# LEOPOLD POSPISIL
## A CRITICAL REAPPRAISAL

Mark Ryan Goodale

The one duty we owe history is to rewrite it (Oscar Wilde).

## Introduction[1]

It seems that there is a process in academia whereby three possible fates await a scholar's work over time. First, and rarely, a scholar's work can maintain its vitality and importance in all its fullness and complexity, even as the years pass and successive paradigms rise and fall. Second, a scholar's work will often remain current, but only in a significantly reduced form, usually limited to one useful theory or methodology, which is known typically through buzzwords or phrases like 'pure law', 'corporations', or 'semi-autonomous social fields'. And third, a scholar's work can be quietly or with great fanfare relegated to the historical dustbin in its entirety.

With regard to the second possible fate, it is not entirely clear that such a restrictive application of a scholar's work flows naturally from the uselessness of other components of the overall body of work. Such is the case with Leopold Pospisil, legal anthropologist and professor emeritus in anthropology at Yale University. In the context of socio-legal studies, Pospisil is typically referenced in that section devoted to either a survey of the 'older' positions or approaches (e.g. Comaroff and Roberts 1981: 7), or, commoner still, in the portion of the work where the author graciously acknowledges her intellectual ancestors, usually in a footnote (e.g. Starr and Collier 1989: 4, n. 3; Lazarus-Black and Hirsch 1994: 22, n. 4).

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In Pospisil's case, the concept he is nearly exclusively identified with is his notion of 'legal levels' (Snyder 1996: 138; Griffiths 1986: 16-18; Rouland 1994: 53-54). I intend to explore in this essay the extent to which this reduction of Pospisil's work is justified. In doing so, it will be necessary to analyze Pospisil's work in light of current trends in socio-legal studies. What I will show is that there are several components to Pospisil's work that merit resuscitation; indeed, it will become apparent that Pospisil's work was remarkably forward-thinking, and has a utility well beyond that of 'legal levels' in helping to inform our understanding of plural legalities.

At this point the reader will naturally pose the questions: Why Pospisil?, and Why now? The answer to the first question has two answers. First, Pospisil is in many ways illustrative of the second possible fate in academia - the arbitrary reduction of a scholar's work to one theory or methodology. What I want to show by elucidating the actual richness and greater usefulness of Pospisil's work is that this process of reduction often does a great disservice to a scholar's work over time by intentionally obscuring other, equally useful, aspects of it. Of course I realize that in many cases a scholar's work merits such a reduction, either because paradigms change, or because the other, excluded components were never very helpful in the first instance. This observation provides a second answer to the first question - Why Pospisil?: excluded aspects of his work remain quite current and inform our analysis of several socio-legal problems.

With regard the second question - Why now? - the answer is that there have been recent important theoretical movements in socio-legal studies;[2] as such, it is interesting to situate Pospisil's work in relation to the more provocative and potentially transformative of these works (e.g. French 1995; Lazarus-Black and Hirsch 1994; Mertz 1994; de Sousa Santos 1995). As this paper will show, many of Pospisil's more important contributions to socio-legal studies have gone unnoticed or undervalued, for reasons to be discussed. But this is not a tribute piece. There are aspects to his work that miss the mark. There are aspects to the

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[2]  I acknowledge that the term 'socio-legal studies' will seem uncomfortably vague to some. I use this term specifically to indicate that I do not want to limit unduly my analysis of Pospisil's work, and its relevance, to the specific literatures that have arisen under discrete titles such as 'legal anthropology', 'legal pluralism', 'sociology of law', 'critical legal studies', and suchlike. Of course I recognize that these separate categories are not entirely the product of disciplinary boundary-drawing, but do in fact signal real differences in objectives and conceptual priorities. My objective is to discuss Pospisil's work as it relates to studies that are united in that 'law' is analyzed as a socially-constituted set of normative patterns or processes.

way in which he presents his work that are troubling. My goal is not to make the case for a 'Pospisil renaissance', but a much more modest one: to draw out some of the true complexity in the work of a major figure in socio-legal studies in the second half the this century.

## A Selective Entrée to the Pospisil Oeuvre

Rather than to provide an exhaustive guide to Pospisil's work, the intent is to structure my evaluation of important concepts in his work through the use of three works which are in many ways illustrative of his best efforts: *Kapauku Papuans and Their Law* (1958a), *The Anthropology of Law: A Comparative Theory* (1971), and an article entitled "Legally induced culture change in New Guinea" (1979).[3]

Before moving to these works, a word should be said regarding Pospisil's biography, since it is directly relevant to his scholarship. Pospisil graduated as a lawyer from Charles University in Prague and practiced law for a brief time in Czechoslovakia (Pospisil 1963b: v). The course of training Pospisil underwent was the classic civil law curriculum, involving the study of Roman law in all its legalistic coherence. Pospisil was much impressed by it. He was particularly drawn to the "beautiful, systematic logic of Roman law" (Pospisil 1971: xi).

The civil law's long history in comparison to the other influential world legal tradition - the common law[4] - and its peculiar development, lead civil law-trained lawyers to highly value the worth of the civil law, and to use it as the natural

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[3]   For a fuller listing of Pospisil's books and articles, see the list of References.

[4]   As Merryman explains:

> The date commonly used to mark the beginning of the common law tradition is AD 1066, when the Normans defeated the defending natives at Hastings and conquered England. If we accept that date, the common law tradition is slightly over 900 years old. It is sobering to recall that when the Corpus Juris Civilis of Justinian … was published in Constantinople in AD 533, the civil law tradition, of which it is an important part, was already older than the common law is today. (Merryman 1985: 3-4)

example of what a perfectly developed legal tradition looks like.[5] What this means for Pospisil is that law is not first and foremost a set of relatively flexible rules for settling practical problems - as common law lawyers would be inclined to see it - but a conceptual system that must be internally logical, and 'beautifully' so if at all possible. As we will see, Pospisil's work, no matter what other significance it might have, always bears the imprint of this early predilection for well-ordered logical structure.

## *Kapauku Papuans and Their Law* (1958)

Pospisil's 1958 monograph (hereafter *Kapauku Papuans*) was his first thorough presentation of fieldwork material from his research in Dutch New Guinea in the mid-1950s. In it Pospisil elaborates on or introduces for the first time important concepts that he was to make the cornerstones of his approach to socio-legal problems: the necessity of establishing a cross-culturally valid methodology; the distinction between 'law' as a conceptual category and 'law' as a term descriptive of a set of social phenomena; the multiplicity of legal systems, or legal levels; and finally, the fact that normative structures are only intelligible from the relative position of legal actors in the larger legal universe.

### *Cross-cultural methodology*

Pospisil is firmly committed to a methodology that in his view can and should be used cross-culturally (Pospisil 1958a: 249). Presumably he expected to devise a theoretical structure that would form the foundation for an understanding of global legal phenomena in their entirety. Indeed, he notes that the cross-cultural strategy he advances arose from a "comparative study of thirty-two cultures and a survey of an additional sixty-three," a library research accomplishment surely rivalling that of Sir James Frazer (Pospisil 1958a: 3).

Pospisil outlines an approach to the study of those social phenomena that, he argues, may be re-conceptualized as specifically legal. He claims that this re-conceptualization is possible if four elements are present: authority, intention of universal application, *obligatio*, and sanction (Pospisil 1958a: 258-272). It is important to pause here and consider just what Pospisil is urging, and how

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[5]   On the ways in which civil law lawyers view their own legal tradition, and the ways in which other legal traditions like the common law must appear by comparison imperfect, see generally Merryman (1985).

radically different it is from the ways in which socio-legal scholars today approach their material. Regardless of what one thinks of the specific attributes Pospisil advances - and indeed he goes to lengths elsewhere to point out that his methodology is only as good as its heuristic value (Pospisil 1971: 19) - one must acknowledge that Pospisil makes a good case for this analysis of legality that seems to avoid the perils of both ethnocentrism and extreme cultural relativism.

More specifically the implication of Pospisil's approach is that one's understanding of legal phenomena can be enhanced at a general level, not in a natural law cultural vacuum, but in a conceptual space that necessarily partakes of the specific cultural examples that feed it, while nevertheless hovering somewhere above them. That is, Pospisil is not saying that law must take a certain form in all cultures to be 'law'. On the contrary, he stresses that legality will manifest itself in the different ways that are determined by the particular cultural logics in which it is embedded. As he says, "there is no law of the Kapauku society, but there is law within … Kapauku [society]" (Pospisil 1958a: 277). The thrust of his insistence on maintaining a cross-cultural focus is not to contribute to a Linnaean typology of legal systems, but to strive for substantive relevance for socio-legal studies.[6]

In retrospect, such a goal might seem quaint or worse. And it would seem logical to assert that Pospisil's cross-cultural framework never achieved a wide acceptance. But in fact the picture is more complicated. In the mid-1960s socio-legal studies experienced something of a paradigm shift,[7] as scholars urged that attention be directed away from an analysis of systems of rules and toward the

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[6] However, in 1965 Pospisil was to publish two articles on Kapauku land tenure and inheritance that used a structural linguistic methodology that resulted in hierarchical classifications (Pospisil 1965a, 1965b).

[7] I would argue that, from the time of the mid-1960s shift toward dispute processes, socio-legal studies have been remarkably paradigm-governed. Every five years or so an edited volume appears in which many of the more prominent socio-legal scholars contribute research data in support of a central theme. See e.g. Nader and Todd 1978; Allot and Woodman 1985; Benda-Beckmann and Strijbosch 1986; Starr and Collier 1989; Lazarus-Black and Hirsch 1994. This theme then becomes a paradigm in the Kuhnian sense, i.e., a general consensus among researchers on a certain point - until the next prominent volume of papers transforms the paradigm, either by adding to it or by replacing it. This observation qualifies Kuhn's (1962) famous distinction between the physical and social sciences, to the effect that the physical sciences are characterized by paradigms while the social sciences are not.

analysis of dispute processes anchored firmly within their social contexts (Snyder 1996: 137). This paradigm shift also led to more collaborative research projects,[8] which eventually resulted in the edited reports of research findings that became common in socio-legal studies.[9]

What this collaborative research represents is at least an implicit attempt to understand socio-legal process at a level of generality that transcends the specific cultural examples, even if this research is primarily designed to describe a particular legal-ethnographic context. If this was not the case, one would be hard put to explain the fact that examples are seemingly included so as to create the impression that 'one of each' is represented. Maybe this is merely an example of the fact that, regardless of the amount of penetrating analysis that demolishes any pretense to truly scientific social science - which would require the testing of phenomena (either through observation or controlled experimentation) leading to general theory - most social scientists refuse in practice to abandon the hope that they will, eventually, be in a position finally to describe the way it is 'out there'. But I think one can argue that Pospisil's cross-cultural designs for socio-legal studies were in fact taken up by fellow researchers for all intents and purposes, albeit only incompletely: cross-cultural meanings are not drawn out, rendering such research ultimately descriptive.

*'Law' as concept vs. 'law' as description*

Pospisil begins the section of *Kapauku Papuans* dealing with 'The form of law' with this curious argument:

> Before attempting an analysis of law, we must stress the assumption that all categories of phenomena including law which are constructed by embracing a number of facts do not exist in the outer world. They are, rather, constructions in our minds made for the sake of convenience. Justification for a category does not reside in its existence outside the human mind…. (Pospisil 1958a: 249).

Pospisil was also to take up this theme in his later work (Pospisil 1971: 16-17). What he seems to be attempting is the introduction of an ontology of law that

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8 An example is the Berkeley Village Law Project, which involved faculty members and graduate students at the University of California-Berkeley.

9 See e.g. the works listed in the last footnote but one.

draws from the wider philosophical systems of thinkers like Berkeley and Hume. Pospisil is arguing this: the researcher may observe a large group of people, obviously divided into two smaller groups, each group talking loudly in turn to a person sitting above the others, who has the last word after a course of time, after which one sub-group begins smiling and clapping backs, while the other sub-group looks astonished and then unhappy. What makes this particular social phenomenon 'legal' is merely the fact that the researcher and others similarly situated have over time found it useful to calling such an event 'legal' as opposed to, say, 'commercial'; that is, as a way of dividing the interpretive labor.

But this observation, Pospisil seems to be saying, takes the social-legal researcher only so far. What is crucial is to discover what it means to the 'legal' actors to engage in the conduct observed. Before that, the researcher has only conceptual categories, which serve merely as tools with which to structure the interpretive framework. In this, the imprint of Pospisil's training in legal philosophy is clear, and the intent admirable. He is compelled to acknowledge that the researcher does not have a privileged window into legal reality, but that this is only because legal reality is contextual and variable, not because conduct that is labelled 'legal' is ultimately unintelligible. The socio-legal researcher can usefully serve as a guide to what conduct deemed 'legal' means to the people involved, by elucidating the particular cultural logic in which it is embedded.[10]

This being the case, a problem arises when Pospisil attempts to operationalize his understanding of the important difference between phenomena and our access to them through mental and linguistic categories. One would assume that Pospisil's awareness of this distinction would lead him to value local understandings of legal process over the conceptual categories that led him to such understandings. In fact, the opposite is the case. In *Kapauku Papuans* the voices of Papuans are very rarely heard, and never in a critical capacity. When we hear from local legal actors it is only through Pospisil's transcripts of various proceedings or through his examination of legal language. The result is that what the reader is left with, in the end, are the categorical tools Pospisil has devised and which are presented in large part as if they constituted local legal meanings.

*The multiplicity of legal systems - legal levels*

Many who are familiar with Leopold Pospisil's work are likely to be familiar with

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[10] See on this point, Comaroff and Roberts 1981: 3-17; 246-249. This work remains an exceptional example in socio-legal studies of how general theory can be dynamically linked to cultural specificity.

it primarily through his concept of 'legal levels'. What Pospisil means is that in any given society there will be a discrete legal system corresponding to each subgroup within the society; in fact, subgroups are defined largely as entities in which the four conceptual components of law - authority, intention of universal application,[11] *obligatio*, and sanction - are present and uniquely constituted (Pospisil 1958a: 273-278). Even though, as we shall see, Pospisil misses the mark in certain respects, his recognition in 1958 of the complex dynamics of legal pluralism was strongly stated and forward-thinking, prefiguring other prominent analyses of the phenomenon by many years (Smith 1974; Moore 1973, 1978; de Sousa Santos 1987). By rejecting the "smoothed out picture of a single legal system in a society" (Pospisil 1958a: 274), and offering the alternative picture of legal levels, he re-cast the backdrop against which socio-legal studies would be conceptualized.[12]

That having been said, it must also be suggested that Pospisil's concept of legal levels is not entirely adequate for describing and elucidating legal pluralism in all its many facets. The most important critique has been levelled by Moore. Her major reservation about legal levels is that they seem to require a rigid pyramidal structure, in which each legal level is nested within ever larger units, with each unit maintaining separate rule-making processes and outputs (Moore 1978: 24). This picture, according to Moore, is overly vertical in its orientation, and therefore fails entirely to address the horizontal relationship between separate legal units. As she says:

> What Pospisil has erected as an analytic classification has much
> in common with the jurisdictional hierarchies and divisions of
> our court systems [presumably she means those of the US]. To
> my mind this formulation does not sufficiently address the
> question of the differences in kind between organizational units,
> and is overly focused on inclusiveness, as if that were always the

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[11] This component, the intention of universal application, has out of the four generated the most controversy. See e.g. F. von Benda-Beckmann 1979: 36-39.

[12] As Snyder (1996: 151) correctly notes, Furnivall (1948) includes the recognition of legal pluralism. Moore asserts (1978: 17-18) that Pospisil 'followed' Max Weber's work on the multiplicity of coercive orders, and was 'led' by Llewellyn and Hoebel's account of 'sublaw-stuff or bylaw-stuff of the lesser working units' (Llewellyn and Hoebel 1941). Even if one finds these arguments persuasive, one must recognize that Pospisil's effort was still the first to problematize legal pluralism systematically, and to draw out its complexities.

most important criterion of hierarchy and difference (Moore 1978: 24).

This critique is well-made. One gets the sense that, because of Pospisil's high regard for legal structures that exhibit 'beautiful' symmetry, he was forced, in the end, to erect a theoretical edifice that was paradoxical. On the one hand, he clearly recognizes the complex possibilities that legal pluralism presents. Indeed, the picture of an industrialized society with literally thousands of legal systems is formidable. On the other hand, he was unable to carry this understanding to its theoretically logical conclusion, which is a picture of society in which legal theory and practice move not only horizontally and vertically, but 'diagonally'. In this sense, Moore's critique of Pospisil is significant since she had in mind an alternative conceptualization of legal pluralism, the 'semi-autonomous social field', which indeed goes further in providing a framework in which the complexity of legal pluralism may be understood.[13]

Griffiths' (1986) analysis of legal pluralism includes a review and critique of Pospisil's legal levels, which Griffiths ranks as the least sophisticated model of legal pluralism of the four most important models, the others being offered by Ehrlich ('living law'), Smith ('corporations'), and Moore ('semi-autonomous social fields') (Griffiths 1986: 15). To the extent that Griffiths weighs Pospisil's concept of legal levels in the balance and finds it wanting as to its overemphasis on hierarchy and its rigidity (Griffiths 1986: 16-17), his critique is in large part a restatement of Moore's 1978 analysis. This is somewhat ironic since Griffiths later concludes that Moore's semi-autonomous social field model is mostly adequate in accounting for the complexity of legal pluralism, and he in fact makes it the centerpiece of his definition of 'law', saying: "Pursuing Moore's analysis to its conclusion ... it follows that *law is the self-regulation of a 'semi-autonomous social field'*" (Griffiths 1986: 38; emphasis in original).

Griffiths' discussion of four prominent models of legal pluralism is augmented by an attempt to depict three of the four models in graphical form (Griffiths 1986: 16, 21, 35). These diagrams are useful, but probably not in the way Griffiths intends. Whether or not they accurately and usefully aid our understanding of the legal pluralism models in question, they in fact demonstrate conclusively the monumental difficulty - I am tempted to say impossibility - of our being able, as theorists, truly to conceptualize a nonlinear, dynamic social process like legal pluralism. The sort of two-dimensional, Euclidean forms that Griffiths employs

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[13] See also Fitzpatrick 1983: 162, in which he criticizes Pospisil's inadequate account of the "dynamic interaction between legal orders", however constituted.

illustrate this. Without minimizing the differences between the approaches to legal pluralism advanced by Pospisil, Smith, Moore, and others, I would argue that this conceptual complexity acts as a real impediment for socio-legal theorists struggling with the fact of multi-legal universes.

The scholar whose work makes the most serious attempt to date to resolve this dilemma through a new angle of approach is Boaventura de Sousa Santos (1987, 1995). Among other things, what makes de Sousa Santos' work so fresh is that he embraces recent advances in the 'new physics' and in postmodern theory, which both provide sophisticated tools with which to analyze nonlinear phenomena. As he explains his approach:

> [I]s not the legal pluralism of traditional legal anthropology, in which the different legal orders are conceived as separate entities coexisting in the same political spaces, but rather, the conception of different legal spaces superimposed, interpenetrated and mixed in our minds, as much as in our actions, either on occasions of qualitative leaps or sweeping crises in our life trajectories, or in the dull routine of eventless everyday life. We live in a time of porous legality or of legal porosity, multiple networks of legal orders forcing us to constant transitions and trespassings. Our legal life is constituted by an intersection of different legal orders, that is, by *interlegality* … Interlegality is a highly dynamic process, because the different legal spaces are nonsynchronic, and thus result in uneven and unstable combinations of legal codes (codes in a semiotic sense) … Such a conception of legal pluralism and interlegality calls for complex analytical tools (de Sousa Santos 1995: 473, emphasis in original).

In many ways, de Sousa Santos' work remains programmatic.[14] But if the interlegal scenario that he contemplates could be depicted in graphic form, it would look something like a multi-dimensional 'legal sponge,' in which legal theory and practice moved in nonlinear fashion through both space and time. The discipline whose graphical forms come closest by analogy to this admittedly unwieldy picture is topology, a relatively new branch of mathematics that deals

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[14]  I am currently preparing a manuscript for publication entitled 'Legal Turbulence: "Disordered Order" at the Legal Margins' (Goodale n.d.), which, among other things, attempts to expand on and operationalize Sousa Santos' notion of interlegality.

with the multi-dimensional properties of irregular forms (Lorenz 1993: 16-17). Therefore, if Pospisil's model of legal levels inadequately accounts for the complexity of legal pluralism - or interlegality in de Sousa Santos' formulation - then he is not alone. Moore's semi-autonomous social fields are clearly a recognition of the type of complexity that de Sousa Santos would later re-define in many respects.

*The relativity of law and its relation to power*

The final theme in *Kapauku Papuans* that merits analysis here is what Pospisil calls 'the relativity of law' (Pospisil 1958a: 277, 288-289). Although related to the concept of legal levels, Pospisil's discussion of the relativity of law is distinct in that it is his attempt to address the notion of power relationships between different legalities, as well as the fact that legal structures change form over time because of such relationships. The way in which power dynamics restructure the contexts through which legality creates meaning was eventually to become a central focus in socio-legal studies (e.g. Starr and Collier 1989). Hence Pospisil's account of this phenomenon in *Kapauku Papuans* deserves closer scrutiny.

Pospisil argued that one is not only subject to multiple and sometimes contradictory legalities by virtue of one's placement in more than one subgroup, but one's notion of what law is likewise depends on the relationship between legalities (Pospisil 1958a: 289). While he certainly did not articulate it in this way, his emphasis on the relativity of law signalled at least a nascent awareness of the fact the law was primarily processed by individuals as a system of meanings. And, like all meaning-systems, legal meanings were intrinsically contextual, fluid, and negotiable.[15]

Besides establishing that legal meanings are relative, Pospisil also turned his attention to the manner in which shifts in power in society changed the ways in which legality was understood. As he explained:

> The law of the society as a whole may not only be ineffective in bringing about a conformation in the legal content of the subgroups, but it also may become lost in the power of one level of the groups over another. In our Western culture, we are accustomed to the belief that the law of the state is the primary standard to which the individual looks for protection and security

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[15] Some of the work in socio-legal studies that best exemplifies this approach to law is that of Elizabeth Mertz (e.g. Mertz 1994; see also White 1985).

> and to which he tries to adjust his behavior … In many other
> cultures the situation is different - the center of power is located
> in the lower levels, [because] the society level is so weak …
> (Pospisil 1958a: 277)

Pospisil's argument here is unpersuasive in one respect and insightful in another. To the extent that Pospisil draws a distinction between law in "Western culture" and that in "other cultures" by claiming that in the West people uniformly look to the state for redress, he is clearly mistaken. From a period in which socio-legal scholars, particularly legal anthropologists, 'came home' and undertook studies in industrialized countries, there has emerged a growing literature that shows the extent to which legal actors often view state law as hostile, inaccessible, and to be resisted, even if resistance takes the form of strategic engagement with it (e.g. Coutin 1993; Greenhouse 1986; Merry 1990; Yngvesson 1993). But if Pospisil was clearly wrong regarding the distinction between different cultures' 'reverence' for state law, he was correct in observing that legal interactions are most significant when they involve individuals who interact regularly in wider social contexts.

## *The Anthropology of Law* (1971)

Pospisil's 1971 volume (hereafter *Anthropology*) is his most important work. In it he includes what was essential in *Kapauku Papuans*, new material from socio-legal research in Austria and Alaska, and reproductions of two articles from *American Anthropologist* in which he attempts componential analyses of Kapauku land tenure and inheritance (Pospisil 1965a, 1965b). What follows is an analysis of crucial new themes in this volume.[16]

### *Empiricism*

Between *Kapauku Papuans* and *Anthropology* Pospisil further refined and solidified his view of the importance of empiricism in socio-legal studies. In this sense he was concerned to finally establish a (necessary) niche for a kind of legal analysis that was driven first and foremost by data collected through ethnographic methodologies. He advises the reader: "three sources then - the Roman juridical, the anthropological, and the jurisprudential - form the basic background against which many of my thoughts should be projected" (Pospisil 1971: xi). However, to

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[16] Certain themes which Pospisil emphasized will not be considered. For example, his semantic analysis of the difference in Roman law between *lex* and *jus* does not merit serious consideration here.

the extent that in *Anthropology* he continually underscores the empirical, 'scientific' nature of the type of socio-legal research he advocates, the emphasis here should obviously be placed on the anthropological branch of this triad.

That said, it is worth considering whether Pospisil in fact demonstrates in his own research the empiricism he so strongly advocates. Much of the book involves him in arguments that are anchored in his fieldwork in New Guinea, Alaska, and Austria. I am certainly in no position to judge the adequacy of his ethnographic work in these areas. But Pospisil does not limit his arguments to these three societies; he also includes analyses of Chinese, Javanese, and Mongol legal systems, with liberal references to other legal systems sprinkled throughout (Pospisil 1971: 24-26, 209, 210-214). This sweeping range is related to his explanation of his research background, mentioned above and reiterated in *Anthropology*; namely, that he had "intensively studied … thirty-two [cultures] and was supported by a survey of an [sic] sixty-three additional societies" (Pospisil 1971: xii).

This recitation is indeed curious if 'empiricism' and 'intensively studied' are given their common meanings. Only two pages before Pospisil alerts the reader to the sweep of his knowledge of legal systems in the world, based on 'intensive study', this strong statement appears:

> [A]nthropology of law is a *science* of law and therefore empirical. Theories should be supported by all relevant facts or at least a representative sample of all facts (meaning phenomena perceived by our senses) available. Scientific theories should be distinguished from scientific hypotheses and presented as ideas that can be ultimately proved by empirical methods. All of these, in turn, should be dissociated from pure speculation, from intellectual pagodas built on the basis of 'pure logic' or sometimes even on emotion or sheer fantasy (Pospisil 1971: x; emphasis in original).

Without belaboring the obvious, there is surely a contradiction between Pospisil's insistence on empirical research forming the foundation for conclusions regarding legal systems, and his use of - admittedly extensive - library research to form the basis of such conclusions in *Anthropology*.[17] Indeed, we may consider the implications for an otherwise interesting assertion like:

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[17] It should be pointed out that Pospisil's theory of empiricism stems from his positivistic view of science, which is not to be confused with positive law.

> [t]hroughout its history … the Chinese legal sphere was dominated by Confucian ideals. These did not place *fa*, the positive law of abstract rules of the numerous dynastic legal codices, at the apex of legal importance. (Pospisil 1971: 24-25)

If analyses not based on phenomena perceived through the senses are in many ways "pure speculation", then a statement such as this must be dismissed as of no scientific interest, if it is offered as Pospisil's own conclusion.

Despite this failing, more should be said regarding Pospisil's insistence on anchoring socio-legal analysis securely in an empirical methodology. As the excerpt above indicates, Pospisil is clearly intent on drawing a distinction between his approach to socio-legal studies and the approach of the proponents of analytical jurisprudence like Kelsen, who argued for a rigorous 'pure theory' of law (Kelsen 1967).

Pospisil's point - his inconsistencies in practice notwithstanding - is well-taken: theories that purport to elucidate the inner workings of law without establishing their connection with law-in-action must be recognized as, in many respects, intellectual artifices. As Paulson says regarding Kelsen's 'pure theory': "[it] does not consort with facts at all" (Paulson 1996: 797). Pospisil would counter, rightly, that legal theory must not only 'consort with facts'; it must be derived from them. And finally, the legacy of artificiality of much of analytical jurisprudence can be seen in the recent work of German legal scientists like Teubner who argue for treating law as an 'autopoietic system', isolated, self-regulating, and self-referential (Teubner 1988, 1993). But in current socio-legal studies those who argue for less facticity are clearly a small group. Most scholars practice a form of research which affirms that what law is can never be fruitfully disassociated from what law does; that, regardless of the form legal theory takes, it must emerge from the crucible of legal practice.

*S. J. L. Zake - provocateur*

In surely one of the oddest side-notes in the history of socio-legal studies, Sejjengo Joshua Luyimbazi Zake submitted a dissertation under Paul Bohannan at Northwestern University entitled *Approaches to the Study of Legal Systems in Nonliterate Societies* (1962), which was devoted entirely to demonstrating the proposition that the majority of socio-legal studies were irremediably tainted by ethnocentrism. Although it is not relevant to discuss the many scholars who fell within the glare of Zake's critical gaze, suffice it to say that most important socio-legal accounts produced up to 1962 receive rough treatment (Bohannan 1957

excepted). Pospisil's work receives an entire chapter (Zake 1962: 68-88).

Most of Pospisil's work is viewed by Zake through a glass darkly. For example, in the course of his discussion of Pospisil's four elements of law, Zake argues that it is necessary to qualify Pospisil's model in the following way:

> Pospisil's type of thinking, it is clear, results from the influence of Euroamerican [legal] systems in which authority is necessary to curb the individual whose interests are seen in competition with or as against the law and not with the law, so that he must be presumed to break it unless pressured into compliance by authority. Hence the prominence in [Pospisil's] argument of external sanctions and identification of 'law' and the differentiation of 'custom' on the basis of this sanction (Zake 1962: 83).

And if the ethnocentric taint to Pospisil's definition of law does not render it suspect, then, according to Zake, Pospisil's shoddy scholarship in general does. As Zake explains, "Pospisil … after condemning most definitions [of law] as being 'contradictory, vague, and unpersuasive' … , utilizes a dictionary definition which is not free from vagueness" (Zake 1962: 63).

Not surprisingly, Pospisil felt a need to address some of Zake's complaints in *Anthropology*. Even though Zake does level more specific criticisms of Pospisil's interpretation of data - and indeed offers an alternative reading of Pospisil's account of the *tonowi*, or Papuan office of authority - Pospisil's rejoinder is limited to Zake's "theoretical misinterpretations" (Pospisil 1971: 16).[18] Basing his argument on his notion, discussed above, that 'law' is a conceptual category that is ascribed by the researcher to social phenomena for heuristic purposes, Pospisil denounces Zake in strong terms for rejecting the role of the socio-legal researcher in interpreting 'folk classifications' of law:

> A cross-cultural theory cannot be composed of a mishmash of contradictory concepts derived from the various cultures whose only common denominator and virtue (in Zake's opinion) would be their 'folk system origin'. His insistence and fixation upon folk systems leads him to fantastic claims about anthropology in general that make it doubtful that he has grasped the very basic

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[18] Without further elaboration Pospisil declares: "I shall not deal here with Zake's misinterpretations of factual material …" (Pospisil 1971: 16).

principles of the science he studies … (Pospisil 1971: 17).

But despite Pospisil's assertion, Zake's "theoretical misinterpretations" in fact do not represent a failure to understand the type of socio-legal research Pospisil advocates. Indeed, quite the opposite: Zake's dissertation would seem to indicate that he understands it only too well. Even though the statement of his argument at times becomes confused and inconsistent,[19] Zake's argument is at base a rejection of the *possibility* that a socio-legal researcher's interpretation - 'ethnology' according to Pospisil - can ever add to an emic account of legality. In many ways, Zake's critique is an early socio-legal version of much of the hyper-critical self-reflections in anthropology and other disciplines in the 1970s, and again in the mid-1980s, that led to disciplinary crises of identity (e.g. Asad 1973; Clifford 1983; Clifford and Marcus 1986; Hymes 1974; Rabinow 1978; Scholte 1971).

In retrospect we must acknowledge that Zake's critique, or a weaker version of it, would eventually carry the day. The idea of the social researcher as definitive authority lost its persuasiveness. A statement like this from Pospisil - "[s]cientific inquiry uses as its tools concepts, categories, apparatus, and procedures designed or selected by the scientist and not by the subjects he studies" (Pospisil 1971: 18) - would come to be seen, at least in the social sciences, as incomplete. The socio-legal researcher and the legal actors he studies are now seen as engaged in a discourse, in which the researcher is often 'selected' by those that were formerly called 'objects' of analysis. As in other spheres of social inquiry, the socio-legal researcher and those legal actors he works with are no longer dichotomized into observer and observed; rather, the research endeavor is seen as an interaction of multiple subjects, or intersubjectivity. As one can imagine, Pospisil would find a statement of socio-legal research conceptualized in such a way foreign, and S. J. L. Zake's dissertation was, despite Pospisil's contemptuous view of it, an augury of this epistemological shift.[20]

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[19] For example, when he claims that studies of religion or social organization in anthropology have privileged local explanations over the anthropologists' (Zake 1962: 165).

[20] Despite a promising start, Zake appears not to have continued his socio-legal research, having only published a work of fiction in 1980. Whether this was because his foray into legal anthropology left a distaste strong enough to deter him further is not known. His novel, *Truckful of Gold*, is a story of politics and mining set in Uganda (Zake 1980).

*Componential analyses*

In *Anthropology* Pospisil reproduces two articles published in the journal *American Anthropologist* (Pospisil 1965a, 1965b), in which he uses a componential analysis methodology borrowed primarily from structural linguistics to analyze Kapauku land tenure and inheritance (Pospisil 1971: 273-322). This methodology had previously been used most extensively to analyze kinship systems. Pospisil explains componential analysis in the following way:

> Componential analysis is applied to a complex matrix ... defined in the well-known kin-type notation (Br, FaBrSo, etc.). This procedure allows the abstraction of distinctive semantic components responsible for grouping particular ... types into the respective 'named categories.' According to the kind of contrast implied, the semantic components are grouped into several dimensions representing specific values. The goal of this analysis is a set of symbolic notations capable of defining the various ... terms by specific combinations of contrastive components. The procedure is usually concluded by a statement (often diagrammatic) about the semantic relationship among the terms and principles which structured the paradigm ... (Pospisil 1971: 276; references omitted).

In drawing on structuralist linguistics in his socio-legal research, Pospisil was participating in a trend in the mid-1960s and early 1970s which saw structuralism's influence spread across disciplines. (See e.g. Barbut 1966 (mathematics); Barthes 1970 (history); Godelier 1970 (economics); Jakobson 1967 (folklore).) In many respects it is difficult to assess the usefulness of Pospisil's attempt, particularly since structuralist analysis in socio-legal research never became common, making comparison with other such studies unhelpful. Nevertheless, a few words should be said about this portion of *Anthropology*, since Pospisil saw in it - the last substantive chapter of the book - a final demonstration of much of the collective theory and methodology that he had developed to that point (Pospisil 1971: 274).

Pospisil's analysis proceeds by listing all the types of land or inheritable property for which the Kapauku have terminology and which are subject to discrete rules. These categories are then assigned new classifications based on common physical features. Finally, Pospisil interprets these categories based on contrastive features, the end result being a matrix in which the cultural/legal logic of Kapauku law is made clear.

So, for example, Pospisil concludes that the Kapauku have "seven dimensions of contrastive features" that describe the Kapauku land tenure: kind of ownership; legal exemption of land from sublineage control; limitation of access; persons entitled to fell secondary trees; importance of regulating frogs; persons entitled to fell old trees; and size of group entitled to hunt animals other than rats (Pospisil 1971: 291-294). When these dimensions are superimposed on the original list of types of terrain singled out by the Kapauku, their land tenure law emerges, which consists of the following: right of ownership; right to shoot rats; right to plank and canoe trees; right to fell secondary trees; right to fish, navigate, trespass, and gather; right to fell old trees; right to hunt 'non-rats'; and right to collect frogs (Pospisil 1971: 296-301).

Although the foregoing description of Pospisil's componential analysis sounds confusing, when the matrix itself is shown diagrammatically its internal logic becomes clearer (Pospisil 1971: 297). For example, if one desired to do so, by tracing a line through the matrix, one would discover that in the Kapauku *bugi* (garden) only owners have the right to hunt both rats and 'non-rats', but the sublineage has the right to fell secondary trees.

Pospisil's enthusiastic endorsement of componential analysis arises from the overarching goal described above, which is to construct a socio-legal methodology capable of cross-cultural application. His view was that componential analysis was the surest way to elucidate the logic behind a legal system's substantive law (Pospisil 1971: 338-339). Indeed, Pospisil had even higher hopes for this approach. He anticipated that by using componential analysis the socio-legal researcher could create 'maps' of any legal system, thereby providing lawyers with the ability to navigate the often treacherous waters of law "in a parsimonious and systematic way" (Pospisil 1971: 339).

What are we to make of this? Pospisil's componential analysis, like most structuralist analysis, is highly arbitrary, unabashedly substituting the researcher's model of the 'deep logic' of legal meanings for local versions. The result is that the ambiguity that accompanies much of the negotiation and contestation of local legality is purposely sacrificed on the altar of logical coherence. This is an unfortunate consequence, even though it is necessary, because it is precisely here that Pospisil displays his best ethnographic analysis. Before he substitutes his structuralist overlay, Pospisil's account of Kapauku terminology shows an appreciation of how locals process the subtle ways in which meanings that have legal significance interpenetrate with wider meaning-systems.

Although the artificiality of Pospisil's componential analysis should lead us to reject it as a substitute for local legal reasoning, the finely grained ethnographic

account that forms its data set is an early example of more recent socio-linguistic approaches that view law as a "culturally constituted mode of analysis that projects an indigenous theory of society" (O'Connor 1981: 224; and see also French 1995). Therefore, to the extent that this important part of *Anthropology* can be 'rehabilitated', it should be; the methodology is rightly ignored, but the analysis of local legal meanings remains important.

## 'Legally Induced Culture Change in New Guinea' (1979)

Pospisil's 1979 article (hereafter 'Culture Change'), written for a volume on the theme of 'imposed law' (Burman and Harrell-Bond 1979), is based on his longitudinal research in New Guinea. Pospisil's contribution is a powerful and lucid analysis of the ways in which Kapauku notions of self, expressed through legality among other things, have been affected by contact with colonial and post-colonial legal orders. In the ways in which he shows how Kapauku locals both manipulate and are manipulated by foreign legalities, Pospisil's analysis highlights how law is intimately penetrated by relations of power and the forces of historical change.[21]

Pospisil has been criticized for practicing a type of socio-legal research that focuses exclusively (and hence unacceptably) on the creation of rules and the maintenance of order, within a theoretical framework that owes much to western legal traditions (e.g. Comaroff and Roberts 1981: 7). However, with 'Culture Change' Pospisil demonstrated that his vision of socio-legal research was essentially dynamic, attuned to context, and rooted in an understanding of the fact that legality manifests itself primarily as power-infused discourse. In this respect, Pospisil's research in 1979 is far from being outdated; indeed, his work appears a full ten years before a major edited volume signalled the fact that mainstream socio-legal studies had firmly embraced 'history and power in the study of the law' (Starr and Collier 1989).

In 'Culture Change' Pospisil shows how the introduction of Dutch, and later Indonesian law into Kapauku territory caused a drastic re-structuring in the political-legal system of authority known as the *tonowi*, which he had described in detail twenty years earlier in *Kapauku Papuans*. He describes a situation in which the Kapauku villages become jurisdictional units in a new national structure, replacing the former sublineage jurisdictional system, which was based on descent and not territory (Pospisil 1979: 138-140). Further, he shows how the superimposition of a formally rational bureaucracy re-structured the quality of

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[21] Merry (1988: 877) focuses on the reflexivity of Pospisil's 1979 account.

authority for the Kapauku; no longer was the idea of authority coextensive with the personal characteristics of the authority figure. According to Pospisil's account, the traditional Kapauku conceptualization of what authority meant had been denatured.

But Pospisil's analysis moves from the interesting and theoretically topical to the truly exceptional with his discussion of how the imposition of novel criminal sanctions and forced labor obligations by the national government clashed with the Kapauku *Weltanschauung* (Pospisil 1979: 140-144). His analysis here reflects both a deep understanding of 'the hold life has' for the Kapauku, and the ways in which individuals' identities are intimately conjoined with the processes by which legal meanings are created.

Pospisil structures his analysis of the impact of legal change by a focus on Kapauku philosophy and its relation to local legal reasoning. He describes, for example, how Kapauku theories of the self ideally see the body and soul divided, but constantly interacting in a symbiotic relationship marked by cooperation (Pospisil 1979: 141). Their legal reasoning flowed from this understanding; punishments, among which public shaming, reprimand, and economic sanctions were the most common, were constituted so as to preserve this essential mind-body relationship while still exacting retribution.

The advent of the Dutch and Indonesian legal systems brought prisons, introducing a new, and horrible, reality, which the Kapauku recognized as inhuman, because they deprived a person of the characteristic most central to their identity: freedom of movement. Pospisil quotes a local man:

> 'Jail is the worst thing. The man's vital substance deteriorates and the man dies. We used to kill only very bad people, but now one may get into prison simply for stealing or even fighting in a war. One dies if shot by an arrow, but in jail one has to suffer before death. One has to stay in one place and has to work when one does not like it. Jail is really the worst thing. Human beings should not like act that. It is most immoral' (Pospisil 1979: 142).

What Pospisil's analysis demonstrates so convincingly is that any account of legal pluralism that merely acknowledges - correctly - that relations of power are central to an understanding of the situation is necessarily incomplete. The socio-legal researcher must not end the analysis with a list of structural changes that accompany the clash of disparate, and unequal, legal orders, as if legal pluralism can ever be understood through a simple process of cause-and-effect. Rather, the advantage that socio-legal research has over non-ethnographically based legal

disciplines is the fact that it begins with an inquiry into how law is understood. Only then does the analysis proceed to the next step, which is to inquire into what law does.

'Culture Change' marks something of a retreat by Pospisil from the confines of the type of scientism advanced in both *Kapauku Papuans* and *Anthropology*. Rather than devoting analysis to sweeping cross-cultural generalizations, here Pospisil limits his study to how forced legal change in Kapauku society alters the tableau within which individuals negotiate identities and social meanings. And this retreat from scientism is certainly to Pospisil's advantage. Although 'Culture Change' represents a world of ambition that has grown smaller for Pospisil, this smaller world - consisting of the analysis of local legal meanings - is more intelligible and likely to prove, I would argue, more enduring.


## Taking Stock: Pospisil's Continued Relevance

As I hope this reappraisal has demonstrated, Leopold Pospisil's work in socio-legal research over the last forty years has been more diverse and complex than is indicated by the usual reduction of his work to his theory of legal levels. It is not easy to say why Pospisil's work has not received the fuller appreciation that it merits. Throughout his work, he consistently states his position in a way that is vigorous, self-assured, and lacking in the kind of guardedness that one might expect to follow naturally from scholarly conclusions that must always remain somewhat provisional. Perhaps his style proved alienating to some. If this is indeed the case, then this article is in a sense an argument that a person's lifework should be evaluated separately from evaluations based on stylistic differences or of a personal nature.

It is suggested that there are at least six facets to Pospisil's work that remain relevant to socio-legal studies today: his insistence on wider relevance; legal levels; the relativity of law; the importance of empirical research; legal language-as-social-code; and his recent analysis of socially-constituted legal meanings.

As we have seen, Pospisil's early work was characterized by a call for a methodology that would give socio-legal research cross-cultural applicability. Although not always clearly stated as such, his hope was that this type of research would over time form the basis of a generalized understanding of the total scope of legality across time and place. In retrospect, this hope appears over-ambitious.

With the increasing awareness of the true, often staggering, complexity of legality, in large part due to its nonlinearity, any approach to social-legal research

that has universal understanding as its goal is at best quixotic. But this does not mean that all valuable research is relevant only in so far as it informs our understanding of a particular legality embedded in a particular context. The results of socio-legal research should be compared because there are historical trends in the ways in which law becomes dynamic, particularly in the movement of legal theory and practice between semi-autonomous legal orders.

The relevance of Pospisil's theory of legal levels lies primarily in the fact that his was the first substantial attempt to analyze the complexity of legal pluralism. The critiques of the theory of legal levels that highlight the extent to which it is overly hierarchical (Griffiths 1986; Moore 1978), uni-dimensional (Zake 1962), and unable to account for qualitative differences between legal levels (Moore 1978; Zake 1962) are indeed well-made. As I have mentioned, recent work by scholars such as de Sousa Santos has not rejected Pospisil's theory of legal levels, but rather built on it. The elucidation of the complexity of legal pluralism remains a central challenge to scholars working in this area (Goodale n.d., referred to above n.14).

Pospisil also argued that law must be conceptualized as an essentially relative phenomenon. Central to his argument regarding the relativity of law is the notion that different legalities are characterized by an inequality of power between them, and that legal structures change form over time because of such inequalities. Further, his emphasis on the relativity of law underscores the fact that one is not only subject to multiple, and sometimes contradictory, legalities by virtue of one's placement in more than one legal order; one's notion of what law is depends on the relationship between legalities.

Pospisil's argument here goes to the heart of much recent work in socio-legal studies (e.g. Lazarus-Black and Hirsch 1994). By emphasizing the fact that law is experienced by people in ways that are entirely contextual, he contributes to current debates about legality as an all-important and ubiquitous site wherein individuals and groups contest hegemony's many forms (Lazarus-Black and Hirsch 1994).

Pospisil's work continually emphasizes the importance that empirical research should play in socio-legal studies. As we have seen, his curious reliance on library readings casts some doubt on the extent to which this emphasis is reflected in his own work. Nevertheless, his point is well-taken, and cannot be understated. In this sense, his emphasis on the importance of planting one's theoretical feet firmly on the ground - in socio-legal research at least - is perpetually relevant.

As Pospisil shows, theories that purport to elucidate the inner workings of law

without establishing their connection with law-in-action must be recognized as, in many respects, intellectual artifices. Although he had in mind pure law theorists such as Kelsen, his critique of analytical jurisprudence is applicable by analogy to much of the recent work coming from German legal science, notably those, like Teubner, who advocate treating law as an autopoietic system.

In many respects Pospisil's componential analyses of Kapauku land tenure and inheritance must be rejected as unduly schematic. However, if one removes the structuralist overlay, his account of Kapauku terminology shows an appreciation for how local Kapauku process the subtle ways in which meanings that have legal significance interpenetrate with wider meaning-systems. As I have shown above, recent work in socio-legal studies has problematized law as a set of meaning-systems which are intrinsically contextual, fluid, and intimately linked to language (and see also Mertz 1994; White 1985). Pospisil's account of the ways in which Kapauku legal meanings interpenetrate with, and are in a sense derived from, language should be seen as an important precursor to this development.

Finally, Pospisil's more recent work marks a crucial transition from research that was overly ambitious in its goals and conclusions to research that has become more lucid through its modesty of purpose. In particular his remarkable account of the impact of 'imposed law' in New Guinea demonstrates a subtle understanding of how legal meanings are often derived from notions of the self. This is important because it adds a new layer of understanding to recent work that focuses on the ways in which law can be seen as power-infused discourse (and see Starr and Collier 1989). In Pospisil's conceptualization, before the inequalities of power between legal orders can be understood, the social identities out of which legal meanings arise must be examined. In many respects, Pospisil's recent work - though small in scope - is his best.

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