] juriscentrism is therefore a faith that has overcome the trial of doubts and skepticism suggesting an answer to the final question. A juriscentrically oriented jurist is not differentiated by the fact that, while remaining blind and deaf to the possible objections towards law, towards the weaknesses of his own object of faith, and the resulting doubts, still sees something more in the legal order, some specific value that makes it, nonetheless, worthy of some faith.¹⁴¹

However, Sulikowski is right to emphasize that "Artur Kozak himself based the justification of his concept not on the reliability of law but rather on fear,"¹⁴² as

[t]he destructive force of anti-foundationalism and skepticism left only rubble behind. What can we build upon it? We cannot bring back to life the universal ideas of Evil or Reason. We need to reference what is basic and proper to any living being: to the self-preservation instinct. Everyone wants to keep the unchanged form and this is the point of origin for the post-postmodern concept of law: everything is a convention. But if we, as

139 Adam Sulikowski, "Postmodernistyczne tropy w jursycentryzmie" [Postmodern Tropes in Juriscentrism], in Jabłoński (ed.), *op.cit.* note 48, 112–113.

140 Sulikowski, "Law after the Death of God," in Bator and Pulka (eds.), *op.cit.* note 58, 181–194, at 192. Cf Staškiewicz, *op.cit.* note 65, 81–82.

141 Pichlak, *op.cit.* note 65, 242. English translation after: Sulikowski, *ibid.*, 192, with modifications.

142 Sulikowski, *op.cit.* note 140, 192.

a society, want to keep the current form, some of the laws must be necessary and not subject to dispute. This is not a matter of Truth and Error, Good and Evil, or Power and Freedom. This is a matter of Life and Death.¹⁴³

This argument is linked to the fact that for juriscentrism “it is impossible for a public sphere to exist,”¹⁴⁴ and therefore law’s “existence and special position cannot be justified by a rational deliberation,” but rather by “practical necessity connected to the survival of society.”¹⁴⁵

In any event, juriscentrism was not only a legal theory but, as Pichlak stresses, a form of

[...] political philosophy, adequate for the philosophy of law and elaborated within it. Such a political philosophy is to justify the need for the existence of the world of law in a certain shape as an answer to [...] worldview pluralism, the disappearance of axiological consensus and the subjectivisation of experiences, as well as [...] the crisis of representative democracy. Law [...] would be in this vision the last chance for agreement, a Noah’s Ark which could take us securely through the rough waters of postmodernism.¹⁴⁶

Referring back to Kozak’s own classification of legal philosophy, internal and external legal theory and the deontology of law, one can say that his project was mainly located within legal philosophy *sensu stricto*,¹⁴⁷ i.e. it is a theory “which has the task of legitimizing law and legal practice ‘to the outside’ and at the same time defend the autonomy of that practice as a guarantor of its identity.”¹⁴⁸ However, one could also say that juriscentrism, thanks to the broad application of tools coming from sociology and philosophy, *de facto* contained elements of what Kozak himself described as external legal theory.

143 Artur Kozak, “Dylematy prawniczej dyskrecjonalności. Między ideologią polityki a teorią prawa” [Dilemmas of Juristic Discretionality: Between Ideology of Politics and Legal Theory], unpublished manuscript presented at a conference (XVIII Ogólnopolski Zjazd Katedr Teorii i Filozofii Prawa, held in Miedzeszynie on 22–24 September 2008), cited after: Sulikowski, *op.cit.*, note 140, 193. The posthumously published version of that paper does not contain the quote (see Kozak, *op.cit.* note 58).

144 Pichlak, *op.cit.* note 65, 241.

145 *Ibid.*

146 Pichlak *op.cit.* note 51, 65. Pichlak notes that the “Noah’s Ark” metaphor for juriscentrism was conceived by Professor Bator.

147 *Ibid.*, 66.

148 *Ibid.*, 66–67.

Nonetheless, in contrast to his perception of such theory, he did not use those tools to disenchant the juridical, but rather as building blocks to construct an affirmative philosophy of law.

4 Juriscentrism in Close-up: Artur Kozak's Concept of Law

4.1 *Introductory Remarks*

The previous section provided a bird's eye view of juriscentrism as an entire theoretical project. This approach forced me to extract from Kozak's rich and colorful writings only the driest gist and present it in a systematic and synthetic fashion. Such an approach was necessary owing to the fact that the present paper is a first presentation of Kozak's legacy to an international audience. However, it does not do justice to Kozak's style and manner of reasoning. In the present section I will therefore try to show 'Kozak in action', by offering a close-up of one selected aspect of his theory – namely the concept of law. The choice of a specific example was not easy (juristic discretion or the social role of lawyers would have been other obvious choices). However, since the concept of law (how 'law' is understood) is not only central to any legal theory, but also predetermines its other elements, I have opted to devote this section to Kozak's concept of law, definitely one of the most original ones that can be found in jurisprudential literature.

The aim of this section is not only to present the outcome of Kozak's analyses, but also to show how he actually reasoned. Therefore, the order of presentation in this section will follow the logical order of his reflection, showing how he passes from reflections on language (section 4.2), treating them as a starting point for his analysis of the phenomenon of law, through his critique of what he calls 'soft ontologies of law' (section 4.3), through to his own concept – a 'hard ontology' of law. The presentation culminates with Kozak's 'moderate conventionalism' (section 4.5) as his theory on *iuris genesis*, or the point at which law actually is born.

4.2 *Language as Starting Point*

Kozak starts his discussion of the concept of law from the problem of language. He justifies this by referring to Berger and Luckmann's notion of social reality:

[...] the law acts through a socially shaped institutional structure which produces a specific, professional semantics. Thanks to this semantics, it can ascribe specific cultural meanings to other elements of the social world and thereby generate an intra-institutional reality. The point of

support for the reality of the law is therefore the reality of culture, generated by society.¹⁴⁹

For Kozak, the ontology of law should be approached through the perspective of the institutional world of lawyers. Kozak argues that “the so-called social world is, in essence, a structure of competing institutional sub-worlds which generate realities alternative to one another.”¹⁵⁰

Language refers to a certain sub-world¹⁵¹ and Kozak argues that legal practice is “doomed to a permanent confrontation with the inhabitants of other social worlds.”¹⁵² Kozak’s concept of law is therefore a militant concept, a concept created in the course of a confrontation, and opposition. He relies on Hart’s metaphor of the ‘internal’ vs ‘external’ point of view, arguing that

[...] for lawyers analyzing legal phenomena from the internal point of view, the basic way of formulating utterances on the phenomena they are interested in are utterances predicating existence, not meaning.¹⁵³

In other words, for lawyers ‘inhabiting’ the social world of law, legal concepts, rights, principles and so forth simply *exist*. Kozak openly opposes *semantics* to *ontology*, underlining that from the perspective of the internal point of view of the legal world, legal phenomena are on the level of ontology, and not textual semantics. This downplays the role of legal texts, which were placed in the center of legal ontology by the positivists, especially the crude positivists of the state-socialist period. The hard reality of the legal institutional world leads Kozak to state that:

From the point of view of an internal, autonomous theory in such behavior of lawyers we discover the presence of an intra-institutional world, experienced in a given cultural context as objective. For various reasons such a world cannot be questioned. It can only be analyzed.¹⁵⁴

For Kozak, lawyers active in the intra-institutional world of law treat legal phenomena as objectively existing, and ascribe meanings to phenomena from outside their world. What is the role of language in this process? Kozak admits that:

149 Kozak, *op.cit.* note 14, 103–104.

150 *Ibid.*, 138.

151 *Ibid.*, 137.

152 *Ibid.*, 138.

153 *Ibid.*, 84.

154 *Ibid.*

It is in language that normative acts are formulated, juridical acts accomplished, procedures conducted. Language seems to be a *sui generis* natural environment in which lawyers accomplish all or almost all of their activities.¹⁵⁵

But does this mean that Kozak joins the classical positivist line of thought, whereby law is equated with a set of normative texts expressed in language, and legal interpretation is reduced to linguistic understanding? Not at all. Having admitted the paramount importance of language for law, Kozak openly distances himself from normativism and positivism:

Focusing on language with its structure, which can be subjected to a logical rationalization, seems to many lawyers to be an ideal solution for conflicts of an axiological character. Such an 'escape into text' has become the brand identification of legal positivism and formalism. It was probably initiated by the French school of exegesis, and it reached its conceptual perfection within Hans Kelsen's pure legal theory with its framework conception of interpretation separating rational linguistic analysis from irrational axiological decisions. The fascination with the linguistic side of law is probably due to the fact that for a lawyer the understanding of a text is a fundamental practical task.¹⁵⁶

Combining legal philosophy with the sociology of law, Kozak puts forward the hypothesis that the lawyers' 'escape into text' is in fact dictated not so much by philosophical reasons, but by practical ones, as way of factoring out conflicts of values. Kozak speculates that it was the French *École de l'exégèse*, an intellectual current of the first half of the 19th century, directly after the enactment of the *Code civil*, which was the first to practice the 'escape into text'.

Kozak proposed a distinction between understanding conceived of as a linguistic analysis, and understanding conceived as linking the text to extra-linguistic reality, "a *sui generis* synthesis of language and extra-linguistic world,"¹⁵⁷ which Kozak himself roughly described as understanding text vs. understanding context. Having made that distinction, Kozak immediately

155 *Ibid.*, 106.

156 *Ibid.*

157 *Ibid.*, 107.

admitted that it is very difficult to apply in practice. He then went on to identify the context in which a text is embedded. Noting that Stanley Fish treated the intent of the speaker as the main relevant context, Kozak pointed out that in legal practice this kind of context is not, as a rule, available.¹⁵⁸ Kozak thereby distanced himself from intentionalism as a paradigm of interpretation. Whilst this gesture can be said to be motivated by pragmatic reasons (in the modern legislative process there is no real 'human intention' behind an adopted text), in Kozak's vision of law this gesture also has a political significance, which will be discussed later on.

If the legislature's actual intent is not the relevant context for understanding legal texts, what is then? Kozak answers by invoking the "reality of culture"¹⁵⁹ as the proper context. Therefore, he distanced himself from the view of those theorists (Krzysztof Pleszka, Tomasz Gizbert-Studnicki) who stipulated that legal texts refer to empirical reality, rather than cultural reality. Kozak differentiated between two possible understandings of cultural reality: institutional-functional (Émile Durkheim) and interactional-pragmatic (W.I. Thomas),¹⁶⁰ but stipulated that regardless of the choice between one or the other theory, "language will never be an independent object of analysis, nor a primary and autonomous medium of communication."¹⁶¹

4.3 *Soft Ontologies of Law*

Kozak identified two main approaches to the ontology of law: 'soft' ontology and 'hard' ontology, distinguishing between modernist and postmodernist soft ontology within the former. As to modernist soft ontologies of law, Kozak enumerates three types:¹⁶² firstly, the concept of law as an "externalization of the state's will"; secondly, the concept of law "as a being existing [...] situationally, coming to existence each time anew in endless negotiations between the parties of an individual or social conflict;"¹⁶³ and thirdly, a concept of law "questioning the notion of a 'correct' meaning of a text," treating interpretation as "not only an admissible, but also necessary element of every act of applying the law [...]"¹⁶⁴ What is common to soft ontologies of law is that they treat the law as a consequence of an act of will: either the legislator's will (modernist

158 *Ibid.*, 108.

159 *Ibid.*

160 *Ibid.*, 108–109.

161 *Ibid.*, 109.

162 *Ibid.*, 110ff.

163 *Ibid.*, 111.

164 *Ibid.*

soft ontology) or the interpreter's will (postmodernist soft ontology),¹⁶⁵ of which Kozak was highly critical.¹⁶⁶

Kozak refers to the first concept of law as 'traditional positivism', whereby law is treated as an expression of the 'legislator's will,' an object of cognition subject to an exegetic hermeneutics.¹⁶⁷ Kozak points out that 'traditional positivism' opened the way to an instrumentalization of law.¹⁶⁸ Modernity brought about "an unlimited entanglement of law with the world of politics,"¹⁶⁹ which was a result of the identification of 'law' with 'statute', and 'statute' with the sovereign's political decision. In Kozak's view, this undermined law's autonomy: even on an ontological and epistemic level, law "ceased to exist as an independent object of cognition,"¹⁷⁰ which Kozak illustrates with the famous quote from German theorist Julius von Kirchmann, who in his book *Die Werthlosigkeit der Jurisprudenz als Wissenschaft* (1847) made the famous statement: "drei berichtigende Worte des Gesetzgebers, und ganze Bibliotheken werden zu Makulatur." For Kozak, this 'political law', inherently tied to politics, is represented not only in leftist legal thought (e.g. Stefan Rozmaryn), but also in the works of François Gény or even Rudolf von Jhering's *Interessenjurisprudenz*.

Whereas the modernist soft ontology of law viewed law as an epiphenomenon, dependent on politics, the postmodern soft ontology is characterized, according to Kozak, by "a negative relationship with regard to the objective meaning of expressions and texts and to their proper or correct interpretation."¹⁷¹ Therefore, whereas modernist soft ontology could rely on the "strong foundation of the 'objective' meaning of a statute,"¹⁷² which was supplemented by an intentionalist position on legal interpretation, this foundation has been undermined by postmodern theories of interpretation. A paradigmatic representative of postmodern ontology of law is, according to Kozak, Stanley Fish. Kozak agrees with Fish "in principle"¹⁷³ but nevertheless questions two aspects of his theory. First of all, he accuses Fish of not liberating himself fully from the Cartesian opposition between subject and object.¹⁷⁴ Commenting on the Fish/Dworkin polemic, Kozak criticizes Fish for assuming the existence of an

165 *Ibid.*, 133.

166 Stawecki, *op.cit.* note 3, 32.

167 Kozak, *op.cit.* note 14, 112–113.

168 *Ibid.*, 114–115.

169 *Ibid.*, 116.

170 *Ibid.*

171 *Ibid.*, 119.

172 *Ibid.*, 117.

173 *Ibid.*, 120.

174 *Ibid.*, 121.

independent *cogito*, and by confounding the micro- and macrosocial perspective of (legal) interpretation.¹⁷⁵ Kozak is most critical of Fish's statement that the interpreter retroactively creates the chain of interpretation which he or she joins.¹⁷⁶ For Kozak, however, a truly anti-Cartesian stance:

[...] consists not in the rejection of the reality of objects given to us in everyday experience, but by its legitimization by presenting practice (also the cognitive one) as a uniform structure in which the subject and object are in fact two sides of the same coin.¹⁷⁷

Applying this dichotomy of Cartesianism vs. anti-Cartesianism to law, Kozak indicates that

[...] in traditional models of legal practice, the lawyer, conceived of a Cartesian, autonomous *cogito*, was limited in his activity either by the reality of the external world of culture (e.g. rules of language or moral principles) or by the will of another, privileged *cogito* (the sovereign).¹⁷⁸

Kozak opposes the traditional Cartesian model of legal practice to two alternative models: one following from the 'unfinished anti-Cartesian revolution,' and the second following from the finished one (juriscentrism). Postmodernism, as in Fish, is an example of the unfinished anti-Cartesian revolution. It is unfinished, because it dismantled the objectivity of the world of culture and removed the *cogito* in the role of the author, but the *cogito* in the interpreter's role "is still doing well and is looking for a good justification of the freedom it has gained."¹⁷⁹ In other words, the Cartesian lawyer was limited by the will of the *cogito*-sovereign, the legislator; the postmodern lawyer, a product of the unfinished anti-Cartesian revolution, is the creative interpreter, unconstrained by the text. One can easily identify here the 'anti-formalists' in the US or the judicial lawmaking in Europe (especially that of constitutional and human rights courts) after World War II. Although lawyers as law-makers are thereby *de facto* empowered, Kozak sees it as a risk for the legitimacy of law:

Now every view of the world is already equally valuable. Views of this kind have particular consequences for legal practice whose essential

175 *Ibid.*, 122.

176 *Ibid.*

177 *Ibid.*

178 *Ibid.*, 123.

179 *Ibid.*, 124.

element is a search for the only correct solution, and not for many potentially possible ones. A consequence of those views is the dismantlement of the theoretical foundations of law's autonomy (because if every decision is acceptable, it should be a decision commonly acceptable, and not only one acceptable to lawyers) and a delegitimization of adjudicating authorities (because through their lips speaks not law, but their own whims).¹⁸⁰

Kozak is therefore fully aware of the risks posed for the legitimacy and autonomy of law by postmodernism. He even goes as far as to admonish Fish for not understanding the "political consequences of the unfinished anti-Cartesian revolution."¹⁸¹ Kozak believes that there is an essential difference between law and literature, and between legal and literary interpretation. The reasons for this are not philosophical, but rather sociological:

[...] a lawyer acts in a totally different social situation than a literary theorist and therefore he must have at his disposal a theory not only explaining his practice but also legitimating it *vis-à-vis* a politically hostile environment.¹⁸²

It seems that from Kozak's perspective, the reason why legal theory, unlike literary theory, must not only explain, but also legitimize the practice of legal interpretation (in contrast to literary interpretation) is purely political: lawyers have to face a "politically hostile environment," whereas literary theorists do not. However, in searching for the lost legitimacy of lawyers' power in society, Kozak does not see there being a possibility of stepping back either to traditional positivism or to natural law theory, which seem to him incompatible with his philosophical assumptions and social reality.

Before presenting his own version of the ontology of law, Kozak discusses a second postmodern version of soft ontology, namely the communicative concept of law (the concept of 'law as a conversation'), in the form proposed by Polish legal theorist, Lech Morawski. Morawski's theory opposes law-as-technique to law-as-conversation. Kozak is partly critical of this theory, writing that:

180 *Ibid.*

181 *Ibid.*

182 *Ibid.*

In general, the notion of law as a conversation is a step in the decidedly right direction because a conversation is something ‘supraindividual.’ It is a structure whose shape does not depend exclusively on the arbitrary will of an individual creator, but is a function of the actions of many subjects [...] However, it is still an occasional structure in the sense that each conversation is different from other ones.¹⁸³

Therefore, whilst Morawski is going – according to Kozak – in the right direction, he does not go far enough. Whilst the concept of law-as-conversation manages to divorce the law from the caprices of the interpreter-*cogito*, and liberate it from the legislator,¹⁸⁴ it still lacks the stability necessary for its legitimacy.

4.4 Kozak’s ‘Hard Ontology’ of Law: Towards Autonomy and Legitimacy

Having presented and rebutted the ‘soft ontologies’ of law, Kozak went on to present his own approach – the ‘hard ontology’ of law. Essentially, it boils down to considering law (*ius*) as the rules of juridical discourse. As Kozak writes:

Law in the juristic sense is only that what binds us independently of our will. Law is constructed within a discourse, but the practice of discourse itself is not the law. A discourse is a network of relationships between speakers. Law crystallizes in these relationships, but one cannot say that law is identical with them.¹⁸⁵

Along these lines, law is defined as the “language of the institutional practice” of law.¹⁸⁶ This ‘language’ (in a metaphorical sense, not to be confounded with legal language in a linguistic sense) is the effect of ‘externalization’ or ‘crystallization’, and is “at the same time the product of a given practice and its regulator.”¹⁸⁷ For Kozak, law-as-language provides a truly ‘hard’ ontology for law thanks to its stability and its roots in the *longue durée* of the legal tradition. Language, in contrast to acts of speech or the individual linguistic competences of speakers, is something which takes much longer to create, is much more

183 *Ibid.*, 127.

184 “[...] the communicative conception of law is a step in the decidedly right direction because it takes away the power over law from a politically privileged subject which – especially under conditions of contemporary democratic politics – is unable to use this gift in our common interest” (*ibid.*, 132).

185 *Ibid.*, 132.

186 *Ibid.*, 147.

187 *Ibid.*

difficult to modify, and offers the necessary stability and predictability within which speakers operate and acts of speech are accomplished. By shifting the emphasis from an act of will – be it that of the legislator, the judge or individual lawyer – towards the law-as-language of juridical communication, Kozak provided it undoubtedly with a very solid ontological foundation and assured that law regained its central function after the displacements effected after the modernist and postmodernist social revolutions. Law-as-language is, at the same time, a law *regained* by the legal community as such, solidified once again to a degree comparable to the Roman understanding of *ius* as a creation of the *ius prudentia* and a product of centuries-long experience. The function of law-as-language is much more essential for the functioning of the legal community and juridical phenomena as such in comparison to other, more common concepts: as a factor structuring legal communication it becomes the element which *enables* the juridical, makes it possible to formulate legal ideas, norms, concepts, and individual decisions, but cannot be identified with any of them. As such, the law becomes much more difficult to pin down for the non-lawyers – those who do not know the language, who have not learned it in a process of socialization *qua* lawyers – politicians, businesspeople, ordinary citizens. Law-as-language has a hard ontology in juriscentrism, but cannot be easily perceived, as it is neither a set of legislative texts, nor of judicial decisions. It lies deeper and beneath, in the background of all those ‘acts of legal speech’.

Such an understanding of law as the culturally constructed *ius* of legal discourse allows Kozak to achieve two further goals: safeguard law's autonomy and legitimacy. Law's autonomy *vis-à-vis* other sub-worlds, especially politics, is founded on its unique methodology, which gives lawyers control over the interpretation of legal texts.¹⁸⁸ This even leads to a situation in which the democratically elected legislator may “enact whatever he wishes,” but still it will be the subject of judicial verification, based not only on the constitution or some higher legal act, but above all on the “acceptable, culturally shaped model.”¹⁸⁹ In Kozak's project, law-as-*ius* builds its authority and legitimacy on its autonomy, including axiological autonomy.¹⁹⁰

At the same time, however, this authority is essential for the law, in the strict sense of the word, whereby law without authority ceases to be law at all. According to Kozak:

188 *Ibid.*, 208–209.

189 *Ibid.*, 149.

190 *Ibid.*, 155.

Law is certainly not a 'better' normative system than the other ones, but it is substantially different, it refers to purely formal values and therefore it can be an instrument for solving conflicts which from the perspective of its participants, could easily be considered as irresolvable. The only thing that law needs to fulfil this socially essential function is authority.¹⁹¹

An autonomous and authoritative law bases its legitimacy not on democracy, but on itself: the judge, according to Kozak, should not ask himself what 'the people' want or try to second guess parliament's intent, but should rather say what the law is.¹⁹²

4.5 *Moderate Conventionalism and The Genesis of Law*

Finally, one should refer to Kozak's concept of the genesis of law, i.e. his views on the point at which law is actually created. Kozak noted that traditional theories conceived of the moment of legislation as the point at which law is created.¹⁹³ However, as he notes, the development of linguistics "provided that the text in itself is unable to determine the conduct of addressees of norms and the organs applying them."¹⁹⁴ As a consequence, the point of law's genesis was moved to the moment of adjudication, which, however, unduly broadened the scope of lawyers' discretionary power.¹⁹⁵ As an alternative to these two approaches Kozak proposed what he referred to as 'moderate conventionalism' which:

[...] looks at this genesis [of law] not as an act but as a process extended between the moment when a statute is enacted and [the moment when a] judicial decision is made on its basis. The genesis of law occurs in the movement between those two points, a movement which is subject to culturally shaped conventions, at least some of which have a necessary character and cannot be freely modified without far reaching changes in the functioning of the whole society. The law creates itself in this space permanently and always anew, but constantly according to the same rules.¹⁹⁶

191 *Ibid.*

192 Kozak, *op.cit.* note 47, 79.

193 Kozak, *op.cit.* note 14, 62.

194 *Ibid.*

195 *Ibid.*

196 *Ibid.*, 62–63.

Kozak's approach to the moment of *iuris genesis* can be described as a truly Hegelian synthesis, overcoming the contradiction between traditional positivism (law as product of the legislator's will) and legal realism (law as product of the judge's will). Kozak emphasized that the error of both approaches lies in their focus on someone's will, rather than on the objective mechanisms of legal culture.¹⁹⁷ He underscored the role both of tradition and on-going legal work, as well as the objective reality constructed in the institutional world of law:

The social space for the activity of legal practice is created between the moment of enactment of a law and the moment of adjudication. It is in this space that certain specific entities, such as normative acts or entitlements and competences, exist. This space is inhabited by peculiar subjects – legal persons, natural persons, state organs etc., which exist in a peculiar, relational way. Movement in this space, thanks to which a law passes from parliament to the court, is the effect of gigantic expenditure of human labor, expressed in the knowledge and experience accumulated by generations of lawyers.¹⁹⁸

Kozak's 'moderately conventionalist' approach to the genesis of law provides the final element of juriscentrism, binding his concept of law-as-culture with the more general picture of the juridical phenomenon as an institutional reality which constitutes the starting point of his juriscenrist theory.

5 Conclusions: Kozak's Legacy and Legal Innovation in Central Europe

Summarizing the legacy of Artur Kozak's theory, Maciej Pichlak notes that its "value [...] rests in the fact that by inciting us to movement, it prevents us from getting stuck in a deadlock."¹⁹⁹ It is a fact that Kozak, probably due to his premature death, did not manage to create a proper academic school. Pichlak, his only *Doktorsohn*, despite having published extensively on Kozak, nonetheless did not choose to continue his *Doktorvater's* work²⁰⁰ and elaborate the project

197 *Ibid.*, 62.

198 *Ibid.*, 63.

199 Pichlak, *op.cit.* note 51, 74.

200 Pichlak himself pointed out that "it is difficult to accept juriscentrism, although it can be a source of inspiration" (*ibid.*, 63), which hardly can be called a declaration of following in Kozak's footsteps.

of juriscentrism.²⁰¹ However, Kozak's influences are clearly visible in Polish legal theory, especially among the researchers connected to the University of Wrocław. Kozak's departure from analytical theory has even been officially celebrated as the birth of a 'post-analytical' paradigm in legal theory.²⁰² The dominant topics of Kozak's scholarship – the social role of lawyers and the limits of lawyer's discretionality – have been taken up, for instance, by Przemysław Kaczmarek and Paweł Jabłoński.²⁰³ I fully agree with Karol Staśkiewicz that juriscentrism “still has a great potential for Polish legal theory and philosophy of law,”²⁰⁴ adding that its potential is not limited to Polish jurisprudence alone.

Although Kozak was definitely an opponent of postmodernism as a philosophical current, and his entire juriscentrist project can be read as anti-postmodernist, nonetheless “both as regards the style and way of arguing – he came very close to this current,”²⁰⁵ as Pichlak rightly notes.²⁰⁶ Adam Sulikowski, in turn, underlined that juriscentrism was “an attempt to enter into a dialogue with postmodernists, which entails the need of accepting some theses that are important for them.”²⁰⁷ One may therefore go as far as to suggest that although Kozak desired to keep the “spectre of postmodernism”²⁰⁸ as far as possible from Polish legal theory, he in fact, *nolens volens*, invited its refreshing spirit.

Kozak's bold spirit of innovativeness in legal theory put him *al pari* with other theoretical innovators of Central and Eastern Europe, such as the well-known Leon Petrażycki (Lev Petrazhitsky) or the less well-known, yet highly innovative Sawa Frydman (Czesław Nowiński). At the same time, just like Petrażycki and Frydman, Kozak was a symptom of his times. This, perhaps,

201 Pichlak's choice of research topic for his *Habilitationsschrift* – law's reflexivity – is, however, definitely much more Kozakian than analytical. See Maciej Pichlak, *Refleksyjność prawa. Od teorii społecznej do strategii regulacji i z powrotem* [Law's Reflexivity: From Social Theory to Regulatory Strategy and Back] (Wydawnictwo Uniwersytetu Łódzkiego, Łódź, 2019).

202 Bator and Pulka (eds.), *op.cit.* note 58, *passim*.

203 See especially Przemysław Kaczmarek, *op.cit.*, note 93; Paweł Jabłoński and Przemysław Kaczmarek, *The Limits of Juristic Power from the Perspective of the Polish Sociological Tradition* (Peter Lang, Berlin, 2019, translated by Stephen Dersley from *Granice władzy prawniczej w perspektywie polskiej tradycji socjologicznej*, Nomos, Kraków, 2017).

204 Staśkiewicz, *op.cit.* note 65, 80.

205 Pichlak, *op.cit.* note 51, 61.

206 See also Bator, *op.cit.* note 50, 16.

207 Sulikowski, *op.cit.*, note 139, 104.

208 The expression was coined by the Czech critical legal theorist, Martin Škop. See Martin Škop, “Stát jako hegemon symbolických nástrojů” [The State as the Hegemon of Symbolic Instruments], in Petr Agha (ed.), *Budoucnost státu?* [Future of the State?] (Academia, Praha, 2017), 91.

makes Kozak's legacy all the more relevant: the fact that his theory was, to a large extent, a reaction to Poland's post-socialist transformation and the growing role of lawyers, jealously looked upon by politicians. Kozak's topicality is therefore twofold – firstly, on a metatheoretical level, his work can serve as a model for combining various, often distant, sources of inspiration, in order to empower legal theory and make it capable of solving current and practically relevant problems. Secondly, one may treat his legacy as a relentless defense of the very idea of the rule of law, understood – without false shame and ideological smokescreens – as the empowerment of lawyers in society.²⁰⁹ Today, ten years after his tragically premature death, Kozak's legacy seems to be more important than ever before.²¹⁰

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209 Cf. Pichlak, *op.cit.*, note 5, 68–69.

210 Cf. Sulikowski, *op.cit.*, note 51.