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Human Person and Fictitious Capacity: Law in Leonardo Polo's Thought

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Leonardo Polo enriches legal philosophy with the concept of 'person', one whose act of being means co-being, co-existence, and which allows the person to grasp his or her act of being through encounter with others—being 'ademas'. This concept might suggest anthropological reflection on individual rights, which are usually conceived as the autonomous sphere of a person as one who can act according to his or her own act of will, and in this way by the exercise of rights can be self-determined. The idea of the person as being-ever-more ('ademas') opens us to the idea of the correlation of our entitlements and of our capacity towards others—which means that we may understand both our entitlements and our capacity only when we encounter others—in dialogue or at the court—by recognizing the constraints upon us of others' entitlements and capacities.

Key words: Leonardo Polo, person, transcendentals, anthropology, Roman law, sources of law, legal interpretation, legal methodology

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1. Introduction

The relation between human person and law turned out to be at the core of Polo's legal reflection. Thus, the function of law as well as the meaning of legal relations for Polo's idea of the openness of the human person—*being-always-more—being-ever-more* (*además*)—will be at the center of our paper. We will try to point to these aspects of Polo's reflection on law, aspects which confirm, nevertheless, the importance of Roman legal thought for his ideas and offer a possible extension of Polo studies towards this field of legal research, which in my case has been inspired by the paper of Daniel H. Castañeda y G.[1]

2. Leonardo Polo and Legal Philosophy

Leonardo Polo is known as the most recent philosopher to have thought in terms of systematic philosophy and who offered a coherent and holistic view on metaphysics, epistemology, ethics and anthropology. It is not surprising that he took on the topic of

1 Daniel, Horacio Castañeda y Granados, "Requirements for the Study of Time and Action in Polo's Notion of Law and Jurisprudence," *Journal of Polian Studies*, no. 1 (2014), 121–162.

law and the legal order as well. Just like other authors of philosophical systems, especially Plato, Aristotle, Aquinas, Hegel and Kant to whom Polo refers constantly, he offered his views on how he understands law in terms of 1) its metaphysical status—mode of existence, essence and relational characteristics; 2) the topic of the just law, whether it exists and what the basis for the justification or legitimacy of the norms of positive law is; and finally 3) legal epistemology, ie. the theory of legal knowledge—"the origin, foundation and nature of the different legal knowledges and the procedures through which the different types of legal knowledge can be accessed".[2]

> **The distinction between public and private is much less clear than the division between individual and state.**

One should not forget that from the very beginning law played an important role in his scientific life. In 1949 he graduated from the Faculty of Law at Universidad Central in Madrid[3] and started practising law, but shortly after he returned to the academic life, receiving a scholarship at the Spanish Juridical Institute in Rome for his doctoral thesis on the existential character of natural law (*¿Qué es el Derecho Natural?*). An important role in this project was played by the professor of Roman law Alvaro D'Ors, who was then also the head of the Higher Council for Scientific Research. However, while studying the issue of the existential character of law Polo discovered the more fundamental question of being and the act of being, and it was in 1950 when he first encountered the issue of mental limit, which led him afterwards to steer his PhD research towards philosophy and the topic of the *real distinction* between being and the act of being. From this moment on his core idea and method became the *abandonment of the mental limit*, which influenced all his philosophical thought.

Although the topic of law was no longer at the center of his work, he did not entirely abandon it. Interestingly enough, it was not Roman law that influenced his remarks regarding legal issues but rather the ideas of Plato and Aristotle, and foremost those of Hegel. Polo's references to Hegel's *Grundlinien der Philosophie des Rechts* are numerous, especially concerning the meaning of I (*el yo*), person (*persona*) and man (*hombre*).[4] In fact the topic of law is particularly interesting for Polo, both in relation to his metaphysical statements on the access to being and with regards to his later developed transcendental anthropology. It is quite significant that the major portion of his analysis of legal matters deals with man-made law[5]: *derecho objetivo* and *derecho subjetivo*.[6] In fact in his early years his work was not inspired by any theory of natural law of his own, even though he taught the course on natural law during his first years at Navarra University, and later during his lectures referred to natural law and human rights, mainly interpreting them from the point of view of Platonic, Aristotelian and Thomistic philosophy.[7]

2 Salvador Rus, "La filosofia juridica de Leonardo Polo," *Anuario Filosófico*, no. 25 (1992), 225–226.

3 Juan, Antonio García-González, "Introducción," in *El acceso al ser. Obras Completas de Leonardo Polo*, Leonardo Polo (Pamplona, 2016), 9–10.

4 Leonardo Polo, *El yo. Presentación, estudio introductorio y notas de Juan Fernando Sellés* (Pamplona, 2004), 53, 58, 60.

5 Juan, Carlos Riofrio Martinez-Villalba, "Derecho, realidad y ficción. Posibilidades y límites," *Revista Telemática de Filosofía del Derecho*, no. 17 (2014), 118.

6 Leonardo Polo, *Politica, derecho, socieded, cultura y arte*, eds. G. Castillo, M.I. Zorroza, II.3 (unpublished).

7 Polo, *Politica, derecho*, II.3.

He accepted the importance of the legacy of Roman legal thought, but it seems that he was much more inspired by Greek philosophy related to the role of law in shaping the state and politics, and the idea of the origin of law. But this does not mean that he was focused only on public law. In fact, he questioned the very idea of a clear distinction between public and private property, suggesting that a more proper understanding of this distinction may be crucial for challenges faced by modern societies.[8] He considered the distinction between public and private much less clear than the division between individual and state.[9] For example he would refer quite readily to private law matters, whether concerning the relation between the human person and the law, as in the case of possession and property, or with regards to the correlation between law, economics and politics when analysing especially commercial law and the role of companies.

A peculiar sign from the time of his PhD research of Polo's interest in the legal philosophy and legal history of the 19th century is his review, published in 1951, of the Spanish edition of the book authored by Roscoe Pound, *Las grandes tendencias del pensamiento jurídico* (Barcelona 1950).[10] Reading his short review paper, one can easily detect how much he was at that time already interested in the philosophical aspect of the legal order.[11] It is not by chance that Polo in a two-pages long review quotes *in extenso* only two fragments of the reviewed book. He did so when pointing out the failure of Anglo-Saxon legal scholarship, that it perceived the law as a tool of social engineering, an approach which reduces the central idea of the continental legal tradition—the affirmation of the individual whose action is imputable as being included in the limits of his act of will—to the idea of a legal order which consists, basically, in reconciling, harmonizing or finding a compromise between interests that collide or overlap.[12] This interplay between act of will, interests and rights influenced Polo's later reflection on the topic of law and its function.

3. *Person and Law*

What Polo's anthropology offers us is the concept of a human person as *being-always-more—being-ever-more*. Bearing in mind different levels of reflection over the human person used by other philosophers—I-person-man—we can refer to the person as an act of being. For Polo, this triune distinction is neither hierarchical nor synonymous. According to Polo, we should instead refer more directly to levels of person-human essence-body. In Polo's perspective, the concept of person and I (*yo*) evolved. He decided to express I and person in the '90s differently when reshaping his analysis prepared in Rome in 1972. He referred to I as to the sphere of human essence—ápice *de la esencia* (apex of the essence)—man's most profound psychological dimension.[13] In contrast, he considered person the deepest, transcendent dimension of the human being. Polo argues that the act of being a person does not vanish in the act of being of the Cosmos. Hegel proposed that the I is no longer a person: it is the act of being of the Cosmos which reappears in all the things of the world: the well-known world spirit. Absolutely contrary to Hegel, Polo recognizes that the cosmic act of being does not preclude other acts of beings—the acts of being of a person. However, regarding the cosmic act of being, it is composed of a variety of substances, but there is one act of being (metaphysical act) and one essence.

Polo does always differentiate between person and man, so the difference in compass needs to be considered. Polo says that the person cannot be approached in general terms, while the man can. Person is always an act of being that is unrepeatable, while a man (*hombre*) refers to human nature—body and soul: intellect and will. And this brings us to the center of Polo's anthropology—the human person's act of being. "Man is not

8 Leonardo Polo, *Las organizaciones primarias y las empresas* (Pamplona, 2007), 170.

9 "Una sociedad poco juridificada inhibe la actividad humana. Entrevista a Leonardo Polo," with O.V. Zegarra, *Ius et Veritas*, no. 1–2 (1991), 24.

10 Leonardo Polo, "POUND, ROSCOE: Las grandes tendencias del pensamiento jurídico (Book Review)," 18 *Arbor* 63 (1951), 465–466.

11 Juan, Antonio García González, Rafael Reyna Fortes, "Presentación," in *Escritos menores (1951–1990). Obras Completas de Leonardo Polo*, Leonardo Polo (Pamplona, 2017), 12.

12 Polo, *POUND, ROSCOE*, 466.

13 Leonardo Polo, "La persona humana como ser cognoscente," *Studia Poliana*, no. 8 (2006), 53.

restricted to being, but rather to co-being. Co-being designates person, that is, being as intimate and outward openness: therefore co-being refers to being-with".[14]

Aristotle's greatest contribution to metaphysics lies in the plurality of the ways to speak of the *ens*—being. Thomas Aquinas masters the concept of *esse*—the act of being—as different from essence (*essentia*). Leonardo Polo—following Aristotle and Thomas Aquinas—offers an idea that there are distinct acts of being (*esse*): persistence (cosmos), co-existence (human person), and Original Identity (God). Human act of being (*esse*) is different from the act of being (*esse*) of the physical universe, ie. cosmos (extramental reality), and also human essence (*essentia*) is different from the essence (*essentia*) of the physical universe (extramental reality). In such case the study of human essence and human act of being would be categorically different from the study of essence and act of being of extramental reality. According to him they are creatures in a different manner: the human creature is personal but the cosmic creature is not. Leonardo Polo challenges the idea that the study of man is a secondary philosophy, the study of a particular given being as a part of reality—*ens* (the concept of being in general). According to Polo the concept of being in general which is the object of classical metaphysics takes its character from extramental reality—"extramental being is first discovered as the grounding, or foundation, of the physical universe". Thus, conclusions of metaphysics (study of the cosmos) cannot be extrapolated in a strict sense to anthropology (study of man), nor can the results of anthropology be strictly applied to metaphysics. Therefore, anthropology must undertake its study in a different way than metaphysics: it must have a different method, and different transcendentals.[15] Consequently, therefore one can argue that Polo's claim on different methodological stance of anthropology confirms that the study of laws of the physical universe, would be categorically different from the study of human laws. And indeed, such conclusion is obvious and understandable.

Polo argues that referring to the human person through the concept of one (*unum*) which merges everything in *ens* (taken from extramental reality), as an object of metaphysics, is the mental limit that is contrary to our initial and basic experience with regards to the act of being—that everyone is distinct—that there is a plurality of beings and acts of beings. Therefore he offers a parallel set of transcendentals of the human person: personal co-existence, personal freedom, personal intellection, and personal love. Co-existence, freedom, intellection, and love are transcendentals that are convertible with the human act of being, because this act is personal, but not with the act of being of the cosmos, which is not personal.[16] Personal co-existence challenges the concept of one, pointing out that human person never can be one, i.e. alone, otherwise it would be a tragedy. In fact human person means—each one—that everyone is a *novum*. Personal freedom removes the idea of human person as a *res* which is driven by necessities, or at best a sponta-

Leonardo Polo—following Aristotle and Thomas Aquinas—offers an idea that there are distinct acts of being (*esse*): persistence (cosmos), co-existence (human person), and Original Identity (God).

14 Leonardo Polo, "Antropología trascendental," vol. 1, *La persona humana* (Pamplona, 1999), 32.

15 Salvador, Piá Tarazona, "The Transcendental Distinction Between Anthropology and Metaphysics", 2 *American Catholic Philosophical Quarterly* 77 (2003), 270.

16 Tarazona, *The Transcendental Distinction*, 269.

neous material movement. Contrary to it Polo argues that human act of being is centered around free acts. That is why, being free differs from the persistence of extramental reality. In Polo's concept then human co-existence is more similar to God's mode of existence—Original Identity. And thus, human is more dependent on God, than extramental reality is. That is why, if God is not personal and free human person will be an absurd—it will still be something—*aliquid*, but it will not be someone—*aliquis*. There will be no transcendental truth (*verum*) if there will be no transcendental intellect corresponding to reality, and thus intellection is the personal side of truth. Finally, not every act of being knows, but also not every act of being loves, so in order to claim that goodness (*bonum*) is transcendental we need a transcendental personal act of being that loves, ie. that is directed towards the good.[17] This is how Polo shapes his concept of human act of being as convertible to personal co-existence, freedom, intellection, and love.

into freedom and personal love, which are necessary in order to grasp our own act of being somehow as if additionally while in the exercise of our freedom and love. "To give is transcendentally free insofar as it refers to acceptance, and to accept is transcendentally free insofar as it refers to giving".[18]

How in the context of Polo's anthropology may we place his reflection on law? In a very similar way, Polo considers the law to allow transcendence—namely, the transcendence of the human person's natural capacity. In explaining the essence of this process, Polo uses the example of the owner. The entitlement that the owner possesses allows him "to protect him/her against aggressions and then, to make it possible for a man to carry out actions" that are not possible by his/her own nature. This image of the owner is unchanged across the works of Polo. It returns when describing the civil law model which does not match the image of the entrepreneur. The owner is understood by Polo as one who shall *guardar el territorio*, *custodiar la propiedad y recibir los frutos*—guard his territory, protect his property and receive fruits. In terms of *titularidad* and *capacidad,* the owner is able to protect his property and his territory, not by physical force but merely by expression of his entitlement—by putting up a sign "No trespassing". By doing this, he utilizes a force which does not belong to him personally. In fact, his entitlement will be observed only if this use is effective: that the trespasser will decide to go away or will be sent away by the court. In that sense we can say that the (act of being of) law (entitlement–capacity) has the character of something furthermore/additional *being-always-more—being-ever-more* (*además*): it empowers the human person with fictitious capacity and is established in relation to others. That is why we may better understand Roman jurists saying: *senten-*

Law transcends the typical powers of human person, providing with a fictitious capacity.

In Polo's reflection on anthropology he claims that the human act of being is necessarily oriented towards others—we can discover our own being only thanks to others, and through that arrive closer to the Original Identity. If, by contrast to this route, we attempt to discover our own act of being by thinking about it, we will try to make it an object of thought, and this very attempt misplaces the true character of the act of being. This, according to Polo, is the mental limit we have to abandon. Therefore, we can grasp our own act of being only as we enter into relation with the other person. "Man cannot give his own act of being, as this is not at his disposal", but "he does have the potential to give his works". Here we encounter the ideas of giving and gratuity, as a way to face our own act of being. In Polo's anthropology, this is convertible

17 Tarazona, *The Transcendental Distinction*, 279–283.

18 Polo, *Antropología*, 220.

tia ius facit inter partes. In fact, decisions of the court become the expression of our entitlements and capacities—*ius*. We may conclude that Polo's idea that the law encounters the human person at the moment of giving him or her entitlement (*titular*) can be understood to mean that at that moment the person becomes enabled to accept entitlement, to give it to others and to exercise new capacities towards others. The act of being of a particular *titular* can be grasped only when it is capacitated, i.e. enforced.

in the legal scholarship on the degree of free will of human person, the understanding of cognitive actions, ie. knowledge and finally of personal love, ie. moral acts of human person.

4. Titularidad *and* Capacidad

There are several issues raised by Polo in his celebrated interview which deserve to be analysed more deeply.[20] First of all, Polo referred to the concept of the historical development of law—"no hay duda que el

Law is a special normativity based on two notions: that of *titularidad*—entitlement, and that of *capacidad*—capacity.

It is very true that any legal order takes into account the fact of coexistence of human person with others, the freedom of human person, its acts of knowledge and love, across different institutions both of private and criminal law. Nevertheless, Polo admits that law transcends the typical powers of human person, providing with a fictitious capacity. It is hard to deny, then, that Polo accepts that human person is driven by certain extramental necessities, like natural limits of our body and physical power. The natural—physical power of man is replaced or reinforced by artificial—intellectual power of legal system. It is confirmed by Polo's idea that *homo sapiens* escaped from the process of mere adaption to environment, typical for other animals, and it started to adapt environment to the need of man—thus he differentiated between hominization (as a somatic process of becoming *homo sapiens*) and humanization which leads to psychological and cultural aspect of man.[19] The intersection of body and soul fuels the longstanding discussions

Derecho experimenta variaciones históricas pero quizá su función sea la misma a lo largo de la Historia" (There is no doubt that the law undergoes historical variations, but perhaps its function has been the same throughout history). In explaining this phenomenon Polo accepts the variety and multitude of legal orders, but asserts that all legal orders nevertheless have something in common, namely the function of law. He refers to two key concepts which express this function: *titularidad* (entitlement) and *capacidad* (capacity/faculty)—"El Derecho es una especial normatividad que descansa sobre dos nociones: La titularidad, y la de capacitación o potestad" (Law is a special normativity based on two notions: that of *titularidad*—entitlement—, and that of *capacidad*—capacity/faculty—or power). Polo's analysis should be read in the context of his philosophy, a fact that was wisely observed by D.H. Castañeda y G., and notions which Polo uses should not be given the meanings commonly used within legal doctrine.

In fact, the notions both of *titularidad* and of *capacidad* will seem very familiar to anyone interested in legal doctrine. However, we do know that even in

19 Leonardo Polo, "On the Origin of Man: Hominization and Humanization", transl. R. Esclanda, A.I. Vargas, *Journal of Polian Studies*, no. 3 (2016), 9–23.

20 *Una sociedad poco juridificada*, 22–24.

Roman law we cannot relate them directly to *titulus* and *capacitas*. In Roman law both terms have their own very precise meanings: the former is the cause of acquiring ownership title, and the latter is the capacity to acquire estate through testamentary succession. In the very same way we should be careful to assign technical legal meanings to Polo's two fundaments of legal order.

One should bear in mind that the understanding of legal order is, in Polo's philosophy, closely related to the concept of the human person, and especially to his transcendental anthropology. That is why his considerations of law are somewhat brief and rather additional to the main theme of analyzing the distinction between act of being and essence across all fields of human experience. In modern legal science *titularidad—entitlement* may be associated with the concept of rights and interests, and with the theory of subjective rights; and *capacidad—potestad* with legal capacity. Again it would be an anachronism to apply such meanings to Polo's notions, although one would have no problem in describing the history of law as a process of assigning rights and distributing legal capacity influenced by social and economical changes. Even though it is difficult to develop a deeper understanding of Polo's legal reflection due the lack of more extensive elaboration of his own, we will stick to the published works as well as some unpublished manuscripts of his lectures which will help us understand better how he approached legal issues.

Polo considers the distribution of entitlements (*titularidades*) among people and the provision of capacity (*capacidad*) as the main functions of any legal order. Regardless of the historical development of law, and regardless of differences between modern legal orders, there is one thing which all legal orders have in common: the function of law which always boils down, according to Polo, to these two spheres: *titularidad* and *capacidad*. Legal orders may differ in the degree to which they fulfil this function and that is why the development of law occurs across time and space. According to Polo: "No hay derecho sin titular y no hay derecho si éste no faculta. En la medida que el Derecho se refiere al titular tiene un entronque en la persona humana" (There is no right without a holder and there is no right if it does not provide with capacity. To the extent that the right refers to the holder, it has a connection with the human person). Law depends on entitlement and capacity, and the relation between law and human person is established in the moment of distributing entitlement. By distributing entitlements and providing people with capacity (not in terms of what legal scholarship calls legal capacity), law enables the human person to transcend its biological limits. That is why law belongs to the sphere of culture. It provides the human person with new capacities which are not available to animals. As Polo puts it, law empowers the human person in that it gives power greater than any individual can have.

The example and ideal to which Polo constantly refers is the title of ownership and its protection. There is no need for the owner to protect his property by force or by erecting physical limits like fences. It is enough that he puts a sign "No trespassing" to effectively protect his own land. By this sign the owner becomes protected by much greater power than he can wield on his own, namely by the power of law which is enforced by the authority of the state. Polo considers the ownership title a pattern, the most fundamental element of *titularidad*. For him, law means a great elevation of the human person above the condition of an animal, which is able to mark its territory but not govern it as an owner. Legal order, by eliminating governance by violence (the law of the club), enables human beings to create a civilization. On the one hand, law gives titles (entitlements) which help to organize and coordinate the relations between people. On the other hand, title holders receive a capacity—an empowerment—to protect their titles by the power of the state. It is legal sanction that makes an entitled person more powerful than a trespasser. From this point of view, a society which is governed by law and in which persons are aware of their rights enables man to flourish and develop.

The interplay between title and empowerment (*capacitación—potestad*) which drives the legal order is for Polo unnatural. It gives to man something which he does not possess in the realm of nature, something which is not material, and that is why it enriches the human being. According to Polo, law exceeds the natural capacity of the person and in fact "it pretends (in the most noble sense of the word) the legal capacity",

meaning that legal capacity is a fictious (unnatural) faculty—a concept which *extends* the natural capacity of the person. As Polo puts it, this task can be completed in different ways, and that is why across history there have been various legal orders which differed in the degree to which they assigned titles and capacity. Some of them are now judged as unjust. Nevertheless, even ancient slavery or medieval feudal dependency was based on this same idea of an interplay between title and capacity.

Jurisdiction, and especially territorial jurisdiction, is another aspect which influences the legal order, for it is jurisdiction that petrifies the distribution of title and capacity. Polo shows that extending jurisdiction over the territory led to the abandonment of feudal dependency. Moreover, it opened up the market which consequently extended the capacity of people and the range of their entitlements. Here we can observe how rich Polo's reflection is, combining legal, philosophical and economical developments. According to Polo, through law we are plugged into the bigger system, we become better than before, and we are embedded in the culture. Polo accepts that there are different legal orders in the world, and that law changes over time; however, every legal order can be judged and analysed through a prism which is universal and constant—the function of law—title and capacity which perfects the human person by giving it new possibilities (*capacitación*).

Looking at this short description of Polo's reflection on law, it is readily observed that here he focusses on matters of private law. One might remark that he is referring to the discussion on the theory of subjective right which evolved in the legal philosophy of modern times. In fact in the 19th century the model example or ideal pattern of subjective right was considered to be the ownership title. Very similarly, ownership title (*propriedad*) plays a key role in describing the meaning of *titularidad* and the normative system which is constituted of legal entitlements (*titularidades*). Does it mean that Polo rejected the idea of the human rights which are vested in every man from the very fact of being a person, and instead referred only to man-made law? Does it mean that Polo did not take into account the 19th century criticism of the theory of subjective right based on the pattern of ownership title that led to invoking the so-called social function of law, and replacing subjective rights with interests? Absolutely not. Polo was fully aware of the idea of the theory of coordinated interests rather than absolute rights that we have seen in the above-cited fragment of his review article of Roscoe Pound book. What is more, he was aware that in modern times the central role of ownership title has been diminished by the concept of the so-called social function of property, which involves the ownership title losing its hegemony.[21]

Polo explains the division into objective right (*derecho objectivo*) and subjective right (*derecho subjectivo*) as the difference between the system of norms and the system of legal entitlements. One cannot understand the norm unless one conceives it as a system of *titularidades*. Such legal entitlement enables the individual to perform actions that exceed the natural capacity of the subject. That is why the validity of the norm is oriented towards the effectiveness of realizing possibilities (*capacitades*) provided by *titularidad.* That is why putting up a sign saying "No trespassing" effectively protects the object of ownership. A mere item of information enables the potential trespasser to decode the abstract sanction. Therefore, efficacy can be achieved simply from the level of concepts influencing the actions of the person.

Even legal proceedings themselves can be seen as a continuation of an interplay of concepts of this sort, as indeed was argued by D.H. Castañeda y G. Sometimes such normative sanction may be effectuated by the authority of the state, but only as a last resort. Here we touch on the idea of the effectiveness of legal norms. It is absolutely intriguing that in Roman law there were established numerous *leges imperfectae*—statutes without normative sanctions—which may be compared to the modern phenomenon of 'soft law'. Nevertheless, these statutes were adhered to by citizens. From Polo's point of view, we can argue that Roman society was a right-based society, driven by law, in which the citizens were well aware of their rights. There were many other means of social constraint which encouraged following rules like *leges imperfectae*, such as that of social esteem (dignity) and the system of moral behavior (often controlled by censors), showing that, even without legal sanction

21 Polo, *Politica, derecho*, II.4.

and the possibility of having recourse to more extensive powers, society can develop institutions that are closely bound to man and can influence his behavior towards fulfilling legal norms.

Polo did acknowledge that human rights—rights of the individual—are inalienable and their violation should be sanctioned, although he was also aware that certain individual freedoms were invoked as natural rights principally because they were politically attractive for liberals and social democrats.[22] Moreover, his concept of the human person and his transcendental anthropology has already been used to justify and clarify the concept of human rights.[23] His analysis of *titularidades* and *capacitad*, and his concept of law as a useful fiction of man's higher powers did not reduce legal order to positive law, created by men only, whether legislators, courts or legal scholarship. Thus, he did not eliminate the concept of rights (entitlements) vested in man from the very fact of being human.

Commercial regulation borrows the model of the civil law owner and this does not fit the reality of the entrepreneur.

5. Polycentric Sources of Law: Customary Law, Statutory Law and the Role of Legislator

For Polo, both customary law (*Derecho consuetudinario*) and statutory law (*Derecho codificado*) belong to the same mode of existence of legal norm—both are the examples of *Derecho positivo*. From the point of view of the origins of norms, there is no difference between them—both have the same author for both kinds of law are man-made. Usually statutory law comes later and serves to codify what practice has already developed. Obviously, for Polo customary law does not belong to the written law but still plays the same role as written law. He highlights the fact that the status of law is that it is in force and recognized. What Polo urges us to reflect upon is that sometimes the state may not be able to provide such legal order—due to its own weakness or that of the judicial branch, or to the lack of regulation. In such cases, there are other social institutions which can produce law which is both effective and recognized. That is why there are differences between customary law and statutory law in terms of the origin of law: the former comes from custom and is unwritten, the latter is written and is binding due to the authority of the body by which it is formally promulgated.

According to Polo, the state is not the sole author of law. That is why he rejected the Kelsenian hierarchy of legal sources. What is quite interesting is that Polo refers to the role of entreprenuer and commercial law as an argument in favor of his idea of polycentric sources of law. He argues that merchants out of the need to distribute risk and security created practical solutions which later were codified as commercial law. Moreover, he shows that modern regulation of commercial law is one of the examples of the weakness of the state and of statutory law. According to Polo, at the center of commercial law stands the entrepreneur and not the model man, the *bonus pater familias* which is characteristic for civil law and stems from the tradition of Roman law. Polo states that modern commercial law is the prolongation of civil law mixed with labor law and regulatory rules created by the state. In his opinion this mode of regulation does not occupy the field of the social phenomenon of commerce and entrepreneurship and that is why there is all the time the place for commercial practice to flourish and to

22 Leonardo Polo, *Politica, derecho…* III.C.4.1.

23 Blanca Castilla de Cortazar, "Antropología trascendental y fundamentación de la dignidad humana," *Miscelánea Poliana* 49, 2015, 2–17.

create its own rules. According to Polo, the model of the owner who "must guard the territory, protect the property and receive the fruits" is mistaken as regards commercial law and should be replaced by the figure of the entrepreneur.

Interestingly, he is not in this respect considering natural law but rather gaps in the legal system which are filled in by the actual practice of people themselves. He offers an example of a commercial law which, according to him, is not entirely filled in by the legislator, a fact which placed it somewhere between civil law and labor law: commercial regulation, Polo asserts, borrows the model of the civil law owner and this does not fit the reality of the entrepreneur. In his lectures, still unpublished, Polo suggests that the model of ownership title lost its hegemony due to the idea of the "social function of property" which is visible in the changing social structure and especially in "the figure of the entrepreneur (*empresario*)". That is why, Polo claims, it is natural that there are many sources of legal norms and they are not limited to state authority only.

Cum autem fere in omnibus regionibus utatur legibus et iure scripto, sola Anglia usa est in suis finibus iure non scripto et consuetudine. In ea quidem ex non scripto ius venit quod usus comprobavit. Sed non erit absurdum leges Anglicanas licet non scriptas leges appellare, cum legis vigorem habeat quidquid de consilio et consensu magnatum et rei publicæ communi sponsione, auctoritate regis sive principis præcedente, iuste fuerit definitum et approbatum. Sunt etiam in Anglia consuetudines plures et diversæ secundum diversitatem locorum. Habent enim Anglici plura ex consuetudine quæ non habent ex lege, sicut in diversis comitatibus, civitatibus, burgis et villis, ubi semper inquirendum erit quæ sit illius loci consuetudo et qualiter utantur consuetudine qui consuetudines allegant.

If law is excessively formalized, then legal minds are not formed. Where there is no more interpretation, the application of the law is annulled.

Polo's recognition that the legislator is not the only source of legal norms is quite in line with the long European legal tradition. We can at this point usefully refer to one of the fathers of English common law, Henry de Bracton, who begins his monumental work *De Legibus et Consuetudinibus Angliae* ("On the Laws and Customs of England") with a comparison of England and other countries (this part is assumed to be contrasted specifically to the countries of continental Europe).

Bracton: *De legibus et consuetudinibus Angliae libri quinque.*
Quæ sunt regi necessaria, 9–19:

This points to the difference in the *method* of lawmaking: on the one hand, the law can come from statutes (statutory law) and from *jus scriptum;* on the other hand, the law can be unwritten and can come from custom (what usage has approved). Thus, two ways of lawmaking are indicated: promulgating law and recognition of usage. Interestingly, the term *lex* is applied not only to laws that are written down, but also to norms that are valid because they have been agreed upon by the relevant state authorities. Thus, it is possible to speak of unwritten statutory law, which is something different from mere custom. For Bracton custom means a custom which is essentially *local*, which is different for particular counties, towns, villages etc.; it is specific in every place and always needs to be learnt and its use ascertained. There is therefore a difference between what results from custom and what results from law. We take this as an indication that legal norms do not have to come from written legal

acts but can also come from social practice. Moreover, the law is not only limited to statutes but also includes *jus scriptum*, which should be understood as written legal knowledge, legal doctrine and scholarship (which at that time flourished in continental Europe following the rediscovery of Justinian's Digest).

6. Legal Interpretation—Law as an Art, not a Science

Polo places himself among those who consider law an art, not a science. The element of practice is for him a fundamental factor of law. He does not consider law to be among the subjects which are essentially constituted by generalized conceptions and claims that formalization of law leads to abrogation of its interpretation and thus of the application which is its core mode of operation. Polo acknowledges that law has "a certain scientific character, but it is not fundamentally a science". He claims that the scientific aspect of law was highlighted in 19th century legal scholarship, especially in German legal doctrine. In this context we can note in particular the Pandectistic legal doctrine, which highly conceptualized legal thought. According to Polo such formalization "may help but it is not the center" of law. He states that if law is "excessively formalized, then legal minds are not formed." Why did he take such an approach to law?

Legal scholarship had to meet the challenge of defining itself and locating itself against the other sciences. This challenge was taken up primarily in the 19th century at the time there arose the dispute between naturalism and anti-naturalism—naturalism at both ontological and methodological levels. However, when we return to Roman legal thought, it is possible to encounter the very same attitude to law as an art (*ius est ars boni et aequi*). In Roman times, however, art was considered one of the forms of science, a science that is constantly applied—*ars*, not *scientia* or *techne*.

Arthur Kaufmann (a representative of legal hermeneutics) stated bluntly: "the world of law comes directly from language", and it exists „only because man exists".[24] How would the Roman jurist Ulpian have reacted to this? Legal hermeneutics is a further step towards an analytical interpretation of the law, since it already uses methods of science that deal with text and language in general, i.e. with the sciences dealing with literature and language itself but also with Bible texts. The question arises as to whether the law can be reduced to language—this is the danger that exists in closing the law off to nothing but a legal text. This is something that in Polo's legal thought would amount to limiting the authors of law to none but the legislator. According to Ulpian, in order to know what the law is, in order to actually deal with the law, one has to know where the word 'law' comes from. Such a sensitivity to language, to what certain concepts mean, is indeed characteristic of Ulpian—*unde nomen iuris descendat* (D. 1,1,1pr. Ulpianus, *Institutes*, book 1). Nevertheless, it would be difficult to say that Ulpian simply reduced the law to language only. The word law—*ius*, according to Celsus and Ulpian, comes from justice—*iustitia*, which is an analysis that goes somewhat beyond just juggling with legal concepts, i.e. merely focusing on the text or legal language, because it refers to *justice*, which in the Digest is considered to be a "permanent will to give what is due to another". A permanent will, a permanent capacity, and therefore a certain virtue, which is visible in this axiological context and which appears naturally in Roman jurisprudence.

When we look at the experience of ancient Roman lawyers, at the experience of *ius commune*—to what happened in law before the scientific or methodological revolution of the 19th century—and when we also look at the experience of American law, which developed a somewhat beyond the overwhelming statutory law and beyond the codification process that was developed in the 18th and 19th century on the European continent, then we observe that the common element of all those who study law—the common activity of any legal order—is interpretation. Thus, the starting point of any theory of law will have to take account of the question of interpretation, and above of all the literal interpretation of norms, written or unwritten, and of certain concepts which are not necessarily legislated but which have been built up by legal doctrine.

Polo also has his own views on this topic of legal interpretation. For him, the interpretation of law cannot be limited to literal interpretation. Such limita-

24 Arthur Kaufmann, "The Ontological Structure of Law," *Natural Law Forum*, 95 (1963), 90.

tion would negatively influence the application of law. Polo highlights the difference between taking into account the intention of the law and that of the legislator. Although both are important, Polo states that it is the intention of the law that should take precedence. That is why he accepts a wide use of analogy and stresses the important role of courts in avoiding legal gaps. The process of understanding—decoding—which happens between the norm and the situation to which it has to be applied convinces Polo to reject the limitation of legal analysis to literal interpretation only. This would leave no room for dialogue, for understanding the norm, and, as Polo explains, where "there is no more interpretation, the application of the law is annulled".

Conclusion

What makes Polo's reflection attractive for legal scholarship is his freedom in thinking about law outside the mental limits of legal doctrine. What I have found particularly interesting is the interplay between the concept of person and the ideas of *titularidad* and *capacidad*. From the standpoint of legal philosophy, most fruitful are Polo's reflections about legal ontology and epistemology: what is the function of law, how does it work, and how we get to know it. In addition, the topic of the mode of existence of law and the idea of just law and natural law deserve more thorough examination. Reading Polo's ideas with a background in Roman law, one can discover many similarities between the two, even though Polo usually maintained that his direct inspiration came from Greek philosophy and the Greeks' understanding of law. Roman legal concepts—of private property, of the owner (*bonus pater familias*)—were, however, invoked in order to describe the current mode of operation of civil law. What is noticeable is that Polo exemplifies the idea of *titularidad* and *capacidad* with exactly the same example of owner and ownership title as the pattern for the meaning of entitlement. Quite surprisingly, Polo acknowledges that the concept of ownership title and property is in crisis nowadays, and in fact is challenged by the rise of commercial law and the role of entrepreneur, which for Polo is part of the idea of the social function of law which Polo may have inherited from the ideas of R. Pound. Needless to say, Polo's reflections on law confirm many intuitions based on Roman law, specifically: 1) treating law as an art which is in constant application and is based on interpretation, which in Roman law was not limited to literal interpretation; 2) thinking outside the box in terms of the author of law: it is not limited to the legislator, and Roman law fuels us with the experience of a plurality of legal sources ranging from customs (*mos maiorum*), through flexible exercise and adjudication of rights which may even challenge *ius civile* by *ius honorarium*, to Roman jurists (*iurisprudentia*) who by interpretation filled the gaps or even interpret with the intention of law (*ratio legis*) and not of the legislator. Finally, Polo enriches legal philosophy with the concept of the person whose act of being means co–being, co–existence, and implies the need to recognize myself through my encounter with others. This concept may well give rise to anthropological reflection on individual rights, which are usually conceived as the autonomous sphere of the person who can act within his/her own act of will, and in this way can be self-determined by the exercise of his rights. The idea of the person as *being-always-more—being-ever-more* opens us to the idea of the correlation of our entitlements and capacity with those of others—which implies that we may understand our entitlements and capacity only when we encounter others, be it in dialogue or at the court—recognizing the constraints that are upon us.

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