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Chapter I

Introducing a map of (in)equalities

Bartosz Wojciechowski, Tomasz Bekrycht, Karolina M. Cern[*]

Equality has been discussed for thousands years in the fields of philosophy and law and most recently in the social sciences and humanities. This discussion has raised most of the philosophical, moral, legal and political questions that are connected with the issues of justice and freedom. However, little discussion has focused on whether citizenship makes people equal or whether those who are equal are recognised as fellow citizens;[1] whether freedom renders all people equal; whether we are equally free to differentiate ourselves from one another. Moreover, the extent to which the principle of equality should include the respect for human diversity still remains an open question.

At least three significant groups of problems determine the way in which equality is questioned and scrutinised: equality of treatment, opportunity and welfare. The equality of individual rights vis-à-vis the law relates to both: the granting of such rights and limiting their application, as well as their deprivation. In order to avoid potential misunderstandings, we must distinguish the following: the individual, who is characterised by his or her existence; the uniqueness that is manifest in the meaning of the individual's name and the ability to use an identity document (i.e., in its descriptive terms); and the prescriptive approach to a person as a personal individuality of 'the highest quality'. Currently, the nature of human rights is determined as inalienable and inviolable, and therefore as constituting a natural attribute of an individual. The two central attributes of the concept of

[*] Karolina M. Cern, Department of Philosophy, Adam Mickiewicz University in Poznań; Bartosz Wojciechowski, Faculty of Law and Administration, University of Lodz; Tomasz Bekrycht, Faculty of Law and Administration, University of Lodz.

[1] Compare Adam Przeworski's *Democracy, equality and redistribution*, in: Richard Bourke, Raymond Geuss (eds.), *Political Judgement. Essays for John Dunn*, Cambridge University Press, Cambridge 2009, p. 288.

human rights are 'being universally valid' and 'being inalienable'. Nevertheless, the difference between the human species — 'being an individual', and human quality — 'being an individuality' should also be considered because it is crucial for understanding the plurality of the social forms of human lives.

In the liberal perspective, individual fundamental rights are exclusively the rights of the individual, that is, his or her individual rights. Their positivist legal expression is in the normative protection of the civil attributes of the individual and his or her unique legal entity. The uniqueness of granting such rights consists in the fact that they are for the benefit of a personalised individual according to the personal meaning of their own names (e.g., age, mental health etc.). Consequently, as 'a personal legal property', every citizen is equally granted the fundamental rights — not as an equal among equals, but as a unique and incomparable person.[2]

As Ronald Dworkin pointed out, "the fundamental human right […] is the right to be treated with a certain *attitude*: an attitude that expresses the understanding that each person is a human being whose dignity matters".[3] Thus, dignity is the quintessence of a human being because it is inextricably linked with every human being irrespective of who he or she is and how and where he or she lives. Thus, for Thomas Cristiano, even "justice is grounded in the dignity of persons".[4] To the extent that the universal and egalitarian concept of dignity assumes that all people deserve to be treated with respect, the concept of dignity has taken the form of the demand to recognise the equal status of all cultures and to eliminate inequalities of gender, origin and race. This concept is based on the fundamental belief that as human beings, we are persons and hence we are all equal, even if we are different in all other respects.[5] Dignity is thus a criterion for establishing whether a given law is fair because fair laws protect dignity, and the violation of such laws is inconsistent with the inherent dignity of all persons. It is therefore accurate to say that no one should be regarded as morally inferior based on physical or racial characteristics that are entirely independent of him or her because "human persons have *equal moral status*".[6]

In addition, it should be kept in mind that living or treating others in ways that are contrary to human rights is afforded neither moral legitimacy nor the right to equal opportunities in life even when they constitute an integral part of a cultural

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[2] Werner Becker, *Über das 'Paradox der Menschenrechte' und wie es sich vermeiden ließe*, in: Eric Hilgendorf (ed.), *Wissensschaft, Religion und Recht. Hans Albert zum 85. Geburtstag*, Logos, Berlin 2006.

[3] Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate*, Princeton University Press, Princeton–Oxford 2006, p. 35.

[4] Thomas Cristiano, *The Constitution of Equality. Democratic Authority and its Limits*, Oxford University Press, Oxford–New York 2008, p. 13.

[5] John Finnis, *The Priority of Persons*, in: Jeremy Horder (ed.), *Oxford Essays in Jurisprudence: Forth Series*, Oxford University Press, Oxford 2001, p. 1.

[6] Thomas Cristiano, *op. cit.*, p. 17.

practice or an element of the religious belief system with which people identify. The principle of neutrality is a manifestation of the egalitarianism of human rights, and the latter, in turn, entitles everyone equally to live in a democratic community governed by democratic rules. Because neutrality has an ethical dimension, it does not allow for the attitude of indifference vis-à-vis the cultural forms that violate human rights.[7] In other words, the idea that tolerance (i.e., the neutrality principle) results from human rights is integral with respecting the rights of others. Accordingly, it is not a question of any tolerance but of tolerance that is directly related to the rights and freedoms vested in others.

The human rights speech is paramount because it has a real influence on the daily life and treatment of many people all over the world. Nevertheless, recently, the focal issue concerns the daily functioning of political and public institutions that exercise, apply and obey laws, including human rights. Political and public institutions are supposed to create possibilities whereby diverse persons and/or groups are able to make use of their rights and influence the system of decision-making for the sake of combating inequalities and discriminatory practices. Therefore, Christiano argued that "public equality, or the idea that the institutions of society must be structured so that all can see that they are being treated as equals, is the core principle of social justice".[8] In formulating the principle of public equality, he refers to the concept of interests of all members of the society as well as to the concept of common good understood as well-being. Thus, for Christiano, a basic principle of justice is that "a just society advances the interests of all persons in it and it advances the interests of persons equally",[9] and therefore the well-being, not the simple aggregation of interests, is of huge importance. For Christiano, the political right to participate in institutions with the goal of changing the world in order to advance the equal interests of persons stems from the principle of distributive justice. In other words, through the principle of public equality, Christiano attempts to include the concept of well-being in the issue of distributive justice.

Because equality, not freedom, is the guiding principle of human rights, human freedom cannot be defined in isolation from the principle of equality. The right of freedom can thus be adequately determined only such that it prescribes obedience only to rules that could be established in concert with all others. In analysing this issue from the perspective of semantics, it cannot be explained without reference to the legislative power equally enjoyed by all. The basic premises of human rights are therefore inherently connected to the right to live

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[7] Wolfgang Kersting, *Recht, Gerechtigkeit und demokratische Tugend. Abhandlungen zur praktischen Philosophie der Gegenwart*, Suhrkamp Verlag, Frankfurt am Main 1997, p. 463.

[8] Thomas Cristiano, *op. cit.*, p. 2.

[9] *Ibidem*, p. 12.

in the state under the rule of law as well as the right to a democratic system of power.[10]

However, discussions about the concept of distributive justice have largely contributed to the development of the concept of the equality of opportunity. Lesley A. Jacobs argues the following:

> The traditional view of equality of opportunity is *one*-dimensional. This view focuses on procedural fairness. In the 1960s, a number of influential liberal political philosophers — most notably, John Rawls and Brian Barry — introduced a two-dimensional view of equality of opportunity. This *two*-dimensional view stressed not only procedural fairness but also background fairness. It constitutes a major advance over the one-dimensional view because it is sensitive to the extent to which the distribution of opportunities is partly a function of background socio-economic differences between individuals.[11]

The discussion launched in the nineteen sixties about the equality of opportunity was heated, and it divided academics into adherents and opponents of distributive justice as a principle of a well-ordered society. For example, Gerald Allan Cohen formulated a detailed objection to, as he termed it, the Rawls/Berry[12] argument on equal opportunity, based on the entailed acceptance of certain inequalities, such as the reinforced inequality of talent, in which "the talented should end up with more, since […] the circumstance of their greater talent justifies no distributive effect".[13] In addition, the labour burden and inequalities of people's

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[10] Robert Alexy, *Die Institutionalisierung der Menschenrechte im demokratischen Verfassungsstaat*, in: Stefan Gosepath, Georg Lohmann (Hg.), *Philosophie der Menschenrechte*, Suhrkamp Verlag, Frankfurt am Main 1998, p. 254 ff.; Klaus Günther, *Liberale und diskurstheortische Deutungen der Menschenrechte*, in: Winfried Brugger, Ulfrid Neumann, Stephan Kirste (Hg.), *Rechtsphilosophie im 21. Jahrhundert*, Suhrkamp Verlag, Frankfurt am Main 2008, p. 338–359.

[11] Lesley A. Jacobs, *Pursuing Equal Opportunities. The Theory and Practice of Egalitarian Justice*, Cambridge University Press, Cambridge 2004, p. 15.

[12] Brian Barry reinforces (or intends to reinforce) the Rawlsian argument formulated and discussed as the difference principle by the recourse to the Pareto argument. Compare John Rawls, *A Theory of Justice. Revised Edition*, Oxford University Press Oxford–New York; Brian Barry, *Theories of Justice. A Treatise on Social Justice, Volume I*, University of California Press, Berkeley–Los Angeles 1989.

[13] G.A. Cohen, *Rescuing Justice and Equality*, Harvard University Press, Cambridge, MA–London 2008, p. 98. Richard J. Arneson formulates Cohen's objection very succinctly: "Cohen argues that Rawls produces an intuitive argument for the difference principle that illicitly moves from (a) premises that appeal to the value of equality to (b) a conclusion that affirms the difference principle as the core principle of distributive justice. […] In other words, the difference principle instruct us to arrange the basic social structure so as to make the worst of as well of as possible, and to let equality chips fall where they may. Cohen protests that there is an incoherence in this argument. From premises afforming the intrinsic moral value of equality, how can you validly reason to a conclusion that says inter alia that equality is not intrinsically morally valuable at all?". Richard J. Arneson, *Justice is not Equality*, in: Brian Feltham (ed.), *Justice, Equality and*

conditions generated by the economic market shaped the research interests of Cohen.[14] In general, Cohen is convinced that fair institutions, which are designed to meet the requirements of justice and equality of opportunity, do not suffice to make a society a fair one; also needed is the attachment of all members of a society to the principles that constitute a part of the motivational structure that is characteristic to them, such as an ethos. Thus, Cohen is interested not only in formal inequalities but also in substantive, genuine inequalities to which the equality of opportunity seems blind.

Social awareness has been influenced by the numerous emancipation movements that originated in Western countries and directed against authorities and/or social inequalities. Examples are the abolitionist movements of the late eighteenth and early nineteenth centuries, modern feminist movements, and contemporary movements that fight for the rights of indigenous peoples. The fact that the recognition of human rights had to be struggled for is indeed a common element in all cultures, particularly in Western, Islamic, Asian and African ones. They are not the primordial element of any particular cultural or religious tradition, but they arise in the course of public political debate.[15] The same applies to the principle of equality: the more that a society changes, the more that the principle of equality, that is, its merits, shall be put into question.

In the context of the discussion about the equality of opportunity and the diversity and plurality of contemporary (changing) societies, Jacobs proposes a shift from the concept of equal opportunity as a guiding standard to the concept of equal opportuni*ties* as meeting the demand to be an ideal that is "sensitive to this pluralism and diversity of opportunities".[16] Although competitive opportunities and non-competitive opportunities should be allocated through distinct and appropriate processes,[17] it is important, as Jacobs rightly argues in *Pursuing Equal Opportunities: The Theory and Practice of Egalitarian Justice*, to understand that all forms of inequalities should be understood as social ones. Moreover, the law should be comprehended based on the post-positivist paradigm, which serves as the best tool because of its transformative power to redesign the social structure of inequalities. This issue was also raised by Adam Przeworski, who stated, "even if all human beings are born only as such, society generates differences among them. Indeed, if their parents are unequal, they become unequal at the moment they are born. To make them equal, recourse to law is necessary".[18] Hence, in

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Constructivism. Essays on G. A. Cohen's Rescuing Justice and Equality, Wiley-Blackwell, Malden, MA–Oxford 2009, p. 16.

[14] G.A. Cohen, *op. cit*., especially Part I.

[15] Heiner Bielefeldt, *Menschenrechte in der Einwanderungsgesellschaft. Plädoyer für einen aufgeklärten Multikulturalismus*, transcript Verlag, Bielefeld 2007, p. 28 ff.

[16] Lesley A. Jacobs, *op. cit*., p. 23.

[17] *Ibidem*, p. 24.

[18] Adam Przeworski, *op. cit*., p. 287.

general, unjust inequalities are those that matter *in* and *for* society because they deprive persons from their inalienable dignity or prevent them from the pursuit of one's life with dignity. It follows that employing the law matters if and only if we have achieved some philosophical, moral and political understanding of what equality means and the ways in which inequalities strike and infringe human dignity. However, this understanding, at least in the realm of practical philosophy, is not achieved for nothing but for the sake of changing the world and making it a better place to live for each person. For that very reason, the law is needed as a medium of communication in reaching agreements that are subsequently applied to transform social, economic and political structures.

Indeed, the issue of equality, particularly the principle of equality, has been a matter of profound academic debate. This issue has also been the subject of legal scrutiny and appropriate decision-making to introduce legal recommendations that are expected to transform social, economic and political structures. For example, in London on 3–5 April 2008, the Equal Rights Trust organised the conference, Principles on Equality and the Development of Legal Standards on Equality, which concluded with the Declaration of Principles on Equality.[19] The Declaration consists of six parts: *Equality*, *Non-Discrimination*, *Scope and Right-Holders*, *Obligations*, *Enforcement* and *Prohibitions.* It includes twenty-seven articles that address the majority of the issues discussed in this chapter. The Declaration recognises the right to equality of all human beings and the right to be equal in their dignity (Art. 1; Art. 9 on a right-holder restates the claim). It emphasises that similarly situated people should be treated equally but differently situated people should be treated differently "according to their different circumstances" (Art. 2) and their capabilities to participate in shaping and changing the world. Therefore, unjust inequalities, that is, socially significant inequalities that result in the discrimination against certain persons and/or groups "must be prohibited where such discrimination (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms" (Art. 5). The duty-bearers are most of all states, however, the other actors also should respect those rights (Art. 10). These issues have been elaborated and justified in this chapter.

It is extremely important to highlight that the Declaration of Principles on Equality was endorsed by the Standing Committee of the Parliamentary Assembly of the Council of Europe, which on 25 November 2011 in Edinburgh adopted the "Resolution and a Recommendation on 'The Declaration of Principles on Equality'" (Resolution 1844 (2011)),[20] "reiterat[ing] the crucial importance

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[19] Text of the Declaration of Principles on Equality is available at: http://www.equalrightstrust.org/ertdocumentbank/Pages%20from%20Declaration%20perfect%20principle.pdf (access: 22-04-2016).

[20] Text of the *Resolution and a Recommendation on 'The Declaration of Principles on Equality'* is available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=18046&lang=en (access: 22-04-2016).

of the principles of equality and non-discrimination, as an essential part of the international protection of human rights, already enshrined in the 1948 Universal Declaration of Human Rights and the 1968 International Covenant on Civil and Political Rights" (Art. 1). Because the referred document has the status of recommendation, the Parliamentary Assembly of the Council of Europe would be able to call on its member states to adopt the Declaration and then elaborate, adopt and/or develop appropriate and effective equality policies and legislation as well as anti-discrimination measures (Art 9 & 10).

It must be noted, however, that adopting and/or developing effective policies and legislation to a certain system of law and appropriate institutional settings is always a challenging endeavour that is demanding both theoretically and practically. Therefore, on 28–29 September 2014, the Centre for the Theory and Philosophy of Human Rights (CENHER), at the University of Lodz, Faculty of Law and Administration, held an international conference dedicated to the issues concerning the principle of equality. This volume consists of selected papers that were presented and discussed at this conference.

The authors of the papers collected in this volume consider what contemporary democratic societies should be guided by to prevent dominant groups from violating the principle of equality. It may seem trivial to assert that in the twenty-first century, in every society there are various forms of social life. Nevertheless, this pluralism plays an important role in shaping the democratically legitimised law and in the democratic functioning of various public and political institutions. Thus, the principle of equality is of particular importance in assuring these various forms.

The volume consists of three parts. In Part I, *The Idea of Equality under Scrutiny*, three chapters analyse the content of equality from a legal perspective, focussing respectively on the historical transformation of its meaning and its contemporary significance for the law (Jasminka Hasanbegović); its contribution to the constitutional debates (Jerzy Zajadło); and its relationship to freedom as a core legal value (Tomasz Bekrycht). Part II, *Concepts of Equality in Question*, focuses on issues of equality raised in the well-known theories of John Rawls (Anna Kalisz), Paul Ricoeur (Marcin Pieniążek) and Hans Kelsen (Monika Zalewska). The theoretical essays in Part I and Part II are complemented in Part III, *Respecting the Principle of Equality — Case Studies*, by discussions about practical problems in implementing and ensuring equality. These problems consist of the legal regulation of culturalism (Ivan Padjen), judicial impartiality and independence (Artur Murdecki), copyright in the EU (Anna-Maria Andersen), Polish legal culture (Paweł Skuczyński), and the barriers faced by women who participate in the political sphere (Małgorzata Niewiadomska-Cudak).

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PART I

THE IDEA OF EQUALITY UNDER SCRUTINY

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Chapter II

(In)equality of human beings: eternal — premodern, modern and postmodern — or outdated legal idea?

Jasminka Hasanbegović[*]

This paper focuses on the idea of legal equality, but first and foremost on the idea of legal equality of human beings. The idea of equality lies at the core of the idea of justice, more precisely it lies at the core of every idea, conception or notion, let alone theory of justice.[1] Namely, justice demands that equals are treated equally, and unequals unequally. This is why justice is more than equality. Equality demands that equals should be treated equally, and justice not only explicitly demands that the unequals are treated unequally, but also inherently requires two other things: on one hand, the differentiation between essential and non-essential (in)equalities, and on the other hand proportionality, proportional action, proportion in treating essential (in)equalities. Hence, equality by itself can be absolute, while equality as a core part of the notion of justice must be also relative, precisely due to being subject to comparison and grading.[2] Although it may sound paradoxically, it is here, in this very fact of being subject to comparison and grading, that smaller and greater inequalities, as well as smaller and greater *equalities* stem from! And, although the phrase 'smaller and greater equalities' might sound Orwellian, ironic, or even totalitarian — as you like — it still doesn't

[*] University of Belgrade Faculty of Law.

[1] Allow me just to remind you of the span of theories of justice between Aristotle, *Nicomachean Ethics*, book V; and Chaïm Perelman, *De la justice*, ULB, Bruxelles 1945 (later appearing in *Justice et raison*, Editions de l'ULB, Bruxelles 1963, as well as *Cinque leçons sur la justice*, in: *Droit, morale, philosophie*, LGDJ, Paris 1968); or John Rawls, *Justice as Fairness*, articles written from 1957 ("Journal of Philosophy" 1957, October 24, 54(22), p. 653–662) to the end of his lifetime (2002), and two books *A Theory of Justice*, Belknap Press of Harvard University Press, Cambridge, MA 1971 (rev. ed. 1999) and *Justice as Fairness: A Restatement*, Belknap Press, Cambridge, MA 2001.

[2] *Cf.* Aristotle, *Topics* or *Topika* or *Topica*, Books II and III; topoi of comparison belong to topoi of accidence.

always have to be so when it is stated that "all animals are equal, but some animals are more equal than the others",[3] as we are going to see.

When we add *fairness* (I prefer this colloquial word to the legal term of Latin origin: *equity*, stemming from ἐπιείκεια in Ancient Greek), which has been determined since Aristotle as something surpassing justice, namely as justice (i.e. justness) of a specific case, hence (in)equality caused by specific circumstances,[4] then it is clearer that not only equality, but also justice (i.e. justness) can be compared and graded, and, moreover, it enables us to notice the dialectics in the relationship between equality and justice, the dialectics of their universal (or general) and specific (or individual) features, where inequality caused by specific circumstances can lead to something which is better and greater than justice, namely fairness. Such a complex connection between equality and justice results in the fact that, accordingly, on the universal, general level one can say very little about equality and justice, hence raising the question whether two Peters — Westen and Unger — were right when talking about the empty idea of equality,[5] and empty ideas in general, in the context of criticism of the analytic philosophy.[6]

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[3] George Orwell, *Animal farm*, 1946/2004. AAARGH Internet Edition, p. 57.

[4] Aristotle, *Nicomachean Ethics*, transl. by W.D. Ross, bk. V, ch. X, §2, §6, §8, 1137b, p. 138–139:

"The same thing, then, is just and equitable, and while both are good the equitable is superior. […] And this is the nature of the equitable, a correction of law where it is defective owing to its universality". And in the same chapter *in fine*: "It is plain, then, what the equitable is, and that it is just and is better than one kind of justice". The same Aristotle's thought, if we use word *fairness* instead of *equitable*, then reads: "The same thing, then, is just and fair, and while both are good the fairness is superior. […] And this is the nature of the fair, a correction of law where it is defective owing to its universality". And *in fine*: "It is plain, then, what the fair is, and that it is just and is better than one kind of justice".

[5] Disagreements with Peter Westen occurred even before his lecture held at his University's conference on February 6, 1980, and subsequently published as *The Empty Idea of Equality*, "Harvard Law Review" 1982, 3(95), p. 537–596. Westen soon replied to criticism in *The Meaning of Equality in Law, Science, Math, and Morals: A Reply*, "Michigan Law Review" 1983, 81, p. 604–663; followed by *The Concept of Equal Opportunity*, "Ethics" 1985, 95, p. 837–850; and finally in the book *Speaking of Equality: An Analysis of the Rhetorical Force of 'Equality' in Moral and Legal Discourse*, Princeton University Press, Princeton, N.J. 1990. A very good critical overview of attitudes and discussions concerning the (non)emptiness of the substance of the equality idea advocated in the Anglo-American theory by Westen, Kymlicka, Dworkin, Waldron, Hart, Rawls and others, as well as a comprehensive critical overview of legal (legislative and court) practices can be found in Nicholas Mark Smith, *Basic Equality and Discrimination: Reconciling Theory and Law*, Ashgate, Farnham–Burlington 2011.

[6] Peter Unger in his recently published book, *Empty Ideas: A Critique of Analytic Philosophy*, Oxford University Press, Oxford–New York 2014 — differentiates between 'concretely substantial' and 'concretely empty' ideas, and demonstrates that the contemporary analytic philosophy deals primarily with 'empty ideas', purely conceptual issues, and not with any 'concretely substantial' issues, important for the concrete reality.

Do these two Peters have a point? It seems so. Unger is right when he discusses the emptiness of ideas of analytic philosophy, which by itself deals with nothing 'concretely substantial', thus lacking any significant insight into concrete reality. In a way, 34 years later, Unger provides philosophical and epistemological foundations for Westen's[7] critical view of the empty idea of equality based (either consciously or unconsciously) on the analytic philosophy, which has dominated the Anglo-American intellectual world throughout the XX century. However, Westen himself is mistaken in approaching the equality principle in the same manner, as a thousand-years-lasting *fixture* of western thought, which caused the principle of equality to be empty of content. For, it is precisely through the universalization and generalization which are not based on and connected to unavoidably partial, parochial, specific realities that the content of the equality principle was rendered empty. The principle itself, transformed into a notion, has been analysed logically and conceptually in different branches of analytic philosophy, including analytical legal philosophy, without any linkages to actual reality.[8] On the other hand, Westen — seemingly on the tracks of Unger, but actually, in a way anticipating him — considers that the principle of equality, in order to be meaningful, has to incorporate specific external values determining which persons and actions are equal or similar. However, once these external values are established, the very principle of equality becomes redundant, and, moreover, a source of confusion and logical fallacies, so the equality rhetoric should then be abandoned. Hence, Westen is correct that concretely substantial principles of equality are always in a certain manner linked to specific, partial, parochial, concrete realities and, so to speak, contextualized by them; that their meaning is determined by these contexts, i.e. concrete realities. But, Westen refrains from engaging in contextual deconstruction of the content of ideas or principles of legal equality, considering instead that this universal idea empty of any content should be abandoned together with the equality rhetoric. And this is where, in my opinion, Westen is wrong. The equality principle is not an outdated, nor redundant, let alone logically harmful idea in concrete, as well as postmodern reality.

We shall now abandon the analytic philosophy's theoretical framework and turn to the contrasting framework of continental philosophy, but not the XX century one, nor even modern continental philosophy. We will return to its very foundations. Let us first go back to Aristotle. Why? Because, as we have seen, he explained to us the origin of such dialectic complexity of links between (in)equality, (in)justice and (un)fairness, as well as their universal (or general) and

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[7] Peter Westen, *Idea of Equality*, p. 537 *sqq.*

[8] For basics of analytical jurisprudence, see Brian H. Bix *Analytical jurisprudence / Analytical legal philosophy*, in: *A Dictionary of Legal Theory*, Oxford University Press, Oxford–New York, p. 6–7. This is the tradition which, according to some, begins with Bentham, continues with Austin, and in the XX century was followed primarily by Hart, and then many others.

concrete (or specific) traits which have presented a stumbling block and a Gordian knot for both Anglo-American analytic philosophy and Anglo-American jurisprudence more than two millennia after Aristotle, as we have been informed by the two Peters. But that is not all. With Aristotle's help we can gain several more important insights.

The renowned fifth book of Aristotle's *Nicomachean Ethics* tells us that equality (as ordinary or essential or absolute equality, and as proportionate or relative equality, i.e. proportionality) lies at the core of the idea of justice as a perfect, complete, greatest virtue, or supreme legal value. Justice as a specific type of equality, hence, is stretched between the idea of identity as sameness or identicalness, and the idea of fairness as uniqueness.

Let us first review how equality and identity 'stretch' justice. Only the essentially equal or at least essentially similar phenomena are called the same, identical, equitable. This is precisely where the first problem arises. Essence[9] is an inherent principle of phenomena (i.e. beings), which is, in the logical sense, expressed by a definition (i.e. by the closest genus and the specific difference). Essence surpasses all individual phenomena (i.e. individual beings), but it is absent, non-existent outside of those individual beings. Aristotle's teaching on identity points out another, even greater source of problems.[10] This teaching

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[9] Aristotle, *Metaphysics*, bk. V, 1017 b 23–26.

[10] Idem, *Topica*, book VII, especially chapter I. Here Aristotle focuses on three basic types of identity: 1) numerical (which is actually the identity of designations of one single phenomenon, in the same way synonyms signify a single phenomenon, e.g. house and building), 2) specific identity (which is in turn the identity of phenomena, and not of their designations, more precisely the identity according to species, e.g. Tutsi and Hutu — two different peoples, i.e. two different types of ethnic groups both in Burundi and Rwanda), and 3) generic identity (which is also the identity of a phenomenon, and not of its designations, but in this instance the identity by genus, e.g. a black and a white may designate identity of two men, or two humans, or two horses, or two animals, i.e. a black person and a white horse). When identity is discussed, Aristotle says that the majority of persons refers to the numerical identity which can be: a_1) nominal (i.e. synonymous identity, for example house and building) or else a_2) definition identity (square and isosceles right-angled quadrilateral), b) proper identity (man and being capable of laughter) and c) accidental identity (Professor at University of Belgrade Faculty of Law present in Łódź on September 28, 2014 and Jasminka Hasanbegović). We should note that, when it comes to numerical identities (as identities of designations, i.e. meanings of terms) we have two designations (i.e. two terms) and a single concept and a single phenomenon (i.e. being or event or thing), while in the case of specific and generic identity (as identities of beings or phenomena or events or things) we have three designations (i.e. three terms) and three concepts, and two phenomena (or beings or events or things). It should also be noted that out of four numerical identities (as identities of designations, i.e. meanings of terms) only one — definition identity — relates to the *essence*, or, more precisely, to the *designation of the essence* of a being (or phenomenon or event or thing), and most precisely, to the *designation of a total essence* of a being, while the other two identities — specific and generic (as identities of beings or phenomena or events or things) refer to the *essence* too, but only to their respective *part of the essence* of a being or phenomenon or event or thing. For more on this, see Jasminka Hasanbegović, *Topika i pravo* [*Topica and Law*], CID, Podgorica 2000, especially p. 33, 66–67 *et passim*.

clearly points out the comprehensive ontological and epistemological difficulties and inherent limitations arising in the course of determining and expressing identity, and in that context of equality. These should always be kept in mind, especially in philosophy and jurisprudence.

Now let us address the proportional or relative equality, i.e. proportionality. When a legislator achieves it, namely when it is achieved in a general, abstract manner, we talk about just laws. Of course, this general, abstract proportional equality is only one of the prerequisites of a law's justness. And when the proportional or relative equality is achieved by a judge in a specific case, in relation to previous, identical or similar court practice cases, we talk about a fair judge. But we have to keep in mind that the specific proportional equality in relation to adjudicated identical or similar court cases remains nothing but one of the conditions a judge needs to meet to be regarded as fair.

And finally, how do equality and fairness 'stretch' justice? By placing it between equality as the essence, or at least core, heart of justice, and then, again both equality as qualitative, essential equality of beings (or events, phenomena, things),[11] and equality as quantitative, proportional equality of beings (or phenomena) on one side, and fairness on the other, and more precisely, fairness as uniqueness, as unique justness, which is not only justice, but more than justness in a specific case, precisely because it gives importance to some non-essential but specific circumstances of a being (or phenomenon).[12] This is exactly the dialectics of paradox. And it seems to be the maximum that – on the universal, general, abstract level – can be said about justice set between equality and fairness. Hence the impression of *nothing new after Aristotle* — not only in theories of justice, but also in its various understandings — is basically correct.

Altogether, even Aristotle's notions of justice and equality would also be empty ideas if they had been developed only in his fifth book of *Nicomachean Ethics*, or if we disregard all other Aristotle's works, especially *Politics*, and his views on the issue of (in)equality of human beings. Inequality of slaves, barbarians, women, children — both in comparison to each other, as different family or society members, and primarily in relation to the Greeks — is explained by Aristotle as natural, as inequality founded in their unequal, different natures, first and foremost, in the different *logos* of all these beings, designating simultaneously their *language* and their *reason*.[13] Still, some nuances should be highlighted. A reconstruction of Aristotle's notion of a man in this context would

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[11] Which, as we have seen, represents the mentioned unattainable identity.

[12] I.e. because it takes into consideration some non-essential but specific, proper or even accidental traits of the case at hand (or as Aristotle would phrase it: it also takes into consideration some temporary properties and accidentalities).

[13] These Aristotle's attitudes, which have attracted attention of different authorities during more than two millennia, are in more detail explained in the first two books of his *Politics* and then also in his *Generation of Animals* (bks. I, II, VI) and *History of Animals* (book IX).

show that for him a man is a Greek (and not a barbarian), a male (and not woman), an adult (and not a child). This is especially important if we recall that for him slaves are "living tools",[14] that "barbarians and slaves have the same nature",[15] that "women possess *logos*, but lack the authority, and children lack a complete *logos*".[16] So, if we accept for Aristotle a man (i.e. human being) is an adult Greek male, then we can state that Aristotle advocates the equality of all men (human beings). Moreover, a few more nuances need to be taken into account. Aristotle considered that a husband and a wife should live in *politeia*,[17] i.e. a system of rule appropriate for the free and the equals,[18] but still stated that a woman should not leave female house quarters, maybe because, as it was previously stated, he believed that a woman possessed *logos*, but lacked authority.

From the contemporary point of view, it could be stated, having in mind not only Aristotle, but almost the entire philosophical thought, that not only the Athenian world (including the period of its democracy), but also the entire Ancient (Greek and non-Greek) world, as well as the entire premodern world in general were ruled by the concept of inequality of human beings — a natural, God-given, or god-ordained as natural inequality of human beings, followed closely by the idea of an entirely natural, God-given *legal* inequality. This idea was realized in different concrete ways, but was almost exclusively taken as unquestionable. It is also necessary to underline that the idea or notion of man in premodern era was very limited in scope and abounding in content, which made conditions that somebody first had to fulfil in order to be considered as and called a man, like it was demonstrated on Aristotle's example.

This makes it necessary to mention at least briefly a few rare but precious exemptions: sophists Hippias, Antiphon and Alcidamas,[19] and Stoics, as proponents of exactly opposite idea to that which will be prevalent in Europe after them, namely to Christian idea of (in)equality. For, when discussing legal equality of humans, it can be stated that during the entire premodern era, not only in specific social realities, but in the world of ideas as well, almost nothing happened from the aforementioned ancient exemptions to the French revolution.[20]

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[14] Aristotle, *Politics*, book I, chapter IV, §3 — 1253b *in fine*.

[15] *Ibidem*, bk I, ch. II, §2 — 1252b3.

[16] Cf. *ibidem*, bk. I, ch. XVII, §1 *in fine* — 1260a11.

[17] *Ibidem*, bk. I, ch. XV, §1 — 1259a39 and bk. I, ch. XVI, §1 — 1259b1.

[18] *Ibidem*, bk. I, ch. VIII, §3 — 1255b20; bk. I, ch. XVI, §1 — 1259b4–6; bk. III, ch. VII, §1 v 1277b7–9.

[19] Mihailo Đurić, *Ideja prirodnog prava kod grčkih sofista* [*The Idea of Natural Law by Greek Sophists*], PhD thesis (1954), University of Belgrade, Belgrade 1958. I used this work from the second, extended edition of Đurić's collected works, Belgrade 2009, Vol. 1, p. 181.

[20] This is, of course, a rough formulation. It would be more precise to say until Sir Edward Coke and John Locke in theory, and in practice until the English Bill of Rights (1689), Virginia

Hippias of Elis was the first to differentiate between the natural and positive law. Unknown even to the knowledgeable public, he was in early XX century 'introduced' to scientific circles as "the ancient Hugo Grotius".[21] Hippias considered all humans his fellow countrymen, kin and co-citizens by nature, but not according to human laws, since equals are naturally similar, and the human law is tyrannical and often violates the nature.[22] Modern interpretations and understanding of this viewpoint differ, so the question whether Hippias was the first cosmopolitan, more precisely, the first representative of the cosmopolitan worldview, or just one among many Panhellenists — has not been answered in the same manner up till now, but the arguments in Đurić's research clearly indicate that Hippias was the first jusnaturalist and cosmopolitan, hence a real predecessor of Stoics, if not the first Stoic.[23]

Antiphon has been controversial since Late Antiquity: Are Antiphon the sophist and Antiphon the Rhamnusian, orator and politician, the same person? When the fragments of Antiphon's work *Aletheia* (*The Truth*) were discovered in early XX century among accidentally unearthed papyri in Egypt as the only original document containing the sophistic teaching on natural law, the question of Antiphon or Antiphons gained importance again and the vivid discussion continued in the current century.[24] Antiphon explicitly states that the differentiation between good and bad families, i.e. between aristocracy and plebeians is quite barbaric, and, in his opinion, it is the characteristic of the existing legal order of positive law, since all people, Greeks as well as barbarians, are perfectly equal. Biological equality, according to him, requires legal equality by regulating interpersonal relations.[25]

Declaration of Rights (1776), North-American Bill of Rights (1789) and the French Declaration on the Rights of Man and Citizen (of the same year, 1789), which were very influential, model legislation of the time.

[21] In his writings on the Greek Enlightenment (VII–V century BC), which starts with the Presocratics and continues with Socrates and the sophists, Johannes Geffcken has called Hippias 'the ancient Hugo Grotius', comparing him to 'the father of modern natural law'. See, Johannes Geffcken, *Die griechische Aufklärung*, "Neue Jahrbücher für das klassische Altertum" 1923, Bd. 51–52, p. 15–31, especially p. 23.

[22] Cf. Hermann Alexander Diels, *Die Fragmente der Vorsokratiker*, 6th ed. revised by Walther Kranz, Weidmann, Berlin 1952, p. 333. This viewpoint of Hippias is presented in Plato's *Protagoras* (337c).

[23] Mihailo Đurić, *op. cit*., p. 203–217.

[24] *Ibidem*, p. 239–243. It should be also added that this discussion endures in the XXI century in new books. Thus, Michael Gagarin, a renowned contemporary expert in the Ancient Greek law, rhetoric, literature and philosophy, presents in his book *Antiphon the Athenian: Oratory, Law and Justice in the Age of the Sophists*, University of Texas Press, Austin 2002 — the arguments in favour of identifying Antiphon the Sophist as Antiphon the Rhamnusian, while Gerard Pendrick provides in his book, published that same year, *Antiphon the Sophist: The Fragments*, Cambridge University Press, Cambridge 2002 — arguments that Antiphon the Sophist and Antiphon Rhamnusian are two different persons, and provides the new edition of and commentary on the fragments attributed to the Sophist.

[25] Cf. Hermann Alexander Diels, *Die Fragmente der Vorsokratiker*, frg. B, col. I, 35 ff. — referred to in Mihailo Đurić, *op. cit*., p. 248–254.

According to Antiphon's exceptionally individualistic, humanistic, democratic and cosmopolitan doctrine, his understanding of natural law was as reformatory and revolutionary as Hippias', what Đurić has convincingly demonstrated. In contrast to brute force and mere sanction of human laws, and in contrast to the divisions of human beings into rich and poor, Greeks and barbarians, divisions that are introduced by these human positive laws, Antiphon's *Truth* proclaims freedom of individuals and equality of human beings.[26]

Finally, when discussing sophists, we should also mention Alcidamas of Elaea because of his famous view which elevates legal equality of humans to the level of a well-founded principle, and which states: "God has created all humans free. Nature made nobody a slave".[27]

Since cosmopolitism is a characteristic feature of the entire stoic social philosophy from the birth of stoicism in Athens with Zeno of Citium in late IV and early III century BC until Justinian's ban on all pagan philosophical schools in 529 AD we should remind us on this occasion of what Epictetus told us and Diogenes Laertius spread later on, namely, that long ago, at the very beginning of the establishing of the stoic school, Laertius' famous namesake, stoic Diogenes of Sinope, had stated: "I am neither Athenian nor Corinthian. I am a citizen of world — a *kosmopolites*".[28] And Epictetus himself later stated: "a man is no longer a man if he is separated from other men. For what is a man? A part of a state, of that first which consists of Gods and of men; then of that which is called next to it, which is a small image of the universal state".[29]

Having in mind that sophists did not share a single harmonized worldview, but quite the opposite, held not only diverging but completely opposed opinions, the stoicism can be considered the first school of philosophy establishing the principle of legal equality of humans, and founding it on equal human nature of all individuals regardless of their potential differences. This contribution of stoics to the political thought is considered their greatest and deepest.[30]

Stoic worldview with its central idea of human equality did not only last for a long time as a school of philosophy — more than eight centuries — but was also quite widespread both in Greece and Hellenistic world in general, as well as subsequently in the Roman Empire. Of course, it is impossible to estimate how influential it would have been if the Christian worldview had not suppressed it owing to the aforementioned Justinian's legal ban in 529. Still, it

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[26] Mihailo Đurić, *op. cit*., p. 253–261.

[27] Scholia on Aristotle, *Rhetoric*, book I, chapter XIII, 1373b18 — referred to in Mihailo Đurić, *op. cit*., p. 257–258.

[28] Epictetus, *Discurses*, bk. I, ch. IX, §1, Greek-Engl. Loeb e-edition; Diogenes Laertius, *The Lives and Opinions of Eminent Philosophers*, bk. VI, ch. II, §VI (72), Greek & Engl. e-eds.

[29] Epictetus, *ibidem*, bk. II, ch. V, §26.

[30] Charles H. McIlwain, *The Growth of Political Thought in the West: From the Greeks to the End of the Middle Ages*, Macmillan, New York 1932, p. 114–115.

can unquestionably be stated that the early Christian thought borrowed and used many central stoic ideas, philosophical concepts and even terms.[31]

Though it can be asserted that Christianity — unlike other religions at the time — represented the first universalistic religion and preached the equality of all humans: Jews, Greeks, Romans, poor, rich, women, men, it preached the equality of all before God, in (His) Final Judgement, and not the equality according to human laws, i.e. not the equality before human laws, or courts and tribunals. Throughout the centuries, the relationship of Christianity towards the state authorities has been expressed by Jesus Christ's famous saying: "Render unto Caesar". That means: "Render unto Caesar the things that are Caesar's; and unto God the things that are God's".[32] As it is well known, during the course of its history, Christianity split into different confessions, i.e. churches, but the attitude towards the legal equality of human beings according to human, i.e. terrestrial laws (*per leges terrenae* or *per leges terrae*) has remained essentially unchanged. In that sense, the historically recent attitudes of protestant, and Roman catholic church, i.e. the Vatican (but not only them) towards Nazism and similar governments and legal orders, e.g. in Croatia at that time, or elsewhere, represent a special problem.[33] Hence, it seems that, in the period after World War II, the views of different Christian and all other confessions or churches on terrestrial legal (in)equality of human beings should be evaluated on the basis of their attitude towards human rights. But, this is a vast topic that cannot be opened on this occasion.[34]

Is it so, that nothing has really happened after the aforementioned three sophists (Hippias, Antiphon and Alcidamas) and Stoics until the American and French revolution and their constitutions and Declarations of Rights? Is it so, that

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[31] For more on this, see the standard work on historical, social, political, cultural, religious, philosophical and other relevant backgrounds of the birth of Christianity: Everett Ferguson, *Backgrounds of Early Christianity*, (1st 1987) 3rd expanded & revisited ed., William B. Eerdmans Publishing Company, Grand Rapids, MI 2003, p. 3 *sqq. et passim*, especially p. 354–369.

[32] In Gospel by Matthew (22:15–22), Mark (12:13–17) and Luke (20:20–26), as well as in non-canonical Gospel by Thomas (100).

[33] There is a comprehensive body of literature on this, so we refer only to the newest, without any pretension to critical expertise: Chris McNab, *The Third Reich*, Amber Books Ltd., London 2009; Robert Michael, *Holy Hatred: Christianity, Antisemitism, and the Holocaust*, Palgrave Macmillan, New York 2006; David Redles, *Hitler's Millennial Reich: Apocalyptic Belief and the Search for Salvation*, New York University Press, New York–London 2005; Roger Griffin, *Fascism, Totalitarianism and Political Religion*, Routledge, Oxon–New York 2005; Robert Anthony Krieg, *Catholic Theologians in Nazi Germany*, Continuum International Publishing Group, London 2004.

[34] On that topic, see some relevant 'BCMS' literature in our (Bosnian-Croatian-Montenegrin-Serbian) language: Enes Karić (prir.), *Ljudska prava u kontekstu islamsko-zapadne debate* [*Human Rights in the Context of Islamic-Western Debate*], Pravni centar, Sarajevo 1996; Eliezer Papo (prir.), *Judaizam i ljudska prava* [*Judaism and Human Rights*], Pravni centar, Sarajevo 1998; Velimir Blažević (prir.), *Ljudska prava i Katolička crkva* [*Human Rights and Catholic Church*], Pravni centar, Sarajevo 2000.

neither in the history of the idea of legal equality nor in social practice nothing has really happened during this period of twelve and a half centuries? This could almost be accepted as such. For, the idea of terrestrial equality of men before the law and courts flared up for a moment in the Antiquity, and then was transcended by the Christianity to the State of God, so it reappeared in the earthly domain only in the modern age, now as an important, essential feature, criterion of modernity, and only then did it start to be slowly and arduously implemented in practice, in reality.

However, the idea of legal equality — as idea of equality of men before the law and courts — did not appear out of thin air in the modern times, nor were the aforementioned twelve and a half centuries just a river of time whose flow brought nothing. There is a legal, political, social and cultural event deserving of our full attention. Not because of what it meant on that day, June 15, 1215, when John Lackland met his 25 barons (and 12 bishops and 20 abbots who served as witnesses) at Runnymede, on the bank of Thames near Windsor Castle, but primarily due to what it has been meaning for the centuries afterwards. The event in question is, of course, the signing of *Magna Carta Libertatum*.[35] As the first document imposed on a king by his feudal subjects attempting to limit by law his power, and to protect their proper rights, the Great Charter of the Liberties of England has only subsequently, during its long and complex history, become an important part of the modern constitutionalisation of government, a precursor of human rights, and a legal model even outside of England. As Lord Denning declared, *Magna Carta Libertatum* was "the greatest constitutional document of all times — the foundation of the freedom of the individual against the arbitrary authority of the despot".[36]

From the perspective of equality, the most important, and still valid, is the provision 29 (and later 39 and 40), which states:

> Nullus liber homo capiatur, vel imprisonetur, aut disseisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum vel per legem terre.
>
> Nulli vendemus, nulli negabimus, aut differemus rectum aut justiciam.[37]
>
> No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land.
>
> To no one will we sell, to no one will we deny or delay right or justice.

But who is *liber homo*, freeman? In 1215, only a King's subject who is a feudal noble: a baron, an earl or a lord, or a male offspring of theirs — but naturally

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[35] James Clarke Holt, *Magna Carta*, 2nd ed., Cambridge University Press, Cambridge 2010, p. 1–22, *sqq.*

[36] Cited according to Danny Danziger & John Gillingham, *1215: The Year of Magna Carta*, Hodder and Stoughton, London 2004, p. 278.

[37] James Clarke Holt, *op. cit.*, p. 460–461.

neither an ordinary man, nor serf — was a freeman, *liber homo* referred to by *Magna Carta Libertatem*. However, it was already by the law adopted in 1354 that the provision 29 was revised, and then *freeman* became simply *a man*, i.e. *man of whatever estate or condition he may be*, and the phrase on *'due process of law' for lawful judgement of his peers or the law of the land* was added to the text of the provision. Hence, it is no surprise that already Sir Edward Coke tried to deny the King's sovereign rights by invoking the Great Charter: "*Magna Carta* is such a fellow, that he will have no 'sovereign'".[38] Coke considered that laws held the absolute power, not the King.[39] We should notice this as a completely *modern* view: It is not the king who is sovereign, but the laws, namely the legislator, i.e. the Parliament. But, following Coke's idea that *Magna Carta* is "a fellow without sovereign", we reach the *postmodern* view: Neither the King, nor the laws, i.e. legislator — the Parliament are the ones who are sovereign, but precisely the *Magna Carta*, namely the rights and liberties of man (later named human rights) that are contained therein (or in any other document).[40]

English constitutionalist ideas, which began as premodern ideas of *Magna Carta Libertatum*, were gradually developed and amended throughout centuries, and then transplanted during American and French revolution into their constitutions and declarations on rights, and subsequently, during two following centuries, disseminated all around the world. Thus we could draw the conclusion that the principle of legal equality of human beings was also realized without any questions or problems, once it was established, i.e. constitutionalised in modern states. But, it didn't happen in that way. Nowhere. Here are several examples, just for illustration purposes.

England is considered the cradle of *modern* democracy. Yet, until 1948 some people were 'more equal' than others, namely 'more equal' from the aspect of electoral rights. For example, the representatives of bourgeoisie were allowed to enter the House of Commons only after the reform of 1832, and the new reform implemented in 1867 additionally lowered the property qualifications in accordance with a new Law, so a large number of industrial workers received

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[38] Cited according to Ralph V. Turner, *Magna Carta*, Longman, London 2003, p. 157.

[39] *Ibidem*.

[40] See on this, from another angle, Jasminka Hasanbegović, *Retoricitet prava i pravnost države — O nespojivosti suverenosti i pravne države* [*Rhetoricity of the Law and Legality of the State — On the Incompatibility of Sovereignty and Legal State (Rechtsstaat)*], in: Danilo N. Basta, Diter Miler (prir.), *Pravna država — poreklo i budućnost jedne ideje* [*Legal State* (*Rechtsstaat*) *— The Origin and the Future of One Idea*], Pravni fakultet u Beogradu — Centar za publikacije and Nemački kulturni i informativni centar u Beogradu, Beograd 1991, p. 52–61; Jasminka Hasanbegović, *Rhetorizität des Rechts und Rechtlichkeit des Staats — Über die Unvereinbarkeit von Souveränität und Rechtsstaat*, "Rechtstheorie", Berlin, Sonderheft Jugoslawien, herausgegeben von Danilo Basta, Werner Krawietz, Dieter Müller, *Rechtsstaat — Ursprung und Zukunft einer Idee*, Symposium zum 150jährigen Bestehen der Belgrader Juristischen Fakultät, 1993, Band 24, Heft 1–2, p. 63–80.

voting rights and a theoretical option to have workers' representatives in the House of Commons. Voting rights were provided exclusively to men until 1918, when they were awarded to women as well, barring those under the age of 30. It wasn't until 1928 that the voting rights of men and women were completely equal, and awarded to persons of both sexes above the age of 21.[41] But, it was not until the reform of 1948 that the last cases of double or plural voting right were eliminated,[42] and only then did the voting right in England become completely universal and equal for all.[43]

In spite of the fact that on the issue of legal equality of men and women from the aspect of voting rights, a great library of books could be collected, there would still be many unwritten facets of that topic waiting for research and analysis and deserving them. Hence, we should use this opportunity to name at least some illustrative data. As early as in the 18th (in just a few countries such as Sweden and Poland) and 19th century, voting rights were beginning to be awarded to women, but only if they were taxpayers (either as guild members or widows), or only at local level. It could be stated that Australia was the first country where women — although not Aboriginal ones — were awarded the voting rights at federal level in 1902. With regards to Europe, Finland was the first country to introduce universal, active and passive voting rights in 1906 regardless of a person's gender, financial situation, race or social position. Some of the countries that follow its example are: 1917 — Poland and Soviet Union; 1918 — Germany; 1920 — USA, after the adoption of the 19th Amendment,[44] although that still did not enable a complete exercise of universal voting rights in that country; 1945 — France and Yugoslavia; 1965 — USA provided universal voting rights in accordance with the Voting Law which prohibits race, gender, education and language based

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[41] For more on this, see Miodrag Jovičić, *Veliki ustavni sistemi: Elementi za jedno uporedno ustavno pravo* [*Great Constitutional Systems: Elements for One Comparative Constitutional Law*], IRO "Svetozar Marković", Beograd 1984, p. 29–30.

[42] The Representation of the People Act from 1948 abolished the right of university professors and property owners to vote two or more times: in the constituency they live in and in their university's constituency; or in the constituency they live in and in the constituency they have property; or three times: in the constituency they live in, in the university's constituency, and in the constituency in which their property is located (of course, if those constituencies are different); as well as any other plural voting rights in general — e.g. in the constituency professor lives in, in his university constituency, and the constituencies in which his properties are located (again, of course, if those are different constituencies). Cf. Hilaire Barnett, Robert Jago, *Constitutional & Administrative Law*, 8th ed., Routledge, Abingdon–New York, 2011, p. 344. It now seems clear where Orwell could also have got his inspiration for all animals being equal, but some more equal than the others on his Animal farm.

[43] Miodrag Jovičić, *loc. cit.*

[44] The Nineteenth Amendment to the United States Constitution provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex".

discrimination in relation to voting rights; 1971 — Switzerland introduced the universal voting rights by including women into electoral processes at federal level, and at cantonal from 1958 to 1990; 2006 and 2011 — United Arab Emirates introduced the limited voting rights for women, and mildly relaxed them, respectively; and 2015 — Saudi Arabia will introduce voting rights for women and allow them to be elected at local level.[45]

This glance on the issue of achievement of legal equality for all regardless of their gender in the field of election and voting seems to clearly indicate that many more similar efforts will need to be invested in the achievement of the general legal equality principle, which remains one of the foundations and criteria of modernity.[46] But, we should note that even before the biggest part of that modernisation task was completed, new postmodern issues and questions that need to be resolved arose. Let us mention just a few of those related to the legal equality of human beings:

Positive discrimination — or, affirmative action — as a phenomenon of a 'more equal' treatment of some groups of people is directly opposite to the principle of (formal) equality of human beings and — only at first glance, paradoxically — represents an attempt to eliminate or at least alleviate as quickly as possible the negative consequences of previously existing and now prohibited discrimination, in the name of justice, fairness and future equality achieved precisely through this unequal treatment, which will in future become unnecessary or at least considerably less necessary.[47]

Legal equality of human beings is expressed indirectly in the international law by the principle of sovereign equality of countries. Postmodern era brings a multitude of new, burning issues that need to be resolved primarily within the framework of international criminal law, but brings also a new type of cosmopolitism appropriate for these times.[48]

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[45] See http://en.wikipedia.org/wiki/Timeline_of_women's_suffrage (access 27.07.2014).

[46] On other issues of gender equality around the world, see Susan H. Williams (ed.), *Constituting Equality: Gender Equality and Comparative Constitutional Law*, Cambridge University Press, Cambridge 2009; and on national equality and minority legal tradition, see William Kurt Barth, *On Cultural Rights: The Equality of Nations and the Minority Legal Tradition*, Martinus Nijhoff Publishers, Leiden–Boston 2008.

[47] On this see in detail in the aforementioned comprehensive analysis by Nicholas Mark Smith, *Basic Equality and Discrimination: Reconciling Theory and Law*, especially p. 89–216; also Tilmann Altwicker, *Menschenrechtlicher Gleichheitsschutz*, with English Summary: *International Equal Protection Law*, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, Bd. 23, Springer, Heidelberg–New York etc. 2011, p. 551.

[48] On this, see almost all papers in Janne E. Nijman, Wouter G. Werner, Vol. Eds., *Netherlands Yearbook of International Law 2012*: *Legal Equality and the International Rule of Law: Essays in Honour of P. H. Kooijmans*, Asser Press/Cambridge University Press/Springer, The Hague–Cambridge–Heidelberg 2013, pp. 266, especially, Janne E. Nijman, Wouter G. Werner, *Legal Equality and the International Rule of Law*, p. 3–24; Brad R. Roth, *Sovereign Equality and Non-*

Among postmodern issues, those stemming from the attitude towards human homosexuality remain especially important and difficult. Until recently treated as a felony, homosexuality then was transferred into law-free space (in German *rechtsfreier Raum*), i.e. became something that is not and should not be regulated by legal norms, something legally irrelevant, so that under certain circumstances has to be tolerated. Additional steps forward have recently been taken so that homosexual relationships are afforded legal protection of similar or same nature as the legal regulation of marital bonds. Commonly, legally registered homosexual relationships are not officially called marriages, but in some places such couples are permitted to adopt children.[49]

Is it possible to have new concepts of equality, fairness, freedom, reasonableness, subject, object, right, responsibility and other basic modern ideas as an articulate system of philosophy, a worldview with consistent legal philosophy appropriate for our time?[50] Of course, but without intending them to express the one and only possible truth and rightness, without empty analytic philosophy ideas, and also empty idea of equality, and with full consciousness of every *zoon politikon* on their important piece of legal, moral, political and every other *responsibility* for themselves, their modern democratic polis, i.e. their national state, and their cosmopolis, i.e. mankind, including all (un)bearable legal (in)equalities, all identities and differences. For, every society in its proper time, every generation, hence, human beings are always the ones who fill all the otherwise empty concepts with content, including the concept of legal (in) equality of human beings. Humans are also those who empty the concepts of content not only in philosophy but in practice too. This is precisely why in modern

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Liberal Regimes, p. 25–52; Tony Carty, Xiaoshi Zhang, *From Freedom and Equality to Domination and Subordination: Feminist and Anti-Colonialist Critiques of the Vattelian Heritage*, p. 53–82; Gerry Simpson, *Great Powers and Outlaw States* Redux, p. 83–98; Jeffrey L. Dunoff, *Is Sovereign Equality Obsolete? Understanding Twenty-First Century International Organizations*, p. 99–127; Rosalyn Higgins, *Equality of States and Immunity from Suit: A Complex Relationship*, p. 129–149; Sarah M.H. Nouwen, *Legal Equality on Trial: Sovereigns and Individuals Before the International Criminal Court*, p. 151–181; Geoff Gordon, *Legal Equality and Innate Cosmopolitanism in Contemporary Discourses of International Law*, p. 183–203.

[49] On this and other contemporary equality issues in USA, but not from the angle of conservative Supreme Court, than from the angle of constitutional laws of federal states and their supreme courts prone to increasing equality and freedom, see very informative, critical and theoretically well founded book Jeffrey M. Shaman, *Equality and Liberty in the Golden Age of State Constitutional Law*, Oxford University Press, New York 2008, pp. 269.

[50] One, not very successful attempt, is presented in Jürgen Ritsert, *Gerechtigkeit, Gleichheit, Freiheit und Vernunft: Über vier Grundbegriffe der politischen Philosophie*, Springer, Wiesbaden 2012, pp. 123, but it should be mentioned as an exemplification of what analytic philosophy does in Europe, moreover, in Germany, what is exactly the object of Peter Unger's criticism because it results in empty ideas, concretely nonsubstantial ideas. As opposed to him, we have Sionaidh Douglas-Scott, *Law after Modernity*, Hart Publishing, Oxford–Portland, OR 2013, pp. 413, who points out the difficulties, and critically reviews some basic concretely substantial postmodern legal ideas.

democracies people are, and should be held accountable for their decisions. The validity of those decisions can be derived from the majority principle, but that doesn't make them adequate nor correct. Hence, modern democracy offers no possibility to hide behind the majority, since the majority isn't *eo ipso* right, and hasn't *eo ipso* (sovereign) right(s). Precisely therein lies the modernity of the democratic principle. It is much more than the majority principle. Modern democracy is also substantial protection of minorities, substantial protection of not only everyone individually but also of specific minorities. That is to say, it is also concrete substantiality of the idea of (in)equality, identities and differences, and accountability for those concrete substantialities, when we care, and only seemingly paradoxically, even greater accountability when we do not care.

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Chapter III

The idea of equality in modern legal philosophy

Jerzy Zajadło[*]

1. Introductory remarks

According to the contemporary Canadian political philosopher, Will Kymlicka,

> So the abstract idea of equality can be interpreted in various ways, without necessarily favouring equality in any particular area, be it income, wealth, opportunities, or liberties. It is a matter of debate between these theories which specific kind of equality is required by the more abstract idea of treating people as equals. Not every political theory ever invented is egalitarian in this broad sense. But if a theory claimed that some people were not entitled to equal consideration from the government, if it claimed that certain kinds of people just do not matter as others, then most people in the modern world would reject that theory immediately. Dworkin's suggestion is that the idea that each person matters equally important is at the heart of all plausible political theories.[1]

At the same time, it is emphasised in the literature that the contemporary debate about the nature of equality has developed two basic thematic strands:

> In modern society, the ideal of equality led a double life. In one of its forms it was very popular, though controversial; while in the second, it proved to be attractive to some and repellent for others. These aspects of equality are the *equality of democratic citizenship* and *equality of conditions*.[2]

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[1] Will Kymlicka, *Contemporary Political Philosophy. An Introduction*, Second Edition, Oxford University Press, Oxford–New York 2002, p. 4.

[2] Richard J. Arneson, *Równość*, in: Robert E. Goodin, Philip Pettit (eds.), *Przewodnik po współczesnej filozofii politycznej* [*A Companion to Contemporary Political Philosophy*], Warszawa 1998, p. 628 [italics in the original — J.Z.].

If the idea of equality is actually considered to constitute, on the one hand, perhaps the most fundamental and, on the other hand, possibly the most controversial issue of contemporary moral philosophy, politics and law,[3] the reference to Ronald Dworkin seems very characteristic. The so-called Dworkin's integral philosophy combines in itself all these elements: firstly, it is not only the philosophy of law, but also the philosophy of morality and politics; secondly, it touches both upon the problem of the equality of democratic citizenship as expressed in contemporary constitutions (political and legal equality) as well as the problem of the equality of conditions determined by the principles of distributive justice (social equality);[4] thirdly, on the one hand, it is still of interest for the global science[5] and, on the other hand, the author himself constantly takes part in a debate on the essence of the idea of equality.[6]

There naturally arises the question about the logical and chronological relation between the two aforesaid trends in the contemporary debate over the idea of equality. It seems, *prima facie*, that the debate over the equality as an element of distributive justice is of a primary character. The starting point here is in fact based on the universal formulas already proposed by Plato[7] and Aristotle.[8] Political and legal equality, in turn, is rather a product of modernity and it is these days discussed primarily in the context of the relevant constitutional and international legal regulations and on the basis of the jurisprudence of constitutional courts and international tribunals. In the following discussion, therefore, the text focuses, on the one hand, on equality in the sense of distributive justice in contemporary political philosophy and philosophy of law, and on the other hand, on Ronald Dworkin's selected concepts. The assumption of the primary character of social equality and the secondary nature of the political and legal equality is, however, as already mentioned, only a *prima facie* conclusion. When taking a closer look,

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[3] Nicholas Smith, *Why Do We Speak of Equality*, "Otago Law Review" 2005, Vol. 11, No. 1, p. 53: "Equality is a core value in moral, political and legal philosophy".

[4] The existence of these two types of equality has been emphasised, thus referring to a broad extent to Dworkin's concept, by Wojciech Sadurski, *Equality and Legitimacy*, Oxford 2008, *passim*.

[5] In the most recent publications, see Alexander Brown, *Ronald Dworkin's Theory of Equality. Domestic and Global Perspectives*, Basingstoke–New York 2009.

[6] Ronald Dworkin, *Justice for Hedgehogs*, Cambridge 2011 — analysed in the Polish literature by Jerzy Zajadło, *Prawnik transcendenty (artykuł recenzyjny)* [*Transcendental lawyer (review article*)], "PiP" 2011, No 6, p. 98–107.

[7] Plato, *Laws*, VI 757: "Equal should be treated equally, unequal should not be treated equally" (cited after Plato, *The State, Laws* (Book 7), Kęty 1999, Book VI, p. 447 ff.).

[8] Aristotle, *Politics*, III 9 (1280a): "For instance, it is thought that justice is equality, and so it is, though not for everybody but only for those who are equals; and it is thought that inequality is just, for so indeed it is, though not for everybody, but for those who are unequal" (quoted after Aristotle, *Politics*, Warszawa 2008, p. 87; cf. also Aristotle, *Etyka nikomachejska* [*Nicomachean Ethics*], Warszawa 1981, p. 168 ff.).

it turns out that in contemporary debates these two perspectives of equality are closely intertwined. As a result, the discussion about the juridical aspect of the idea of political and legal equality undertaken on the basis of constitutionalism stimulates to a certain extent the disputes around the idea of social justice carried out on the basis of the political philosophy. Therefore, for the sake of a certain transparency of argumentation, I present the basic elements of the principle of equality adopted in modern constitutionalism. The relevant provision of the Polish Constitution will serve as the example here.

2. The principle of equality in the Constitution of the Republic of Poland

In the Polish Constitution of 1997 the principle of equality in the broad sense has been defined in article 32, on the one hand, as equality in the strict sense and in this sense it stands for the right to equal treatment by public authorities at the level of law application (equality before the law) and law making (equality in the law) (article 32 paragraph 1), and on the other hand, as the prohibition of discrimination for any reason in political, social or economic life (article 32 paragraph 2). In the literature of the constitutional law the prohibition of discrimination is sometimes identified with the equality in the law, but for the purposes of this study there has been adopted a classification which, on the one hand, emphasises the positive (equality) and the negative (discrimination) aspect of the problem, while on the other hand, indicates the possibility of violations both on the level of law application as well as law making. Originally, the principle of equality, and especially equality before the law, was related primarily to the problem of law application. On the basis of the general theory of constitutional rights, however, Robert Alexy showed in a very convincing manner that the so-called general right to equality should also apply to the process of law making.[9] It seems that a broad understanding of the principle of equality as a certain concept is also referred to in the Preamble of the Constitution: "All citizens of the Republic of Poland [are] equal in rights and obligations towards the common good — Poland".

Equality is also referred to in the article 33 concerning the equality of women, but from a normative point of view, it is a kind of constitutional *superfluum* because its disposition is, in fact, contained in the general principle expressed in article 32. The act of introducing a separate provision concerning the equality of women to the Basic Law was, however, justified from the perspective of facts as well as the educational role of the constitution. It should be also noted that the widely understood issue of equality can be encountered in other places of

[9] Robert Alexy, *Teoria praw podstawowych* [*Theory of Constitutional Rights*], Polish translation by Bożena Kwiatkowska and Jerzy Zajadło, Warszawa 2010, p. 297 ff.

the Constitution of 1997 (article 6, article 11, article 60, article 64 paragraph 2, article 68 paragraph 2, article 70 paragraph 4, article 96 paragraph 2, article 127 paragraph 1 and article 169 paragraph 2), but it is not always connected with the said principle of equality in the strict sense and with the prohibition of discrimination. The principle of equality applies not only to all citizens, but also to people who are not Polish citizens (foreigners, stateless people). What is more, in practice it applies not only to individuals but also to legal persons and other organizational units without legal personality.[10]

It is assumed in modern constitutionalism that the principle of equality should be the foundation and an inherent feature of civil society, while on the other hand, it should be viewed as a democratic rule of law. Just as human dignity is sometimes considered 'principle of principles' in the axiological sense, the equality (German *Gleichheit*) can be, in turn, treated in the same categories from social, political and juridical perspective. On the basis of the Constitutional Court jurisprudence this principle is sometimes referred to as the 'very first of the principles'.[11] This does not mean that the principle of equality is deprived of the axiological dimension—on the contrary, according to some authors only a joint approach to equality, dignity and liberty allows to understand the constitutional system of values.[12] The principle of equality, conceived in this way, is nowadays widely used in all areas of human life and it permeates from the level of the constitution through the entire legal system to its different branches — civil, financial, economic, commercial, criminal, labor, procedural, family, etc. In the historical sense, equality was naturally a dynamic category and its content and significance have evolved with the progress of civilization and political, economic as well as social development. Hence, it is difficult to compare the relevant solutions of the Polish fundamental laws — from the Constitution of May 3rd of 1791, the Constitution of March 1921, the Constitution of April 1935 and the Constitution of July 1952. No doubt, however, that the principle in question has never played such a considerable political role as in the current Constitution of 1997. The contemporary significance of the principle of equality cannot be in fact

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[10] Bogusław Banaszak, *Prawo konstytucyjne* [*Constitutional Law*], Warszawa 2008, p. 481; Marek Chmaj, *Równość wobec prawa* [*Equality before Law*], in: Marek Chmaj (ed.), *Wolności i prawa człowieka w Konstytucji Rzeczypospolitej Polskiej* [*Freedoms and Human Rights in the Polish Constitution*], Zakamycze, Kraków 2006, p. 62.

[11] Jerzy Oniszczuk, *Równość — najpierwsza z zasad i orzecznictwo Trybunału Konstytucyjnego* [*Equality — the Very First Principle and the Jurisprudence of the Constitutional Court*], Warszawa 2004.

[12] Anna Łabno, *Zasada równości i zakaz dyskryminacji* [*Principle of Equality and Prohibition of Discrimination*], in: Leszek Wiśniewski (ed.), *Wolności i prawa jednostki oraz ich gwarancje w praktyce* [*Individual Freedoms and Rights and their Guarantees in Practice*], Warszawa 2006, p. 35–51; cf. also Marzena Kordela, *Zarys typologii uzasadnień aksjologicznych w orzecznictwie Trybunału Konstytucyjnego* [*The Outline of the Typology of Axiological Justifications in the Jurisprudence of the Constitutional Court*], Bydgoszcz–Poznań 2001, *passim*.

detached from the environment in which it operates, and especially from the idea of civil society, democratic rule of law and the international protection of human rights.

In the hierarchy of the Polish Constitution the principle of equality is factored out in Chapter II in the context of a detailed catalogue of human liberties, rights and obligations in the form of a general principle, next to, among others, the principle of dignity (article 30) and freedom (article 31).[13] It should be emphasised that the European law has similarly placed equality in the Charter of Fundamental Rights of the European Union. Equality is presented there as one of the general principles, in addition to dignity, liberty and solidarity.

In the history of politico-legal thought the idea of equality was most typically confronted with the idea of freedom; to simplify, it could be said that while freedom represented, especially in the nineteenth century, the basis of liberal doctrines, the equality was at the centre of the socialist movement. It should be noted, however, that the ground-breaking importance was attributed to the political thought of the French Enlightenment, particularly the ideas of Charles Montesquieu (*The Spirit of Laws*) and Jean-Jacques Rousseau (*The Social Contract*). From historical point of view, nevertheless, the problem has a much longer tradition and more complex dimension; the attitude to the principle of equality among people, from antiquity until today, has always been the basis for creating different visions of social and political order, and depending on whether it was a positive or a negative attitude, there emerged different concepts based on egalitarianism or, on the contrary, on elitism. It should be noted, however, that under the conditions of mass society and from the point of view of modern science such a picture should be regarded as a far-reaching simplification. There still arise disputes about whether the values of liberty and equality are compatible,[14] but the stereotype that identifies them exclusively with right-wing or left-wing political mainstream respectively is rather the thing of the past.

These modern trends in ethics, political philosophy and legal philosophy are also reflected in the contemporary constitutionalism. Currently there are attempts to formulate the text of the Constitution, including the constitutional catalogues of human and civil rights and liberties, in such way as to ensure a complementary realization of different values.[15] The theory of human rights differentiates the so-called three generations of human rights, attributed to certain ideals, namely liberties and personal rights as well as liberties and political rights arising out of the idea of liberty (the first generation of human rights); economic, social and

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[13] Leszek Garlicki, *Prawo konstytucyjne. Zarys wykładu* [*Constitutional Law. Outline of a Lecture*], Warszawa 2007, p. 87–93.

[14] From the most recent literature, cf. Jan Narveson, James P. Sterba, *Are Liberty and Equality Compatible?*, Cambridge 2010.

[15] Zygmunt Ziembiński, *Wartości konstytucyjne — zarys problematyki* [*The Constitutional Values — Outline*], Warszawa 1993.

cultural rights and liberties arising from the idea of equality (the second generation of human rights); solidarity rights arising out of the idea of solidarity (the third generation of human rights). Despite the fact that the division into three generations of human rights was established primarily in the international law doctrine, it can be also mutatis mutandis applicable to the theory of the constitutional law. It should be nonetheless emphasised that equality on the basis of the constitution has a much broader scope and it is not merely an ideological foundation of economic, social and cultural rights and liberties, since as a principle of law it pervades the entire catalogue of human and civil rights and liberties. There can indeed arise some conflicts between the ideas of liberty, equality and solidarity,[16] yet these are the Constitution and the generally accepted standards of international human rights protection that should constitute the normative basis where the problems are solved through the socio-political discourse in the context of the so-called deliberative democracy.

It should be recognised, however, that while such principle of human dignity is considered as a widely accepted standard in the constitutions of modern democratic states, the principle of equality is a commonly adopted standard. The vast majority of the constitutions of modern democratic states contains solutions similar to the above-quoted article 32 of the Constitution of 1997. It means that, on the one hand, the principle of equality is treated as a general principle factored out in the context of human and civil rights and liberties and, on the other hand, the principle of equality gains a double meaning: equality before the law and equality in the law as well as prohibition of discrimination. The literal wording of article 32 of the Constitution of 1997 implies not two, but rather three principles (equality before the law, the right to equal treatment and prohibition of discrimination), but it seems that the first two essentially constitute normative unity and they create the principle of equality in the strict sense. It is not certain what else could be equality before the law if not the right to equal treatment on the part of public authorities at the law application level (equality before the law) and law making level (equality in the law). In turn, a different approach is presented when treating the prohibition of discrimination as the prohibition of an arbitrary interference with the principle of equality in the strict sense.

When analyzing the Polish Constitution of 1997, equality before the law (namely, *isonomia* already encountered in the ancient thought)[17] and, respectively, equality in the law, stand for, to paraphrase Ronald Dworkin's rhetoric, an attempt of a compromise between *treating everyone equally and treating everyone as*

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[16] Thomas Hoppe, *Menschenrechte im Spannungsfeld von Freiheit, Gleichheit und Solidarität*, Stuttgart 2002.

[17] Małgorzata Masternak-Kubiak, *Prawo do równego traktowania* [*Right to Equal Treatment*], in: Bogusław Banaszak, Artur Preisner (eds.), *Prawa i wolności obywatelskie w Konstytucji RP* [*Civil Rights and Liberties in the Polish Constitution*], Warszawa 2002, p. 119.

equals.[18] In other words — it is not a general prohibition of differentiating the legal situation of individuals, but it is rather a prohibition of such differentiation on the basis of arbitrary criteria without factual inequalities that lead to discrimination or undue preference. In this sense, the principle of equality is combined with the idea of justice. It is obvious that the law can and even should differentiate individuals and social groups due to their specific characteristics (e.g. age, health, family or material situation). The issue is that "units that are equal in some particular respect determined by the law, must be treated equally, and the like in a similar manner".[19] In this sense, "the principle of equality is not absolute" and "it allows for the differentiation of the legal position of similar units" but "it must be nevertheless justified — only if such justification is missing, this differentiation assumes the form of discrimination (preference) and becomes contrary to article 32 paragraph 2 of the Constitution".[20]

Thus it is clear that both aspects of the principle at issue, namely equality before the law and equality in the law (article 32 paragraph 1) and the prohibition of discrimination (article 32 paragraph 2) are closely related. It should be stressed that this second aspect of the principle of equality (i.e. the prohibition of discrimination) has been defined in the Constitution of 1997 in a very broad sense, not to say that "it has been presented as widely as possible".[21] This is distinguished by article 32 paragraph 2 both from other similar solutions adopted in the constitutions of modern democratic states as well as from the regulations found in the acts of international law (e.g. article 14 of the European Convention on Human Rights and article 2 paragraph 1 of the Covenant on Civil and Political Rights). What is being most often pointed out are the criteria based on which discrimination should not occur, like gender, race, colour, language, religion, political views, property birth, etc. Meanwhile, article 32 paragraph 2 does not indicate these criteria and rather uses the general prohibition of discrimination "in political, social or economic life for any reason whatsoever". From the point of view of the doctrine of the constitutional law, "Polish regulation, though it is unusual, is very practical and functional".[22]

A broadly understood principle of equality is of utmost importance from the perspective of the activities of the Constitutional Court — the references to this principle can be encountered in a number of rulings both after the entry into force of the Constitution of 1997, as well as on the basis of the July Constitution of 1952. When analysing the three principles factored out in the constitutional catalogue

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[18] See below on the equality conception in Dworkin's integral philosophy.

[19] Marek Chmaj, *op. cit.*, p. 65.

[20] Leszek Garlicki, *op. cit.*, p. 92 ff.

[21] Marek Chmaj, *op. cit.*.

[22] *Ibidem*, cf., however, Protocol 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms as of 4 November 2000.

of human and civil rights and liberties, namely dignity, liberty and equality, the latter is by far the most common. Generally speaking, it can be said that the case law has interpreted this principle in three main contexts: "the obligation of treating equally all equals and treating the like in like manner; the admissibility of legitimate diversities; relating equality to the principle of justice".[23]

3. The problem of equality in contemporary philosophy of law and political philosophy

We can therefore state that in the modern constitutionalism (in the constitutional law and in the science of the constitutional law) the principle of equality in terms of political and legal equality is a widely accepted and rather uncontested paradigm. Even if this interpretation encounters major difficulties and controversies in judicial practice and in the doctrine, it applies rather to details than to the fundamental principles. For the sake of accuracy it must be emphasised that there are opinions that question both the rationality and the substantive content as well as practical juridical significance of different kinds of constitutional formulas of the principle of equality, but they are rather rare. In 1982, there has been published an extensive article in "Harvard Law Review" by Peter Westen that had a very characteristic title: *The Empty Idea of Equality*.[24] Although his proposal has more opponents than supporters, yet it cannot be ignored in the legal discussions on the nature and functions of the principle of equality. The framework of this study is too modest to allow for a detailed analysis of Westen's basic thesis about non-substantive character of equality. Let us only indicate that this viewpoint touches upon the recognition that both in the legal as well as in juridical language, the equality is merely a rhetorical ornament that can be confidently given up without any damage to the idea of justice. The following examples are given in this respect: there is the sentence *Equal Justice under Law* on the United States Supreme Court building. What does it actually mean? Why not simply: *Justice Under Law*? The same is true of the fourteenth amendment to the American Constitution and the so-called *Equal Protection Clause*; why isn't it simply called *Protection*?[25]

A slightly different approach can be observed in the philosophy of law and political philosophy — it is difficult to talk here about a clear, universal and

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[23] *Ibidem*, p. 75.

[24] Peter Westen, *The Empty Idea of Equality*, "Harvard Law Review" 1982, Vol. 95, No. 3, p. 537–596; the author presented his thoughts later in a more extensive monograph *Speaking of Equality: An Analysis of the Rhetorical Force of 'Equality' in Moral and Legal Discourse*, Princeton 1990.

[25] Williame O'Brian Jr., *Equality in Law and Philosophy*, "Inquiry — An Interdisciplinary Journal of Philosophy" 2010, Vol. 53, No. 3, p. 260.

generally accepted paradigm, especially when it comes to the idea of equality in the sense of social equality. What is more, the vast majority of contemporary authors accepts very differently conceived idea of equality, yet there is also a very large group of scholars contesting all forms of egalitarianism.[26] Although the issue has been already extensively described in complex literature, it still remains valid also in practical terms. For example, US President Barack Obama's proposals to reform health care and social insurance encountered a response from a libertarian philosopher, Tibor R. Machan, in the form of a book with a very characteristic title: *Equality, So Badly Misunderstood*.[27] In Poland the discussion about the problem of state intervention in the financial market in the defence of individual borrowers who took out credits in Swiss francs was nothing else than just analysing the problem in terms of the so-called *luck egalitarianism*[28] and the consequences of life choices related therewith.

It should be noted that for the purposes of this study, although the concepts of 'philosophy of law and political philosophy' are used here, the proper understanding should be that of the political philosophy. Modern scholars dealing with the idea of equality, both approvingly and critically, very often are not legal philosophers (lawyers) in the strict sense, but rather philosophers in general sense, namely ethicists, political scientists, sociologists, sometimes even economists, to indicate only such names as Richard J. Arneson, Isaiah Berlin, Gerald A. Cohen, Stefan Gosepath, Jürgen Habermas, Friedrich A. Hayek, Will Kymlicka, Thomas Nagel, Jan Narveson, Kai Nielsen, Robert Nozick, Derek Parfit, Thomas W. Pogge, John Rawls, Thomas Scanlon, Samuel Scheffler, Amartya Sen, Peter Singer, James P. Sterba, Larry Temkin, Ernst Tugendhat, Michael Walzer, and Bernard Williams. This substantive differentiation of authors that deal with the idea of equality in the meaning of social equality is hardly surprising, since defining the principles of rational distributive justice (and hence the idea of equality) requires not only knowledge of philosophy, but also economics, political science, social psychology or sociology. The problem of equality in the sense of social equality is in fact much more complex and controversial, and much more difficult to solve than the phenomenon of equality in terms of political and legal equality.

Legal philosophy devotes much less attention to the issues of equality compared to other fields. If the issue of equality appears in monographs, textbooks and anthologies of texts in this field, it rather concerns the problem of the relations between law and morality,[29] or the philosophical foundations

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[26] There is a wide presentation of a variety of viewpoints, *ibidem*, p. 257–284.

[27] New York 2010.

[28] More broadly on this aspect of the problem of equality, see Carl Knight, *Luck Egalitarianism. Equality, Responsibility and Justice*, Edinburgh 2009.

[29] E.g. David Dyzenhaus, Sophia Reibetanz Moreau, Arthur Ripstein (eds.), *Law and Morality: Readings in Legal Philosophy*, 3rd ed., Toronto 2007, in particular Chapter V: *Equality*, p. 445–532.

of constitutionalism and the principle of politico-legal equality as an essential element of this philosophy.[30] On the other hand, however, it is difficult to make a clear distinction between the philosophy of law and political philosophy. There can be in fact encountered scholars who combine both these disciplines, such as Joseph Raz, Jeremy Waldron or, last but not least, already mentioned Ronald Dworkin. Yet, what is characteristic, for these authors the main interest in equality is in direct proportion to the assumed interrelations between the philosophy of law and political philosophy.

The frames of this study are too modest to discuss all the aspects of the debate undertaken in contemporary political philosophy on the principle of equality, there is, however, no doubt that egalitarianism still remains a central problem in this field of knowledge, next to such concepts as liberalism, communitarianism, democracy, identity or justice.[31] Let us only try to reconstruct the basic elements of the paradigm of this discussion. As befits philosophy in general and political philosophy in particular, this paradigm can be reduced to a few fundamental questions that are attempted to be answered, but it should be emphasised that the answers are very diverse.[32] The central question is naturally the question *What is equality?* However, it is to such an extent general that it needs to be clarified and, consequently, there arise subsequent questions: firstly, *Equality of what?* — welfare, resources, opportunities, capabilities, skills?; secondly, *Equality of (between) whom?* — what are the criteria of the similarities and differences between people that should be taken into account in the process of their equal or unequal treatment?; thirdly, *Equality when?* — as a starting point or rather as an adjustment of already encountered inequality (i.e., *ex ante* or *ex post factum*)[33]?; moreover, *Equality why?* — is equality entitled to any immanent moral value, and if so, what is the relationship of this value to other values, like liberty, dignity, justice, solidarity, etc.?

When considering the academics who combine legal philosophy with political philosophy and attach the utmost importance to the issue of egalitarianism, a special place is given undoubtedly to Ronald Dworkin. As far as such legal philosophers

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[30] E.g. Maimon Schwarzschild, *Constitutional Law and Equality*, in: Dennis Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*, 2nd ed., Malden–Oxford 2010, p. 160–176; cf. also David M. Adams, *Philosophical Problems in the Law*, Belmont 2005, in particular Chapter 3: *Constitutional Law: Equal Protection of the Laws*, p. 276–383.

[31] Cf. recently Thomas Christiano, John Christman (eds.), *Contemporary Debates in Political Philosophy*, Malden–Oxford 2009; in Polish literature — Adam Swift, *Wprowadzenie do filozofii politycznej* [*Introduction to Political Philosophy*], Kraków 2010.

[32] A clear picture of this paradigm is presented by Stefan Gosepath, *Equality*, in: *Stanford Encyclopaedia of Philosophy* (http://plato.stanford.edu).

[33] It is, in turn, stressed in ethics that the correction of inequalities for the sake of equality may be either of a retrospective or perspective dimension — Bernard R. Boxill, *Równość, dyskryminacja i polityka preferencji* [*Equality, Discrimination and Policy of Preferences*], in: Peter Singer (ed.), *Przewodnik po etyce* [*Guide to Ethics*], Warszawa 1998, p. 381–390.

as Joseph Raz[34] or Jeremy Waldron[35] touch upon equality rather incidentally, in case of Dworkin we deal with the development of a comprehensive and coherent conception, sometimes referred to as the theory of liberal egalitarianism. In any case, Dworkin is probably the only legal philosopher who tries to answer all the specific abovementioned questions of the paradigm of equality in terms of social equality: What? Whose? When? Why?

4. Equality as part of axiological holism — *Justice for Hedgehogs*

Dworkin's theory of liberal egalitarianism is relatively well-known in Poland — either by direct works[36] or by Polish translations of English-language publications in the area of political philosophy.[37] This concerns in particular his construction of a hypothetical auction resulting *ex ante* in the equality of resources, but adjusted *ex post* by insurance scheme that provides fair approach to egalitarianism. In the subsequent part of this article I will therefore leave aside a detailed analysis of the views of the American legal philosopher in this regard, referring the interested reader to the cited literature, yet, on the other hand, it is worth at least briefly recalling some facts in this respect. First of all, different kinds of egalitarian formulas have already appeared in Dworkin's first major work, i.e. *Taking Rights Seriously* in 1977.[38] They are considered interesting for a lawyer in this respect that due to their brevity, they to some extent resemble the above-cited elements of the paradigm of equality in the sense of politico-legal equality (especially *equality before the law* and *equality in the law*).[39] Dworkin suggests in fact that, first of all, the essence of equality should be reduced to *the right to equal concern and respect*[40] and, secondly, to distinguish *equal treatment* of all from treating all *as equals*.[41] We are dealing here in fact with the answer, general as it may seem, to the question of *What is equality?* Dworkin's views on the idea of

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[34] Cf. e.g. Joseph Raz, *The Morality of Freedom*, Oxford 1986.

[35] Cf. e.g. Jeremy Waldron, *God, Locke, and Equality: Christian Foundations in Locke's Political Thought*, New York 2002.

[36] Cf. e.g. Janusz Karp, *Sprawiedliwość społeczna. Szkice ze współczesnej teorii konstytucjonalizmu i praktyki polskiego prawa ustrojowego* [*Social Justice. Sketches of Modern Theory of Constitutionalism and Practice of the Polish Institutional Law*], Kraków 2004, p. 94–104.

[37] Cf. e.g. Richard J. Arneson, *op. cit.*, *passim*; Will Kymlicka, *op. cit.*, p. 103–117; Stuart White, *Równość* [*Equality*], Warszawa 2008, p. 107–132.

[38] Polish edition – Ronald Dworkin, *Biorąc prawa poważnie*, Warszawa 1998.

[39] It should be emphasised that the importance of these formulas is still attracting attention in the legal literature — among the recent studies, cf. e.g. William Lucy, *Equality under and before the Law*, "University of Toronto Law Journal" 2011, Vol. 61, p. 411–465.

[40] Ronald Dworkin, *Biorąc prawa poważnie*, p. 328.

[41] *Ibidem*, p. 407.

equality were later developed in four articles published in the 80's of XX century. What is characteristic, nevertheless, these studies are numbered as related parts and bear the joint title *What is Equality?* The author criticizes and rejects, above all, the idea of equality of welfare,[42] then he votes in favor of equality of resources,[43] confronts the equality with liberty,[44] and finally explains the essence of political equality.[45] Dworkin's most fundamental work devoted to liberal egalitarianism is primarily the book *Sovereign Virtue* of 2000. In this work, the author develops his thoughts contained in the previous above-cited books and articles, yet he also goes a step further — he in fact recognizes the equality in the formula of *the right to equal concern and respect* as the fundamental virtue legitimizing the liberal-democratic sovereign.[46] The above questions about the essence of equality are answered by Dworkin in the following way: *Equality of what?* — resources rather than welfare; *Equality of whom?* — individuals treated not equally but rather as equals; *Equality when?* — both *ex ante* (hypothetical auction) and *ex post* (insurance system, egalitarianism of a particular case); *Equality why?* — as liberal-democratic order (the virtue of sovereign), complementary and not competitive vis-à-vis liberty.

My intention is to focus on Dworkin's recent book, *Justice for Hedgehogs* (hereinafter abbreviated as *JfH*),[47] since, on the one hand, it reflects the current state of the author's views and, on the other hand, it places the idea of equality in a wider context of ethics, political philosophy and legal philosophy. Dworkin mentioned his work on this publication already when he gave an interview, characteristically enough entitled *The Transcendent Lawyer*,[48] in autumn 2005. The author said then that "The book would be a good opportunity to recapitulate what he wrote on various issues: equality, law, morality, human values and meaning of human life. All of this would require showing interdependencies between these

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[42] Idem, *What is Equality? Part 1: Equality of Welfare*, "Philosophy and Public Affairs" 1981, Vol. 10, p. 185–246.

[43] Idem, *What is Equality? Part 2: Equality of Resources*, "Philosophy and Public Affairs" 1981, Vol. 10, p. 283–345.

[44] Idem, *What is Equality? Part 3: The Place of Liberty*, "Iowa Law Review" 1987, Vol. 73, p. 1–54.

[45] Idem, *What is Equality? Part 4: Political Equality*, "University of San Francisco Law Review" 1987, Vol. 22, p. 1–30.

[46] Idem, *Sovereign Virtue. The Theory and Practice of Equality*, Cambridge–London 2000.

[47] Cf. above, footnote 6.

[48] Adam Liptak, *The Transcendent Lawyer*, "New York University — The Law School Magazine", Autumn 2005, Vol. XV, p. 13–23; it must be emphasized that in English the word 'transcendent' stands both for 'transcendent' and 'highest' (in the sense of authority), but also 'indefinite' (*Wielki słownik angielsko-polski* [*The Great English-Polish Dictionary*], Warszawa 2002, p. 1247) — taking into account the content of the entire interview, it seems that the transcendent lawyer in this case stands for "a lawyer of the highest authority", being transcendent in the sense that he exceeds the established limits and ways of thinking.

values. In his previous work he had tried to treat the matters more broadly than, so to speak, practised by a majority of legal philosophers; hence there arose the need to combine them all together". From this point of view, *JfH* indeed deserves special attention of the Polish reader, since it is a kind of summary of different topics of Dworkin's philosophy, relatively fairly well known in our country.[49] The book is special and unique to such extent that even before its official release (sic!) it was subject to a special scientific conference with the participation of prominent economists, ethicists, philosophers, political scientists and lawyers.[50] This allowed Dworkin to make changes to the original manuscript, which took into account at least some of the comments of his adversaries,[51] but also in the very first sentence of the introduction to *JfH* (p. IX) the author writes: "This book is not about what other people think: it is conceived as a completely autonomous argument" [own translation]. In the foreword to the said conference the author acknowledges that he appreciates the specificity of the situation when the book is being discussed in such a group even before its publication. It must be admitted that these comments prove that the American lawyer has a big sense of humor. In this context Dworkin even recalls an anecdote from the life of his master, a distinguished Judge Learned Hand. The latter repeatedly told how he imagined the heaven after death and one of the elements of this vision was a banquet with the participation of prominent philosophers, including Socrates, Descartes, Franklin, and the speaker of the evening was Voltaire. After a few preliminary words, the crowd of philosophers shouted: "Shut up Voltaire and sit down. WE WANT HAND". Dworkin refers to this story and in this context he writes that he had his own vision of heaven, since there gathered such outstanding people "to discuss yet unfinished book thus giving him the chance to take advantage of what they say. Yet, the best part is that he by no means intended to die". Dworkin concludes his introduction by paraphrasing Hand: "And now I'm going to shut up and listen".[52]

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[49] Cf. Polish editions of Dworkin's works: *Biorąc prawa poważnie* [*Taking Rights Seriously*] and *Imperium prawa* [*Law's Empire*], transl. by J. Winczorek, Wolters Kluwer, Warszawa 2006.

[50] The conference was held on 25–26 September, 2009 at the University of Boston, and its results were published in the "Boston University Law Review", April 2010, Vol. 90, No. 2, p. 465–1087 (*Symposium: Justice for Hedgehogs. A Conference on Ronald Dworkin's Forthcoming Book* (with the participation of, inter alia, Kwame Anthony Appiah, James E. Fleming, Samuel Freemann, F.M. Kamm, David Lyons, Stephen Macedo, Martha Minow, Amartya Sen, T.M. Scanlon, Lawrance B. Solum, Jeremy Waldron and the response of Ronald Dworkin)).

[51] Ronald Dworkin, *Response*, "Boston University Law Review" 2009, Vol. 90, No. 2, p. 1059: "I will try to indicate, in the published version, where I have changed the earlier draft significantly in response to criticism here, and I apologize in advance if I have neglected to mark some changes in that way". In *JfH* this attitude was reflected primarily in the footnotes (p. 425–487), where the author refers to some of the papers presented at the said conference.

[52] Idem, *Keynote Address. Justice for Hedgehogs*, "Boston University Law Review" 2009, Vol. 90, No. 2, p. 469, 477.

The title of the work requires some explanations (*Justice for Hedgehogs*),[53] because it determines both the book's content and the applied methods. Dworkin was here inspired by a well-known essay by Isaiah Berlin first published in 1953. In this essay the author presented his own interpretation of the following sentence uttered by Archilochus, a Greek poet of the seventh century BC: "The fox knows many things, but the hedgehog knows one big thing". The colloquial meaning of this aphorism indicates mostly that in the face of many sneaky tricks of the fox, the hedgehog has indeed only one method of defence, yet a very effective one, he curls up. Berlin attempted to give it a little deeper meaning. According to him,

> Scholars had variously interpreted these vague words which probably mean only that the fox, for all his cunning, must surrender to one weapon of the hedgehog. When understood figuratively, these words may, however, reveal the meaning that emphasizes one of the deepest differences which divide writers and thinkers, and perhaps people in general. There is indeed a huge gap between those who boil everything down to a single central vision, to one less or more coherent or articulated system within which they understand, think and feel, namely to a single, universal principle whereby everything what they are and what they say matters; while, on the other hand, those who seek multiple targets, often unrelated, or even contradictory, if at all somehow interconnected, unrelated to any aesthetic or moral principle due to some psychological or physiological reasons. Life led by the latter, their deeds, the ideas professed by them, can be referred as centrifugal rather than centripetal, since their thought disperses or dissolves, errs on many levels, grasping the essence of the most diverse experiences and things as something in themselves, without trying to consciously or unconsciously place them within (or leave them outside) any unchanging, all-embracing, sometimes self-contradictory and incomplete, sometimes fantastic, uniform internal perspective. The first type of intellectual and artistic personality belongs to the hedgehogs, the second to the foxes.[54]

Berlin himself later claimed that this metaphor was viewed by him only as a certain intellectual game and he never assumed that this interpretation will become even a methodological paradigm in the literature.[55]

Dworkin definitely assumes the attitude of the hedgehog and hence this is not only the origin of the title of the reviewed work, but the general methodological characteristics of all his philosophico-legal system, called, after all, 'integral legal philosophy'.[56] Indeed, Dworkin, as pointed out by Berlin when characterizing scholars-hedgehogs, has 'one and central vision' of law, within the general philosophical reflection, subordinate to 'one and universal principle'. In case of

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[53] It seems that Polish translation *Justice according to Hedgehogs* is more appropriate taking into account the content of Dworkin's book and the semantics of the Polish language.

[54] The Polish edition: Isaiah Berlin, *Jeż i lis. Esej o pojmowaniu historii u Tołstoja* [*The Hedgehog and the Fox. An Essay on Tolstoy's View of History*], Warszawa 1993, p. 27 ff. (also in Isaiah Berlin, *Rosyjscy myśliciele* [*Russian Thinkers*], Warszawa 2003, p. 21 ff.).

[55] Ramin Jahanbegloo, *Conversations with Isaiah Berlin*, London 2000, p. 188 (Polish edition: *Rozmowy z Isaiahem Berlinem*, Warszawa 2002).

[56] Marek Zirk-Sadowski, *Wprowadzenie do filozofii prawa* [*Introduction to Legal Philosophy*], Kraków 2000, p. 197 ff.

the book at issue this approach still relies on a consistent treatment of the law as a moral idea and the recognition of the indissolubility and homogeneity of values embodied in it, the content and interrelationships of which are determined by interpretation.[57] As a result, 'values' and 'interpretation' are two central concepts in the centre of Dworkin's thinking when assuming the attitude of the hedgehog. One more feature of this method of understanding the world should be emphasised — according to Dworkin, in the process of interpretation we do not need, as claimed by Archimedes' 'fulcrum to move the earth'. On the contrary, the interpretation should be undertaken without preconceived assumptions within the meaning of Archimedes' fulcrum, because otherwise we only hinder the achievement of a consensus by reaching the truth and in this sense, as highlighted in the literature,[58] Dworkin's system is anti-Archimedean.

It is difficult to overestimate Dworkin's role in the contemporary legal philosophy. According to the official statistics, he is one of the most quoted authors in the American legal science, just like his basic works,[59] It therefore comes as no surprise that in the literature there are relatively many papers on both Dworkin's entire output,[60] as well as his individual works.[61] What is more, this year will probably bring further discussions and analyses since December 11 marks the eightieth anniversary of the American scholar's birth. One can disagree with Dworkin or not, but it is hard not to appreciate the extent and quality of his work and the great commitment in the discussion over current problems concerning morality and political-legal issues. In this respect, Dworkin is truly a unique philosopher of law,

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[57] It should be emphasized that the idea of the unity of values in terms of metaphors referring to the attitude of the hedgehog does not appear in the reviewed book as *Deus ex machina*, but it was previously developed by Dworkin — cf. e.g. Ronald Dworkin, *Do Values Conflict? A Hedgehog's Approach*, "Arizona Law Review" 2001, Vol. 43, No. 2, p. 259. Such a methodology provided the basis for Dworkin's vision of the relations between equality and liberty as can be seen especially in the work *Sovereign Virtue*.

[58] Arthur Ripstein, *Introduction: Anti-Archimedeanis*, in: idem (ed.), *Ronald Dworkin*, New York 2007, p. 5 ff.

[59] In 2000, Dworkin held the second place on this list, just after Richard Posner and just before Oliver Wendell Holms — Fred R. Shapiro, *The Most-Cited Legal Authors*, "The Journal of Legal Studies" 2000, Vol. 29, No. S1, p. 424; when it comes to the most frequently cited works, Dworkin's three books are at the forefront (*Law's Empire* — 2nd place, *Taking Rights Seriously* — 9th place, *A Matter of Principle* — 11th place: Fred R. Shapiro, *The Most-Cited Legal Books Published Since 1978*, "The Journal of Legal Studies" 2000, Vol. 29, No. S1, p. 401).

[60] Cf. e.g. Marshall Cohen (ed.), *Ronald Dworkin and Contemporary Jurisprudence*, London 1984; Alan Hunt (ed.), *Reading Dworkin Critically*, New York 1992; Stephen Guest, *Ronald Dworkin*, 2nd ed., Edinburgh 1997; J. Burley (ed.), *Dworkin and His Critics. With Replies by Dworkin*, Malden–Oxford–Carlton 2005; Arthur Ripstein, *op. cit.*

[61] Cf. e.g. Scott Hershovitz (ed.), *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin*, Oxford–New York 2006; and a special edition of the journal "Ethics" 2002, Vol. 113, No. 1, p. 5–143, *Symposium on Ronald Dworkin's Sovereignty Virtue*.

he presents quite a different type of a legal philosopher, a philosopher who feistily moves through the existing state of science, disputing the current political and social problems, affecting directly the minds of lawyers and public opinion in general, rooted directly in the practice of law.[62]

This influence applies not only to American jurisprudence, but also to other countries, it suffices to point out, for example, the extensive reception of these concepts in the case law of the German Federal Constitutional Court.[63] Throughout his life, Dworkin engaged not only in criticism of legal positivism,[64] but also in the dispute about the essence of the principle of equality[65] and the basic moral dilemmas associated with abortion and euthanasia,[66] central to the political philosophy. Initially, Dworkin's core legal philosophy in his polemic with Hart consisted mainly in the issue of the borders and the essence of the law, but later it was primarily the problem of its application and interpretation in practice,[67] including the practical problems of moral interpretation of the American constitution.[68] Dworkin has a unique polemical talent and a soul of not only a scholar but also of a committed journalist who keenly reacts to the surrounding reality — the latter is surely the source of his many essays published for many years in the "New York Review of Books", "The Times Literary Supplement" and "The Guardian". This also resulted in the release of major works that were published in response to the negative phenomena in American democracy[69] and the functioning of the Supreme Court[70] during the presidency of George W. Bush. If *JfH* is in fact, according to the author, a kind of summary of the different strands of the current scientific output, it must be admitted that Dworkin has indeed much to recapitulate. It is emphasised in the literature that Dworkin's multithreading interests — from the criticism of legal positivism, through the role of interpretation in law application process, political philosophy of egalitarian liberalism, moral dilemmas related to the essence of

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[62] Tomasz Kozłowski, *Autorytet versus przemoc. Ronald Dworkin w obronie imperium prawa* [*Authority versus Violence. Ronald Dworkin in Defence of the Empire of Law*], "Studia Iuridica" 1996, Vol. XXXI, p. 47.

[63] Jeffrey B. Hall, *Taking 'Rechts' Seriously: Ronald Dworkin and Federal Constitutional Court of Germany*, "German Law Journal" 2008, Vol. 9, No. 6, p. 771–797.

[64] As already seen in *Taking Rights Seriously*, later in *Law's Empire*, and recently, partly also in *Justice in Robes*, Cambridge 2006.

[65] Ronald Dworkin, *Sovereign Virtue*.

[66] Idem, *Life's Dominion. An Argument about Abortion, Euthanasia and Individual Freedom*, New York 1993.

[67] Idem, *A Matter of Principle*, Cambridge–London 1985.

[68] Idem, *Freedom's Law. The Moral Reading of the American Constitution*, Cambridge 1996.

[69] Idem, *Is Democracy Possible Here? Principles for a New Political Debate*, Princeton–Oxford 2006.

[70] Idem, *The Supreme Court Phalanx: The Court's New Right-Wing Bloc*, New York 2008; a reprint of the text on this problem was also published in Poland, "Gazeta Wyborcza" of 31 October 2008 — *America needs to be humble*.

human life, to the problem of American politico-legal system — result partly from his personality and character, and partly from his biography. In this last aspect, there should be primarily noted the impact that other eminent lawyers and philosophers, like Herbert L.A. Hart, Judge Learned Hand, and last but not least, John Rawls had on Dworkin's conceptions.[71] Each of them was a source of invaluable inspiration for Dworkin, yet, on the other hand, Dworkin argued with all of them — to the greatest extent with Hart, to a slightly lesser extent with Hand and the least with Rawls. The polemic with Hart resulted primarily in the criticism of legal positivism and the search for the so-called third way. Hand contributed to the understanding of law application process and the interpretation of law and constituted to some extent the prototype of a paradigmatic judge — Hercules. Finally, Rawls' theory of justice provided an inspiration, though not uncritical one, for Dworkin's liberalism and egalitarianism. When a few years ago there was issued an anthology of texts which were the canons of American legal thought of the last century, Dworkin's now classic article about the so-called hard cases had a very characteristic title: *liberalism: interpretation and role of the judge*.[72] It is hard to disagree — an integral legal philosophy indeed relies on placing special emphasis on the judge who practises certain moral and political values in the process of interpretation. In this sense, the judge, especially the constitutional judge, is not only 'legal philosopher' but also a 'political philosopher'.[73]

In *JfH* we revisit all these topics, and not only these. This confirms the abovementioned thesis that Dworkin is indeed primarily a philosopher of law, but not only that, he is also a moral philosopher and a political philosopher. The work consists in fact essentially of several parts, determined by these three primary areas of the author's interest and the issues that he touches upon (or, more correctly, recapitulates), namely independence [of the moral sphere — J.Z.] (p. 21–96), interpretation (p. 97–188), ethics (p. 189–252), morality (p. 253–324) and politics (p. 325–415). The entire content is joined in the first chapter, which forms a kind of a road map for the entire book (p. 1–19) and in the epilogue, which recognizes the indivisibility of human dignity (p. 417–423). It would seem that in *JfH* there are relatively few philosophico-legal issues and that the book at hand is devoted primarily to the theory of morality, but these are only appearances. In fact, in Dworkin, the inherent connection between morality and the law is the hallmark of his entire output, from *Taking Rights Seriously*, through *A Matter of Principle*,

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[71] Arthur Ripstein, *Introduction*…, p. 2–5.

[72] David Kennedy, William W. Fischer III (eds.), *The Canon of American Legal Thought*, Princeton 2006, p. 549 ff. (originally, Ronald Dworkin, *Hard Cases*, "Harvard Law Review" 1975, Vol. 88, No. 6, p. 1057–1108).

[73] Ronald Dworkin, *Hart's Postscript and the Character of Political Philosophy*, "Oxford Journal of Legal Studies" 2004, Vol. 24, No. 1, p. 1–37 (also in *Justice in Robes*, p. 140–186); more on this topic, recently David Robertson, *The Judge as Political Theorist: Contemporary Constitutional Review*, Princeton 2010.

Law's Empire, *Freedom's Law* and *Justice in Robes*, to *JfH*.[74] In the literature, such legal philosophy (e.g. Radbruch formula, Dworkin's integral legal philosophy) is defined in this context as 'ethical-legal essentialism' — as opposed to 'nihilism' (e.g. Scandinavian Legal Realism, the theory of autopoiesis), 'reductionism' (e.g. Kelsen pure theory of law) and 'normativism' (e.g. Hart's moderate positivism, Radbruch's relativistic idealism).[75] It should be noted, however, that even if we accept Dworkin's legal philosophy as a kind of legal moralism, it has nothing in common with paternalism and with such form of the interrelations between law and morality as would be suggested by Patrick Devlin in his famous dispute with Herbert L.A. Hart. Regardless of any differences between Hart and Dworkin in terms of the substance of the law, both of them had fundamentally criticized Devlin's legal moralism (paternalism) from the position of liberal tolerance. Dworkin does not in fact question the impact of public morality on the law, but at the same time he asks the question of what is understood by public morality and which of its content should be legally relevant.[76]

In *JfH*, however, we deal with something more than just ethical cognitivism — Dworkin not only argues that values may be the subject of objective cognition, but he even claims that, in the process of interpretation, we can form opinions on the sentences concerning morality in terms of truth and falsehood.[77] Moreover, it does not only concern ethics, but also meta-ethics. In other words, the sentences describing our moral and ethical beliefs can also be true or false. It can be expected that such standpoint will be a subject of radical criticism on the part of philosophers, as was already evident in some of the papers delivered during the abovementioned conference in Boston. However, the differentiation between ethics and morality, as adopted in *JfH* requires some explanation. According to Dworkin, ethics refers to that part of human dignity which is associated with our

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[74] It must be emphasized that Dworkin is not isolated in this respect, because the idea of combining legal philosophy and moral philosophy is very prevalent in American jurisprudence — more on this see Matthew D. Adler, *On (Moral) Philosophy and American Legal Scholarship*, in: Francis J. Mootz III (ed.), *On Philosophy in American Law*, New York 2009, p. 114–121.

[75] Dietmar von der Pfordten, *Rechtsethik*, Munich 2001, p. 112–203 — ethical and legal essentialism stands here for a close relationship between law and ethics; ethical and legal nihilism emphasizes the absence of any such relation; ethical and legal reductionism confirms the existence of such a relation, but regards it as undesirable and therefore unreal; finally, ethical and legal reductionism recognizes the existence of such a relationship as possible from normative and factual point of view, yet irrelevant from the perspective of the concept and ontology of law (*ibidem*, p. 113).

[76] Cf. recently Robert Kane, *Ethics and Quest of Wisdom*, Cambridge 2010, p. 251; cf. also Ronald Dworkin, *Biorąc prawa poważnie* [*Taking Rights Seriously*], Chapter X: *Wolność i moralizm* [*Liberty and Moralism*], p. 429–460.

[77] Dworkin developed this thought more broadly for the first time in an extensive work Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, "Philosophy and Public Affairs" 1996, Vol. 25, No. 2, p. 87–139.

choices in respect of good and dignified life; while morality can be viewed as a set of norms that determine our attitude to other people.

In this context there arises the following question: do we need to be acquainted with Dworkin's previous works to properly understand *JfH*? The answer is not straightforward. One can in fact read *JfH* as a completely autonomous work of a specific moral theory applied to politico-legal problems. Yet, one can also read this book differently — as a kind of original explanation of why the earlier works presented specific views on the nature of law, equality, liberty, democracy, dignity, etc. Therefore, before proceeding to a detailed reading of *JfH*, one should carefully read the first chapter, which indeed constitutes, in accordance with its title (*Baedeker*), a kind of a road map[78] of the entire work. Dworkin makes here one basic assumption and several more specific assumptions (although he does so in a reverse order as compared to the actual layout of the book), which he then develops in the nineteen chapters.

This basic assumption, befitting the person assuming the attitude of the hedgehog, reads as follows: "This book defends the great and traditional philosophical thesis: the unity of values". "Value is one grand thing" which, according to Dworkin, is seen by a legal philosopher who assumes the attitude of the hedgehog from Archilochus aphorism (*JfH*, p. 1). The author has in mind here not values in general, but he focuses primarily on ethical and moral values. This does not mean, however, that Dworkin does not recognize the pluralism of values, on the contrary — it only means that "ethical and moral values are mutually interrelated" (*JfH*, p. 1). Thus, Dworkin undermines not moral pluralism, but rather moral skepticism and relativism (*JfH*, p. 23–68).

In turn, the specific assumptions, as already mentioned, are presented in a reverse order as compared to the layout of the book. The author begins therefore with the idea of justice which includes values of equality, liberty, democracy and law. When it comes to equality, Dworkin repeats all these elements that he previously developed in *Sovereign Virtue*. He thus revisits his well-known twofold thesis of egalitarianism ('equal concern' and 'equal respect' towards the individual on the part of the state) and the idea of distributive justice being based on 'equality of resources' and on the rejection of 'equality of welfare'. The author follows here Rawls' ideas, yet with one significant difference, he does not join the idea of equality with the conception of the social contract, but he infers it directly from a specific ethical theory which allows people to make their own choices in life.[79] Dworkin recognizes that there may arise conflict between equality, conceived in the above sense, and liberty, but unlike Hayek, and especially in contrast to the leading representatives of contemporary libertarianism, he does

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[78] The author himself describes it in this manner: "a road map of the entire argument" (*JfH*, p. IX).

[79] M. Schwarzschild, *op. cit.*, p. 170.

not believe that this conflict cannot be overcome.[80] The author therefore proposes to distinguish freedom in abstract sense from liberty in particular sense. Freedom is not subject to any restrictions, hence limitations apply only to liberty. Only the latter can therefore be combined with equality — in such case the "apparent conflict between liberty and equality disappears" (*JfH*, p. 4). In this context there arises the problem of democracy and the conflict between positive liberty and negative liberty. According to Dworkin, the answer to this may be to distinguish between the different concepts of democracy: "majoritarian or statistical concept and partnership concept", with a clear preference for the latter, because only this one guarantees the "participation of every citizen as an equal partner in a democratic community, which means more than having only one equal vote" (*JfH*, p. 5). Finally, Dworkin touches upon law as the ultimate element of the idea of justice thus revisiting his basic thesis about the close relationship between law and morality. In his opinion, morality has a branched tree structure: "the law is a branch of political morality, which is, in turn, a branch of a more general personal morality, and the latter is, finally, a branch of an even more general theory of the good life" (*JfH*, p. 5).

These assumptions about justice, equality, liberty, democracy and law have been further developed by the author in the last part of *JfH — Politics* (p. 325–415). This is, however, the final effect, presented in just less than one-fourth part of the book. All other fragments are as if a way to get to the final result. First and foremost, Dworkin explains his basic method — interpretation. As widely known, this is a key point in the integral philosophy of law — Dworkin himself stressed earlier that he perceives the essence of the law in the process of interpretation and he recognizes it as an interpretative fact.[81] In *JfH* we deal with an even broader recognition of the problem — the author views the interpretation not only as a process of understanding the essence of the law, but as a general method of approaching moral problems, and perhaps it is even a certain type of philosophizing, *mos philosophicus*, the way to get to know and understand reality. One must indeed admit that such an understanding of this concept goes far beyond the traditional legal approach to interpretation as the synonym for clarification. Paul Ricoeur, when once analysing Dworkin's legal philosophy asked in this context the question about the relationships between so-conceived interpretation and argumentation.[82] In his opinion, Dworkin's interpretation is

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[80] The problem of the existence or non-existence of a necessary conflict between equality and liberty still arouses interest in the American political philosophy — in the recent literature cf. especially Jan Narveson, James P. Sterba, *Are Liberty and Equality Compatible?*, Cambridge 2010; regardless of this, Dworkin's concept of equality has also become the subject of analyses — Alexander Brown, *Ronald Dworkin's Theory of Equality*, New York 2009.

[81] Cf. e.g. Ronald Dworkin, *A Matter of Principle*, Chapter II" *Law as Interpretation*, p. 119–177.

[82] Paul Ricoeur, *Interpretation and/or Argumentation*, in: idem, *The Just*, Chicago 2000, p. 109–126.

not the same as the argumentation in Robert Alexy's or Manuel Atienza's theory of legal discourse, but it approaches the latter or, in any event, it at some point dialectically intersects it.[83] This becomes more clear and understandable when a pair of concepts 'interpreted/argued' is compared with the pair 'understand/explain/'.[84] Either way, it is hard not to agree with the opinion expressed in modern science that Dworkin's interpretation is placed in that trend of thought which is referred to as "hermeneutic turn in law and philosophy".[85] In *JfH* such conceived interpretation was applied by Dworkin primarily to reconstruct the content of such values as justice, dignity, equality, liberty and democracy. What comes as a certain novelty in the work at issue is a precise determination of mutual and intrinsic relationships between these values within the basic assumption of work, namely 'the unity of value' seen through the eyes of a scholar who assumes the attitude of the hedgehog. It could seemingly be seen that we deal here with some axiological monism which is rather difficult to accept. In fact, however, at least in my opinion, it is rather an axiological holism, in which the idea of equality, as discussed here, remains in a symbiotic relationship with other values, like liberty, dignity, justice, democracy, etc.

It should be emphasized that the view which recognizes the unity of such values as dignity, equality and liberty is becoming increasingly popular in the science of law — such standpoint, even without referring to Dworkin, has been presented, among others, by Susanne Baer. According to the latter author, these values should be presented not as a hierarchical pyramid, but rather in the form of three vertices of a triangle defining the area of the rights of the individual. A characteristic feature of this approach is the recognition of the constitutional unity and necessity of all these values, without any preference for any of them.[86] It is also worth mentioning another graphic vision of the legal system that appeared recently in the literature in the context of the concept of global law. According to the author of this proposal, Rafael Domingo, the legal system has the structure of a pyramid, but it is not a flat figure within the meaning of the hierarchical model of Hans Kelsen, but rather a three-dimensional polyhedron. The basis of this model is provided by a broadly understood humanity, while its tip is a person that embodies the values of human dignity, personal liberty and

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[83] In the Polish literature Marek Zirk-Sadowski, when describing Dworkin's conception, even uses interchangeably the concepts of 'interpretation' and 'argumentation' — *Wprowadzenie* [*Introduction*], in: *Imperium prawa* [*Law's Empire*], p. XIV ff.

[84] Paul Ricoeur, *op. cit.*, p. 110, 126.

[85] Francis J. Mootz III, *Interpretation*, in: Austin Sarat, Matthew Anderson, Cathrine O. Frank (eds.), *Law and the Humanities*, Cambridge–New York 2009, p. 357 (the author emphasises the fact that Dworkin in *Law's Empire* refers directly to Hans-Georg Gadamer — see *Imperium prawa* [*Law's Empire*], p. 51 ff., footnote 2).

[86] Susanne Baer, *Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism*, "University of Toronto Law Journal" 2009, Vol. 59, No. 4, p. 417–468.

equality among persons. The base and the top of the figure are joint by seven planes reflecting justice, rationality, coercion, universality, solidarity, subsidiarity and horizontality.[87]

I have already indicated that *JfH* may be differently perceived by the readers, depending on whether they are fairly well acquainted with Dworkin's earlier works on legal philosophy, politics and morality, or had no previous contact with them. The first group would be represented both by ardent supporters of integral philosophy of law, as well as its radical opponents. It seems that reading *JfH* will only reinforce their positive opinions, while the skeptics will not presumably abandon their existing doubts, which may be even intensified. In turn, those who will have the first contact with Dworkin's views will be undoubtedly encouraged to read *Taking Rights Seriously*, *A Matter of Principle*, *Law's Empire*, *Freedom's Law*, *Sovereign Virtue* and, last but not least, *Justice in Robes*. Dworkin's book is in fact incredibly inspiring and provokes a heated discussion, both in its recapitulating layer, revisiting previously analysed issues as well as in the aspect of new ones. The author is aware of the controversy and the synthetic nature of some theses. Perhaps this prompted him to subject them to a critical evaluation even prior to the official publication of the work. Yet, a certain hallmark of our times of the Internet era may be the fact that Dworkin already in the introduction encourages his readers to a further discussion on a specially created web page (www.justiceforhedgehogs.net): "I cannot promise to answer all comments, but I will try to take into account the suggested additions and improvements" (*JfH*, p. X).

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[87] Rafael Domingo, *The New Global Law*, New York 2010, p. 121–194.

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Chapter IV

Positive law and the idea of freedom

Tomasz Bekrycht[*]

1. Introduction

The content of this study is provided by the analysis of the phenomenon of positive law as a precondition for implementing one of the fundamental values of our culture, namely the idea of freedom. This analysis will be undertaken according to the assumptions of the method of the phenomenological analysis as a methodological tool for describing the basic concepts of the selected areas of reality. The purpose of this method is to cognitively reach the fundamental ontological categories and to describe this result by means of possibly unambiguous terms, so that — as the phenomenologists assume — firstly, there was fully revealed to us the object of cognition and, secondly, to avoid the errors of categorical transition, namely in order not to relate the cognitive results of a given ontological category to another category.

The fact that in the history of jurisprudential thought there is being constantly analysed the issue of a full understanding of the phenomenon of positive law, is the outcome of a certain need resulting, on the one hand, from continuous efforts to develop unambiguous answers to currently posed questions and, on the other hand, from the fact that the object of cognition escapes our understanding. This dialectical movement which has been given to us for at least twenty-five centuries, not only in relation to the concept of positive law, but also to a number of basic categories analysed in the context of the social sciences and humanities, and which since the Enlightenment has appeared with the ideal of the so-called scientific knowledge and the program of 'disenchantment of the world',[1] affects

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the whole area of jurisprudence and the question of its scientification and a precise definition of its fundamental concepts.

The reason for our continuous search for an adequate definition of a real (essence) of positive law is a certain methodological error which is gradually discovered in the history of jurisprudential thought, yet which, in my opinion, is not entirely realised by those who deal with the issues of the positive law. The question is to separate and thus to realize the object of cognition, namely positive law. This error is revealed in an improper separation of the concept of law and the concept of positive law, the concept of legal norm and the concept of the norm of positive law and translating the analyses of ethical issues into positive law issues, and thus in inconsistently assigning the cognitive results in some areas of research to other areas.

It is naturally not only the deficit of a consistent methodological attitude, but — as shown by the history of jurisprudential thought, or by the history of the idea of natural law and the political and legal doctrines — a certain fleeting (of course not in the aesthetic sense) or elusive object of study, namely positive law. This object somehow escapes in its analysis, either in the direction of the concept of law in general, or in the direction of the concept of normativity of law, or the concept of the norm of law itself, or in the direction of the issues concerning values, morality and, finally, in the direction of the general issues of theoretical and normative ethics.

The same is postulated by Jacques Derrida in *Force of Law*, namely that it is necessary to realize the diversity of the concept of positive law from other concepts which are brought closer to it or sometimes even identified with it, like the concepts of justice, rule or law.[2]

Despite the fact that the indelible dichotomy between law of nature (and the divine law) and positive law has been perceived from the very beginning of the ancient thought, a reflection was always directed towards the former and it was mainly from this perspective that arguments were formed about the latter. This always results in conceptual analyses of law in heteronomic nature of the concept of positive law with respect to the autonomous concept of natural law and divine law as well as in the subordination of the former in respect to the latter, as typically evidenced by the Stoic doctrine.

The centuries-long struggle with the attempt to determine the nature of the law in general and the nature of positive law in a way that would satisfy (or not) not only the creators of a given concept, but also other philosophers of law, has led in case of most philosophers of law of the twentieth century to the rejection of the possibility of creating the ontology of law and the ontology of positive law.

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[1] Max Horkheimer, Theodor W. Adorno, *Dialektik der Aufklärung*, S. Fischer, Frankfurt am Main 1988 (Polish edition: Max Horkheimer, Theodor W. Adorno, *Dialektyka oświecenia* [*Dialectic of Enlightment*], trans. by M. Łukasiewicz, Wydawnictwo IFiS PAN, Warszawa 1994), p. 19.

[2] Jacques Derrida, *Force of Law*, in: idem, *Acts of Religion*, Routledge, New York–London, 2002, p. 232–235.

Clearly, however, the advent of the phenomenological movement in the philosophical thinking of the early twentieth century has provided us with such methodological tools and solutions developed by means of them that already today allow to deal with the numerous problems of broadly understood ontology of law. Developing the method of eidetic analysis in phenomenology; making a clear separation between the issues of formal and material ontology; identifying the ways of being and the so-called moments of being; defining what we mean by the concept of being and the concept of idea; determining the mutual relations between the area of metaphysics and ontology — all these are the methodological tools that allow not only to precisely determine the subject of the analysis, but at the same time they also allow to avoid the entire series of the error of categorical transition in the study of what is generally referred to as the phenomenon of law, and in particular the phenomenon of positive law.

At this point I skip the problem of describing the method of phenomenological analysis and the conceptual apparatus characteristic of this phenomenological movement, since the matter of this issue would not only far exceed the framework of an article in its traditional meaning, but it would also suffice for the publication of a comprehensive monograph[3]. What I intend to do at this point due to the subject of this article, is to emphasise that what is defined in the phenomenology as the idea of a given object, is often linguistically presented by the word 'concept', hence the literature often talks about the concept of a given object; just as the philosophy of law, for instance, talks about the concept of law, typically meaning that what phenomenology calls the idea (of law).[4] Therefore, when speaking of the concept of law, it will be in the phenomenology of law and in the phenomenology of positive law, in accordance with the premises of the method of phenomenological analysis, that we will search for the content of the idea of law and the idea of positive law as necessary and feasible relations between the ideal qualities (pure beings). The latter of these concepts, namely the concept of an ideal quality in phenomenology, is characterized as follows: An ideal quality is something that can be referred to as the basic data in the ontology, i.e. something that can no longer be reduced to more basic properties, and thus to be described by means of other predicates. This is something original that can be — to use the language of phenomenology — 'seen' or 'captured' and linguistically defined only in some explanatory context. Such qualities include, for example, 'plane', 'goodness', 'identicality', or 'squareness'. The relationships between the ideal qualities in the context of a given idea are

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[3] All of these issues could be found in the works of Husserl, the phenomenologists of Munich and Göttingen group and in the subsequent generations of philosophers who identify themselves with the phenomenological movement. As for the Polish literature, these issues are described extensively in numerous works of Roman Ingarden and his students.

[4] In phenomenology, in turn, the meaning of the expression 'concept' is utterly different. Roman Ingarden, *Z teorii języka i filozoficznych podstaw logiki* [*From the Theory of Language and the Philosophical Foundations of Logic*], PWN, Warszawa 1972, p. 375.

what is referred to as the essence of a given subject. These relationships are not easy to intellectually grasp, since they include the areas of existence (or, to be exact, the mode of existence), matter (or more specifically, the essence of quality) and form (or specifically, the attributes of the entity). "Every object (anything at all) — as Ingarden writes — can be considered from three different points of view, or in other words, in three different respects: 1) as to its existence and mode of existence, 2) as to its form, 3) as to its material properties".[5] Accordingly, in the process of a proper cognition of the object there can be differentiated three horizons of the ontological problems: 1) existential and ontological questions, 2) formal and ontological questions, and 3) material and ontological questions. The first horizon requires from us the answer to the question about the mode of existence proper to a given object; the second requires the answer to the question about which form can be attributed to the object, and the third requires the answer of which variables and constants are present in the idea of a given object, namely the questions about the relationships between the qualities present in the content of the idea of that object. Thus, the essence of the object cannot be regarded as a set of certain properties which statistically appear most frequently in the characteristics of a given object, but it is rather a very complex image that we would often like to reduce to a formula of a (real) definition, which in the case of many objects is simply impossible. Even in relation to the seemingly 'transparent' objects in mathematics, such as a square, determining that it is 'a rectangular equilateral parallelogram' — can be, on the one hand, regarded as ultimate insight into the nature of a square, but on the other hand, it is far from its understanding. Thus, someone who wants to reflect on the idea of a square cannot confine himself merely to repeat this formula, but he needs to — metaphorically speaking — cause such intellectual acts that end with self-realization and with 'seeing' the idea and those three qualities that form its core (or essence). This is an endless cognitive dialectic, because in order to know something, one needs to understand it, yet in order to understand, one needs to continually learn it. Thus, the essence of the object is revealed along with researching these three abovementioned areas, namely the material properties, the form and the mode of existence.

2. The concept of law

I shall begin by presenting the area of research horizon which constitutes the starting point of any phenomenological analyses. I will therefore present (though due to the scope of the article, only synthetically) the issues relating to the substance of the law in general, in order to subsequently ask about the nature of

[5] Roman Ingarden, *Spór o istnienie świata*, t. I: *Ontologia egzystencjalna* [*The Dispute over the Existence of the World*, Vol. I: *Existential Ontology*], PWN, Warszawa 1987, p. 68.

positive law. Thus, the analysis of the phenomenon of law deals with the ambiguity of this concept, which on the one hand, seems obvious, but on the other hand, as I view it, requires a continuous emphasis due to the abovementioned phenomenon — frequently encountered in the literature — of reducing the analyses concerning the meaning of the concept of positive law to the concept of law in general, or to the analyses of other phenomena, such as the concept of normativity, or the concept of the rule of action.

The analysis of the concept of law as law must be therefore — according to the assumptions of the phenomenological analysis — initially determined by intuitively grasping its constitutive nature. The individual nature that constitutes the object (constitutive nature) is regarded in the understanding of the phenomenological analysis as a particular moment which determines that a given object is itself. Constitutive nature is expressed in the phrase 'this is X', where the word 'is' is present in the identifying function that constitutes a given individual object. Due to the process of initially drawing our attention to a particular object, we can begin eidetic analyses, thus rising gradually to higher and higher levels of abstraction in the direction of the analysis of the nature of the object.[6] Recognizing the existence of the nature that constitutes the object has two meanings, crucial from the perspective of the ontological analysis. It protects us, firstly, against reductionism and, secondly, against the error of a categorical transition, and in the process of researching the essence of the law, the nature that constitutes the object does not allow us to be directed at such concepts as 'the legal norm', 'the social phenomenon', 'the rule of conduct (behaviour)' or 'value', and thus to reduce the concept of law to the abovementioned concepts. Naturally, if we state that the debtor shall render performance and then we provide a number of opinions, like 'This is a norm', 'This is a rule of behaviour', 'This is value', 'This is a social phenomenon', 'This is law', all these judgments are indeed true, yet from the point of view of the ontology of law, the condition of them being true is complied with only when ensuring that the last argument is true. In other words, if we are interested in the law, the first four judgements are not independent in respect of the last. However, if we are interested in the norm, rule, social phenomenon, or value, then these judgments are neutral from the point of view of the ontology of law. Therefore, the concept of the nature that constitutes the object allows us to preserve the horizon of interest only as a part of the concept of law, rather than in other normative areas, thus protecting us from seeking its nature in other categorial areas, for example ethical ones, i.e. the issues of justice or utility.

In other words, the analysis of the phenomenon of positive law will deal with a certain range of social phenomena, some of which may be referred to as the law, but at the same time many of them cannot be qualified as such phenomenon, at least in the sense of the concept of law searched for here. If we say that one should

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[6] Idem, *Z teorii…*, p. 344–351.

use cutlery when eating; one should help the elderly; one should not interrupt others; one should admit one's mistakes; one should judge people fairly, these are not situations that are commonly understood as belonging to the idea of positive law, though they express certain rules or norms that could be referred to as law.[7] Even if we do this, it is not perceived as the act of defining law that is meant when we say that the debtor must render performance or that the competent court to adjudicate divorce lawsuits is the regional court, or that agreements shall be abided by. Therefore, we need to exclude a vast range of social phenomena for which a common concept of the rule of action or normativity allows to call them law, yet it is not the concept of positive law that would aptly characterise this phenomenon. Thus, any attempts to declare the research on the being, the idea, the nature, or the concept of law, oriented at the analyses of the concept of the rule, normativity, justice, mental experience, social behaviour or norm, are doomed to failure. It is already at the outset that they undertake a reduction or categorial transition, not even intuitively reaching the correct object, or in other words, they do not aim at the constitutive nature of law as law or the constitutive nature of positive law. Nobody naturally doubts that the concept of the legal norm, the legal rule, normativity of law or justice are related to the concept of law as law, but they are not the latter. Nobody doubts either that law is considered as social phenomenon and as the element of mental experience, for example of the obliged party, yet law has an utterly different ontological status than its norm, not to mention justice or mental experience.

According to the method of the phenomenological analysis, we need to reduce our knowledge to the original phenomena and to the original moment at which we start perceiving law and whose nature is being intuitively searched by us. This primary moment is the relationship with another entity. In a single self of the entity understood either as a transcendental I or as an empirical entity with mental experience this concept will not be found. We can only find there such laws which, on the one hand, can be counted among the natural sciences, and on the other hand, can be possibly counted among those laws which *a priori* constitute categorial forms of thinking. The concept of law which constitutes a specific phenomenon of the interrelations between entities always presupposes — we might say, in its very nature — not only the existence of the second entity, but something more, namely, some indifferent attitude towards the latter. It is the attitude that requests something from the other entity, or requires a certain behaviour towards it. This is a primary phenomenon which we call law. In jurisprudence it assumes the form of a linguistic expression: 'a claim' (or 'right') and 'obligation'. The concept

[7] It is at the same time obvious that there are some phenomena that can be referred to as laws, yet which differ far from the concept of law that we look for. I am referring here to the laws in the sense used by deductive or empirical sciences, but also linguistic laws (rules), or the laws of the effective operation.

of 'a right' is, however, understood and used more widely in jurisprudence than the concept of the claim, for example, when we talk about the right to property, rights in rem or the individual right. Each of these concepts, however, is always secondary to the concept of a claim ('the right to …') and is involved in a number of assumptions, including the assumption of the existence of positive law, whose content grants to a certain entity some right, for example the right to property, or is involved in the existence of some metaphysical source where this claim is drawn from, for example the right to life.

The primary phenomenon, however, is always the claim and obligation, namely the possibility of requiring something from someone, or the need for a certain behaviour towards someone. Such a primary phenomenon of intersubjective relationship is characteristic of the areas that are commonly referred to as human social activity. However, there are multiple areas of the existence of mutual claims and obligations. They contain those that are traditionally called morality, statutory (positive) law, customs, religion. However, when sticking to the assumptions of the phenomenological analysis method (eidetic reduction), we naturally assume that we do not have any knowledge about these areas yet. It is not only easy to assume such attitude but also to remain in it. The point is that the entire 'bulk' of knowledge should not be mindlessly transferred to the analysis of the phenomenon of law, but always used through the prism of — so to say — a giant filter of positive criticism and lack of involvement in the existing conceptual apparatus. It is very important to carefully separate the two specific phenomena and not to fall — as it often happened in the history of the philosophy of law — in the ambiguities and complex concepts. In any case, the attempt to capture the constitutive nature of law shows the multiplicity of areas which this name could be attributed to, as it is the case with the name 'moral law', 'statutory law' or 'customary law'.

The idea of law defined in the above manner (i.e. law as law) can now be subject to the ontological analysis, according to the abovementioned areas of substantive — ontological formal — ontological and existential — ontological research. However, due to the modest frames of this article, I will leave aside the detailed analyses that should be carried out in these three areas, thus referring the readers to the literature where the latter task was undertaken.[8] In order to most

[8] See Adolf Reinach, *Die apriorischen Grundlagen des bürgerlichen Rechtes*, in: idem, *Sämtliche Werke*, Textkritische Ausgaben in 2 Bänden, heraus. Karl Schumann, Barry Smith, Philosophia Verlag, München–Hamden–Wien, 1989; Tomasz Bekrycht, *Aprioryczność prawa. Ontologia prawa w fenomenologii Adolfa Reinacha* [*A priori Nature of Law. The Ontology of Law in Adolf Reinach's Phenomenology*], Wolters Kluwer, Warszawa 2009; idem, *O związku koniecznym między prawem a moralnością* [*On Necessary Relations between Law and Morality*], in: *Abiit, non obiat. Księga Poświęcona Pamięci Księdza Profesora Antoniego Kościa SVD* [*Abiit, non obiat. The Book Devoted to the Memory of Professor Antoni Kość SVD*], (collective edition), Wydawnictwo KUL, Lublin 2013.

adequately turn to the analysis of the phenomenon of positive law, I shall now make a few summarising remarks.

The idea of law as law assumes two inseparable moments, namely the claim and the obligation. These two moments which are the primary phenomenon of law are the starting point for the analysis of qualitative property of its ideas. Both obligation and claim require carriers. It is a certain relationship of necessity, because the claim is always the claim of someone vis-à-vis someone else, while the obligation is always seen as the possibility of requiring that the carrier of the claim fulfils it. One of the most difficult problems perceived by the phenomenological analysis is a material determination of the carriers of claims and obligations. This involves a question of what qualities must a carrier or carriers of this interrelation have to be the subjects of law by their very nature. However, when remaining only with the analysis of qualitative property of the idea of law as law, it can be then assumed that the claim and the obligation are characterised by the content which always refers to the future behaviour of the carrier of the obligation, regardless of the type of this behaviour and irrespective of whether the content of the obligation concerns the very behaviour or its outcome.[9] In addition, behaviour may relate to the carrier of the claim itself and to the third party. In other words, the addressee of the content of the obligation does not need to be the addressee of the obligation. The content of the obligation can assume the existence of a certain condition and term and there may be a multiplicity of the carriers of claims and obligations. All of these relations of necessity and probability which form the part of the idea of law, constitute its qualitative property, being both the changeable and stable contents of its ideas.

In turn, there arises the question of the form of law, namely the need to verify the idea of law in the formal-ontological dimension. On the ground of ontology there exists a close relationship between the form and the material property of the entity.

> Any form of anything — as Roman Ingarden writes — is in its very nature a form of some materially defined object. Without this material 'filling', without any qualitative determination […] it would be only a certain artificially created abstractum that could not exist for itself. Conversely, qualitative determination cannot exist without the form.[10]

The abovementioned analysis of qualitative property of the idea of law entails a strictly relative (correlative) nature of law as law. The correlate of right is the obligation and necessity-based existence of carriers: 'A is obliged vis-à-vis

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[9] Such act of relating the content of law to the future behaviour has its implications that are crucial for the logical analysis of norms, or more precisely for the question of whether norms have the logical value. It is a derivative of the question about the logical value of 'the statements about the future'.

[10] Roman Ingarden, *Spór*…, Vol. I, p. 69.

B' and 'B has a claim against A'. This indicates that law assumes the form of a relation, and carriers as "the subjects forming the elements of the relation not only materially determine the 'core' of the relation, but they are also a purely ontological foundation of the existence of the core of the relation, and thus of the relation itself".[11] The form of the relation is characterised by the fact that it includes at least two objects, namely the carriers of the relation who — together with this specific relation attributable to them — form one whole of a higher order.

From the perspective of the analysis of the phenomenon of law there arises a very interesting issue, namely which factor determines that someone (something) becomes the element of this relationship and, secondly, at which point such relation is indeed formed and thus when is law actually created.

At this point, due to the scope of this article, I am urged to settle only for general comments, which constitute the cognitive result of the analysis of many other issues. In general, it can be said that a necessary condition for the existence of legal relation is the existence of a certain communication bond, which indicates that the carriers of the relationship of law can only be those entities that can communicate, namely understand the meaning of the words uttered by them, or more generally, they must have and use the same meanings, regardless of their carriers. In turn, the second question, one of the most difficult yet most important for capturing the phenomenon of law, is the question of what is the source of its origin, i.e. how is it that the situation of communication involves law, namely a bond based on claims and obligations.

This is nevertheless the question not only about the source of the formation of law, but about the very possibility of the existence of the situation of communication. In this sense, it is a transcendental question about the conditions of the possibility of communication, whose detailed analyses are left aside in this article in order to provide the readers with the references to one side of the phenomenological research related to the concept of social acts and acts of speech as well as the analyses undertaken in the transcendental philosophy as to the issue of constituting intersubjectivity.[12]

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[11] Idem, *Spór o istnienie świata*, t. II: *Ontologia formalna*, cz. 1" *Forma i istota* [*The Dispute over the Existence of the World*, Vol. II: *Formal Ontology*, Part I: *The Form and the Being*], PWN, Warszawa 1987. p. 299.

[12] See, inter alia, Karl-Otto Apel, *Transformation der Philosophie*, Band 2: *Das Apriori der Kommunikationsgemeinschaft*, Suhrkamp, Frankfurt am Main 1973; John L. Austin, *How to Do Things with Words*, Harvard University Press, Oxford 1975; Armin Burkhard, *Soziale Akte, Sprechakte und Textillokutionen*, Max Niemeyer, Tübingen 1986; Johann Gottlieb Fichte, *Grundlage des Naturrechts nach Prinzipien der Wissenschaftslehre*, Felix Meiner, Hamburg 1960; Jürgen Habermas, *Theory of Communications Action*, Vol. 1: *Reason and the Rationalization of Society*, trans. by Thomas McCarthy, Beacon Press, Boston 1987; idem, *Theory of Communications Action*, Vol. 2: *Lifeworld and System: A Critique of Functionalist Reason*, trans. by Thomas McCarthy, Beacon Press, Boston 1987; Georg W.F. Hegel, *Phänomenologie des*

When generalizing the cognitive results of the abovementioned areas it should be assumed that, in accordance with the contemporary tradition of transcendental philosophy and phenomenology, the relation of law arises, *a priori*, as a result of an act of communication by fulfilling the act of the promise.

At this point I intend to refer briefly to the existential-ontological analyses, i.e. to the mode of the existence of law. What is important for these analyses is the statement that the mode of the existence of the relation (and thus, law) cannot be reduced to the mode of the existence of its carriers. It will be like this only in the situations in which we deal with the relations between ideal objects. However, in case of the carriers attributed with other mode of existence than the ideal one, the case gets more complicated. It can be doubted already in the context of the relations between the carriers attributed with a real mode of existence (people) that, for example, the relation of law between two entities (people) exists in the same way as these entities, namely in the real terms. 'Having a claim' and 'having an obligation' exist in fact differently than X who is entitled to a claim and Y who is obliged. The existence of law, or the occurrence of the said relation between X and Y does not involve any changes in those entities themselves, but rather in some other sphere of existence from which these entities are somehow ontically separated, as really existing individuals. The case can be even more complicated if we recognised the existence of the relation of law between the entities who are attributed with different ways of being; it would be so, for example, in regard to determining the mode of the existence of law, in the relation between God and man. Here, the mode of the existence of each entity—carrier of the relation of law is different, unless we deem, as a part of some doctrine, that both God and man are entitled to the same mode of existence. Roman Ingarden, having undertaken a meticulous formal, existential and ontological analyses of the idea of 'relation', assumes that it is very difficult to determine its type of the mode of existence. The mode of the existence of the relation somehow escapes cognitive analyses, hence we encounter such problems in a centuries-long analysis undertaken as a part of the philosophy of law, as to the existence of law as such and as to the possibilities of its cognition as a specific category of being. On the one hand, one could raise a defence against the statement that this is not an intentional creation, because after certain speech acts have been undertaken, the relation of law is created *a priori* and exists independently of the acts of the consciousness of the carriers, while, on the other hand, neither law nor carries treated as real objects can be perceived sensually. It could be ultimately assumed — following Ingarden's insights as to how the relation exists—that law is attributed with so-called weaker mode of existence, as a real existence, when the carriers of the relation of law are real objects (just as in the currently existing world these are people), and there could

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Geistes, in: idem, *Gesammelte Werke*, Bd. 9, Hamburg 1980; Jaakko Hintikka, *Cogito, ergo sum: Inference or Performance?*, "Philosophical Review" 1962, Vol. 71, No. 1.

be basically left unresolved the question of the determination of the existence of law for the entities — carriers who would be, in turn, attributed with various modes of existence; hence there arises such a cognitive problem in the area of legal analyses which we relate to the idea of God and divine law.

3. Positive law

The analysis of the general idea of law (namely the concept of law as law), as characterized above, encompasses in its scope a larger field of social phenomena than the one that we used to typically refer to as law, namely positive law. Therefore, in order to accurately capture the specificity of this important area of reality we need to very carefully follow the assumptions of the phenomenological analysis and not depart from the 'purity' of the appearing phenomenon which at this point can be merely regarded as a phenomenon of positive law.

The peak of the existence of positive law can be obtained here, following the guidelines of the methods of eidetic analysis, like in the analysis of law as law, only in the three areas of the ontological research, i.e. in substantive, formal, and existential-ontological research. In addition, in order to accurately capture the specificity of positive law, I will use the reference method, consisting in comparing these two phenomena, i.e. the phenomenon of law as law and positive law.

Firstly, in order to provide a correct characteristics of the phenomenon of positive law, one should properly identify and describe its constitutive nature, namely to point out the factor that makes it the object of analysis and that differentiates it from law as law. It turns out that it is not easy to indicate such a difference and cognitively grasp it, since positive law, like law as law, implies not only the existence of another entity, but also — as we have already indicated above — a peculiar indifferent attitude towards it, and this is the attitude of requiring something from another entity in the form of the necessity of its behaving in a certain way. Thus, positive law and law as law share a common form, namely relation.

Therefore, in order to capture the constitutive nature of positive law and not to confuse it with the phenomenon of law as law, it seems that one can point to a few differentiating moments that can be attributed to the phenomenon of positive law, and that are not specific to law as law. Firstly, what appears spontaneously in the phenomenon of positive law is a certain reference to the concept of power, coercion, sovereign and legislator. Secondly, the phenomenon of positive law indicates a specific way in which it appears in reality, namely it indicates other sources of its creation than the phenomenon of law as law. While in the analysis of the idea of law as law the latter source was simply one speech act (the act of promising, which *a priori* results in the existence in the area of claim and obligation), the phenomenon of positive law is seen as something more

complicated. In order to regulate, or set the world of the behaviour required from other entities, the mere performance of the act of regulation is not enough. Apart from the fact that there must be preserved all the conditions of the situation of communication, as mentioned above (there must be a sender, recipients, and there must be the identity of the meanings), which are associated with the indication of the communicative and material *a priori* as one of the ontological foundations of law, this condition appears as necessary, yet not sufficient for positive law. In other words, this situation requires a certain activity of the addressee of the act so that the reality proposed by the regulating entity (the sender of the act) could work in the field of potential actions, since an act of speech called an act of regulation (*Bestimmungsakt*) operates somehow in one direction and sets something, yet only for the recipient, as opposed to the act of speech, which — according to the possible source of the creation of the relation of law as law — operates equally in the area of the entity that fulfils the act as well as the entity to whom the act is addressed. However, to emphasise it once more, this one-sided operation of the act of regulation is not sufficient for its effectiveness. While the effective fulfilment of the act of promise (as a causal source of the phenomenon of law as law) has its basis in the *a priori* communicative action and there is no requirement of any action on the part of the recipient of the act, the effectiveness of the act of regulation requires something more. Thus, the fundamental source to justify the existence of positive law is not provided by the act of regulation (*Bestimmungsakt*) but rather by the specific act of being granted the possibility of regulation, thus constituting the sphere in which acts of regulation may play the role of projecting behaviours and, together with the act of regulation, create reality, defined by us as positive law-based reality. In this act there takes place a peculiar 'surrender' or 'giving away a part of one's freedom'.

Thus, the preliminary eidetic analyses of positive law demonstrate the difference of the positive law in relation to the concept of law as law, and this difference is primarily based on taking into account, on the one hand, the dual nature of social acts and, on the other hand, grasping the primordial role of the act of granting the possibility of regulation as the justification of positive law in the sense of causal justification. In other words, what differentiates the phenomenon of positive law from the phenomenon of law as law is the causal difference, namely the dual nature of the undertaken acts as the source of the existence of law. It can be also stated that the phenomenon of positive law is not exhausted in its being defined as an act of regulation, but it is necessary to characterise it also by indicating the act of granting the possibility of regulation. What is more, the latter provides basis for the former; it is the assumption of the former, without which the former could not exist. It is not possible to effectively undertake the act of regulation without a prior effective act of granting the possibility of regulation. There exists a close relationship of existence, namely interdependence of the relations between those acts arising from the essence of positive law. It therefore

seems that both significant correlation of these two acts, as well as the character of granting the possibility of regulation, fundamental to the phenomenon of positive law, have typically shunned the analyses of the concept of positive law and blurred the significant difference between the phenomenon of law as law and the phenomenon of positive law as well as the differences of such concepts as the sovereign and the legislator.

The concept of this act, as the justification of positive law, cannot be confused with any situation of a contract or agreement between the parties, the content of which would be a regulation. The situation of the contract will never result in a direct exposure of norms for specific recipients, but it will, at most, provide basis to a claim for complying with the norms. The point is that in such a situation there would disappear four constitutive moments that shape the phenomenon of positive law, i.e. the existence of the relation of power, coercion, legislature and sovereign. The entity that would be a party to the contract of regulation would have the same position in relation to the addressee of law, since it would be bound only by a claim and obligation. This position could be referred to as merely based on claim and obligation but not on authority or power. The entity bound by the contract would therefore not be able to be a legislator (it could not rule, or regulate). Omitting this phenomenon had, in my opinion, considerable effects on the justification of positive law, since it gave rise to a number of contract-oriented doctrines with a very strong intellectual influence on the jurisprudential issue of the justification of positive law. Moreover, there was observed a considerable duality of the concept of social contract, differentiating between the contract between the citizens themselves and the contract between the legislator and the citizens. This duality further obscured the issue of the nature and justification of positive law. No one noticed, at the same time, that the former contract is a classic civil law contract and falls under the concept of law as law, while the second contract — namely the contract between the people (nation, citizens) and the sovereign or the government — assumes an existing relationship of power and the existence of the legislator.

> The power — as Hannah Arendt writes — is never owned by the individual; it belongs to the group and it exists so long as the group holds together. When we say that someone is 'in power', in fact, a reference is made to the fact that a certain number of people authorized him to act on their behalf.[13]

It is ontologically materialised in the situation of communication, thus fulfilling the act of granting the possibility of regulation.

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[13] Hannah Arendt, *On Violence*, Houghton Mifflin Harcourt, Boston, MA 1970 (Polish edition: Hannah Arendt, *O przemocy. Nieposłuszeństwo obywatelskie* [*On Violence. Civic Disobedience*], trans. by A. Łagocka, W. Madej, Aletheia, Warszawa 1999, p. 56–57).

We must therefore distinguish and accurately describe the concept of the sovereign and the concept of the legislator as constitutive elements of the phenomenon of positive law. The sovereign is the entity (in the broadest sense of the word) that has the power, but in the sense of 'potency' or 'being powerful', in order to, on the one hand, define itself as a political unity and, on the other hand, as a decision-maker of the form and type of a certain political existence in which it fulfils the act of granting the possibility of regulation and thereby indicates the legislator.

In Carl Schmitt's view, it is 'system-granting power' which is uniform and indivisible, and 'it is not, next to different 'powers' (such as the legislative, the executive and the judiciary) yet another power co-ordinated with them, but it creates an extensive basis for all other 'powers' and 'divisions of powers'.[14] Only the entity (entities) which is the addressee of the act of regulation can be the sovereign, since it constitutes itself as a political unity, namely by fulfilling the act of granting the regulation, it agrees to being the addressee of law. No matter how we call this entity, whether the nation or the community or the people, this entity (as the sovereign) determines the effectiveness of regulation (as the addressee of law).

However, the analysis at the conceptual level needs to take into account — in accordance with the methodology of eidetic analysis — the actual idea of the sovereign. At the level of actuality we are unable to empirically identify this entity nor its norm-making activities. "[P]opular sovereignty is no longer embodied in a visibly identifiable gathering of autonomous citizens. It pulls back into the, as it were, 'subjectless' forms of communication circulating through forums and legislative bodies".[15]

> As Schmitt writes — as long as people have the will of the political existence, it is more important than any regulation or form. As an unorganised unit, it cannot be broken down. As long as it exists and wants to continue to exist, life force and energy of the people are inexhaustible and it is always able to find new forms of political existence. Its weakness lies in the fact that it has to resolve the fundamental issues relating to its political form and its organization, even though it is not formed or organized itself.[16]

In order for the sovereign to be able to take norm-making decisions and to actually shape the content of social relations there must appear some organizing principle, which is founded on an act of granting the possibility of regulation, that would define the institution of authority, but not the authority understood as 'potency' ('power') but as 'subjecting oneself' to the will of the legislator

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[14] Carl Schmitt, *Verfassungslehre*, Duncker & Humblot, Berlin 1993 (Polish edition: Carl Schmitt, *Nauka o konstytucji* [*Studies on Constitution*], trans. by M. Kurowska, R. Marszałek, Teologia Polityczna, Warszawa 2013, p. 144).

[15] Jürgen Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, trans. by Wiliam Rehg, The MIT Press, Cambridge, MA 1996, p. 135–136.

[16] Carl Schmitt, *Nauka o konstytucji* [*Studies on Constitution*], p. 152–153.

and to the vision of the social relations shaped by the latter, in particular to the ought behaviours. Thus, there was revealed to us the second understanding of the concept of power, alongside the concept of 'the possibility of regulation' or the concept of 'the surrender' and 'dependency'.

At the same time, there arises the question whether a frequently encountered in the literature phenomenon of identifying the concept of the sovereign with the concept of the legislator is legitimate and whether the separation of these concepts is necessary or whether the phenomenological analyses do not accurately assess it. In other words, the question is whether the community can set laws itself. Obviously, this is not ruled out, but — in my opinion — we lose sight of the phenomenon of positive law. The norms set out by the community of law would not then be positive laws because there would be eliminated the relation characteristic of law in general and of the positive law, therefore we would lose the very form from a formal and ontological point of view — law would cease to be law. In addition, there would disappear such concepts as the concept of the sovereign, the power and the legislator. Yet, as I mentioned earlier, it is not excluded and can be — metaphorically speaking — conceptually saved using the structure of the social roles that we can assume in relations with other entities. However, this may cause a certain breakdown of the identity of the entity in cases of specific axiological dilemmas. For Kant, nevertheless, this dilemma is excluded, because in his conception of metaphysical elements of the theory of law he made the people (the nation) the sovereign, i.e., "The legislative authority can belong only to the united will of the people", [17] which — in his opinion — leads to quite embarrassing situation, giving rise to contradictory situations, that the sovereign is at the same time the subjected entity. To some extent, this is also perceived by Schmitt when he writes that there exist two opposing political organizational principles, namely that of the identity and that of the representation. In the first form, the sovereign would not only be the subject of political unity, namely the constitutional legislator, but the lawmaker. In this form, however, there would not emerge positive law. Its existence is, however, founded in the second form, namely the representation, because "the entire, absolute identity of real people with oneself as a political unity, is never and nowhere granted".[18] The same problem is noted by Jürgen Habermas when writing that there cannot be justified the situation where citizens vest laws in themselves, that is to create a situation in which the sovereign is also the legislator, namely the sender and the recipient of law. It is impossible because we lose sight of the phenomenon of positive law and we remain at the level of morality, that is, the concept of law as law, because

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[17] Immanuel Kant, *The Metaphysics of Morals*, trans. by Mary J. Gregor, in: Mary J. Gregor (ed.), *The Cambridge Edition of the Works of Immanuel Kant*, 12th printing, Cambridge University Press, Cambridge 2008, p. 457.

[18] Carl Schmitt, *Nauka o konstytucji* [*Studies on Constitution*], p. 335.

as moral legislators, we are not identical with the legal subjects on whom, as addressees, this right is *bestowed*. […] The idea of self-legislation by citizens, then, should not be reduced to the *moral* self-legislation of *individual* persons.[19]

This idea of self-legislation by citizens cannot exist without the idea of power (understood as 'surrendering'). "Political power is not externally juxtaposed to law but is rather *presupposedby* law and itself established in the form of law."[20]

The concept of representation can be thus identified with the act of granting the possibility of regulation and the entity that is the addressee of this act — with the concept of the legislator. At the same time, it entails the relation of power and, together with the fulfilment of the acts of regulation, it reveals the entire phenomenon of positive law — "the legislature is constituted as a branch *within* the state".[21]

Thus, such concepts as the concept of the sovereign, the representation, the legislator and the power as well as the concept of coercion associated with the latter (as discussed below) constitute, next to the form, that which is referred to in eidetic analyses as qualitative property of the object and what constitutes the scope of material and ontological research in the analysis of the idea of positive law.

The fact that we usually detach the concept of positive law from the concept of power is an error, which has its foundation in the empirical analyses. This was pointed out by Habermas when writing that law is often perceived and it functions as the instrument of power, but he emphasises, at the same time, that it is a distortion arising from the fact that in such cases we in fact deal with the phenomenon of illegitimate power. Power and law are mutually constituted. Modern complexity of social relations has thus obscured the phenomenon of positive law, which can be — according to Habermas — correctly reconstructed on the examples of abstractly recognized primitive communities, where you can perceive the phenomenon of converting the power understood as authority into the power understood as a legitimized institution. According to Habermas, there can be seen two processes that occur at the same time, i.e. the power is authorized by some significant value, usually sacred law, and law is at the same time sanctioned by this authority. We must therefore distinguish the function fulfilled mutually by power and law from the function of law and the function of power as their intrinsic functions.[22]

In summary, when a given community fulfils the act of granting the possibility of regulation, in being there appears positive law, as very aptly described by Kant in the analysis of the basic problems of the philosophy of law: We give or disclaim our freedom in order to recover it again, but in different quality.[23] It could be said that it is the freedom to decide about the unity of the community, namely about

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[19] Jürgen Habermas, *Between Facts and Norms*…, p. 121.
[20] *Ibidem*, p. 134.
[21] *Ibidem*, p. 150.
[22] *Ibidem*, p. 137–143.
[23] Immanuel Kant, *The Metaphysics of Morals*, p. 450–451.

the political unity that demands from a man to make a choice between naturalistic and anti-naturalistic normativity. The first freedom is regarded as arbitrary will, namely unlawful wild freedom. The second, on the other hand, is referred to as legal freedom. This change is, nevertheless, undertaken at the cost of the loss of a part of the arbitrary will in favour of security, i.e. we cannot exceed the limits of the freedom of others, thus gaining security of action in the area of our own freedom. Leaving aside the motivational nature of the justification of law, connected with ensuring the safe operations in the sphere defined by law, the most important factor is that there conceptually arises the assumption of coercion, both in terms of limiting the actions in accordance with one's own will, namely arbitrary will, and in the sense of the entitlement to apply coercion as a remedy for the occurrence of violence on the part of the arbitrary will of another entity.[24]

However, the relation of power, namely positive law, as already mentioned above, can be in fact abolished, and the support for positive law (power) — as Hannah Arendt writes — "can be always challenged and its reliability cannot be compared with indeed 'unquestionable obedience', which is forced by the act of violence […]. This is the power of the people who lend power to the state institutions; it just constitutes a continuation of that consent which created laws in the first place".[25] Thus, the concept of coercion, resulting from the act of the 'surrender' (of power), as being yet another decisive factor in the context of the constitutive nature of positive law, cannot be confused with the concept of violence. Any political form of exerting power needs to have the support of the recipients of law. If it loses the latter, there ends power and there begins violence, namely a purely physical effect on the other party (often as an instrumentally better arsenal of tools, increasingly better developed in technical progress).[26] Power is constituted "between people, when they act together, and it disappears when they diffuse".[27] Power expresses what is common between those who act and those who speak. Power stems from the opportunity of joint action that exists in the entities, namely from the potency provided by speech and common life. This is not something empirical, but rather intentional and intellectual, therefore

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[24] *Ibidem*, p. 388–390.

[25] Hannah Arendt, *O przemocy…* [*On Violence…*], p. 52–53.

[26] Therefore, it cannot be said that the revolution is directed against power or law as such, but rather against a specific authority or against the content of law. Similarly, the institution of civil disobedience is only possible when we deal with a group and not with the individual person. Without the support of the group, the violation of the norms of positive law is viewed negatively as unlawful or illegal, not only in terms of the assessment of a broadly understood justice system, but primarily as a social judgement. Thus, the public nature of the violations of law by a single entity within the framework of civil disobedience is a kind of emanation of the group.

[27] Eadem, *The Human Condition*, The University of Chicago Press, Chicago–London 1998 (Polish edition: Hannah Arendt, *Kondycja ludzka*, trans. By A. Łagodzka, Aletheia, Warszawa 2000, p. 219).

power can be divided abstractly, without depleting it,[28] as opposed to violence, which is a purely physical domination of man over man.

The law of reciprocal coercion is referred to by Kant as "the *construction* of that concept".[29] To support his position, he uses analogy to mathematics, because, just like the properties of pure mathematics cannot be derived directly from the very concept of mathematics, but only from the construction of the concept, the concept of law can be discovered only by its construction; in other words, the act of presenting the concept of law cannot flow from the very concept itself, but from a "fully reciprocal and equal coercion", strictly subordinated to the common principle and compatible with the latter only.[30]

Kant identifies the concept of law with the authority to coerce. The thesis of this identity is derived from contradictions. He justifies it as follows: if a given entity uses its freedom in such a way that it cannot be reconciled with the freedom of another entity, in accordance with the universal laws, then its action is 'contrary to law'. The opposition to the illegal action — according to Kant — can be treated as providing support to this action and is compatible with the latter, and so

> if a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e., wrong), coercion that is opposed to this (as a *hindering of a hindrance to freedom*) is consistent with freedom in accordance with universal laws, that is, it is right.[31]

In turn, Habermas describes this bundle of two elements, namely coercion and freedom, existing within the phenomenon of positive law, in such a way that positive law derives its justification from the 'alliance' of two elements, i.e. the normative decision of the legislator and the expectations of the sovereign, namely the recipients of this normativity. At the same time, there exists a certain ideal tension which

> reappears in the law. Specifically, it appears in the relation between the coercive force of law, which secures average rule acceptance, and the idea of self-legislation (or the supposition of the political autonomy of the united citizens), which first vindicates the legitimacy claim of the rules themselves, that is, makes this claim rationally acceptable.[32]

Habermas perceives the legitimization of contemporary legal systems in the idea of self-determination of the legal community, which arrives at this agreement by means of a discourse. In contrast, the functional justification is derived by positive law from the necessity of reconciling that which is private and that which is public. This element differentiates positive law from morality, or more broadly, from the

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[28] *Ibidem*, p. 221.
[29] Immanuel Kant, *The Metaphysics of Morals*, p. 389.
[30] *Ibidem*.
[31] *Ibidem*.
[32] Jürgen Habermas, *Between Facts and Norms*…, p. 39.

concept of law as law, where the said self-determination is uniform, i.e. whenever there is symmetry of rights and obligations. This symmetry cannot appear in the concept of positive law due to the need of separating the roles of the legislator and the recipient. If we agree that there exist some laws, apart from the idea of self-determination and recognizing it in the form of positive law, law ceases to be positive and thus legitimized by its recipients, and as a result, it begins to control them, which can have a risk in the ideology and violence — "an impersonal domination of laws is as fundamental as Leviathan's violence whom the laws must shackle".[33]

The most important thing is that the content of the concept of positive law must be sought in the said duality of the idea of freedom, which is the attribute of the political community and the power constituted of the latter, as potential limitation, or coercion.

4. Conclusion

By analysing the phenomenon of positive law, the latter appears, on the one hand, as something natural, necessary and immanent for the social reality and, on the other hand, together with the idea of power and coercion, it is seen as a specific problem and something unwanted, understood more as necessary evil than as good used for the benefit of the individual and society. Yet, as strongly emphasised here, the claim contained in the latter perspective, appears only because one would often like to talk about positive law and justify its existence in such areas of social relations in which it does not occur. In other words, where there is violence, there is no law, and violence — as very accurately analysed by Hannah Arendt — cannot be equated with coercion.

> Paradoxical achievement of law — Habermas writes — consists therefore in the fact that the potential conflicts of unleashed subjective freedom are tamed by law by means of norms which, as long as they can exert force, they are considered legitimate on the shaky ground of unleashed communicative freedoms.[34]

If we realize this interrelation, our attitude to law, to the act of shaping its content, its legitimization and respect to it, will return to their original idea of a joint, active participation in the social life and will realize the danger of dogmatic assertions about the rule of law and its institutional domination, since this idea recently departed from its original meaning. The phenomenon of positive law reveals the idea of the synthesis of that which cannot be reconciled, namely the idea

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[33] This quotation there is only in the 4th German edition and in the Polish edition (Polish ed. p. 583).

[34] *Ibidem* (Polish ed. p. 589).

of freedom with the idea of necessity. The emergence of positive law is — to use Habermas' metaphor[35] — a wedge of the exalted idea driven into social complexity, namely of the idea of self-restraint of liberty in the name of itself. This conclusion clearly indicates that the legal system is not constituted, and cannot be constituted by perfectly arranged rules that would be independent in their normativity of its actual social interactions, and thus the look at law cannot be taken only from the perspective of the objectives of its system, because it impoverishes its real (social) dimension, from which it derives its legitimacy and which it should ultimately serve.

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[35] *Ibidem* (Polish ed. p. 588).

PART II

CONCEPTS OF EQUALITY IN QUESTION

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Chapter V

Gender issue in John Rawls' concept of equality

Anna Kalisz[*]

Equality is the soul of liberty; there is, in fact, no liberty without it.
Frances (Fanny) Wright (1795–1852)

Gender equality is more than a goal in itself. It is a precondition for meeting the challenge of […] *promoting sustainable development and building good governance.*
Kofi Annan (b. 1938)

I. The idea of equality is not only a political slogan. It has been also (at least since the French Revolution) one of the fundamental principle both in law and political philosophy. However, there is a controversy in defining the precise notion[1] itself as well as in specifying the relation between equality and justice.

The social sciences have provided — next to the general concept — variety of different specific conceptions of equality (e.g.: libertarianism, utilitarianism). Equality may be basically viewed as a combination of aspects and principles — from formal equality (legal aspect), proportional equality (distributive aspect) up to moral equality (aspect of dignity and respect).[2]

The common ground for different conceptions is a complex and multifaceted nature of equality and its connection with social (distributive) justice. "Above all it serves to remind us of our common humanity, despite various differences."[3] It

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[1] Gr. *isotes*, Lat. *aequitas.*

[2] The moral equality — in terms of equal dignity and equal respect constitutes the 'egalitarian plateau' for all contemporary political theories — Will Kymlicka, *Contemporary Political Philosophy*, Clarendon Press, Oxford 1990, p. 5.

[3] Stanford Encyclopedia of Philosophy: http://plato.stanford.edu/entries/equality/.

results with the need of establishing common basic social principles, rules and norms that ensure the just social order.

II. One of the most popular and successful current approaches to the issue of equality and justice is John Rawls' concept described mainly in *Theory of Justice*.[4]

It tries to escape from the utilitarian perspective and to create an alternative to it. This approach points out (as all the egalitarians) the formal aspect of equality — that everyone counts as one and no one as more than one and the interests of all should be treated equally, but in the same time provides such substantive version of the distributive aspect that served best the utility principle (*argumentum at utile*), neglecting the separateness of persons.[5] In Rawls' opinion such approach cannot provide a satisfactory account of the basic rights and liberties of the citizens as free and equal persons. Justice 'does not allow that the sacrifices imposed on a few [or less powerful counted as a few — A.K.] are outweighed by the larger sum of advantages enjoyed by many.'[6]

In other words — utility principle cannot serve as a decent and proper base for 'well-ordered society'. It follows that the primary subject of justice is a basic structure of society, namely: the division and distribution of fundamental rights and duties (goods and burdens). This structure in a significant way influence everyone's life prospects. "Men born into different positions have different expectations of life determined, in part, by the political system as well as by economic and social circumstances."[7] *Ergo* — the principles of social justice must in the first place apply to these inequalities. All basic social goods — liberty and opportunity, income and wealth, and the bases of self-respect, etc. are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favored. As other egalitarians, Rawls does not hold inequality to be negative *per se* — not every case of unequal distribution must lead to social injustice. Nevertheless, the principles of justice shall serve the elimination of involuntary disadvantages.

Rawls' theory brings back and refresh the idea that is basic and fundamental not only for European, but entire so-called 'Western' political, social and legal culture — the idea of social contract. This, in turn, is based on assumption that people's nature is neither entirely altruistic nor purely egoistic and that the society is a combination of common and conflicting interests. Thus, the society must decide on fundamental principle of its own structure. Public conception of justice deriving

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[4] See also previous papers mentioned at: John Rawls, *Theory of Justice*, (revised edition), Cambridge, MA 1999, p. XX ('Preface'). Also idem, *Political Liberalism*, Columbia University Press, New York 1993.

[5] Idem, *Theory of Justice*, p. 166–168.

[6] *Ibidem*, p. 3.

[7] *Ibidem*, p. 7.

from common acceptance — a 'civil friendship' — and based on the fundamental agreement. Such agreement[8] is a result of a dialog between free, equal and rational persons in pluralistic society. Naturally free people (persons of equal liberty) rationally determine the principles of justice. Such principles provide a distribution of various social goods in order to prevent or solve the conflicts. Such rules shall be settle without any social prejudice or privileges, so "the original position of equality corresponds to the state of nature in the traditional theory of the social contract".[9]

As autonomous individuals, we all bear responsibility both for the consequences of our actions and for ameliorating unequal conditions. Freedom, however, does not indicate that individuals are responsible for circumstances beyond their control — race, sex, and skin-color, but also intelligence and social position — which thus are excluded as distributive criteria. In this context equal opportunity is insufficient because it does not compensate for unequal innate gifts. Human beings should have the same initial expectations of 'basic goods'. This in no way precludes ending up with different quantities of such goods or resources, as a result of personal economic decisions and actions.

Since justice shall serve the elimination of inequalities, its principles shall be best chosen behind a veil of ignorance, where

> no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities.[10]

This way no one is able to design principles to favor his particular condition — which make initial situation as well as a result of the contract fair. This explains the name of the concept 'justice as fairness'.

Thus, "a set of principles is required for choosing among the various social arrangements which determine […] this division of advantages and for underwriting an agreement on the proper distributive shares".[11] There arise the question, whether such arrangements shall change with other social circumstances as a part of a social progress.

III. According to the above and following Rawls' thought — minority must not cede its freedom to majority and the rational principles of justice serve the elimination of any inequalities which do not depend on human beings themselves and are accidental — just like a gender matter is. Despite the pure fact, that women are a majority (in

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[8] Further: Banu Kilan, *J. Rawls' idea of an 'overlapping consensus' and the complexity of 'comprehensive doctrines'*, "Ethical Perspectives" 2009, Vol. 16, No. 1, p. 21–60.

[9] John Rawls, *Theory of Justice*, p. 11.

[10] *Ibidem*.

[11] *Ibidem*, p. 4.

number) in the contemporary society, within the structures of power and decisional processes they still remain the status of a minority — the less favored. This fact not only leads really or potentially to unfair decisions, but also is strongly connected with the gender question—as is being perceived in social mentality, culture and norms.

Gender[12] in its socio-political aspect is defined as is the range of characteristics pertaining to, and differentiating between, masculinity and femininity. Firstly — it was used in a sense other than grammar category (feminine, masculine) in the 1950s by psychologist John Money[13] and then widespread during the 1970s', when feminism embraced the concept of a distinction between biological sex and the social construct[14] of gender. The feminist roots have attracted numerous antagonists to the idea.

Currently there are many various philosophical and sociological theories about gender — some of them of the radical nature. In short and on average — it may be defined as the relations between men and women, both perceptual and material. Since such relations evolve through times and with the social and cultural development, the legal constructs shall also evolve according to the actual changes.

Gender is neither determined biologically, nor inherently connected to one's physical anatomy. It is rather a result of sexual characteristics of either women or men, but is constructed socially. *Sex* is biological — at birth, it is used to identify individuals as male or female. *Gender* is far more complicated than the sex question.[15] Along with one's physical traits, it is the complex interrelationship between those traits and one's internal sense of self as male, female, both or neither as well as one's outward presentations and behaviours related to that perception. In *Theory of Justice* Rawls does not use such a term as 'gender', though there is a simple mention about the category of 'distinctions based on sex'.[16]

Gender may be understood through traditional, transitional and egalitarian approach. In this very context term 'gender' refers mainly to the latter one — to the issue of equality between man and women and the problem of (non) discrimination and it does not mean denying neither differences between man and women nor the borders between biological sex. It is rather on 'fairness' and 'justice' than on denying that men and women are different. It is also connected with such oppositions — or better — interactions as: 'nature and culture', 'private

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[12] Latin term *genus*.

[13] *Vide*: John Money, *Hermaphroditism, gender and precocity in hyperadrenocorticism: psychologic findings*, "Bull Johns Hopkins Hosp.", June 1955, Vol. 96, No. 6, p. 253–264.

[14] At the same time gender fits the social constructionist movement in psychology, that states since "some categories really are social constructions: they exist only because people tacitly agree to act as if they exist" — Steven Pinker, *The Blank Slate: The Modern Denial of Human Nature*, Penguin Books, London 2002, p. 202.

[15] Further reading, e.g.: *Sex versus gender*, in: *International Encyclopedia of Sociology*, Frank N. Magill (ed.), London–Chicago 1995, p. 1180–1181.

[16] John Rawls, *Theory of Justice*, p. 85.

and public', the question of fair balance and harmony. It is on the question of power — and power is connected to the question of justice.

The main assumption is that biological sex is directly tied to specific social roles and expectations that define the behaviors that are 'appropriate' for men and women and determine women's and men's different access to rights. This leads to the creation of gender systems. The issue is that the social roles and in the same time the entire gender identity evolve. Such changes cause changes both in social norms and in legal regulations. Hence, two further questions arise: firstly — that not in every society (state) the political and legal system provides an accurate approval to such changes, the second — that the legal regulations may either hasten or inhibit them.

It is worth to emphasise, that the 'vail of ignorance' theory seems to be easily applied to gender theory. The human being may express, develop and fulfil themselves in a more successful and efficient way if there is no previous prejudice or at least assumption that their characteristics and behaviors shall refer to biological sex and the roles the social constructs provides for them on such ground.

Since an important component of the self-concept is derived from memberships in social groups and categories, the 'well-ordered society' shall follow aforementioned changes in gender-identity to support development of the individuals (in a short perspective) and social (in a further one). Thus, the social contract shall be constantly re-negotiated to match the actual situation and the legal regulations shall both follow and support such action.

The pure fact of having been born to the particular sex cannot automatically determine certain social roles, ignoring *de facto* practices, attitudes and social predispositions of a particular human being. The preserved social and legal constructs facing modern challenges may lead to unjust inequalities. In practice — although the specific nature and degree of these differences vary from one society to the next, they still tend to typically favor men. Since there is still strong 'common acceptance' for traditional gender-identity which may be viewed unfair, law may be a tool for — in some cases following in others supporting actual state. To serve the elimination of unfairness and inequalities certain legal principles (as non-discrimination principle)[17] and institutions (as

[17] The main global and European legal acts are clear on this matter. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 by the UN General Assembly defines discrimination against women as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field". European Convention on Human Rights in its Article 14 (Prohibition of discrimination) states: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association

quotas or parities)[18] seem to be — in spite of huge controversy they usually cause at first in almost every society — proper measures to deal with such issues, which has been confirmed by both: the Council of Europe[19] as well as the European Union.[20]

Despite the aforementioned definition, gender is often misunderstood as being the promotion of women only. It is not, however. It focuses on women and on the relationship between men and women, their roles, access to and control over resources, division of labor, interests and needs.[21] The impression that it serves the promotion of women solely may derive from the fact, that gender put the emphasis on — *inter alia* — the status of women as an actual minority, the issues of equality and choice as well as the non-discrimination principle.

VI. 'Combining' such issues with the aforementioned concept of equality — according to Rawls' 'strict compliance theory'[22] predicates that, as mentioned, in the hypothetical well-ordered society the rational principles of justice serve the elimination of any inequalities which do not depend on individual human beings themselves and are accidental — just like a gender matter is.

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with a national minority, property, birth or other status." The Charter of Fundamental Rights of the UE in article 21 provide: "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited." Further, in Article 23 (Equality between men and women) states: "Equality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex." Thus, it is clear that prohibition of discrimination is an element of the principle of equality.

[18] Further reading: Mieke Verloo, *Another Velvet Revolution? Gender Mainstreaming and The Politics of Implementations*, IWM Working Paper No. 5/2001, Vienna 2001; Stina Larserud, Rita Taphorn, *Designing for Equality. Best-fit, medium-fit and non-favourable combinations of electoral systems and gender quotas*, International Institute for Democracy and Electoral Assistance, Stockholm 2007.

[19] E.g.: *Gender Mainstreaming — Conceptual framework, methodology and presentation of the good practices*, Final Report of Activities of the Group of the Specialists on Mainstreaming, Section on Equality between Woman and Men, Directorate of Human Rights, Strasbourg, May 1998, http://www.gendermainstreaming-planungstool.at/_lccms_/downloadarchive/00003/Europarat.pdf (access: 15.05.2015).

[20] *Vide* e.g.: Communication from The Commission: Incorporating Equal Opportunities for Women and Men into All Community Policies and Activities, Brussels, 21.02.1996, COM(96) 67 final, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51996DC0067&from =EN (access: 11.04.2015).

[21] More: Heidi Bravo-Baumann, *Gender and Livestock: Capitalisation of Experiences on Livestock Project and Gender*, Working Document, Swiss Agency for Development and Cooperation, Bern, September 2000, *passim*.

[22] A normative approach to the principles of justice as rational rules, that would regulate an ideal and hypothetical well-ordered society.

It is not deniable that through most of the history, law has constrained women and legal regulations have supported their exclusion from sociopolitical processes based on biological differentiation. This fact has created the sources of inequality and led to a situation of social injustice (understood as a lack of justice) and inadequacy. Nevertheless, as said, not every case of unequal distribution must lead to social injustice. It is worth deliberating what, then, could justify unequal distribution?

The first justification that Rawls' conception argues with aforementioned argumentum *ad utili* (the principle of utility) — does not seem to be compatible with the conception of social cooperation, since

> it hardly seems likely that persons who view themselves as equals, […] would agree to principle which may require lesser life prospects for some simply for the sake of a greater sum of advantages enjoyed by the others. Since each desires to protect his interests, […], no one has a reason to acquiesce in an enduring loss for himself in order to bring about a greater net balance of satisfaction.[23]

Also the second argument that usually enters the debate, exceptionally permitting an unequal distribution (for example of wealth and authority) only if it results in compensating benefits for everyone, and in particular for the least favored[24] is not to be applied, because the aforementioned situation does not benefit everyone, on the contrary — it deprives 'less advantaged' of their benefits.

According to Rawls — most likely we finally settle upon a variant of the utility principle — but we at least can try to look for better solutions. Especially, we should not furnish a basis for inequality: that rather one should find mechanisms for securing equality, despite valued differences.

The legal regulations on non-discrimination and equality in the gender aspect seem to be linked mostly with creative, distributive, preventive, motivating and — last but not least — with educational functions of law, which in this case is a device for changing a social consciousness as well as socio-political manners and practice. There are no doubts though, that law may encourage to some social practice and discourage from another. It may also, eventually, change, form or at least affect the social attitude. Thus, such regulations preserve the principle of equal participation in social consciousness and then turn into established social practice. They are supposed to bring near that real possibilities for participation in all aspects of social life should be equally distributed.

Ergo, except for regulations on non-discrimination or parities/quotas the equal distribution demands support in various levels and aspects of the social structure in order to support not only formal equality (which is nowadays rather undeniable), but also its proportional and moral aspect.

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[23] John Rawls, *Theory of Justice*, p. 14.

[24] Idem, *Political Liberalism*, p. 35; idem, *Theory of Justice*, p. 14–15.

It seems to correspond with Rawls' idea of organizing society as a 'fair system of cooperation' (based on rationality, reciprocity, impartiality and mutual advantage) and his concept of one of the main components of egalitarianism — an authentic equality of chances.[25] Fair equality of opportunity implies that not only must the competition regulated by quality of opportunity be procedurally fair, it must also minimize the impact of differences in social background of the competitors as a result.

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[25] *Idem*, *Political Liberalism*, p. 36 and 47–56.

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Chapter VI

Paul Ricoeur's concept of equality and some of its applications in legal and political philosophy

Marcin Pieniążek[*]

1. Introduction

This article is an attempt to bring closer Paul Ricoeur's views devoted to the concept of equality and its possible connotations in the field of philosophy of law and political philosophy[1]. The basis of reasoning are provided by the assumptions adopted by Ricoeur in two relatively late works, i.e. *Soi-même comme un autre*[2] and *Parcours de la reconnaissance*.[3] It should be noted that Ricoeur's concept refers to the views of Aristotle, and then creatively adapts and exceeds them, drawing *inter alia* from the achievements of Edmund Husserl[4] and Emmanuel Lévinas.[5] Ricoeur, among other things, differentiates between 'reciprocity' and 'mutuality', the first of which is related to 'the logic of justice' while the second to 'the logic of gift'. This distinction allows to capture the inner dialectics of the concept of equality, while providing its in-depth characterization at three levels (indicated below) of the definition of ethical aspiration.

In Ricoeur's studies the issue of equality is not a central but rather a recurrent theme, providing more specific considerations. In *Soi-meme comme un autre* it

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[2] Paul Ricoeur, *Soi-même comme un autre*, Éditions du Seuil, Paris 1990.

[3] Idem, *Parcours de la reconnaissance. Trois etudes*, Gallimard, Éditions Stock, Paris 2004.

[4] Cf. Edmund Husserl, *Cartesian meditations: An introduction to phenomenology*, Springer Netherlands, Dordrecht 1977.

[5] Cf. Emmanuel Lévinas, *Totalité et infini: Essai sur l'extériorité*, Martinus Nijhoff, The Hague 1961; idem, *Autrement qu*'être ou au-delà de l'*essence*, Martinus Nijhoff, The Hague 1974.

constitutes a direct substrate of the philosopher's views concerning the ethical aspiration of the entity, while in *Parcours de la reconnaissance* it is the base of a reflection on the political and legal dimension of the recognition of human subjectivity. It is surprising that Ricoeur as if accidentally develops a theoretically uniform concept of equality, which is the core of the research ranging from the micro-scale of the subject to the macro-scale of the political philosophy. In this paper, this concept will be extracted to the surface and shown through the prism of some specific issues relating, inter alia, to the theory of the law of obligation and the theory of the state.

2. Equality as the element of the constitution of the entity

The direction of the argument is determined by the transition from the ontoethics of the entity to 'the struggle for the recognition' of its subjectivity at a political level. It should be clarified that Ricoeur correlates these issues in the definition of the ethical aspiration understood as "the intention of the good life with another and for another, in just institutions".[6] Of the three levels of the abovementioned definition the interpersonal level, expressed in the phrase 'with another and for another' as well as the political level, expressed by the notion of 'just institutions', are considered as the places where the issue of the equality is being examined. However, in Ricoeur's views, the analysed issue is already revealed at a seemingly individualized first level of ethical aspiration. The entity indeed respects itself, if its 'intention of the good life' results in equal treatment of another, confirmed in observing its promise. Thus, Ricoeur implies that the entity remains itself (in *ipse* sense) if it follows its own commitments, despite the passage of time or changes in the character (i.e. the fluctuations of being oneself in *idem* sense), etc.[7] It is significant that the fact of making a promise to another person is, in the philosopher's view, of a paradigmatic character in respect to the commitment even if undertaken only in respect to oneself. Therefore, Ricoeur argues that ethically significant being oneself is

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[6] Paul Ricoeur, *Soi-même comme un autre*, p. 202.

[7] In the context of the distinction of being oneself in *idem* sense and *ipse* sense Ricoeur introduces a narrativised concept of the-one-who-is-himself. According to the philosopher, 'being oneself' is a conscious decision of proving oneself every time, what can interfere with the natural (and subject to change) disposition of character. See Paul Ricoeur, *Soi-même comme un autre*, p. 143. See earlier views in idem, *The question of the subject: the challenge of semiology*, in: idem, *The conflict of interpretations*, Continuum, London–New York 2011, p. 232–262. See also David Rasmussen, *Rethinking Subjectivity: Narrative Identity and the Self*, in: Richard Kearney (ed.), *Paul Ricoeur. The hermeneutics of action*, SAGE Publications, London–New Delhi 1996, p. 160–172.

impossible without taking into account the context of another human being.[8] The thesis of 'self-esteem' in relation to Another is thus grounded in the concept which deems reciprocity — the premise of equality — to be the foundation of the identity of the entity.[9]

The theory of the entity developed by Ricoeur is applied in the analyses of the philosophical and legal basis of the law of obligations. First of all, it allows to specify a personalized, onto-ethical foundation of *pacta sunt servanda* principle.[10] At the same time, it allows to interrelate this principle with mutual recognition,[11] constitutive for the law of obligations, as well as with formally understood being under the influence of one's own accord.[12] The theory of the entity, taken from Ricoeur, unifies therefore the issues of reciprocity and promises at the level of the onto-ethics of the party to the contract.[13] As a result, the phenomenon of abiding by the agreements is granted its basis in the very existence of the party (in *ipse* sense). Moreover, in the light of Ricoeur's theory, any legally significant commitment shall be made by the entity in respect of 'oneself as another'. The commitment is therefore an ethically significant way of being the party to the contract, defining itself by means of the reciprocity principle. Ricoeur's views concerning 'the ontology of reciprocity' provide an ultimate possibility of building subjectively well-established and unified theory of the law of obligations.

The philosopher writes,

> although respecting oneself indeed gains its primary role in the movement of reflection [of the entity — M.P.] […], this meaning remains disconnected until it runs out of dialogic structure which is introduced by a reference to another man. In turn, this dialogical structure remains incomplete, apart from a reference to the just institutions.[14]

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[8] "Preserving oneself is in case of a person such a conduct that the other person may count on us", Paul Ricoeur, *Soi-même comme un autre*, p. 195.

[9] Cf. idem, *Parcours de la reconnaissance*…, p. 119 ff.

[10] Cf. Marcin Pieniążek, *Dlaczego dotrzymujemy umów? Zasada pacta sunt servanda w świetle filozofii Paula Ricoeura* [*Why do we keep agreements? Pacta sunt servanda principle in the light of Paul Ricoeur's philosophy*], in: Aleksandra Samonek (ed.), *Teoria prawa. Między nowoczesnością a ponowoczesnością* [*Theory of law. Between Modernism and Post-Modernism*], Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków 2012, p. 255 ff.

[11] The reference to Aristotle's concept of friendship (*philia* — see below). Cf. Aristotle, *Etyka nikomachejska* [*Nicomachean Ethics*], PWN, Warszawa 1982, p. 511.

[12] The reference to the Kantian concept of categorical imperative. Cf. Immanuel Kant, *Ugruntowanie metafizyki moralności* [*Groundwork of the Metaphysics of Morals*], Zielona Sowa, Kraków 2005, p. 95.

[13] The problem of the interrelations between the principle of reciprocity and the categorical imperative has been touched upon by Ricoeur not only on the basis of ethical considerations, but also theological ones. Cf. Paul Ricoeur, *Figuring the sacred. Religion, narrative and imagination*, Fortress Press, Minneapolis 1995, p. 293–302.

[14] Paul Ricoeur, *Soi-même comme un autre*, p. 203.

This means that the relational element, resulting in the question of the mutual arrangement of the subjects on the map of the adopted commitments, belongs to the most basic level of the ontoethics of the entity. From a broader ethical perspective this question concerns the equality of the entities connected by interrelations, both in interpersonal as well as political dimension.[15]

3. Equality in interpersonal relationship

The necessary mediation of another on the way to the realization of one's own respect opens up the second level of ethical aspirations. When characterizing the interpersonal level of the aspiration, Ricoeur uses Aristotle's achievements in which a prominent place is granted to equality issues. More specifically, Ricoeur treats the Aristotelian concept of friendship (*philia*), in the light of which 'friendship is equality', as the basis of his analyses. The analysis of the study on friendship, contained in the books VIII and IX of the *Nicomachean Ethics*[16] is thus undertaken by Ricoeur due to the mediating role of another man in the realization of the ethical aspirations.[17] The philosopher assumes that the friendship links the first and the third level of this aspiration, thus providing a transition between an individualized intention of "the good life […] and justice, the virtue of human multiplicity of a political nature".[18]

Ricoeur explains that he aims "to preserve the ethics of mutuality, sharing and co-existence"[19] from Aristotelian achievements. Therefore, in Ricoeur's view, the key features or properties of friendship, closely correlated with equality, is mutuality (French *mutualité*) and reciprocity (French *réciprocité*), "indispensable at the ethical level". The concept of reciprocity is subjected to a deep analysis in later *Parcours de la reconnaissance*, thus opposing this concept with reciprocity understood as a formal equivalence.[20] However, Ricoeur emphasizes already in *Soi-même comme un autre* that the mutuality in friendship has "its own requirements" of which the most important is "to love another as the one that he indeed is". This seemingly obvious statement sheds some light on the issue of equality, thus setting a rule of the irreplaceability of the entities that are the parties to the relation of friendship. The philosopher interconnects the said rule with an individualized ethical aspiration of the parties and with 'self-esteem' in the following way: loving

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[15] See below in points 3 and 4.

[16] Paul Ricoeur, *Soi-même comme un autre*, p. 213.

[17] In *Parcours de la reconnaissance* Ricoeur writes as follows: "A man 'who acts and suffers' has to go through a lot in order to find out that he is actually capable of certain achievements. This self-recognition […] requires at every stage the help of another man", *ibidem*, p. 119.

[18] *Ibidem*, p. 213. The problem of 'equality-related' aspects of justice will be touched upon in point 4.

[19] *Ibidem*, p. 219.

[20] This opposition will be characterised in point 5.

another man 'as' the one that he indeed is "prevents any […] egological deviation: it establishes mutuality. The latter, in turn, cannot be thought without a reference to the good which is present […] in the friend, in the friendship, so that self-reflexivity is not abolished, but as if split by mutuality […]".[21] Ultimately, according to Ricoeur, "friendship adds rather than takes away anything from self-esteem. It adds the concept of mutuality in the exchange between human beings, each of which respects itself".[22] At the same time, Ricoeur emphasizes the importance of reciprocity in friendship and he refers to 'the old saying', according to which 'friendship is equality' — "since each of the two friends gives another the equivalent of what he receives".[23] Reciprocity understood as a condition of equality comes here to the fore in the context of the philosopher's considerations. Ricoeur states that it constitutes a peculiar binder of the second and the third degree of ethical aspirations because "it is through reciprocity that friendship is adjacent to justice". Then the philosopher directly reaches to the concept of equality and concludes that "it places friendship on the way to justice, where sharing life with one another by a very small number of people gives way to the division of the shares among many people at the level of historical political community".[24] This means that, according to Ricoeur, equality creates a uniform foundation for the pursuit of ethical aspirations both in terms of interpersonal relationships, as well as in just social institutions. When anticipating the discussion on the struggle for the recognition of subjectivity in the political and legal sphere, the philosopher claims that equality is the premise of friendship, while in just institutions it remains a goal to achieve.[25]

With reference to Aristotle's views, Ricoeur argues that in the interpersonal dimension the issue of equality is interrelated with the concept of care. This term stands for a readiness to provide help as well as solicitude for the life and happiness of the other, namely for encouraging another to the same extent as encouraging oneself.[26] According to Aristotle's intention, Ricoeur combines the analysed concept with the ancient Greek concept of the pronoun *allēlous* ('one another').[27] Consequently, in Ricoeur's view, solicitude constitutes the fundamental feature of equality-related bond between individualized entities — friends.[28] Therefore,

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[21] Paul Ricoeur, *Soi-même comme un autre*, p. 215.

[22] *Ibidem*, p. 220.

[23] *Ibidem*, p. 215. It should be added that the issue of mutuality and reciprocity bothered the philosopher also in the view of ultimate things; the paragraphs devoted to these issues can be found in the last writings of Ricoeur (of 2004 and 2005), published as *Vivat jusqu'à la mort. Suivi de fragment*. Cf. Paul Ricoeur, *Soi-même comme un autre*, Éditions du Seuil, Paris 2007.

[24] Paul Ricoeur, *Soi-même comme un autre*, p. 220.

[25] *Ibidem*, p. 215–216.

[26] Małgorzata Kowalska, *Wstęp* [*Introduction*], in: Paul Ricoeur, *O sobie samym jako innym* [*Oneself as Another*], trans. by Małgorzata Kowalska, PWN, Warszawa 2005, p. XXIX.

[27] Paul Ricoeur, *Soi-même comme un autre*, p. 225.

[28] As Aristotle writes, a friend is the second 'I' (*állos atuós*). Cf. Etyka nikomachejska [Nicomachean Ethics], IX, 4, 1166 a 32.

as the philosopher believes, "care does not add to self-esteem from the outside, but it develops its dialogical dimension" through the exchange between giving and receiving.[29] At this point, there appears the key issue of equality; according to the philosopher, friendship is indeed "a shaky equilibrium point" in which giving and receiving are inherently equal. With reference to the Aristotelian theory of Golden Mean (*mesótes*) Ricoeur considers this point as "the middle of the range whose opposite ends are the opposite kinds of incompatibility between giving and receiving, depending on whether in the initiative of exchange there prevails the pole of oneself or the pole of another".[30] This means that the starting point for forming the relation of friendship is the original inequality, overcome in the name of solicitude.[31] These views encourage the philosopher to formulate the concept of the interpersonal relationships, typical of the second level of ethical aspiration, characterized by the reversibility of roles and irreplaceability of people. In the proposed model, unique people, realizing their ethical aspirations remain equal friends.

Ricoeur believes that equality-related character of friendship leads to the development of its particular attribute, i.e. the similarity of the entities. The philosopher claims that "similarity is the result of exchange [i.e. dialectics — M.P.] between self-esteem and solicitude for another". This statement expresses the essence of Ricoeur's ethical theory, according to which *there can be no self-esteem without self-esteem for another as for oneself.* The philosopher explains that "as for oneself means that you are also able to initiate something in the world […]".[32] Therefore, the issue of equality again reveals its fundamental nature for the ontoethics of the entity that remains in the interpersonal relationship, as postulated by Ricoeur.

Ricoeur's views on Aristotelian virtue of friendship are used in the theory of the law of reciprocal agreements, especially in the analysis of the issue of equality of the contracting parties. From the outlined perspective, the analysed aspects of equality (mutuality, reciprocity) may be indeed considered as constitutive criteria of the bond in the contract concluded *inter partes*. Moreover, the philosopher's views on the 'reversibility of roles' and 'irreplaceability of the entities' allow to capture the essence of the formal and material aspect of obligation relation. They allow the analysis of the reciprocity rule in the contract (by means of the pronoun *allēlous*), and at the same time they allow to individualize its parties. Ultimately, in light of Ricoeur's views, the observance of contracts is the consequence of a dialogic balance between giving and receiving, expressed in the concept of solicitude. The correlate of such a relationship shaped in the contract is resemblance, understood as the mutual recognition of the subjectivity of the equal parties of an obligation.

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[29] Paul Ricoeur, *Soi-même comme un autre*, p. 212.

[30] *Ibidem*, p. 221.

[31] The problem of inequality will be raised in point 4 and 5.

[32] The presented idea has been expressed in the title of the work *Soi-même comme un autre*.

4. Equality in political relations

As mentioned above, in Ricoeur's theory equality provides a common basis for both interpersonal as well as political relations, in which the problem of just (e.g. state) institutions has a central place.[33] The philosopher characterizes this uniform foundation of the second and the third level of ethical aspirations by pointing to the close relationship between solicitude and justice. According to Ricoeur, "equality […] is related to the life in [just] institutions in the same way solicitude is related to interpersonal relations". When expanding the above parallel, the philosopher states that solicitude as a 'response' in the relations with the other man "places in front of the-one-who-is-himself another who is the face in the strong sense" (i.e. within the meaning of Lévinas);[34] while on the basis of justice, "equality places in front of the man 'others who will never be faces'".[35] Ultimately, according to Ricoeur,

> the sense of justice does not detract anything from solicitude; even more so, it indeed assumes the latter to the extent that it considers people to be unique. On its part, justice increases solicitude to the extent to which the entire humanity is in the centre of application.[36]

What can serve as a concise summary of the dialectics of solicitude and justice is Małgorzata Kowalska's comment, according to which in the relations with 'other anonymous entities' ethics requires *concern for justice*, understood as the act of granting equal rights for all.[37]

The question of the interrelations between equality and justice is placed by Ricoeur at the third level of ethical aspirations. At this level there takes place (as discussed in *Parcours de la reconnaissance*) the struggle for the recognition of the political and legal subjectivity which is a consequence of the intention of the good

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[33] Under the term 'institution' Ricoeur understands the structure of the co-existence of historical community — the people, nation, region, irreducible to direct interpersonal relationships. The nature of the institutions is shaped, in Ricoeur's view, by common customs rather than by forced rules, which is due to the fact of closely relating this concept with ethics. Cf. David M. Kaplan, *Ricoeur's critical theory*, State University of New York Press, New York 2003, p. 105–106.

[34] According to Lévinas, "The concept of the face […] leads to the notion of sense […] independent of our initiative and power. It stands for the philosophical anteriority in relation to being and externality which does not call for power or possession […]. The concept of the face allows […] to describe immediacy", Emmanuel Lévinas, *Całość i nieskończoność. Esej o zewnętrzności* [*Totality and infinity. Essay on the externality*], trans. by Małgorzata Kowalska, PWN, Warszawa 2002, p. 43. Cf. Paul Ricoeur, *Emmanuel Lévinas: thinker of testimony*, in: idem, *Figuring the sacred*…, p. 108–126.

[35] Paul Ricoeur, *Soi-même comme un autre*, p. 236.

[36] *Ibidem*.

[37] Małgorzata Kowalska, *op. cit*., p. XXX.

life, realized, *inter alia*, in the institutions of a properly operating state.[38] According to Ricoeur, in the macroscale of just institutions the concept of equality plays a key role. It is again understood by the philosopher in Aristotelian terms, as an average measure (*mesótes*) and equality among one another (*isótes*). Ricoeur cites Aristotle's view, according to which "the average measure is an equality, since in every activity in which one can talk about what is greater and what is smaller, one can talk about what is equal".[39] Following Aristotle, Ricoeur assumes *mesótes to be a reasonable feature common for all the virtues of private or interpersonal character*, thus tightening the bond between the interpersonal and political level of realizing the ethical aspirations.[40] The philosopher draws deeply on Aristotle's achievements in respect of the interrelations between justice and the 'average measure' as well as he recalls that "that which is just, is […] in accordance with the law and equity". Therefore, in Aristotle's opinion, the offence against equity (taking more than someone is entitled to) and the offence against equality have a common element, namely ánisotes — inequality of *pleonéktes* — a greedy man.[41] Ricoeur emphasizes that in Aristotle's views, both the disadvantage of the desire to constantly have more — *pleonexí* — as well as inequality refer to 'goods or burdens' which should be subject to just distribution. This observation draws Ricoeur's attention to the bonds that interconnect equality with the issue of distributive justice, applicable to "honour or money, or other things that can be the subject of distribution between the participants in the national community".[42] As a result, the concept of 'proportional equality', aimed at providing the characteristics of distributive justice, is valued by Ricoeur as Aristotle's outstanding achievement. The concept stems from Aristotle's belief that arithmetic equality does not correspond to "the nature of people and distributed goods". Therefore, Aristotle writes that "justice is […] something proportional […] because the ratio is considered as an equality of relations and it assumes at least four elements".[43] The above comment means that the distributive justice is based on four-element relation of proportionality, including two people and two shares and in any case it aims at equaling two relations between the person and merit.[44] Ricoeur emphasizes the importance of Aristotle's position

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[38] According to the dictionary definition, the institution "is understood as a public facility operating in a certain area, or as a set of legal or moral norms for the organization of a given sphere of life. This term is also understood as an organization or institution, based on specific standards", after: Władysław Kopaliński (ed.), *Słownik wyrazów obcych i zwrotów obcojęzycznych z almanachem* [*Dictionary of foreign words and phrases in foreign languages with the almanac*], Oficyna Wydawnicza RYTM, Warszawa 2006, p. 258.

[39] Aristotle, *Nicomachean Ethics*, V, 1131 a 12–13.

[40] Paul Ricoeur, *Soi-même comme un autre*, p. 232.

[41] *Ibidem*, footnote 1 on p. 232.

[42] *Ibidem*, p. 233. Cf. Aristotle, *Nicomachean ethics*, V, 2, 1130 b 30–33.

[43] Cf. Aristotle, *Nicomachean ethics*, V, 1131 a 29–32.

[44] Paul Ricoeur, *Soi-même comme un autre*, p. 235.

which leads to the justification of the concept of equality, not consisting in simple egalitarianism. The importance of the commented Aristotle's views is equaled by Ricoeur with the efforts undertaken in the twentieth century by John Rawls in *A Theory of Justice*.[45] Ricoeur ultimately uses his interpretation of Aristotle's views for "recognizing a convincing and enduring strength of the interrelation between justice and equality". At the same time, for Ricoeur average measure and proportional equality are "the ways of a philosophical and ethical form of 'saving' equality".[46] From the perspective of the present argument, it is critical to indicate the philosopher's conclusion according to which equality (in the sense of *isótes*) constitutes *an ethical core of justice*.

According to Ricoeur, 'proportional equality' is realized in a "special arrangement of just institutions", namely in the state. Ricoeur assumes, after Hannah Arendt, that the state guarantees the "duration longer than ephemeral existence of the human being", providing the individuals with 'prolongation of mortality'. In addition, it allows the 'intergenerational integration', understood (after Wilhem Dilthey) as a fusion of inherited traditions and projects involving the future of a particular historical community.[47] According to Ricoeur, rationality is a characteristic feature of the state, expressed in the operation of the institutions, intermediating between the 'legacy of generations' and the 'projects of modernity shaped by the market'. At the opposite extreme of the rationality of the state there is located the remainder of the archaic and irrational 'founding violence', visible in the historically established "tradition of the authority of the power".[48] Ricoeur refers at this point to M. Weber's opinion, according to which "the state is understood as the valid recourse to authority in the final instance".[49] As a result, Ricoeur distinguishes the vertical aspect and equality-related (horizontal) aspect of the state political relations. The first is related by the philosopher with the issues of institutionalized violence and the concept of 'ruling', referring to Max Weber's hierarchical division between the rulers and the ruled.[50] In contrast, Ricoeur borrows the importance of the horizontal dimension from Arendt who defines the community's 'consensual desire to live'

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[45] According to Ricoeur, a similar task was contemporarily set by John Rawls. Cf. John Rawls, *A Theory of Justice: Original Edition*, Belknap Press of Harvard University Press, Cambridge, MA 2005.

[46] Paul Ricoeur, *Soi-même comme un autre*, p. 235.

[47] Paul Ricoeur, *Krytyka i przekonanie. Rozmowy z François Azouvim i Markiem Launay* [*Critique and Conviction: Conversations with François Azouvi and Marc de Launay*], trans. by Marek Drwięga, Wydawnictwo KR, Warszawa 2003, p. 142 (original title: Paul Ricoeur, *La critique et la conviction. Entretiens avec François Azouvi et Marc Launay*, Calmann–Lévy, Paris 1995).

[48] *Ibidem*, p. 142–143.

[49] *Ibidem*, p. 143.

[50] Paul Ricoeur, *Soi-même comme un autre*, p. 227.

as ‘common authority’. Finally, the philosopher states that the purpose of the state policy should be ‘a developed compromise’ between hierarchical ruling and equality-related common authority.[51] For individuals this compromise stands for overcoming inequality and “recognizing their subjectivity at the political and legal level”.[52]

Ricoeur discusses more closely the issue of inequality, understood as the horizon of the ‘average measure’, i.e. as a reference point for solicitude and justice. Referring to Lévinas, Ricoeur writes that asymmetric boundary states, being in violation of the idea of just shares in goods and burdens (both in interpersonal as well as political relationships), on the one hand, rely on a selfish separation and, on the other hand, on the infinite, mutual indebtedness.[53] Thus, Ricoeur indicates a problem of recognizing the subjectivity of another man as a result of overcoming the initial asymmetry, discussed in the book *Parcours de la reconnaissance*. In this work the philosopher develops an original concept of equality which is not viewed only as a formalized reciprocity, but also as mutuality of autonomous entities.

5. The features of equality: mutuality and reciprocity

As compared with *Soi-même comme un autre* in *Parcours de la reconnaissance* the issue of equality rarely reveals its leading role, giving place to the original analyses of reciprocity and mutuality. However, as mentioned above, according to Ricoeur, equality is a direct consequence of, or correlate of these categories. The subsequent presentation takes into account this relationship and explores its consequences.

As pointed out above, Ricoeur’s deliberations in *Parcours de la reconnaissance* focus on the issue of recognizing the subjectivity of another (and, as a result, the mutual recognition). From the perspective of the ethical aspiration, they develop the phrase “you are also able to initiate something in the world”.[54] Like in *Soi-même comme un autre*, in *Parcours de la reconnaissance* Ricoeur takes up the issue of inequality as the state preceding the recognition

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[51] More broadly on Paul Ricoeur’s political philosophy: Bernard P. Dauenhauer, *Ricoeur. The promise and risk of politics*, Rowman & Littlefield Publishers, Inc., Oxford 1998; idem, *Ricoeur and Political Theory: Liberalism and Communitarianism*, in: Scott Davidson (ed.), *Ricoeur across the Disciplines*, The Continuum International Publishing Group Inc., New York 2010. See also: Marcin Pieniążek, *Paul Ricoeur’s thought as the basis for the political theory of the European Union*, in: Antonia Geisler, Michael Hein, S Hummel (eds.), *Law, politics and constitution. New perspectives from legal and political theory*, Peter Lang, Frankfurt am Main 2014, p. 95–108.

[52] Paul Ricoeur, *Krytyka i przekonanie*…, p. 144.

[53] Idem, *Soi-même comme un autre*, p. 236.

[54] *Ibidem*, p. 226.

of mutual subjectivity. In the undertaken analyses the philosopher draws on the achievements of Thomas Hobbes, Emmanuel Lévinas, Edmund Husserl and Georg Wilhelm Friedrich Hegel (Jena period). In particular, Hobbe's views are used by Ricoeur to illustrate the logic of the original non-recognition, struggle and exclusion, visible in the famous anti-topos 'man is wolf to man'.[55] Ricoeur suggests that "when going from […] the logical exclusion relationship between the same and another to a dialectical relationship […], we are heading towards the category of reciprocity or mutuality".[56] In addition, the philosopher draws attention to the difficulty that "understanding of the relationship of reciprocity" encounters in the depths of phenomenological philosophy. Therefore, Ricoeur examines Husserl's and Lévinas' views in which the nonsymmetrical relation of *alter* and *ego* constitutes the 'initial situation'.[57] In the political and legal practice, this asymmetry is a flashpoint of conflict and struggle for recognition, aimed at overcoming inequality, or at realizing interpersonal reciprocity and distributive justice. In the chapter *The struggle for recognition at the legal level*, the philosopher undertakes the analysis of the concept of 'legal recognition', which (after Axel Honneth) he associates with the principle of reciprocity. According to Ricoeur,

> We can consider ourselves as the holders of the rights only on the condition that at the same time we are aware of the normative commitments that we have to abide by in respect of the other person. In this sense, the recognition has a double reference — the norm and another man; when it comes to the norm, recognition is understood as […]validation, giving validity; when it comes to people, recognition is perceived as the process of identifying each person as an individual who is free and equal to all other people […].[58]

In practice, an important ground for the recognition of subjectivity are human rights (as indicated by Bartosz Wojciechowski, among others in the context of the issues of 'equality of opportunity').[59] Finally, in Ricoeur's belief, the process of expanding the sphere of equal rights takes place by means of a distribution of new categories of rights (i.e. by increasing their 'quantity'), and by allocating these

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[55] The Roman playwright, Titus Maccius Plautus, is considered to be the author of the maxim *Homo homini lupus est*, used in the comedy *Asinaria*. The paraphrase of this anti-topos was used in Thomas Hobbes' *De Cive* when he writes: "To speak impartially, both sayings are very true; That Man to Man is a kind of God; and that Man to Man is an errant Wolfe. The first is true, if we compare Citizens amongst themselves; and the second, if we compare Cities". Cf. Thomas Hobbes, *Man and Citizen (De Homine and De Cive)*, Hackett Publishing, Indianapolis 1991, p. 388.

[56] Paul Ricoeur, *Parcours de la reconnaissance*…, p. 241.

[57] *Ibidem*, p. 246.

[58] *Ibidem*, p. 309.

[59] Bartosz Wojciechowski, *Human rights as the element of mutual recognition and equality of opportunity*, in: Marek Zirk-Sadowski, Bartosz Wojciechowski, Karolina M. Cern (eds.), *Towards recognition of minority groups. Legal and communication strategies*, Ashgate, Farnham 2014, p. 63–76.

rights to new categories of individuals or groups (i.e. by increasing the circle of their recipients).[60]

In *Parcours de la reconnaissance* the philosopher made a further step and asked the question about 'peaceful states of mutual recognition', alternative to the struggle for recognition. According to Ricoeur, these states 'escape' the logic of a formally understood reciprocity, characteristic for the institutional legal order, commercial competition, and the like. The philosopher, therefore, opposes 'the states of peace' with "the states of struggle […] that does not necessarily stand for violence […] but they also include struggles in the field of justice, as evidenced, for example, by the proceedings before the tribunal".[61] This means that the philosopher questions the model of equality, consisting only of the legal equivalence of entities.[62] As a result, Ricoeur completes the issue of equality with the original meanings correlated with the concept of mutuality and those related to the 'one-sided logic of gift'.

Ricoeur distinguishes three types of 'peaceful states of mutual recognition': *philia* (in the Aristotelian sense), *erõs* (in the Platonic sense) and *agapē* (in the biblical and post-biblical sense).[63] *Philia*, as discussed above, is of a border nature, since it combines the prospect of reciprocity and mutuality.[64] Meanwhile, the experience of *agapē*, 'closest to friendship', 'already excludes the idea of reciprocity", since its characteristic "generous habit of giving […] no longer requires a reciprocation gift and is not associated with such expectation". Ricoeur introduces the concept of one-sided generosity, 'typical of *agapē*', in order to call into question the reductionist perspective of the logic of reciprocity. 'The logic of gift' therefore meets the 'critical function' in respect of the formal concept of equality, which blurs the features of the parties of the interpersonal relationship.[65] At the same time, according to the philosopher, 'the logic of gift' individualizes the donor and the beneficiary through the features of a solemn ceremony, characteristic for *agapē*. An example here would be a symbolic 'gift' of marriage vows, which is not the exchange of 'something for something', but consists in a formal submission on unilateral but mutual promises by the spouses. Therefore, Ricoeur argues that "human beings are capable of experiencing […] a symbolic recognition, a model of which can be the ceremony […] of [mutual] act of giving".[66] A solemn characteristics of presenting someone with a gift breaks the schematic nature of the reciprocity rule, applied in law. Ricoeur realistically states that the relations of mutuality are exclusive and in the context of reciprocity "they

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[60] Paul Ricoeur, *Parcours de la reconnaissance*, p. 311.
[61] *Ibidem*, p. 343.
[62] *Ibidem*, p. 339.
[63] *Ibidem*, p. 342.
[64] *Ibidem*, p. 344.
[65] *Ibidem*, p. 342.
[66] *Ibidem*, p. 242–243.

look like clearing [franc. *clairières*] in a dense forest".[67] However, in a society of anonymous individuals one can easily perceive the palpable hunger for individual treatment that exceeds the logic of reciprocity in favour of the gift that does not demand retribution. Today, this phenomenon is revealed in charity events,[68] in constantly developing volunteer hospice movement,[69] etc. On the other hand, the indicated needs are sometimes abused by commerce when the slogans of products in the advertisements use the rhetoric of 'extraordinary gifts' for 'an individually treated customer'.[70]

Ricoeur relates the 'logic of gift' with 'the paradox of mutuality'. It consists in the fact that although the gift does not expect to be reciprocated, it raises in the recipient the need of a similar response. Such a response is not subject to the rule of a formalized reciprocity, but it preserves the asymmetry of entities and is expressed in an analogous act of presenting the other person with a gift. At this point it is worth noting that Ricoeur's views were inspired by the New Testament; 'the logic of gift' stands in fact for the consent of the recipient to serve humbly with respect to the donor. For example, St. Paul in his letter to the Philippians recommends that Christians "should in humility assess one another as being more important than themselves", thus achieving true equality.[71]

The abovementioned standpoint presented by Ricoeur reveals weaknesses in the logic of reciprocity and it enriches the concept of equality with informal mutuality. At the same time, the logic of gift humanizes the perspective of equality by emphasizing the uniqueness of entities, interconnected with the bond of *agapē* and other 'peaceful states of mutual recognition'. Finally, in Ricoeur's belief reciprocity and mutuality constitute the internal dialectics of equality. As pointed out, 'the state of peace' in the form of *philia* synthesizes these two perspectives, thus creating a complete model of equality. In friendship the principles of 'the interchangeability of roles' and 'irreplaceability of people' reach 'the balance', desired both in the interpersonal solicitude and in political distributive justice.

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[67] *Ibidem*, p. 339.

[68] In Poland, they for example include annual fundraising to purchase medical equipment within the framework of the so-called 'Great Orchestra of Christmas Charity' (www.wosp.org.pl, access: 15.01.2015) or purchasing gifts for Santa Claus Day for poor families within the programme 'Noble Bundle' (www.szlachetnapaczka.pl, access: 15.01.2015).

[69] Cf. the quote from the website of the Hospice of St. Lazarus in Krakow: "Voluntary help plays a crucial role in hospice care, through the selfless help offered to patients and families, in the direct service rendered to the patients as well as in the form of performing administrative and organizational activities related to fundraising in order to carry out this care" (after: http://www.hospicjum.krakow.pl/index.php?option=com_content&task=view&id=25, access: 15.01.2015).

[70] An example of such are TV commercials suggesting that there is a special voluntary gesture of the manufacturer behind the product — cf. the slogan "I give you what I'm hiding in myself", etc.

[71] *Pismo Święte Nowego Testamentu* [*The Scriptures of the New Testament*], Pallotinum, Poznań–Warszawa 1976, p. 509 (St. Paul in his letter to the Philippians – 2,3).

6. Summary

The undertaken analysis sought to achieve twofold results. Firstly, it was to reconstruct Paul Ricoeur's views on the concept of equality. This reconstruction took into account the contexts in which the philosopher discussed the perspective of ethical aspirations and the 'struggle for recognition' of the political and legal subjectivity. The article firstly aimed at presenting the onto-ethical conception of the entity, in which 'self-esteem' is related with the reciprocity rule (point 2). The essential part of the argumentation was devoted to Aristotelian inspirations of the concept of equality in Ricoeur's philosophy, visible on both interpersonal and institutional level of the implementation of ethical aspirations (points 3 and 4). The final part of the article brought closer the original ideas of the philosopher on the characteristics of equality, namely reciprocity and mutuality (point 5).

Secondly, the presented argumentation pointed out some possible applications of the proposed concept of equality in the field of philosophy of law and political philosophy. These references were correlated with the three spheres of implementing ethical aspirations as defined by Ricoeur. In the sphere of 'self-esteem' equality was considered to be an onto-ethical foundation of *pacta sunt servanda* principle (point 2). In the sphere of interpersonal relations equality found its application in the analysis of the issue of mutual agreements, thus taking into account the concepts of friendship (*philia*), solicitude and resemblance (point 3). In turn, in the area of just institutions equality served the purpose of providing the proper characteristics of political relations, remaining in correlation with the problem of distributive justice in a properly ordered state (point 4).

It should be emphasized that a uniform concept of equality, developed by Ricoeur, holds together three levels of the implementation of ethical aspirations. This unification is evident especially in the context of the concept of 'the struggle for recognition' of the political and legal subjectivity. This struggle starts in a microscale of the entity which recognizes Another as an equivalent foundation of 'self-esteem'. Then, it moves to the interpersonal level where the equality of the parties is at stake, being the basis for the observance of mutual obligations. The most extensive arena of the struggle for the recognition of subjectivity is the sphere of just institutions, in which 'all that are not faces' participate in common authority based on the principle of proportional equality.[72]

As mentioned above, Ricoeur rejects the view according to which the realization of equality is a mere consequence of the 'struggle for recognition'. Equality is being consistently connected by him with a peaceful 'ethics of

[72] Cf. Marcin. Pieniążek, *On Paul Ricoeur's tribute to legal philosophical issues of recognition and reciprocity*, in: Marek Zirk-Sadowski, Bartosz Wojciechowski, Karolina M. Cern (eds.), *op. cit.*, p. 87–102.

coexistence', fundamental to being oneself, for mutual solicitude and social justice. In this context, the argumentation brought closer the dialectics of reciprocity and mutuality (point 5), inspiring for legal philosophy and political philosophy. When differentiating reciprocity and mutuality, Ricoeur opposes 'positive' equality of the gift with 'negative' equality of the claims. The concept of mutuality ultimately captures the weaknesses of the formal reciprocity rule which assumes the replaceability of people in the political and legal sphere. We should finally give the floor to Ricoeur when he writes that

> the mentioned […] ethical feelings [reciprocity, mutuality — M.P.] belong to […] the phenomenology of 'you also' and 'one-as-another'. They in fact express the paradox contained in this equivalence; the paradox of the exchange that takes place between that which is unique. Therefore, equal esteem for another as for oneself and equal esteem for oneself as for another become fundamentally equally important.[73]

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[73] Paul Ricoeur, *Soi-même comme un autre*, p. 226.

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Chapter VII

Some misunderstandings concerning Hans Kelsen's concepts of democracy and the rule of law

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Although Hans Kelsen's *Pure Theory of Law* is arguably one of the most influential theories of law in Europe, it has been occasionally misunderstood. One of the most common misunderstandings is the claim that Kelsen's concept of the *Rechtstaat* (the rule of law) legitimizes any regime, the Nazi one included.[1] This misunderstanding stems from the fact that Kelsen ascribed a double meaning to the concept of *Rechtsstaat*. While in a broad sense, Kelsen identified every legal order and state with *Rechtsstaat*, and that meaning is recalled by Holmes, he also recognized the classical meaning of the *Rechtsstaat* in the narrow sense, which corresponds with the concept of the rule of law.[2]

The aim of this paper is to analyze the basis of this fundamental misunderstanding and demonstrate that on the contrary, Kelsen was one of the strongest supporters of democracy of that time. It will involve the analysis of several concepts, such as the pure theory of law, as well as the constitutional and political theories which Kelsen developed during his lifetime. The greatest emphasis will be placed on Kelsen's theory of democracy, since its detailed and precise construction is the best evidence it could not act as a justification for the Nazi regime. This confusion stems from the fact that Kelsen's theory of democracy is very often wrongfully ascribed to the pure theory of law, which has a different aim and a very general character. An analysis of democracy demands

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[1] See: e.g. S. Holmes, *Kelsen, Hans*, in: Seymour Martin Lipset (ed.), *The Encyclopedia of Democracy*, Vol. 2, Routledge, London, p. 698.

[2] See also: Stanley L. Paulson, *Hans Kelsen and Carl Schmitt: Growing Discord, Culminating in the 'Guardian' Controversy of 1931*, in: Jens Meierhenrich, Oliver Simons (eds.), *The Oxford Handbook on Carl Schmitt*, Oxford University Press, Oxford, http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199916931.001.0001/oxfordhb-9780199916931-e-34 (access: 30.11.2016), p. 12–13.

a lower-level approach than usual with a greater level of detail, and an analysis of legal norms which is universal for every legal system. Hence, in section one, the concept of *Rechtsstaat* as part of the pure theory of law will be presented as a starting point for Holmes, along with the reasons why Kelsen could not use *Rechtsstaat* in its classical meaning. This will be followed by an elaboration of its constitutional dimension. Finally, section three will entail a detailed analysis of democracy; confirmation that Kelsen was a great supporter of democracy understood in terms of freedom and equality, values which contradict those of the Nazi regime.

1. Hans Kelsen *Rechtsstaat* and the Pure Theory of Law

It is said that when a lawyer, an economist and a psychiatrist go to the market, each has a different story to tell. However, Stephen Holmes seemed oblivious to this tale when he made his famous objection to Kelsen's thought in the *Encyclopedia of Democracy* (1995). Namely, he writes: "Kelsen made a notorious statement that even the Nazi regime qualified as a *Rechtsstaat* — a constitutional state in which the rule of law prevails". This statement seems to be a result of a common error in understanding Kelsen's discourse, which lies in disregarding the fact that Kelsen operated on more than one level of thought. The highest, most general and abstract level, which could be referred to as a metatheory of law, is his *Pure Theory of Law*, in which he queries the valid conditions of legal science, through which a specific vision of legal order emerges through methodological assumptions such as the *Is* and *Ought* dichotomy. Under this level several dimensions exist with constitutional, political, international law and even ethnological aspects, and despite sharing some common points, each has its own distinct aim. To account for Holmes' misunderstanding mentioned above, it will be sufficient to consider the constitutional and political dimensions of the pure theory of law.

The history of ascribing to Kelsen responsibility for laying the theoretical foundations for the Nazi regime is a long one. After the Second World War, legal positivism in Germany was perceived as a "legal philosophical scapegoat for National Socialism's perversion of the law".[3] Probably because of the great influence of Kelsen's theory at the time, legal positivism was closely associated with his name.[4] This state of affairs often failed to recognize that legal positivism is not a homogenous concept and Kelsen's *Pure Theory of Law* in particular cannot be strictly identified with such features as statute- or subsumtion-positivism and

[3] Matthias Jaestaed, Oliver Lepsius, *Der Rechts- und Demokratietheoretiker Hans Kelsen-Eine Einführung*, in: Matthias Jaestaed, Oliver Lepsius (eds.), *Verteidigung der Demokratie Abhandlungen zur Demokratietheorie*, Mohr Siebeck, Tübingen 2006, p. IX.

[4] *Ibidem*.

Jurisprudence of Concepts (*Begriffsjurisprudenz*).[5] Clearly Holmes refers to this tradition but elaborates it by demonstrating an example which supports his belief, namely the concept of *Rechtsstaat* in the *Pure Theory of Law*. In his theoretical speculations, Kelsen does not raise the problem of *Rechtsstaat* very often, the reason being that his theory, which abstracts from any references to the Is sphere, as well as the question of the content of law, has not much to offer to develop the theory of *Rechtsstaat*. On the grounds of the *Pure Theory of Law*, Kelsen could only state that from this point of view, every state is a *Rechtsstaat*.[6] Namely Kelsen claims that: "If the state is comprehended as a legal order, then every state is a state governed by law (*Rechtsstaat*)."[7] It was probably this statement which drew Holmes to his unfortunate conclusion.

And indeed, taken out of the context of the *Pure Theory of Law*, the statement may be interpreted to imply that every legal order, even that of the Nazi regime, is not only legitimized but also has an axiological value as a *Rechststaat*. This conclusion, however, is only possible if the entire background of the *Pure Theory of Law* is disregarded, together with the fact that, to be accepted as scientific, the theory must be clear, critical of ideology, relative and positivistically oriented.[8] Hence, it should be universal and abstract from any content of the law, as it must describe any legal order (even one as unjust as Nazi regime).[9] Kelsen interprets 'scientific' as abstaining from any evaluations of legal content; it is irrelevant whether law is good or bad, just or unjust, as all these factors can be changed in time. What is significant is the form of law, which should be universal and eternal. On the other hand, the content of legal rules has no direct influence on the methodology of legal science, so they are not regarded in the *Pure Theory of Law*.[10] Hence the only thing which Kelsen, who regarded law and state as equal, could say about *Rechtsstaat* in his *Pure Theory of Law* was that every state is *Rechtsstaat*.[11] Even so, perhaps to prevent misunderstandings, in the following paragraph, Kelsen mentions the traditional, political meaning of the *Rechtsstaat*. He defines it as "a special type of state or government namely that which conforms with postulates of democracy and legal security",[12] and Kelsen

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[5] *Ibidem*, p. XIV.

[6] Hans Kelsen, *Pure Theory of Law*, trans. by Max Knight, The Lawbookexchange, LTD. Union, New Jersey 2002, p. 313; *idem*, *Was ist die Reine Rechtslehre?*, in: *Demokratie und Rechtsstaat, Festschrift für Zaccaria Giacometti*, Zürich 1953, p. 143–161; reprinted: Hans R. Klecatsky, René Marcic, Robert Schambeck (eds.), *Die Wiener rechtstheoretische Schule. Schriften von Hans Kelsen, Adolf Merkl, Alfred Verdross*, Franz Steiner Verlag, Stuttgart–Wien 2010, p. 508.

[7] Hans Kelsen, *Pure Theory of Law*, p. 313.

[8] Matthias Jaestaed, Oliver Lepsius, *op. cit.*, p. IX.

[9] In positivistic paradigm law can have any content. On the other hand, supporters of natural law doctrines would not agree that law which is so unjust is still law.

[10] Matthias Jaestaed, Oliver Lepsius, *op. cit.*, p. XIII.

[11] Hans Kelsen, *Pure Theory of Law*, p. 312–313.

[12] *Ibidem*, p. 313; *idem*, *Was ist die Reine Rechtslehre?*, p. 508.

specifies the elements of *Rechtsstaat*: 1) a relatively centralized legal order, 2) in which norms of administration and jurisdiction are bound by general legal norms, 3) such norms are created by parliament, 4) parliament is elected by the People, 5) the government is responsible for its acts, 6) the courts are independent, 7) guarantees exist of certain civil liberties, especially freedom of speech and freedom of religion.[13] Kelsen's intentions are clear. There is no doubt that he uses the term *Rechtsstaat* in both *sensu largo* and *sensu stricto*, he binds it with the idea of democracy, which will be elaborated in the following paragraphs.

The scientific character of legal theory is also one reason why Kelsen rejects such values as justice and equality in the Appendix to the 2nd edition of the *Pure Theory of Law*. Although Kelsen is a relativist in the sphere of cognition of moral norms and values, he is certainly not a moral relativist or nihilist. On the contrary, he believes in moral pluralism.[14] Hence, he regards the consideration of any moral formula intended to provide a criterion for what is just and unjust, equal and unequal and so on, as problematic: it demands specific criteria which cannot be objective. For example, in the formula "you shall treat people equally in equal circumstances" there is a problem with defining 'equal' and 'equal circumstances'. One potential objection could be why people can vote when they are 18 and not at age 17: Is that not equal? Another could be that one could ask, if all women are equally deprived of the right to vote, does it mean that, according to the formula, there is equality in society? After all, they are treated equally in equal circumstances. Such a rejection of values in law leads to another rejection in the constitutional sphere which will now be discussed.

2. The constitutional sphere

Hans Kelsen is known not only as one of the most influential legal theorists, but also as an architect of the constitutional court. Not only did Kelsen have the opportunity to build a theoretical basis, as a constitutional judge he was also a practitioner, when such a court was created in Austria. His thoughts about the constitutional court and the role of the constitution in the legal system can be perceived as a continuation of the *Pure Theory of Law*. He begins his reflections on constitutionalism where he had to end the *Pure Theory of Law* if he wanted it to remain scientific. In these reflections, Kelsen could not fully abstract his theory from content and from the practical dimension anymore. In particular, he could not abstain from considering whether there were any values which should be incorporated into the constitution. Although Kelsen's answer appears negative and radical at first glance, he provides an interesting justification of his views.

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[13] *Idem*, *Pure Theory of Law*, p. 313.

[14] Matthias Jaestaed, Oliver Lepsius, *op. cit*., p. XVI.

He states that as such values either bear some kind of ideology as part of their meaning, and that their general nature allows them to justify any point of view, it is better to refrain from placing them in the constitution.[15] What is more, Kelsen claims that if we agree with his view about values, insofar that it is impossible for a scientific definition to be provided for them, we must agree that they are relative and dependent on personal views, including those of constitutional judges. Incorporating such values, such as justice, into the constitution could mean that the whole legislative process might be paralyzed in constitutional court by these judges, who might claim, for example, that a certain act of parliament is unjust, and hence, invalid.[16] Kelsen concludes that if lawmakers intend to introduce policies, general rules or limitations for the content of parliamentary acts, they must be as precise as possible.[17] This radical view might be explained by the times in which Kelsen lived. His view stems from the 1930s, where he could observe the process of democracy in Germany being supplanted by the Nazi dictatorship. As a great advocate of democracy, he was skeptical of any attempts which could render it a mere façade. Nowadays, the situation is different, and practice has shown that the presence of values in a constitution rather strengthens democracy than weakens it. However, this is only possible because some aspect of the basic values is specified and set in international treaties concerning human rights. This is one of the main reasons why today we can say that Kelsen was wrong. Nevertheless, his remarks may still be valid as a warning for the future, since Kelsen was right in reasoning that such a situation is possible. Kelsen also appears to have had great faith in law (and lawmakers), perceiving it as some kind of perfect construct, while also seeming to have very little trust of judges. Another example will be presented in the following paragraph concerning democracy to support this thesis.

3. Hans Kelsen and the theory of democracy

As Matthias Jestaed and Oliver Lepsius point out, the theory of democracy is more akin to a theory of state, which is distinct from the legal theory mentioned above.[18] Although at first glance, this analysis may appear to be reminiscent of the previous one in which Kelsen built a picture of law, its writing has a completely different character, being more emotional and much less analytical: More bound

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[15] Hans Kelsen, *Wesen und Entwicklung der Staatsgerichtsbarkeit*, "Veröffentlichung der Vereinigung der Deutschen Staatslehrer", Heft 5, 1929, reprinted: Hans R. Klecatsky, René Marcic, Robert Schambeck (eds.), *op. cit.*, p. 1516–1517.

[16] *Ibidem*, p. 1517.

[17] *Ibidem*.

[18] Matthias Jestaed, Oliver Lepsius, *op. cit.* p. XVIII.

with political philosophy than a theory of state. In this paper, I will concentrate on the latter, as it is focused on the value of democracy and the values within it rather than its institutional aspect. However, I will supplement this picture with Kelsen's publications of a more analytical character.

The second meaning of the *Rechsstaat*, *sensu stricto*, can be found in writings which concern the political sphere, especially those written in the 1930s, when Kelsen suffered political harassment both in Austria and Germany. That was also the time of his famous polemic with Carl Schmitt, in which, among other topics, the essence of democracy was discussed. Some of his writings about democracy such as *Staatsform und Weltanschauung* from 1933 are very untypical of him, since they are written in emotional language. Kelsen confronts in this text the idea of democracy with the dictatorships whose development he observed, as he claimed in the text, in the Soviet Union and Italy.[19] As Kelsen points out, the aim of the text is different to that of his other analysis of democracy. While the earlier text is of a scientific character, this one is directed toward understanding the idea and roots of both regimes: democracy and dictatorship. From his perspective, the analysis will be based on the parallel between social science and philosophy. Kelsen is convinced that such an approach will demonstrate that the difference between the two is much deeper than just their mode of organization.[20]

Both social science and philosophy characterize similar distinction. While in epistemology, the focus of any problem is the distinction between the subject and object of cognition as regards its external aspect, ethical and political thought concern the subject and object of hegemony.[21] In contrast, its internal aspect concerns the nature and predispositions of the subject, which in turn determine its relation to the object. Kelsen concludes that the basis of political or philosophical belief lies in the mental structure and personality of political theorists and philosophers, how they experience themselves, and view the relationship between themselves and either You or It.[22]

However, Kelsen also has several reservations. First of all, he concedes that this parallel between philosophy and political thought is not absolute, and that there are exceptions. It should not be anticipated that every time someone has certain epistemological beliefs, he also shares certain political beliefs. Such an approach is impossible because human nature is not rational. What is more, it is often the case that those unhappy with democracy become supporters of autocracy, and vice versa.

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[19] Hans Kelsen, *Staatsform und Weltanschauung*, Recht und Staat in Geschichte und Gegenwart Series, J.C.B. Mohr, Tübingen 1933, reprinted: Hans R. Klecatsky, René Marcic, Robert Schambeck (eds.), *op. cit.*, p. 1575. Although it seem that he discusses processes of Soviet Union and Italy, it seems that considering the year of the article in fact he refers to much closer situation to him: in Germany and Austria.

[20] *Ibidem*, p. 1576.

[21] *Ibidem*.

[22] *Ibidem*, p. 1576–1577.

Much depends on historical circumstances.[23] Hence, Kelsen's intention is to describe tendencies rather than absolute rules. Secondly, Kelsen's aim is to present some ideal types rather then what exists in reality, where it is more likely to find a variety of blends of both democracy and autocracy.[24] As such, his analysis is more of a practical than theoretical character. Namely, not how it is, but how it ought to be.

One of the main motives given in this text, which acts as a basis for further analysis, is the contradiction of rational versus irrational. Kelsen finds this opposition essential to the contradiction between democracy and autocracy. Additionally he claims that the starting point of the division between democracy and autocracy is worldview, namely the question of whether absolute values exist and can be cognized.[25] Relativism and rationalism accompany democracy since they are bound to tolerance for the views of others. This tolerance makes discourse and compromise possible, while autocracy is bound to absolutism and irrationality. As a result of these key features, Kelsen attributes more characteristics to both democracy and autocracy, with freedom being the main category for democracy, presented in table 1.[26]

Table 1

Democracy	**Autocracy**
Rational	Irrational
Relativism	Absolutism
Freedom	Captivity
Equality	Inequality
Discourse and compromise	Leader followed unconditionally
Legality	Justice
Critical view	Metaphysical view
Mother figure	Father figure
Pacifism	Imperialism
Individualism	Collectivism

3.1. Freedom

Contrary to the classical understanding of democracy, which emphasizes equality, the distinctive feature of democracy according to Kelsen's theory is freedom, more specifically mental freedom (*geistig*), which is distinct from, for

[23] *Ibidem*, p. 1577–1578.

[24] *Ibidem*, p. 1578.

[25] *Ibidem*, p. 1587; *idem*, *On the Essence and Value of Democracy*, Nadia Urbinati, Carlo Invernizzi Accetti (eds.), trans. by Brian Graf, Rowman and Littlefield Publishers, Inc., Lanham, MD–Plymouth, UK 2013, p. 103.

[26] *Idem*, *Staatsform*…, p. 1578–1583; see also Matthias Jestaed, Oliver Lepsius, *op. cit.*, p. XXIV.

example, economical freedom.[27] The freedom necessary for democracy is based on tolerance, and entails such freedoms as freedom of religion, beliefs, speech, consciousness and, last but not least, scientific freedom. This final freedom ensures that when facing a dilemma between will (subjective, directed into someone's preferences) and cognition (objective, directed on truth), cognition prevails.[28] Another division of freedom important for Kelsen's theory of democracy is that of individual freedom, bound to self-determination, and collective freedom, understood as codetermination.[29] Hence, the principle of freedom must embody social order by being transformed into social and political freedom.[30] To support his reasoning, Kelsen presents the evolution of the meaning of 'freedom'. First, the idea of freedom from state rule was substituted with the idea that the individual should be able to participate in this rule.[31] Later, to be politically free meant: "to be subject to a will, which is not, however, a foreign, but rather one's own will".[32] The final step of this transformation of meaning is the substitution of individual freedom with popular sovereignty, and the subject being ruled by the citizen.[33]

The third division, which Kelsen regards as the most important, and is associated with the second, is the division between natural and social freedom. While natural freedom negates social order, social freedom is an expression of free will, as it represents the negation of causality. One is either bound by the rules of the causal world of nature, but free from social reality, or is bound by social, normative rules, but is also free from causality. Kelsen defines the social freedom as such which entails such principles as political self-determination of the citizen, participation in government.[34]

3.2. Equality and majority

To elaborate this concept of freedom, Kelsen in *On the essence and Value of Democracy* notes that in any relationship between master and subject, the question from the subject about equality is inevitable. The form of equality that "no man has a right to rule over another" supports negative freedom, understood as freedom from any social limits.[35] However, such freedom does not guarantee real equality. According to Kelsen, equality is only possible if we allow ourselves to be ruled.[36]

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[27] Matthias Jestaed, Oliver Lepsius, *op. cit.*, p. XXV, Hans Kelsen, *Staatsform*…, p. 1581.
[28] Hans Kelsen, *Staatsform*…, p. 1581.
[29] *Ibidem*, p. 1578; Matthias Jestaed, Oliver Lepsius, *op. cit.*, p. XXV.
[30] Hans Kelsen, *On the Essence*…, p. 28.
[31] *Ibidem*, p. 32.
[32] *Ibidem*, p. 28.
[33] *Ibidem*, p. 33.
[34] *Ibidem*, p. 28.
[35] *Ibidem*, p. 27.
[36] *Ibidem*, p. 27.

Such a concept of freedom allows Kelsen to reject the paradox based on the discord of individual freedom and the democratic legal order based on factious representation of the will of the people. He rather perceives freedom as a value which can only be ensured by indirect democracy, since democracy should not express only the will of the majority, manifested by direct democracy, as it could lead to infringement the right of minority.[37] For Kelsen the majority principle is bound with the freedom of minorities, which might apply to anyone at some point,[38] thus such freedom is also bound with equality. Freedom directed solely towards 'Myself' without equality rule cannot be the foundation of democracy. Only freedom directed towards the equality relationship defined by Me — You, which entails a sense of responsibility, recognition of the other, and which directs I not into Myself but rather You, can be the basis of democracy. And only such meaning of freedom encompasses the idea of equality.[39] Equality understood in this way is defined as the equal chance to take part in discourse, understood as the free competition of ideas, which is a result of taking a relativistic approach.[40] All of this can be achieved by a specific type of personality, which perceives others not as strangers or foes, but rather as equals and friends. Such a person directs the energy from aggression not into the outside world but rather internalizes it as self-criticism and a sense of responsibility, and values freedom. On the contrary, the more a person supports autocracy and dictatorship, the more he needs to limit his support for freedom.[41] As autocracy entails a radical inequality between rulers and ruled, there is no room for the acknowledgment that Your experiences are as important as Mine. Subjects rather identify themselves with the ideal-I or, as Kelsen describes it, the *Über-ich*, represented by a dictator unlimited in power. Such identification with authority is the reason why subjects are voluntarily obedient in dictatorships.[42]

Kelsen disagrees with the claim that equality can be derived from the majority principle, not the contrary, as it has been often argued. For Kelsen it is based on a false assumption that the principle that the 'majority should rule' can be derived from the claim that "the will of one person should not count more than the will of other person", which would result in a majority dictatorship based on the claim that the "many are stronger than the few".[43] Instead of basing equality rule on the majority principle, Kelsen proposes an alternative idea based on the freedom concept. In this version, the principle would be "If not all, then at least as many individuals as possible should be free",[44] which according to Kelsen,

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[37] Matthias Jestaed, Oliver Lepsius, *op. cit.*, p. XXII.
[38] *Ibidem*, p. XXIII.
[39] Hans Kelsen, *Staatsform*…, p. 1579.
[40] *Idem*, *On the Essence*…, p. 103.
[41] *Idem*, *Staatsform*…, p. 1579–1580.
[42] *Ibidem*, p. 1580.
[43] *Idem*, *On the Essence*…, p. 31.
[44] *Ibidem*, p. 31; *idem*, *Staatsform*…, p. 1579.

should ensure the principle of equality. It would mean that an absolute majority is not enough to secure this principle, and more efforts need to be made to fulfil this basic requirement of democracy. On the other hand, Kelsen notes that a numerical majority seldom occurs in realty. The lawmaking process is more dependent on the mutual interactions between groups of interests and their persuasive power, and that in democracy, discourse and its result, compromise, are the factors which decide the shape of law. Kelsen concludes that at least in parliamentary democracy, the majority principle means "compromise and balancing political differences".[45] Kelsen also points out that although the concept of majority presupposes the existence of a minority, it does not directly predict the security of the rights of minorities, but it at least entails the possibility of such protection.[46]

3.3. Discourse and compromise

If all conditions mentioned above are fulfilled, then a place exists for a specific discourse based on compromise.[47] Discourse is made possible by free speech, as well as freedom of beliefs, religion and consciousness, and compromise is made possible by tolerance and relativism, which in democracy is perceived as a distinct value, understood as the expression (in the political sphere) of free will, which is legally equal.[48] In contrast, there is obviously no room for discussion and compromise in autocracy, since no tolerance exists for different views and even religions. There is no room for an objective science serving the truth: it is supposed to support the whole system so that the will prevails over cognition.[49]

In this context, Kelsen presents also the problem of leader (*Führer*) in autocracy and in democracy. The dictator represents absolute values, which puts him in the sphere of the irrational. His power is very often justified as having its source in God, thus he only answers to God. This allows him to be above the law. His autocratic power is constant and of static character, while democracy is more dynamic in character. Dynamism stems from the fact that leaders are responsible to the People, and so can be controlled and criticized. The power of the leader is not permanent; he can be changed if he fails as a leader of the People.[50] Next, in considering such aspects of democracy as cooperation, Kelsen compares it to the relationship between mother and brother (or rather, *mutterliche Brüderschaft* — matriarchal brotherhood) which is bound with the ideas of the

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[45] *Idem*, *On the Essence*…, p. 69–70; see also *idem*, *Demokratie*, "Schriften der Deutschen Gesellschaft für Soziologie", I. Serie, V. Band, 1927, reprinted: Hans R. Klecatsky, René Marcic, Robert Schambeck (eds.), *op. cit.*, p. 1448.

[46] *Idem*, *On the Essence*…, p. 67.

[47] *Idem*, *Staatsform*…, p. 1580.

[48] *Ibidem*, p. 1581; Matthias Jestaed, Oliver Lepsius, *op. cit.*, p. XXIV.

[49] Hans Kelsen, *Staatsform*…, p. 1581.

[50] *Ibidem*, p. 1584.

French Revolution: Equality, Freedom and Brotherhood, and contrasts it with the father–child relationship present in autocracy. No horizontal relationships exist in the paternal relationship, rather a vertical relationship with a strict hierarchy.[51] He also binds democracy with rational pacifism, which can also be bound with mother figure, and autocracy with imperialism, which could be perceived as a father and hero archetype, bound with no respect to any cultural or national differences. Kelsen points out that autocracy, as one of the tools of imperial policy, uses aggression on another country, which is 'justified' as a defensive war.[52]

3.4. Legalism, certainty of law and justice

Kelsen also believed that democracy is bound with certainty of law and legalism. He rejects justice as irrational and defines it as what a dictator believes is just, and what legitimizes statutory acts of violence. Such legal order is, according to Kelsen, unpredictable since it is impossible to derive individual from general norms, as the content of the former depends on the will of the dictator.[53] Many general norms simply cannot be effective. Conversely, Kelsen reasons that firstly, in democracy, individual acts of state are rational because of their accordance with law, and secondly, that law reflects the will of the people. Hence, the courts have to respect the law.[54] Kelsen adds that the principle of legality can only function properly when combined with the principle of transparency (*Publizität*). Transparency not only prevents such negative phenomena as corruption, but also makes the work of administration more effective, and is a guarantee that none of the rights of citizen will be infringed as part of the relationship with the state.[55]

While it is difficult to refute that certainty of law is an important component of democracy and *Rechtsstaat*, it can be said that although Kelsen concedes that he describes an ideal type of democracy, it is obvious that this ideal type will not work in the world of Is when acts of Parliament reflect the will of the People. It is a work of fiction of which Kelsen is aware when he writes about the People and representation. An even more serious objection can be raised at this point. Kelsen errs when he contradicts justice with legalism and the certainty of law because he also defines justice very arbitrarily. While he uses an idealized picture of legal reality with certainty, he takes the worst case scenario for granted when it comes to justice. Not only does he abstain from any solid definition of justice, and is

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[51] *Ibidem*.

[52] *Ibidem*, p. 1585.

[53] *Ibidem*, p. 1582.

[54] *Idem*, *Staatsform*…, p. 1582; *idem*, *Geschworenengericht und Demokratie. Das Prinzip der Legalität*, "Neue Freie Presse" 1929/23128, reprinted: Hans R. Klecatsky, René Marcic, Robert Schambeck (eds.), *op. cit.*, p. 1582.

[55] Hans Kelsen, *Staatsform*…, p. 1583.

not eager to treat it as regulative ideal, he also assumes that it must stem from an irrational, probably cruel, tyrant. It is worth noting that Kelsen seemed to be aware of the danger of such a mistake. In The Essence and Value of Democracy he notes: "In arguments over democracy a lot of misunderstanding is repeatedly created by the fact that one side only talks about the idea, while the other side only talks about the reality of this phenomenon."[56] Why, then, didn't Kelsen avoid this mistake in his other writings? Perhaps in his defense, he discusses legalism in the context of democracy, where legalism works properly, but talks about justice in the context of autocracy, where it does not. Of course it is dubious whether Kelsen properly presents the ideal type of autocracy as a worst-case scenario. Kelsen based his description on his own observations in 1930s Europe and if looking at the consequences of the rule of autocratic regimes of that time, it could be said say his observations at that time were perhaps even too optimistic. It also seems that although nowadays Kelsen's observations are accurate, the current conflict in Ukraine perhaps being a good example, they certainly do not concern every autocracy in the world.

3.5. The People

To understand the argument of legalism as supporting the will of the People, the People as a category should be explained. In *The Essence and Value of Democracy*, Kelsen perceives the People in terms of unity in its normative meaning. Hence, this unity is created by law, which decides whether an individual belongs to the People. Such a bond might be created by law based on historical, national or social criteria.[57] Kelsen remarks that not each aspect of human activity can be accounted to the 'People' category. For him, unity of the people is "understood as a unity of human acts normatively regulated by the legal order".[58] In this regard, the People can only be considered in the normative sphere. The whole of human activity outside law belongs outside this category. Kelsen points out that there is also another meaning of the People, confused with the first one, bound with participation in the lawmaking process. Obviously not all those subjected to the rules can participate in legislative activity.[59] Participation in lawmaking by the people can be considered here as an ideal. Kelsen claims that in democracy, the division of the People into political parties might help at least with resolving the issue of conflicts of interest. For Kelsen "The 'People' does not actually exist as a viable political force prior to its organization into parties […]."[60] It seems that

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[56] *Idem*, *On the Essence*…, p. 35.
[57] Matthias Jestaed, Oliver Lepsius, *op. cit*., p. XX; Hans Kelsen, *On the Essence*…, p. 36.
[58] Hans Kelsen, *On the Essence*…, p. 36.
[59] *Ibidem*, p. 36–37.
[60] *Ibidem*, p. 40.

we are a little closer to fulfilling this ideal, thanks to the existence of different forms of public participation and NGOs which are outside the party structure, which were unknown to Kelsen. If Kelsen understands People in terms of their organization into parties, then his argument that the law expresses the will of the people seems not that controversial. However, as it was demonstrated earlier, Kelsen's definition of the People nowadays is not exactly adequate.

With the People is bound another fundamental category for democracy: representation. Kelsen regards it as the relationship between Parliament, understood in normative terms, and people. For that reason, Kelsen perceives representation, understood as the identity of the ruler and ruled, as fiction. At the same time, Kelsen criticizes the belief that the will of the People is of natural, substantive character which binds the parliament and can only be reproduced by Parliament. Such a will of the People, independent from the will of the organs of state, does not exist: on the contrary the will of the people as a fiction is imputed to the will of the organs of the state. For Kelsen, only such a construction can ensure individual interest and social pluralisms. The postulated identity of ruler and ruled must lead to the negation of pluralism, since the consequence of such concept (identity of the ruler and ruled) would be the will of the People which must be the only one. It results in the disappearance of pluralism, and its substitution with a homogeneous and anti-liberal model of democracy.[61]

4. Summary

To sum up, an analysis of Kelsen's writings on *Rechtsstaat* and democracy allows several conclusions to be drawn.

Firstly there are clearly two meanings of *Rechtssaat* in Kelsen's writings. The first has a theoretical character concerning legal science and derives from Kelsen's claim that law and state are equal. The second, *sensu stricto*, meaning is strictly bound with the idea of democracy, which Kelsen contrasts with an autocratic regime.

Secondly, Kelsen's concept of democracy is not coincidental. It is a sophisticated theory which consists of elements which are important features of democracy, such as freedom, equality, discourse, compromise, the People, representation and legalism. These elements are ascribed very precise meanings, and the relations between them are exhaustingly described. It is also clear that Kelsen's vision of democracy is a liberal one, which can be perceived as the antithesis of the Nazi regime. His concept of democracy seems valuable and relevant, and universal.

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[61] *Ibidem*, p. XX–XXI.

And finally, we can conclude that Kelsen never supported the Nazi regime by his theory. Rather, he opposed it, which he expressed clearly by discrediting autocracy. The observations which he made in the 1930's were accurate at that time and to some extent, remain accurate today. Holmes claim appears false and based on a serious misunderstanding. By the same token, it could be said that Schrodinger was a sadist who performed cruel experiments on almost dead cats.

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Chapter VIII

Religious rights in Croatia: legal regulation of culturalism[1]

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Relja Bašić:[2]©
"Everything goes with everything else"[3]

Attempts of the left-liberal Government of Croatia installed in 2011 to introduce health education relaxing conventional sexual morality and advancing gender mainstreaming, and to legalize the same-sex marriage, has prompted problems of this inquiry. The solution consists of two parts.

The first part (1) is the framework of the inquiry, which (1.1) outlines problems in detail, (1.2) adopts a theoretical approach, (1.2.1) defines theoretical constructs, (1.2.2) construes basic concepts, (1.2.3) postulates explicit values, and (1.3) formulates hypotheses of the inquiry.

The second part (2) is the policy analysis proper. It performs the following tasks: (2.1) The identification of the constitutional principles, or *jus cogens*, that are in accord with postulated values and serviceable as the ground for the appraisal of the decisions in the next section. (2.2) A description of the Croatian left liberal legal decisions on human reproduction and an appraisal of the decisions as tending towards, against or past the constitutional principles or *jus cogens*. (2.3) The identification of conditions of the decisions, which consists of two steps: (2.3.1) the ascription of the Croatian left liberal decisions on human reproduction to left

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[1] All the translations of Croatian titles (between slashes) in the footnotes are provided by the author.

[2] © 1930–, actor and theatre director.

[3] A reply to the question „Is there anything you have learned between your 40th and 50th birthday?" in the interview to the women's magazine "Svijet" in 1980. The reply included the explanatory remark "One can be a rotten scoundrel *potpuni šuft* and a great conductor".

liberalism as (A) a culture, (B) a worldview, termed culturalism, and (C) a religion; (2.3.2) explanation of the action-guiding reasons to which the Croatian left liberal decisions on human reproduction are ascribed by left liberalism as ideology. (2.4) A forecast and appraisal of future decisions. (2.5) A proposal of alternative decisions that are more in conformity with the constitutional principles or *jus cogens*.

The context of the problems is the conflict between Croatian left liberalism and Croatian ethnic traditionalism, which may be seen as an instance of a much wider Western development. The wider conflict was described a quarter of a century ago as the Culture Wars between the right-wing, orthodoxy or conservativism, on the one side, and left-wing, liberalism or progressism, on the other.[4] For reasons *infra* at 2.3.1, the Croatian left liberal decisions on human reproduction will be ascribed to the worldview termed culturalism as a set of beliefs and demands with religious functions that is a part of, or closely related to, left liberalism. Hence the title of this paper.

The motto of the paper, "Everything goes with everything else", is a reminder that the unity of the beautiful, the true and the good may not be possible even within a theatre but only at the freize of the Frankfurt Alte Oper; that is, on the building whose owners have converted it, in a self-ironic twist proportional to the pomposity of the idea of such a unity, into a multipurpose entertainment hall. The motto is used *ex abundandi cautela* as a *caveat* that Croatian left liberalism, culturalism, religion, ideology, and other basic concepts about society used in this paper are merely ideal types (see *infra* at 1.2.1.BA). The emphatic warning should remind the reader that, within the framework of this inquiry at least, a person who holds some of the views categorized in the paper as left liberal or culturalist does not necessarily hold all the views categorized that way; furthermore, that she can hold, and in fact often does hold, also very different views, including some categorized as ethnic traditionalist, conservative or orthodox, which are according to the paper diametrically opposed to left liberal and distant from both plain left and plain liberal views. But the motto is also a reminder that not only concepts, or at least basic concepts, of social sciences but also everyday concepts, all or at least some, are ideal types. This is to say that social world is possible only if its participants share, and to the extent they share, the assumption that although, as the motto points out incisively, everything *goes* with everything else, it is not the case that everything *agrees* with everything else. Not to put a too fine a point on it, the social world is possible precisely for the reason that its participants take seriously inferences about human action and interaction according to the pattern underlying the saying *Qui bene bibit, venit in caelum*.[5]

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[4] James Davison Hunter, *Culture Wars: the Struggle to Define America — Making Sense of the Battles over the Family, Art, Education, Law, and Politics*, Basic Books, New York 1991.

[5] Qui bene bibit, bene dormit. Qui bene dormit, cogitat non malum. Qui cogitat non malum, non peccat. Qui non peccat, venit in caelum. Igitu: qui bene bibit, venit in caelum = He sleeps well who goodly drinks. Who sleeps thus well no evil thinks. Who thinks no evil never sins. Who sins

1. Framework

1.1. Problems

The problem of the paper is both legal and jurisprudential. The legal problem is that Croatia has been torn, for the past quarter century, by conflicts that were in 1990s identified and regulated as ethnic and in the 2000s recognized as moral. The jurisprudential problem is that Croatian legal scholarship has not even noticed religious features of the conflicts let alone proposed how to regulate them as religious by law.

The ethnic conflicts that raged in Croatia in the 1990s and persist as subtler but differentiated tensions today should be of interest at least to countries with a predominantly Catholic population and an inclination towards clericalism. The inclination has been described by the late Joseph Tischner (March 12, 1931–June 28, 2000) as the attitude — widespread among Catholics still after the II Vatican Council — that the unity of the Church and the State is comparable to eating meat on Friday, that is, a venial sin.[6] A related inclination in Croatia in the 1990s was diagnosed as a fascist (more accurately: nazi) tendency, which was fostered by Croatian communists reorganized as ethnic nationalists with the aid of their former snitches, chiefly under the name of the Croatian Democratic Union and with the backing of a bulk of Croatian Catholics.[7] As other ethnic nationalisms the Croatian variant has properties of a religion.[8] The nazi tendency, whose mellowing into ethnic traditionalism was balanced by top-to-bottom corruption in the late 2000s,[9] may well be on a comeback.[10]

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not, salvation wins. Therefore: He who drinks so vell, surely shall be saved from Hell. Translation according to http://firedirectioncenter.blogspot.com/2008/07/tgif.html (access: 06.08.2010).

[6] "The International Conference on 'Christianity and Democracy'" (sponsored by Fundacja im. Stefana Batorego; Warsaw: Palace of Culture and Science, Warsaw Hall, 26–27 June 1993).

[7] Ivan Padjen, *Approaching Aliens: A Plea for Jurisprudential Recovery as a Theoretical Introduction into (Ex) Socialist Legal Systems*, "Dalhousie Law Journal" 1991, Vol. 14, No. 1, p. 23–64, esp. 40–45; Ivan Padjen, Miomir Matulović, *Cleansing the Law of Theory: A View from Croatia (Editorial)*, "Croatian Critical Law Review" 1996, Vol. 1, No. 1–2, p. 1–122, esp.53–74; Ivan Padjen, *Vjera u narod bez vlasti i vlasništva: Crkvena šutnja 1961.–1971. i glasnost 1990.*- [*The Faith in 'Narod' without Power and Property: Ecclesiastical Silence in 1961–1971, and 'Glasnost' in the 1990s*], "Politička misao/Croatian Political Science Review" 2012, Vol. 49, No 4, p. 175–211.

[8] Ivan Padjen, *Nacionalizam kao religija* [*Nationalism as a Religion*], "Feral Tribune", god. 23, br. 1067 (3.03. 2006).

[9] E.g. the prime minister, a deputy prime minister and at least two ministers of the late 2000s have been tried and/or sentenced on charges of corruption.

[10] Deputy chairman of the Croatian Democratic Union resigned both the party office and party membership on 27 February 2015, explaining that the party's political orientation had become extreme right while the party's organization had been based on military and police obedience.

This paper is concerned with the main adversary of Croatian ethnic traditionalism, as manifested by the legal decisions on human reproduction that have been proposed and/or adopted by the Government of Croatia in 2011–13. Human reproduction is used here to designate biological, cultural and social (other than market economic) dimensions of the reproduction of humans. The decisions have concerned directly health education relaxing conventional sexual morality and advancing gender mainstreaming, and legalization of the same-sex marriage, but impinged also on gender identification, sexual mores, human procreation and child rearing. The major coalition parties that form the incumbent government[11] have been established also (as well as virtually all the other Croatian parliamentary parties today) by former officials and rank and file of the Croatian League of Communists.[12] Since the names of the major coalition parties are The Social Democratic Party of Croatia and The Croatian People's Party — Liberal Democrats, their decisions on human reproduction are by the names of their authors left liberal. Arguably a significant number of both supporters and opponents of the Coalition Government would agree that the Coalition program,[13] which has been used to justify the decisions, is left liberal by its content.

1.2. Theory

The inquiry is formulated in terms of the policy analysis developed initially by Harold D. Lasswell and Myres S. McDougal[14] and adjusted[15] to integral theory of law and critical legal scholarship. Integral theory of law, which is a stream of

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Drago Prgomet in „Nedjeljom u dva", HTV1 (1 Mar 2015, 2:00–3:00 PM), http://www.hrt.hr/enz/nedjeljom-u-2/ (seen: 1.03.2015, 11:00 PM).

[11] See the official website of the Government of the Republic of Croatia in English, https://vlada.gov.hr/en.

[12] See e.g. Paula. M. Pickering, Mark Baskin, *What is to Be Done? Succession from the League of Communists of Croatia*, "Communist and Postcommunist Studies" 2008, Vol. 41, p. 521–540.

[13] Kukuriku koalicija, Plan 21, http://www.kukuriku.org/plan21/ukratko/uvod/ (read: 2.03. 2015).

[14] Harold D. Lasswell, Myres S. McDougal, *Jurisprudence for a Free Society: Studies in Law, Science and Policy*, New Haven Press, New Haven, CT 1992, esp. Ch. 1: *Criteria for A Theory About Law*, p. 3–38.

[15] Esp. Ivan Padjen, *Law and Religion in Post-Modernity: Dilemmas Prompted by the Croatian Catholic University*, in: Miroslav Polzer et al. (eds.), *Religion and European Integration: Religion as a Factor of Stability and Development in South Eastern Europe*, The European Academy of Sciences and Arts — Edition Weimar, Weimar 2007, p. 377–398; Goranka Lalić Novak, Ivan Padjen, *Europeanisation of Asylum: From Sovereignty via Harmony to Unity*, "Politička misao/Croatian Political Science Review" 2009, Vol. 46, No. 5, p. 75–101; Ivan Padjen, *Catholic Theology in Croatian Universities: Between the Constitution and the Treaty; A Policy Oriented Inquiry*, in: Budislav Vukas, Trpimir Šošić (eds.), *International Law: New Actors, New Concepts, Continuing Dilemmas: Liber Amicorum Božidar Bakotic*, Nijhoff, Leiden 2010, p. 13–40; *idem*, *Metodologija pravne znanosti: pravo i susjedne discipline* [*Methodology of Legal Science: Law and Neighbouring Disciplines*], Pravni fakultet Sveučilišta u Rijeci, in print 2015, see: Ch. 2.5.3: *Istraživanja* de lege

conventional European legal scholarship, conceptualizes law as a unity of, on the one hand, positive and extrapositive legal standards and, on the other, social action.[16] Critical legal scholarship inquires into presuppositions of law, assuming *inter alia* that lawyers are a part of legal problems as well as of legal solutions.[17]

1.2.1. Constructs

(A) Neither philosophical nor scientific approaches can provide commonly acceptable concepts or explanations of culture, worldview, ideology or religion. While all scientific theories — including theories of natural sciences — are underdetermined by facts and value laden,[18] theories and even concepts of social sciences and humanities, at least the basic ones, such as revolution and tragedy, are contestable, that is, loosely linked to facts and inherently evaluative. Culture, worldview, ideology and religion are essentially contested concepts in that disputes about their content "cannot be settled by appeal to empirical evidence, linguistic usage, or the canons of logic alone".[19] Suffice it to note here that culture, which is the most inclusive of the key concepts of this inquiry, is not an independent entry in the most comprehensive encyclopedia of the history of philosophical concepts ever produced. In the encyclopedia culture shares the same entry with philosophy of culture,[20] thus admitting that culture is a scholarly construct which exists, like beauty, in the eyes of the beholder, rather than as an entity out in the world.

(B) A basic concept or proposition of a social science can be cognitively useful only if it is recognized or even construed as an ideal-type, that is, a heuristic device to recognize and learn (understand, interpret, describe, explain, 'measure', etc.) data about human interaction (conditions, participants, actions, means, esp. symbolic, results, etc.). An ideal-type is cognitively fecund, because it is inevitably informed empirically, but does not have a truth value. In that the ideal-type differs

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ferenda: *upotreba Lasswelove i McDougalove političkopravne analize* [*Research* de lege ferenda: *the Use of Lasswell and McDougal's Policy Analysis*], p. 165–178.

[16] Introduced into Croatian legal theory by Nikola Visković, *Pojam prava: prilog integralnoj teoriji prava* [*The Concept of Law: A Contribution to Integral Theory of Law*] (1976), 2nd ed., Logos, Split 1981, which lists, at 33–356, as the major integral conceptions of law the ones developed by Savigny, Hauriou, Stammler, Del Vecchio, Gurvitch, Lask, Mayer, Radbruch, Westermann, Wiaecker, Fechner, Coing, Siches, Reale, Cossio, Pashukanis and Cerroni.

[17] See Ivan Padjen, Miomir Matulović, *op. cit.*, esp. at p. 110–111.

[18] Mary Hesse, *Theory and Value in the Social Science*, in: Christopher Hookway, Philip Pettit (eds.), *Action and Interpretation*: *Studies in the Philosophy of the Social Sciences*, Cambridge University Press, Cambridge 1978, p. 1–16, esp. at p. 1–2.

[19] In the sense of John Nicolas Gray, *On the Contestability of Social and Political Concepts*, "Political Theory" 1977, Vol. 5, No. 3, p. 331–348, cit. at p. 344; relying on Walter Bryce Gallie, *Essentially Contested Concepts*, "Proceedings of the Aristotelian Society" 1956, Vol. 56, p. 167–198, which identified religion as such a concept.

[20] *Kultur, Kulturphilosophie*, in: *Historisches Woerterbuch der Philosophie*, Bd. 4, I–K, Schwabe & Co, Basel 1975, p. 1309–1324.

from a model, a concept used in natural sciences, which is construed to represent facts.[21] Concepts and propositions about human interaction developed and used in everyday communication are also ideal types but different from ideal types of social sciences.[22]

(BA) The concepts of culture, worldview, ideology and religion *infra* at 1.2.2 are construed as ideal-types. The concept of religion, which is a principal tool of this inquiry, is construed at some length.

(BB) The explanations of the Croatial left liberal decisions on human reproduction by conditions *infra* at 2.3 are ideal types of development.[23]

The first ideal type is developmental in a weak sense. It is the ascription of an action, including a decision or a reason, to an action-guiding reason why the action is justified (instrumentally and/or practically, esp. ethically) and hence probable. An action-guiding reason could be simple, such as a value or a rule, or complex, such as an institution or a legal system. The first ideal type is used in this paper to ascribe the Croatian left liberal decisions on human reproduction to action-guiding reasons that pertain to left liberalism as a culture, a worldview and a religion.

The second ideal type is developmental in a strong sense. It is the explanation of an action, including a decision or a reason, by an interest, that is, expected advantage, that renders the action probable. This ideal type describes a causal sequence by stating "what only approximately or partly happens in a number of cases, and, therefore, cannot be given the status of a causal law of nature".[24] The second ideal type in this paper is used to explain by left liberalism as ideology the action-guiding reasons to which the Croatian left liberal decisions on human reproduction are ascribed.

1.2.2. Concepts

(A) *Culture* is human communication. It includes symbolic communication (verbal, musical, gestural etc.) and non-symbolic actions (e.g. ways of courting the opposite sex or of hewing wood etc.) into which symbolic communication

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[21] Max Weber, *'Objektivitaet' sozialwissenschaftlicher und soziopolitischer Erkenntnis*, in: *idem*, *Gesammelte Aufsätze zur Wissenschaftslehre*, 3. Aufl., Mohr, Tuebingen 1968, p. 146–214. See Barbara Saegesser, *Der Idealtypus Max Webers und der Naturwissenschaftliche Modellbegriff: Ein begriffskritischer Versuch*, Birkhaeuser, Basel 1975, esp. p. 159–172.

[22] See Alfred Schutz, *On Phenomenology and Social Relations*, ed. by H.R. Wagner, University of Chicago Press, Chicago, IL 1970, esp. Chapter 5: *Selective Attention: Relevances and Typification*, p. 118–122, extracted *inter alia* from *idem*, *The Well Informed Citizen: An Essay on the Social Distribution of Knowledge*, 1946, Vol. 13, No. 4, p. 463–467; T.D. Wilson, *Alfred Schutz, Phenomenology and Research Methodology for Information Behaviour Research*, http://www.informationr.net/tdw/publ/papers/schutz02.html (read: 10.03..2015).

[23] Max Weber, *'Objektivitaet'*…, p. 203–204.

[24] Thomas Burger, *Max Weber's Theory of Concept Formation: History, Laws, and Ideal Types*, 2nd ed., Duke University Press, Durham, NC 1976, at p. 133.

is woven. Culture is constituting as well as constituted by a human community, which is free or appears to its participants to be free from either natural or social necessity. The definition just stated is broad enough to include, first, a non-utilitarian pursuit of values embodied in such activities as arts, which are the most commonly considered ingredient of high culture (in charge of special government ministries), and religions;[25] secondly, human activities to subdue nature, such as agriculture and horticulture;[26] and, thirdly, ideologies (see *infra* at C).

(B) *Worldview* consists of beliefs and demands.They can be abstracted from a culture. But a worldview can be held also by an individual or a small group independently of a culture. Worldview is structurally and functionally similar to philosophy, religion (see *infra* at D) and ideology (see *infra* at E).

(C) *Ideology* (in a narrow sense) is an account, which is partly distorted by dominant economic and political interests, of the functioning and legitimacy of (modern) society. Like a traditional culture, which unifies members of a community, ideology is widely accepted although it both reflects and serves interests of the proprietary socio-economic class. A mode of capitalism, such as industrial or financial capitalism, and/or a particular ruling class (e.g. industrial capitalists, financial capitalists, business managers, members of professions, civil servants, military officers, etc.) can have its own ideology, which differs partly from ideologies of other modes of capitalism and/or other ruling classes. For those reasons it is possible that a mode of capitalism has several ideologies developed by different classes and even social strata — most notably intellectuals — which are not proprietors of the means of production and are even critical of aspects of capitalism. For the same reasons a modern culture, a worldview and a religion can be and often is ideological.[27] The concept of ideology in a wider sense includes

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[25] Eugene Halton, *The Cultic Roots of Culture*, in: Richard Muench, Neil. J. Smelser (eds.), *Theory of Culture*, University of California Press, Berkeley, CA 1992, p. 29–63.

[26] See *Culture*, in: Andrew Edgar, Peter Sedgwick (eds.), *Cultural Theory; The Key Concepts*, Routledge, London 1999, p. 101–103.

[27] See esp.: Karl Marx, Friedrich Engels, *Deutsche Ideologie*, in: *idem*, *Werke*, Bd. 3, Dietz, Berlin Ost 1962, http://www.mlwerke.de/me/me3/me3_000.htm; Karl Marx, *Das Kapital*, 1. Kap., 4. Absch.: *Der Fetischkarakter der Ware und sein Geheimnis*, in: Karl Marx, Friedrich Engels, *Werke*, Bd. 23, Dietz, Berlin Ost 1962, http://www.mlwerke.de/me/me23/me23_000.htm. See also: Martin Seliger, *The Marxist Conception of Ideology*, Cambridge University Press, Cambridge 1977; a critical exposition: Kurt Lenk (Hrsg.), *Ideologie, Ideologiekritik und Wissensoziologie*, 7. Aufl., Luchterhand, Darmstadt 1976, a selection of writings on ideology and related problems; Jeffrey Alexander, *The Promies of a Cultural Sociology: Technological Discourse and the Sacred and Profane Information Machine*, in: Richard Muench, Neil. J. Smelser (eds.), *op. cit*., p. 293–323, on the ideological and religious role of technology; Jakov Jukić (Željko Mardešić), *Ideologija i religija* [*Ideology and Religion*], in: *idem*, *Lica i maske svetoga: ogledi iz društvene religiologije* [*Faces and Masks of the Sacred: Essays on Social Religiology*], Kršćanska sadašnjost, Zagreb 1995, p. 67–178, views of the leading Catholic religiologist in Croatia in the late XXth century on the relevance of Marxist analysis of ideological functions of religion to Christians.

also the ideology or ideologies of dominated classes, such as the proletariat or, in the contemporary world, of the hired labor. The concept of ideology is used in this inquiry in its narrow sense.

(D) A concept of *religion* is developed in the following eleven theses, which are — however — not meant to be revolutionary.[28]

(DA) In contemporary societies, in addition to conventional religions such as Christianity or Islam or Buddhism, there are many other sets of beliefs and practices that have been labelled religions: enlightenment.[29] Marxism,[30] scientific nationalism,[31] statism,[32] sovereignty,[33] nation,[34] sports,[35] money,[36] spending,[37] Google,[38] even capitalism as such[39] and work as oblivion of death.[40]

(DB) An additional reason why there is no reliable definition of religion is the paradox of religious rights: contemporary societies, which are allegedly secularized, at a closer look are swarmed by religions; however, what counts as

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[28] Relying on Ivan Padjen, *Legal Nature of Religion*, in: *Convictions philosophiques et religieuses et droits positifs*, Bruylant, Bruxelles 2010, p. 480–481.

[29] Comp.: Paul Hazard, *The European Mind, 1680–1715*, trans. by J. Lewis May, A Meridian Book, New York 1963, Ch. VI: *Science and Progress*, p. 304–318; Carl L. Becker, *The Heavenly City of the Eighteenth-Century Philosophers* (1932), Yale University Press, New Haven, CT 1966, at p. 123 f.

[30] Carl L. Becker, *op. cit.*, at p. 161 f.

[31] Steve Fuller, *Science*, University of Minnesota Press, Minneapolis, MI 1997, Ch. 4: *Science and Superstition*, p. 40–79.

[32] E.g. Hans Kelsen, *Gott und Staat*, "Logos: Internationale Zeitschrift fuer Philosophie der Kultur" 1922–23, Bd. XI, H. 3, p. 261–284; repr. in *idem*, *Aufsaetze zur Ideologiekritik*, Luchterhand, Neuwid a. R. 1964, p. 29–55.

[33] E.g. Jacques Maritain, *Man and the State*, University of Chicago Press, Chicago, IL 1951, Ch. 2: *The Concept of Sovereignty*, p. 28–53.

[34] E.g.: Cruise O'Brian, *GodLand: Reflections on Religion and Nationalism*, Harvard University Press, Cambridge, MA 1988; John E. Smith, *Quasi-Religions: Humanism, Marxism and Nationalism*, Macmillan, Houndmill 1994.

[35] E.g. baseball as an American civic religion, according to Brian Reich, *Gospel on the Mound: Our National Pastime and the Culture of Religion*, http://www.stadiuummouse/religion/ReligionandSports.pdf (read: 12.08.2009).

[36] William Greider, *Secrets of the Temple: How the Federal Reserve Runs the Country*, Simon and Schuster, New York 1988, at p. 52–54, 231–240, 420–423.

[37] Adams McCrea, *Advertising Characters: the Pantheon of Consumerism*, in: Sonia Maasik, Jack Solomon (eds.), *Signs of Life in the USA: Readings on Popular Culture for Writers*, Bedford Books, Boston, MA 1997, p. 359–368.

[38] http://www.thechurchofgoogle.org/Scripture/Proof_Google_Is-God.html (read: 12.08.2009).

[39] Željko Tanjić, *Kapitalizam kao religija: izazov za kršćanstvo (I. dio)* [*Capitalism as A Religion: A Challenge to Christianity (Ist part)*], "Glas Koncila", god. 43, br. 12/1552 (21.03.2004), http://www.glas-koncila.hr/rubrike_teoloski.html?broj_ID=781 (read: 12.12.2013); *idem*, *Kapitalizam kao religija: izazov za kršćanstvo (II. dio)* [*Capitalism as A Religion: A Challenge to Christianity (2nd part)*], "Glas Koncila", god. 43, br. 13/1553 (28.03.2004), http://www.glas-koncila.hr/rubrike_teoloski.html?broj_ID=823 (read: 12.12.2013).

[40] Alain De Botton, *The Pleasures and Sorrows of Work*, Pantheon, New York 2009.

a religion is determined conventionally, the most important convention being law. Legal definition of religion has four salient features. Firstly, in post-modern societies law is to a great extent determined by human rights, which empower every single individual to declare at will whether she or he has a religion and what the content of their religion is.[41] By the same token, secondly, a social group that cultivates a set of beliefs and practices similar to conventional religions is empowered to declare that their beliefs and practices are not a religion. Thirdly, national, transnational and international legal acts tend to provide protection to personal conscience and philosophical conviction that is equal to protection they provide to religion.[42] Fourthly, Western legal orders, which are today virtually by default liberal, sanction religions, conviction and conscience positively only, that is, by recognizing their identity and privileging them, but not negatively, by persecuting them because they are what they are or profess to be. Liberal orders sanction negatively, or appear to sanction negatively, only certain actions, such as hate speech, irrespective of whether the actions are performed by a religious community or a person of a certain conviction.

(DC) The view that in contemporary societies religion is what is legally recognized as religion does not ignore the feature that is widely held to be the definiens of religion, namely, sanctity.[43] The idea of order, which is the fundamental idea of philosophy of law,[44] is intimately related to or even identical with the idea of the holy.

(DD) Since there is no reliable answer to the question "What is religion?", theories of secularization, which claim that in modern society religion is disappearing,[45] may be based on a misconception of their subject-matter. Arguably

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[41] Syndicat Northcrest v. Amselem (2004), S.C.R. 551.

[42] Čl. 40. Ustava Republike Hrvatske [Art. 40 of the Constitution of the Republic of Croatia], "Narodne novine", 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 5/14; Art. 4 des Grundgesetz fuer die Bundesrepublik Deutschlands [Art. 4 of the Basic Law of the Federal Republic of Germany], (23 Mai 1945; Zuletzt geaendert durch Art. 1 G v. 23. Dezember 2014. / 2438); Art. 18 of the Universal Declaration of Human Rights, UNGA Res 217 A (III) of 10 December 1948, UN Doc A/810, at 71 (1948); Art. 18 of the International Covenant on Civil and Political Rights, UNGA Res. 2200 (A), of 16 December 1966, UN Doc. A/6316 (1966), entered into force 23 Mar 1976.

[43] E.g.: Émile Durkheim, *Les Formes élémentaires de la vie religieuse et le système totemique en Australie* (1912), 5ème éd., Les Presses universitaires de France, Paris 1968, Livre III, Ch. 5., sect. 1, p. 387–392, http://classiques.uqac.ca/classiques/Durkheim_emile/formes_vie_religieuse/formes_elementaires.pdf; Rudolf Otto, *Das Heilige: Ueber das Irrationale in der Idee des Goettlichen und sein Verhaeltnis zum Rationalen* (1917), 4. Aufl., Trewendt & Granier, Breslau 1920, https://archive.org/details/RudolfOtto_dasHeilige (read: 1.12.2012).

[44] Grzegorz Leopold Seidler, *Die Grundidee der Rechtsphilosophie*, "Archiv fuer Rechts- und Sozialphilosophie" 1978, Bd. 64, No. 2, p. 145–161.

[45] Kevin Schultz, *Secularization: A Bibliographic Essay*, "Bibliographic Review", http://www.iasc-culture.org/THR/archives/AfterSecularization/8.12RBibliography.pdf (read: 1.12.2012).

they misinterpret disappearance or weakening of manifest Christianity as a full-fledged secularization.

(DE) The claim of theories of secularization that religion is a negative condition of social development is a prejudice. It fails *inter alia* to take into account Parson's dismissal of the so-called Hobbesian problem. According to Parsons, if most people in most situations follow hypothetical imperatives, as assumed by the Hobbesian problem, social order cannot be created.[46] Hence religions that command people to act altruistically are conditions of social order and for that reason also of social development.

(DF) Unlike the claim that religion is only a negative condition of social development, criticism of religion as a false consciousness, or ideology, is in many respects valid. The criticism is paralleled by a distinction, which has been made by protestant theologians and assimilated by the Catholic Church, between faith, as a surrender to God's mercy, and religion, as a human fabrication of the sacred.[47]

(DG) Precisely the fact that conventional religions have diverse effects regulated by law requires a jurisprudential concept of religion. The reason why the concept is needed is not to label something as a religion. As noted *supra* at DB, such a label might be protested as a violation of rights. At the same time, the label is not legally required since liberal laws regulate conscience and conviction as if they were religions. A concept of religion is needed for at least the following reasons. First to learn consequences of the legal recognition of a set of beliefs and/or practices as a religion, especially in education and media, against the will of those who hold the beliefs and/or engage in the practices. Secondly, to explore *pace* liberalism the feasibility of preventing, by means used in legal regulation of religion, negative consequences that may be inherent to a set of beliefs and/or practices with salient features of a religion. Thirdly, to prepare a tradeoff between rights of legally recognized and legally non-recognized religions. Fourthly, to probe into limits of legal regulation of religion.

(DH) Emil Durkheim's concept of religion is most fecund for a policy analysis of religious rights in Croatia. Although Durkheim has not left a succinct definition of religion, the gist of his views of the matter is encapsulated in the following two statements: Religion is "Before all, […] a system of ideas with which the individuals represent to themselves the society of which they are members, and the obscure but intimate relations which they have with it";[48] "Religion holds within it, from the very beginning, but in a muddled sort of way, all the elements

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[46] V. esp. Talcott Parsons, *The Stucture of Social Action*, The Free Press, New York 1968, at p. 89 ff. See also Richard Muench, *Theorie des Handelns: Zur Rekonxtruktion der Beitraege von Talcott Parsons, Emile Durkheim und Max Weber*, Suhrkamp, Frankfurt am Main 1982, at p. 31 ff.

[47] See: Rosino Gibellini, *La teologia del XX secolo*, 3a ed., Editrice Queriniana, Brescia 1996, Croatian tr.: *idem*, *Teologija dvadesetog stoljeća*, Kršćanska sadašnjost, Zagreb 1999, at p. 16–18; Jakov Jukić, *Lica i maske svetoga*…, p. 26–30.

[48] Émile Durkheim, *op. cit.*, Livre II, Ch. VII, sect. IV, at p. 219; English trans.: *idem*, *Elementary Forms of Religious Life* (1915), 5th impr., Unwin & Allen, London 1964, at p. 225.

that have given rise to the various manifestations or collective life.'[49] Durkheim's concept of religion is deemed fruitful here for the following reasons:

– it is conventional. It is applicable to beliefs and practices commonly held as religions, such as Christianity or Buddhism;

– it is comprehensive. It includes theistic religions, such as Judaism, Christianity and Islam, and atheistic religions, such as Buddhism, Jainism and Brahmanism;[50]

– it is contextual. It links religion to virtually all the other aspects of society, that is, to arts, morality, law, philosophy and science, with a possible exception of economy.[51] Thus there is no difference in principle between religion and science, since, on the one hand, fundamental notions of science are of a religious origin[52] and, on the other, science is becoming a religion;[53]

– it is developmental. While in primitive societies religions are syncretic, that is, encompassing all aspects of social life, in more developed societies religions tend to become distinct from arts, morality, science etc.

(DI) Durkheim's concept as amended by Charles Taylor is even more fecund. Taylor construes three ideal-types of the triangular relationship between the individual, her religion and her polity. In the paleo-Durkheimian relationship there is a union of church and polity with a membership in the church that is compulsory for all the political subjects other than few foreigners and heretics. In the neo-Durkheimian relationship a political subject has a choice of belonging or not belonging to one or none of several churches but belongs, whether she likes it or not, to the polity that has a providential role to play. The expressive individualism is, according to Taylor, quite un-Durkheimian, in that both religious and political choices are not only free but also strictly personal, so that at the end of the day an individual is likely not to belong to either a church or a polity.[54]

(DJ) The addition of this paper to Taylor's typology is that expressive individualism by weakening impersonal links between the individual, on the one hand, and both the church and the polity, on the other, strengthens inadvertently personal links between the individual and her fellow individuals. Since the impersonal links tend to be political, personal links turn out to be not only moral but moral claims to enforce morality by law.

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[49] *Ibidem*, *Prefaces to L'Année sociologique*, in: Yash Nandan (ed.), *Émil Durkheim: Contributions to L'Année sociologique*, Free Press, New York 1980, at p. 54; cit. by Marcel Fournier, *Émile Durkheim: A Biography*, trans. by David Macey, Polity Press, Cambridge, UK 2013, at p. 317.

[50] Marcel Fournier, *op. cit*., at p. 317.

[51] *Ibidem*.

[52] Émile Durkheim, *Les Formes*…, Livre III, concl., sect. IV, at p. 417.

[53] Steven Lukes, *Émile Durkheim: His Life and Work: A Historical and Interpretive Study*, Penguin, Harmondsworth 1977, at p. 71–77.

[54] Charles Taylor, *Varieties of Religion Today: William James Revisited*, Harvard University Press, Cambridge, MA 2002, at p. 93–95.

(DK) In Western societies there is a widely observed though tacit agreement — which is hardly if ever discussed — between legally recognized religions and legally recognized non-religions that the former are while the latter are not religions.

The agreement is legally justified by the legal separation of church and state in modern societies. Hence a typical Western state is legally secular even if its government prescribes its schools to display crucifixes in state-school classrooms, since "the cross had become one of the secular values of the […] Constitution and represented the values of civil life".[55] The secular nature of such a prescription has been recognized even by the European Court of Human Rights's argument that "prescribing the presence of crucifixes in State-school classrooms — a sign which, undoubtedly refers to Christianity — […] is not in itself sufficient […] to denote a process of indoctrination".[56]

The agreement is explicable by the benefits that both religions and non-religions derive from the separation. Although the Catholic Churcha and other Christian churches at first resisted secularization of their assets, they have managed to turn other aspects of the separation to their advantage. An indication of the advantage is a discrepancy between the institutional grandeur of Christian churches and a negligible number of practicing Christians in Western European societies. At the same time, many groups and institutions have derived benefits precisely from the fact that they are legally recognized as non-religions providers of services that used to be provided by legally recognized religions. The cases in point are public research and educational institutions, which are considered secular even if their findings and teachings are as exact as theology, astrology or *die Rassenwissenschaft.*

1.2.3. Values

While all the constructs advanced in this paper, as ideal types informed by experience, are implicitly value-laden, policy analysis includes also explicit fundamental values, which are meant to be postulated. There are several obvious candidates for fundamental meta-positive values of legal regulation of religion. The first is human dignity as defined by Lasswell and McDougal, namely, as the widest possible shaping and sharing of all other values. The values include rectitude, respect, wealth, etc.[57] While the postulation of human dignity as the highest value might be *prima facie* acceptable in a policy analysis of religious rights in Croatia, since the value is compatible with social teaching of the Catholic

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[55] Republica Italia, Consiglio di Stato, according to the European Court of Human Rights, Grand Chamber, Case of Lautsi and others vs. Italy (Application no. 30810/46), Judgment (18 March 2011), sect. 16.

[56] *Ibidem*, sect. 71.

[57] Harold D. Lasswell, Myres S. McDougal, *op. cit.*, at p. 34–35.

Church[58] and Catholicism is the most widespread denomination in Croatia, the value is not specific enough to identify the points of conflict that usually are and ought to be regulated by law, including religious rights. The second candidate is natural law expounded by Thomas Aquinas. However, the first precept or principle of natural law according to Aquinas, namely, that good is to be done and ensued, and evil is to be avoided, is also too general.[59] Hence the third candidate. It is self-preservation, which is Aquinas's first specific precept of natural law[60] and, at the same time, "the first foundation of natural Right", according to Hobbes.[61] The first reason why self-preservation is postulated as the highest value is the assumption that human rationality can be improved upon. On that assumption, religious conflicts, whatever their ultimate causes, can be prevented by legal regulation at a cost that is lower than, on the one hand, consequences of such conflicts and, on the other, net costs of non-religious — especially economic — conflicts. The assumption is backed by a relative success of the separation of church and state in some Western societies. The second reason is that a value higher than self-preservation may provoke rather than prevent religious conflicts. Thus a government guaranty of religious freedom is likely to be less objectionable than government assistance to religious communities, since such assistance is likely to be considered discriminatory towards communities that are not recognized as religious.

1.3. Hypotheses

The Identification of the practical problem is the first hypothesis. Section 2.2 describes the Croatian left liberal decisions on human reproduction and appraises them as tending towards, against or past constitutional principles or the *jus cogens*.

The second main hypothesis has two principal parts. The first, which is examined in Section 2.3.1, is that the decisions can be ascribed to the tenets of culturalism. The second, which is examined in Section 2.3.2, is that the decisions can be explained as ideological consequences of financial capitalism.

The third hypothesis, examined in Section 2.4, is that, under given economic conditions, Croatian ethnical traditionalists and other conservatives, and even non-conservatives are likely to react to left liberalism or culturalism in several disparate ways.

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[58] Dom David Granfield, *Towards a Goal-Oriented Consensus*, "Journal of Legal Education" 1967, Vol. 19, No. 4, p. 379–402, esp. at p. 280–383.

[59] Thomas Aquinas, *Treatise on Law: Summa Theologica, Questions 90–97*, Henry Regnery Co., n.d. Chicago, IL, Q. 94, Art. 2, at p. 59–60.

[60] *Ibidem*.

[61] Thomas Hobbes, *De cive*, 1.7, http://www.unilibrary.com/ebooks/Hobbes,%20Thomas%20-%20De%20Cive.pdf (read: 15.10.2010).

The fourth hypothesis, which is made good in Section 2.5, outlines legal regulation of left liberalism culturalism that would be more in accord with constitutional principles.

2. Analysis

2.1. Principles

Constitution of the Republic of Croatia includes the following provisions on religious rights, which are compatible with survival as the meta-positive value of legal regulation of religion: A guarantee of the freedom of conscience and religion and free public profession of religion and other convictions (Art. 40); equality of all religious communities before the law and the separation of all religious communities and the state; freedom of religious communities, in conformity with law, publicly to perform religious services, to open and manage schools and social institutions and to enjoy the protection and assistance of the state (Art. 41). As constitutional provisions, they are *jus cogens.*

The following provisions of the Constitution are also directly relevant to the decisions described in Section 2.2:

"All persons in the Republic of Croatia shall enjoy rights and freedoms, regardless of race, colour, gender, language, religion, political or other conviction, national or social origin, property, birth, education, social status or other characteristics. All persons shall be equal before the law." (Art. 14);

"Freedom of thought and expression shall be guaranteed." (Art. 38 Sect. 1);

"The family shall enjoy special protection of the state." (Art. 61 Sect. 1);

"Parents shall bear responsibility for the upbringing, welfare and education of their children, and they shall have the right and freedom to make independent decisions concerning the upbringing of their children." (Art. 61 Sect. 1).

Although the right to religious association is not directly relevant to the decisions described in Section 2.2, it may be useful to note that there are no reported judicial decisions on, or even public controversies over, the existence or practice of religious groups without legal status in the Republic of Croatia (there is a still not observed ECHR jugdgment on the full recognition of some minor religious communities by the Republic of Croatia).[62] Hence it can be safely assumed that unincorporated religious groups manage to enjoy freedoms and rights guaranteed by Croatian law, invoking Art. 43 of the Croatian Constitution, which guarantees to everyone the right to freedom of association, Art. 7 of the Law on Legal Position

[62] European Court of Human Rights, Case of Savez Crkava 'Riječ života' vs. Croatia (Application no. 7798/08), Judgment Final (8 December 2008), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-102173#{"itemid":["001-102173"]}.

of Religious Communities,[63] which guarantees the freedom of religious association, and provisions of Croatian law that guarantee *jus standi* to unincorporated entities (Art. 7 Sect. 3 of the Law on Civil Procedure;[64] Art. 2 Sect. 4 of the Law on General Administrative Procedure;[65] Art. 17 Sect. 2 of the Law on Administrative Disputes,[66] i.e. on the judicial review of administrative action).

2.2. Decisions

Identification of the practical problem is the first hypothesis. This section describes the Croatian left liberal decisions on human reproduction and appraises them as tending towards, against or past the *jus cogens*.

The Government of the Republic of Croatia installed in 2011, with a support of influential media and a growing following, accelerated gender-mainstreaming by implementing a health upbringing curriculum[67] that, in addition to relaxing restraints of conventional sexual morality,[68] advanced inclusive language about LGBTIH issues; and by announcing openness to legalization of the same-sex marriage.[69] The measures were paralleled by a loss of autonomy of the religious program at the Government controlled Croatian Radio and Television.[70]

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[63] Zakon o pravnom položaju vjerskih zajednica, "Narodne novine", 83/2002, 73/2013.

[64] Zakon o parničnom postupku, "Narodne novine", 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 123/08, 57/11, 148/11, 25/13.

[65] Zakon o općem upravnom postupku, "Narodne novine", 47/09.

[66] Zakon o upravnim sporovima, "Narodne novine", 20/10.

[67] Agencija za odgoj i obrazovanje, Kurikulum zdravstvenog odgoja [Agency of Upbringing and Education: Curriculum of Health Upringing], http:// www.azoo.hr/images/zdravstveni/Kurikulum_zdravstvenog_odgoja.ppf_ (read: 4.09.2013); the most_controversial issues are underlined in the excerpt Kurikulum zdravstvenog odgoja — teme za 4. Modul / Curriculum of Health Upbringing — topics of the Module 4: http://zdravstveniodgoj.com/uploads/multiple_upload/b61ddd39-0975-bb0f-b94c-9a62f0ed2906_kurikulum_4.modul.pdf (read: 4.09.2013).

[68] As put succinctly by Mr. Zeljko Jovanovic, Minister of Science, Education and Sports, "parents do not have the right to keep their children in ignorance. A workshop will be held, with a special emphasis on poisitive behavior. The expression 'pornography' shall not exist in the elementary school […]. School physicians will talk with children about masturbation". *Jovanović: Roditelji nemaju pravo držati djecu u neznanju* [*Jovanovic: Parents do not Have the Right to Keep Children in Ignorance*], "Dnevnik", 28.08.2013, repr. http://dnevnik.hr/vijesti/hrvatska/ministar-zeljko-jovanovic-predstavio-plan-i-program-zdravstvenog-odgoja---300445.html (read: 1.11.2014).

[69] Kukuriku koalicija, Plan 21.: 19. Ljudska prava i građanske slobode; 2. Rodna ravnopravnost, 3. Sloboda izbora životnog stila [Curriculum Coalition, Plan 21: 19. Human Rights and Civil Freedoms; 2. Gender Equality; 3. Freedom of Choice of a Life Style], http://www.kukuriku.org/plan21/ljudska-prava-i-gradjanske-slobode/(5 August 2013) (read: 4.09.2013).

[70] Hrvatska biskupska konferencija "Reagiranje Tiskovnog ureda HBK na istup HRT Komunikacija u emisiji Mir i dobro" [Croatian Bishops' Conference "Reaction of the CBC Press Office to CRT Communication in the Emission Peace and Goodness"], 3.11.2013, http://www.

President of the Republic of Croatia (2010–15), by profession a law professor, who had been nominated to the non-partisan highest office by the Social Democratic Party, supported the health upbringing curriculum.[71]

According to the main newspaper of the Catholic Church in Croatia, the proposed health upbringing curriculum "imposes gender ideology that does not observe findings of developmental psychology, does not know terms of balanced and integral development of a human person, denies the value framework as a necessary ingredient of upbringing, is implemented illegally and coercively into the school curriculum, violates the right of parents to choose upbringing of their children".[72] The newspaper interpreted the gender ideology, which inspired the proposed health upbringing curriculum, as a belief that a child acquires by birth only a biologically determined sex but not a gender, since the child chooses freely a gender, or non et all, later on in life.[73]

A liberal public intellectual labeled the health upbringing as "health confessional instruction".[74]

The Constitutional Court of the Republic of Croatia rescinded the curriculum on a procedural ground, namely, as violating *inter alia* the right of parents to take part in adoption of the curriculum.[75] In a seemingly unrelated decision, on criteria of appointment to scientific ranks, the Court declared and maintained, in a manner reminiscent of constitutional rulings on church and state, the separation of science and the state.[76] The Minister of Science, Education and Sports commented the

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hbk.hr/?type=vijest&ID=462; *Biskupi digli glas: "Vjeronauk se diskriminira, a vjeroučiteljima je upitna egzistencija"* [*The Bishops Raised their Voice: "Confessional Religious Instructions is Being Discriminated Against, While the Cathehists' Existence is at Stake*"], "Jutarnji list", 18.10.2013, http://www.jutarnji.hr/hbk-nezadovoljan-polozajem-vjeronauka-i-ukidanjem-autonomije-religijskog-programa-na-hrt-u/1133838/ (read: 19.10.2013).

[71] *Predsjednik se uključio u raspravu. Josipović uz Jovanovića: Podržavam uvođenje zdravstvenog odgoja u škole* [*The President has Joined the Debate: Josipović with Jovanovic: I support Introduction of Health Upbringhing to Schools*], "Novi list", 28.12.2014, http://www.novilist.hr/vijesti/hrvatska/josipović-uz-jovanovica-podrzavam-uvodenje-zdravstvenog-odgoja-u-skole?articlsrcelink=related (read: 30.12.2012).

[72] Branislav Stanić, *U 25 gradova na vjerničku inicijativu održan do sada neviđen 'prosvjed igračaka': Ne dirajte im djetinjstvo!* [*'The Toys' Protest', Not Seen Earlier, Held in 25 Towns*], "Glas Koncila", god. 51, br. 50/2008 (16.12.2012.), p. 1, http://www.glas-koncila.hr/index.php?option=com_php& Itemid= 41&news_ID=21665 (read: 30.10.2014).

[73] Nikola Radić, *Što je to u pozadini zdravstvenog odgoja koji se nameće u školi? Idemo li prema 'gender'-društvu* [*What is Behind the Health Upbringing That is Imposed at School? Are We Heading Towards a 'Gender-Society'*], "Glas Koncila", god. 51, br. 50/2008 (16.12.2012.), p. 9, http://www.glas-koncila.hr/index.php?option=com_php& Itemid= 41&news_ID=21665 (read: 30.10.2014).

[74] Zarko Puhovski, *Zdravstveni vjeronauk* [*Health Religious Upbringing*], "Pescanik", 31.12.2012, http://pescanik.net/zdravstveni-vjeronauk (read: 12.11.2014).

[75] Ustavni sud Republike Hrvatske, Odluka Broj: U-II-1118/2013, "Narodne novine", 63/13.

[76] Ustavni sud Republike Hrvatske, Odluka Broj: U-II-1304/2013, "Narodne novine", 99/13.

Court's Decision on the Health Upbringing Curriculum claiming that the Court did not rescind the Curriculum. The Prime Minister and Chairman of the Social Democratic Party, a lawyer by education, declared that a cultural war was going on in Croatia.[77] President of the Court reacted to the Prime Minister's comments of the Court's rulings: "Enough!"[78]

"In Name of the Family", a civic association of Catholic provenance, backed by virtually all religious communities, initiated a referendum on the question whether to add to the Constitution of the Republic of Croatia the provision that marriage is a life union of a man and a woman.[79] 749.316 voters (cca 20% of the electorate) supported the inititative.[80] Croatian Parliament called the referendum.[81] The Constitutional Court announced that the referendum was constitutional.[82]

In a heated public debate it was claimed *inter alia* that the referendum was discriminatory since the right to marry is a fundamental human right.[83] President of the Republic opposed the referendum, claiming that it was not needed but that, if held, would send a moral message.[84] The Prime Minister castigated the

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[77] *Reakcije na odluku Ustavnog suda; Milanović: "Vrlo agresivna grupa ljudi provodi kulturni rat"; Jovanović: "Kurikulum zdravstvenog odgoja nije ukinut"* [*Reactions to the Constitutional Court Decision; Milanović: "A Very Aggressive Group is Waging a Cultural War"; Jovanović: "Curriculum of the Health Upbringing is not Rescinded"*], "Slobodna Dalmacija", 22.05.2013, http://www.slobodnadalmacija.hr/Hrvatska/tabid/66/articleType/ArticleView/articleId/210889/Default.aspx (read: 12.11.2014).

[78] A. Milković, *Jasna Omejec, predsjednica Ustavnog suda: "Moj odgovor Milanoviću: Sad je dosta"* [*Jasna Omejec, President of the Constitutional Court: "My Reply to Milanović: Now it is Enough"*], "Globus", 13.07.2013, http://globus.jutarnji.hr/hrvatska/moj-odgovor-milanovicu--sad-je-dosta (read: 12.10.2013).

[79] http://uimeobitelji.net/ (read: 20.10.2014).

[80] *Provjereni potpisi za referendum "U ime obitelji"* [*Referendum Signatures Verified: "In name of the Family"*], "Glas Istre", 3.09.2013, http://www.glasistre.hr/vijesti/hrvatska/provjereni-potpisi-za-referendum-u-ime-obitelji--421980 (read: 30.10.2014).

[81] Hrvatski sabor, Odluka o raspisivanju državnog referendum [Croatian Parliament, Decision on Calling a National Referendum], Klasa: 014-01/13-01/03 (8.11.2013), "Narodne novine", 134/13.

[82] Priopćenje Ustavnog suda Republike Hrvatske o narodnom ustavnom referendumu o definiciji braka [Announcement of the Constitutional Court of the Republic of Croatia on the Popular Constitutional Referendum on the Definition of Marriage], Broj: SuS-1/2013 (14.11.2014), "Narodne novine", 138/2013.

[83] *Referendumska definicija braka diskriminirajuća je za manjine* [*The Referendum Definition of Marriage Discriminates Against Minorities*], "Večernji list", 11.11.2013, http://www.vecernji.hr/hrvatska/referendumska-definicija-braka-diskriminirajuca-je-za-manjine-902688.

[84] *Josipović: Referendum je nepotreban ali će imati velike moralne poruke. Predsjednik RH Ivo Josipović na kavi s građanima rekao je da će na referendumu o braku glasovati protiv* [*Josipović: Referendum is Not Needed but Will Have Great Moral Messages. President of the RC Ivo Josipovic at the Coffee With Citizens Said at the Referendum He Would Vote Against*], "Večernji list", 30.11.2013, http://www.vecernji.hr/za-i-protiv/josipovic-referendum-je-nepotreban-ali-ce-imati-velike-moralne-poruke-906045 (read: 1.11.2014).

referendum after it was held as covertly homophobic, emphasising that he could not pronounce himself on the issue beforehand.[85]

At the time the referendum was being prepared, a professor of family law, who was a member of the Iustitia et pax commission of the Croatian Bishop's Conference, supported the law on registered partnership of the same sex persons. However, she opposed legislative provisions that would grant parental rights to the persons *qua* parties of such partnerships, on the ground that provisions already in force regulate parental rights irrespective of sexual orientation.[86] The Referendum was held on the 1st of December 2013. The turnout was 37.90%. The result was Yes 67,87% against 33.51% No, while 0.062% of the votes cast were invalid.[87] The result was declared valid by the State Electoral Commission[88] and the Constitutional Court.[89]

Croatian Parliament adopted a law on registered partnership of persons of the same sex, without significant opposition of either religious communities or civic associations at the end of 2014.[90]

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[85] *Milanović: "Ovaj referendum je topovska priprema za referendum o ćirilici, no neće im proći!"* [*Milanović: "This Referendum is Artillery Preparation for a Referendum on the Cyrillic Script"*], "Jutarnji list", 1.12.2013, http://www.jutarnji.hr/milanovic--referendum-o-braku-je-topovska-priprema-za-referendum-o-cirilici--no-nece-im-proci--/1143683/ (read: 30.10.2014).

[86] Marinko Jurasić, *Korac Graovac: "Ne treba izmišljati skrb o djeci za homoseksualce": Obiteljski zakon ima instrumente zaštite djece koji vrijede i za istospolne partnere*, "Večernji list", 18.10.2013.), repr. http://zdravstveniodgoj.com/news/ne-treba-izmisljati-skrb-o-djeci-za-homoseksualce (read: 20.10.2014).

[87] Državno izborno povjerenstvo / Službene stranice, Referendum 1. prosinca 2013: Potpuni službeni rezultati državnog referenduma — stanje 2.12.2014. u 9.00 sati: pristupilo je glasovanju 37.90%, za 65.87%, protiv 33.51%, nevažeći i neubačeni listići 0.62% [The State Electoral Commission / Official Pages, Referendum of 1 December 2013: Complete Official Results of the State Referendum: status on 2 December 2014 at 9 A.M.: turnout 37.90%, for 65.85%, against 33.51%; not valid and/or not cast: 0. 62%], http://www.izbori.hr/2013Referendum/rezult/rezultati.html (read: 2.12.2014).

[88] Državni izborno povjerenstvo, Odluka za to da se u Ustav RH unese odredba po kojoj je brak životna zajednica žene i muškarca [The State Electoral Commission, Decision to Add to the Constitution of the RC the Provision that Marriage is a Life Community of a Man and a Woman], Klasa: 014-02/13-07/24; Urbroj: 507/18-13-2 (10.12.2013.), "Narodne novine", 147/13.

[89] Ustavni sud RH, Odluka u povodu okončanja postupka nadzora nad ustavnošću i zakonitošću provođenja državnog referenduma održanog 1. prosinca 2013., na kojem je članak 62. Ustava Republike Hrvatske dopunjen novim stavkom 2. [Constitutional Court of the RC, Decision Concerning the End of the Supervision of the Constitutionality and Legality of the State Referendum Held on 1 December 2013], Broj SuP-O-1/2014, Zagreb (14.01.2014), http://www.usud.hr/uploads/Odluka%20u%20povodu%20okon%C4%8Danja%20postupka%20nadzora%20nad%20ustavno%C5%A1%C4%87u%20i%20zakonito%C5%A1%C4%87u%20provo%C4%91enja%20dr%C5%BEavnog%20referenduma%20odr%C5%BEanog%201.12.2013.pdf (read: 14.01.201).

[90] Zakon o životnom partnerstvu osoba istog spola, "Narodne novine", 92/14.

The decisions on human reproduction summarized above depart from the constitutional principles listed in Section 2.1 in the following ways. First, the attempt to impose health upbringing violates Art. 40 of the Croatian Constitution on the separation of religious communities and the state, which implies the separation — to the extent that is humanly possible — of any worldview and the state. The fact that the attempt was justified by allegedly scientific grounds is legally irrelevant, since it is obvious that such attempts cannot be justified by science. Secondly, the attempt violates also the constitutional provision that parents have the right and freedom to make independent decisionc concerning the upbringing of their children (Art. 61 Sect. 1 of the Constitution). Thirdly, the equalization of the homosexual partneship and the (heterosexual) marriage may imply that the special protection of the family by the state (Art. 61 Sect. 1 of the Constitution) no longer applies to the natural procreation of children, because it is peculiar to the heterosexual marriage.

To dispel any possible misunderstanding, it is useful to make here three additional notes. First, the left liberal claim that there is a fundamental human right to marry does not run counter the constitutional principles in Section 2.1. However, the claim implies — inadverently — that the fundamental human right to marry includes the right to polygamy and/or polyandry, on the one hand, and the right of juridical persons to marry, on the other. Secondly, the constitutional principles are not violated either by The Law on Registered Partnership of Persons of the Same Sex or by the existing legislative provisions that empower persons who meet certain requirments, without regard to their sexual orientation or gender, to adopt children. Thirdly, a hypothetical legislative provision that would empower registered partners of the same sex to adopt children, if the provision required that adoption in every single case was in the best interest of a child to be adopted, would not violate the constitutional principles in Section 2.1 either.

2.3. Conditions

2.3.1. Ascription

This section ascribes (in the sense *supra* at 1.2.1.BB) the Croatian left liberal decisions on human reproduction to (A) a culture, (B) a worldview, and (C) a religion. The section provides evidence for the first part of the second main hypothesis (*supra* at 1.4)

(A) *Culture* The decisions at 2.2 can be ascribed to the culture that is termed left liberal in Croatia, left-wing or progressive in Europe and liberal in the United States.[91] It is identical or at least akin to political correctness, which

[91] James Davison Hunter, *op. cit.*, at p. 43. Johnathan Haidt, *The Righteous Mind: Why Good People are Divided by Politics and Religion*, Random House–Vintage Books, New York 2012,

became an influential code of conduct and a set of undelying beliefs in North American Universities at the turn of the 1990s.[92] Liberalism is also closely related to a widespread set of beliefs and demands that presented itself before the collapse of communism as humanism.[93] Liberalism in that sense is a culture that finds moral authority in "the spirit of the modern age, rationalism and subjectivism".[94] It differs from the culture that is known as conservative, right-wing or orthodox,[95] which finds moral authority in an external and transcendent instance.[96] A social psychologist claims to have found empirical differences between dominant Western cultures that consist in the following: while liberal wisdom is most sensitive to care/harm, less to liberty/oppression, even less to fairness/cheating, and is virtually insensitive to loyalty/betrayal, authority/subversion and sanctity/degradation,[97] the conservative wisdom treats all six values equally.[98] The social psychologist's claim is corroborated by the entry 'Left Liberalism' in Liberapedia, a specialized lexicon of Wikipedia that provides, as evidenced by its name and content, an internal account of left liberalism. The entry reads as follows:

> Left Liberalism is a form of liberalism that cares about suport for vulnerable people and freedom for everybody. Left Liberals sometimes disagree with the centre-left and classical liberalism. Left Liberalism aligns more with modern liberalism such as social liberal ideas.[99]

(B) *Worldview* Since culture defined as human communication (*supra* at 1.2.2.A) is diffuse, the Croatian left liberal decisions oh human reproduction can be ascribed only to a more structured point. An appropriate candidate for the job is a worldview, which has been defined as consisting of beliefs and demands (*supra* at 1.2.2.B). Hence the decisions are ascribed to the worldview that is abstracted from left liberalism as a culture. In accordance with its content, which consists of views of human reproduction, the worldview is termed culturalism. Like other

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XXIII. f & Ch. 7, p. 150–179. An exemplary liberal publication is the magazine "The Nation", which is self-described as the flagship of the Left, http://www.amazon.com/The-Nation/dp/B000CNEFRE (read: 2.03.2015).

[92] See: David Horowitz, Paul Collier (eds.), *The Heterodoxy Handbook: How to Survive the PC Campus*, Regnery, Washington, DC 1994; Jeffrey Williams (ed.), *PC Wars: Politics and Theory in the Academy*, Routledge, New York 1995.

[93] See esp. Paul Kurtz (ed.), *Building A World Community: Humanism in the 21st Century*, Prometheus Books, Buffalo, NY 1989.

[94] James Davison Hunter, *op. cit.*, at p. 43–46 ff.

[95] *Ibidem*, and Johnathan Haidt, *op. cit.*, Ch. 7, p. 150–179. An exemplary conservative publication is the magazine "National Review". See J. Quinn, *Top 10 Conservative Magazines*, http://usconservatives.about.com/od/gettinginvolved/tp/TopConservativeMagazines.htm.

[96] James Davison Hunter, *op. cit.*, at p. 43.

[97] Johnathan Haidt, *op. cit.*, at p. 350–353.

[98] *Ibidem*, at p. 356–358.

[99] *Left liberalism*, Liberapedia, http://liberapedia.wikia.com/wiki/Left_Liberalism (read: 8.03.2015).

basic constructs of this inquiry, culturalism is also an ideal type. It is construed as culturalism in the strong sense (BA) and culturalism in weak senses (BB).

(BA) *Strong* The first tenet of culturalism in the strong sense is that humans are a product of culture in that nature, which had generated humans as well as other species, had been changed by humans to the extent that culture is the distinctly human nature and disponible for further change by humans. Hence it is appropriate to designate left liberalism as culturalism. The designation needs refining. Culturalism is materialism, that is, the worldview that the world can be explained by itself, that is, by matter.[100] In ordinary speech naturalism is equivalent to materialism.[101] "Since the end of the 17th century naturalism may designate any teaching that explains 'nature' as the foundation and norm of all phenomena, also of history, culture, morality and art."[102] But culturalism as materialism is not naturalism or at least it is not plain naturalism.[103] Hence the ideas such as *Ius naturale est quod natura omnia animalia docuit*[104] are incompatible with left liberalism.

The second tenet is that humans can know human nature, that is, culture. Left liberalism is construed here as a worldview consisting of three disparate ways of knowing (or grasping reality with functions of knowing), the third one being a corrective of the truth in law, which is a result of the first way. The first is science, that is, knowledge methodically gained by observation rather than speculation. For that reason materialism, especially as naturalism, is opposed to philosohy *qua* philosophy.[105] However, while earlier left and liberal worldviews considered findings of natural science to be exact,[106] left liberalism freely draws on theories that natural science is a social construct.[107] The second way of knowing is arts,

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[100] Werner Post, Alfred Schmidt, *Was ist Materialismus? Zur Einleitung in Philosophie*, Koesel, Muenchen 1975.

[101] *Ibidem*.

[102] Günter Gawlick, *Naturalismus*, in: *Historisches Woerterbuch der Philosophie*, Bd. 6, Schwabe & Co., Basel 1984, p. 517–519.

[103] A set of beliefs and demands overlapping with left liberalism was labelled naturalism in Ivan Padjen, *Nezrela demokracija Hrvatska* [The Immature Democracy Croatian], in: Milan Podunavac, Bilijana Đorđević (eds..), *Ustavi u vremenu krize: Postjugoslovenska perspektiva* [*Constitutions in the time of a Crisis: A Post-Yugoslav Perspective*], Udruženje političkih nauka Srbije i Fakultet političkih nauka Univerziteta u Beogradu, Beograd 2015, p. 173–196, relying tacitly on *idem*, *(Ne)ćudorednost (međunarodnog) prava /The (Im)Morality of (International) Law*, ICR, Rijeka 1988, sect. 3.3. heb, at p. 173. The term naturalism as the designation of a similar set of beliefs is used also by Charles Taylor, *Sources of the Self: The Making of the Modern Identity*, Harvard University Press, Cambridge, MA 1989, p. 495–520 and *passim*.

[104] Natural law is what nature teaches all animals. *Digesta* 1,1,1,3.

[105] Werner Post, Alfred Schmidt, *op. cit.*, at p. 10.

[106] See e.g. Richard York, Brett Clark, *Marxism, Positivism and Scientific Sociology: Social Gravity and Historicity*, "The Sociological Quarterly" 2006, Vol. 47, No. 3, p. 425–450.

[107] E.g. Bruno Latour, *Politiques de la nature. Comment faire entrer les sciences en démocratie*, La Découverte Armillaire, Paris 1999. See criticism Ian Hocking, *The Social Construction of What?*, Harvard University Press, Cambridge, MA 2000.

that is, a creative transformation of the world.[108] Hence the high value that left liberalism ascribes to high culture. The third is introspection, that is, examination of one's own thoughts and feelings, built upon sensation or feeling of stimuli. The reliance on the second and the third way of knowing, which are peculiar to every single knowing subject, may be seen as a precondition of the third tenet. The reason is that introspection may well be the only way to know one's human nature, especially one's gender, which is — according to a prominent view that fits into the ideal type of left-liberalism — determined by nurture rather than nature.[109] Introspection is also necessary to rectify the law's insensitivity to one's pain.[110] Since a change of human nature is an act of artistic creation it is seen here as implying artistic experience.

The third tenet is that a human being not only can but ought to change human nature totally. What distinguishes the thrid tenet from conservativism is the belief in the actuality, possibility and desirability of a *total* change of one's gender, sex, marriage, family, procreation, end of life; and also of creating new human life artificially and of bringing up human offspring in institutions other than families since families are prone to abusing children.[111] The belief is construed here to include the following reasons: the nature that is of concern to humans has already been changed by humans totally; the changes made thus far have not eliminated oppression, especially sexual and/or gender oppression to women, LGBTIH individuals and minorities etc.; there are no legitimate social constraints on an individual's liberty to bring about further changes; such changes can be, as artistic creations, fulfilling and also liberating morally, politically and legally.

The ideal-type of culturalism as a worldview implies that there is a logical sequence betweeen, on the one hand, an action, such as a Croatian left liberal decision on human reproduction, and a tenet of culturalism as a worldview; and, on the other, between the three tenets. Logical sequence is not a logical necessity but a strong reason for believing and/or deciding and/or doing something .Thus the acceptance of the first

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[108] See James Davison Hunter, *op. cit.*, at p. 248.

[109] "We believe it is indispensable to deconstruct the binary sex/gender system that shapes the Western world so absolutely that in most cases it goes unnoticed. For 'other sexualities to be possible' it is indispensable and urgent that we stop governing ourselves by the absurd notion that only two possible body types exist, male and female, with only two genders inextricably linked to them, man and woman. We make trans and intersex issues our priority because their presence, activism and theoretical contributions show us the path to a new paradigm that will allow as many bodies, sexualities and identities to exist as those living in this world might wish to have, with each one of them respected, desired, celebrated." International Gay and Lesbian Human Rights Commission [IGLHRC], 2005, Institutional Memoir of the 2005 Institute for Trans and Intersex Activist Training, p. 8, http://www.iglhrc.org/files/iglhrc/LAC/ITIAT-Aug06-E.pdf

[110] See esp. William E. Conklin, *The Phenomenology of Modern Legal Discourse: The Juridical Production and the Disclosure of Suffering*, Dartmouth & Ashgate, Aldershot, UK 1998.

[111] On the presumption of the family abuse of children see David Horowitz, Paul Collier (eds.), *op. cit.*, p. 53–64.

tenet is a strong reason for accepting the second, while the acceptance of the second reason is a strong reason for accepting the third one. It is strong but not conclusive. Hence, one can accept one tenet but not the others without committing a logical error of the kind that if all men are mortal and Socrates is a man Socrates is not mortal.

The ideal type of culturalism as a worldview concerned with human reproduction, while informed empirically, is designed to recognize a concievable but historically or empirically rare belief that humans are a product of culture.

(BB) *Weak* Weak versions of culturalism as a worldview consist of one or two of the tenets specified *supra* at 2.3.1.BA. Suffice it to note here few examples.

Weakening the first tenet into a belief that humans are a product less of nurture and more of nature may belong not only to culturalism and left liberalism and also to worldviews and/or cultures such as Enlightenment or Marxism. The Enlightenment's idea of progress implies that humans change the world they are born into a human artefact and that the changes thus far have been (*inter alia*) liberating but not liberating enough.[112] The idea was a cornerstone also of Marxist communism.[113] Its main achievment, advocated by congresses of the Communist Party of the Soviet Union from the mid 1950s till the mid 1980s, should have been the Baikal Amur Magistral, the irrigation project in Central Asia to divert by nuclear explosions Siberian rivers that flow into the Arctic Ocean into Central Asia instead (the project was eventually frustrated by a growing oppositon of scientists).[114]

Scepticism toward findings of natural science, which is defined as the second tenet of culturalism, has been a trademark of conservative policies on global warning in the USA in the past quarter of a century.[115]

(C) *Religion* Ontological assumptions of culturalism, as stated in the first tenet *supra* at 2.3.1.B, are materialistic and as such atheistic.

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[112] For a historical account that is on the whole sympathetic to the idea see e.g. Sidney Pollard, *The Idea of Progress: History and Society*, Penguin, Harmondsworth, UK 1968. For a collection of historical and on the whole critical essays see e.g. Gabriel A. Almond, Martin Chodorow, Roy Harvey Pearce (eds.), *Progress and its Doscontents*, University of California Press, Berkeley, CA 1982.

[113] E.g. Alfred G. Meyer, *The Idea of Progress in Communist Ideology*, in: Gabriel A. Almond, Martin Chodorow, Roy Harvey Pearce (eds.), *op. cit.*, p. 67–82.

[114] See: Alexander Dallin, *The XXVth Congress of the CPSU: Assessment and Context*, Hoover Institution, Stanford, CA 1977, at p. 21, referring to *XXV. S'ezd Kommunisticdheskoi partii Sovetskogo Soyuza, 24. fevralya–5. marta 1976. goda: stenograficheskii otchet v 3-kh tomakh*, Politizdat, Moskva 1976; Michael L. Bressler, *Water Wars: Siberian Rivers, Central Asian Deserts, and the Structural Sources of a Policy Debate*, in: Stephen Kotkin, David Wolff (eds.), *Rediscovering Russia in Asia, Siberia, and the Russian Far East*, Sharpe, Armonk, NY 1995, p. 240–255; Christopher J. Ward, *Breznev's Folly: The Building of BAM and Late Soviet Socialism*, University of Pittsburgh Press, Pittsburgh, PA 2009.

[115] John Arit, *Bush vs. Bush vs. Bush: Which Bush is Most Conservative? You Might Be Surprised*, "Bloomberg Politics", http://www.bloomberg.com/politics/articles/2015-01-13/which-bush-is-most-conservative-you-might-be-surprised (read: 15.01.2015).

Since conservativism is defined as a worldview that finds moral authority in an external and transcendent instance,[116] left liberalism as its opposite cannot be ethically religious, either. The most important property that distinguishes left liberalism from religion is the left liberal idea and practice of free change of one's gender, sex, marriage, family, procreation, end of life and also of free artificial creation of new human beings. From the standpoint of conservativism, the idea and practice degrade utterly sanctity of human life.[117] Catholics, at least the Catholic Church in Croatia, are eager to present left liberalism and its transformations as a materialistic and atheistic reaction to Christianity that emerged in the late Middle Ages.[118] Without denying that there is more than a grain of truth in the Catholic presentation of left liberalism, it may be even more intellectually rewarding to see the presentation as an inverted mirror image of theories of secularization (see *supra* at 1.2.2.DD) that is tacitly in agreement with left liberalism that the latter, unlike Christianity, is not a religion (see *supra* at 1.2.2.DK).

However, there are strong reasons to identify left liberalism, including culturalism, as a religion and, moreover, a theistic religion. The first is a theistic content of the three tenets outlined above. Namely, only God (at least as conceived of by conventional monotheistic religions, i.e. Judaism, Christianity, and Islam) is not created, knows her origin and can change it. However, the left liberal God is every individual for herself rather than an eternal, omnipresent, omnipotent etc. being, or a nation, Leviathan, proletariat, etc. For that reason left liberalism can be categorized as a polyanthropism modelled on polytheism. Secondly, the theistic nature of left-liberalism, and also of an important stream of contemporary pure liberalism, is manifested by endless efforts to construe moral and political obligation based on consent. The effort is reminiscent of the refusal of the Holy See (the Pope as God's vicar plus Curia) of the third party settlement of disputes with other states.[119] Thirdly, left liberalism is, not unlike Christianity throughout much of its history, determined to proselitize and, moreover, enforce its beliefs and demands by man-made laws.

2.3.2. Explanation

This section explains the action-guiding reasons to which the Croatian left liberal decisions on human reproduction are ascribed to (*supra* at 2.3.1) by left liberalism as ideology. The section provides evidence for the second part of the second main hypothesis (*supra* at 1.4).

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[116] James Davison Hunter, *op. cit.*, at p. 43.

[117] See Johnathan Haidt, *op. cit.*, at p. 350–353.

[118] Ivan Tišov, an interview with Marguerite A. Peeters, *Posljedica zapadne kulturne revolucije gubitak je vjere* [*A Consequence of the Western Cultural Revolution is a Loss of Faith*], "Glas Koncila", god. 54. br. 6 / 2120 (8.01.2015), p. 6–7.

[119] E.g. Herbert Franz Koeck, *Concordats*, in: *Encyclopedia of Public International Law*, ed. by R. Bernhardt, North Holland, Amsterdam 1984, p. 43–49, at p. 46.

(A) Capitalism

To the extent reasons, including reasons of action, are ideological they are consequences of modes of production. They correspond roughly to economic systems in the orthodox economic literature. An economic system is a set of decisions on "*what* goods and services are to be produced", "*how* these goods will be produced" and "*who* will receive the benefits of this production".[120] Only two major types are relevant here: industrial capitalism in the period ca 1945–1980, and financial capitalism in the period ca 1980-.[121] Every condition (culture, industrial capitalism etc.) is construed as an ideal-type (explained *supra* at 1.2.1.B). The two types can be recognized in a description of economic developments in the USA in the post-WWII.

The following description fits the type of industrial capitalism:

> Before 1980, economic policy was designed to achieve full employment, and the economy was characterized by a system in which wages grew with productivity. This 4 configuration created a virtuous circle of growth. Rising wages meant robust aggregate demand, which contributed to full employment. Full employment in turn provided an incentive to invest, which raised productivity, thereby supporting higher wages.[122]

The following description fits the type of financial capitalism:

> After 1980, with the advent of the new growth model, the commitment to full employment was abandoned as inflationary, with the result that the link between productivity growth and wages was severed. In place of wage growth as the engine of demand growth, the new model substituted borrowing and asset price inflation. Adherents of the neo-liberal orthodoxy made controlling inflation their primary policy concern, and set about attacking unions, the minimum wage, and other worker protections. Meanwhile, globalization brought increased foreign competition from lower-wage economies and the prospect of off-shoring of employment. The new neo-liberal model was built.[123]

(B) Ideology

Although the beliefs and demands that are commonly recognized as liberal or progressive in the United States of America, or left liberal in Croatia and in Liberapedia, are described by both their opponents and proponents as left, left liberalism as a worldview and a religion designated culturalism is also an ideology, construed as well as other basic cocepts of this inquiry as an ideal type. More precisely,

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[120] David Kennett, *A New View of Comparative Economic Systems*, Harcourt, Fort Worth TX, 2002, at p. 5–6.

[121] *Ibidem*, p. 54–57.

[122] Thomas Palley, *America's Exhausted Paradigm Macroeconomic Causes of the Financial Crisis and Great Recession*, "New American Contract: A Project of American Foundation", July 22, 2009), at p. 3–4, http://www.newamerica.net/publications/policy/america_s_exhausted_paradigm_macroeconomic_causes_financial_crisis_and_great_recession (???).

[123] *Ibidem*, at p. 4.

it is an ideology of financial capitalism but developed, if one looks at the historically or empirically existing views that fit the concept, primarily by social groups that are neither financial capitalist nor their managers. As ideology in general or a particular ideology, culturalism conceals interests it serves. The following comparison, which is a part of the USA folklore, is instructive in that regard: liberals/progressives are pro-choice, against capital punishment, for higher taxes of the rich and for government aid to the unemployed and to unwed mothers, while orthodox/conservatives are pro-life, for capital punishment, for lower taxes and against government aid to the individuals who do not want to work or who breed beyond their means. The comparison is instructive by not even mentioning economic problems that divide the USA and thereby suggesting that not only abortion and taxation but also taxation and government aid to the unemployed are quite unrelated to the ownership of the means of production. Principal ideological practices and/or functions of culturalism can be summarized in the following five points.

(BA) Depopulation

Capitalism in the 19th century England was accompanied by the Victorian morality, which tied human sexual activities to procreation and fostered the latter so that Victorian houses were "swarmed by children".[124] The Victorian morality was beneficial to the then prevailing mode of capitalist production, which was labor intensive. Financial capitalism, which has transferred a bulk of maufacturing and services from the West to the East and developed fiancial industry instead, needs less labor even in Asia and Latin America, where manufaturing still matters.

By promoting reproductive rights culturalism decreases both population and unemployment in the West and thus facilitates further dismantling of the welfare state, which is to financial capitalism unecessary and for that reason too heavy a burden.

(BB) Eutanasia

The aging population in the USA has driven the share of government spending for pensions to 20% and for health to 22% of the total USA government spending.[125] Although the costs of dying of a single individual at the beginning of the 21st century are not dramatically higher than they were forty years earlier, they raise now much concern because the costs of medical care in general have increased from ca 6% to over 10% of the USA gross national product.[126] Similar developments have been taking place in the rest of the West. Thus in 2011,

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[124] Richard J. Evans, *The Victorians: Gender and Sexuality*, http://www.gresham.uk.ac/lectures, https://www.youtube.com/watch?v=FUwhSN1MsyI (read: 8.03.2015).

[125] http://www.usgovernmentspending.com/ (read: 8.03.2015).

[126] Anne. A. Scitovsky, *'The High Cost of Dying': What Do the Data Show?*, "The Milbank Quarterly: A Multidisciplinary Journal of Population Heath and Health Policy" 2005, Vol. 83, No. 4, p. 825–841.

EU-27 general government expenditure amounted to 49.1% of the gross national product, while government expenditure on 'social protection' and 'health' taken together accounted for 54.8% of the total government spending of the EU-27 in 2011.[127]

By promoting euthanasia culturalism justifies decreases of both government and private spending on pensions and medical care for the sick and the elderly.

(BC) Minorities

The classical liberalism (esp. of the Federalist papers) had been concerned above all with the protection of minorities. The minorities it was concerned with were the proprietary classes. They were to be protected from the expropriation by the non-proprietary classes.[128] The old (especially Marxist and/or communist) left has maintained that the principal antagonism is the one between the bourgeoisie and the proletariat so that the emancipation of the proletariat would include the emancipation of women as the oppressed sex. The contemporary socially concerned liberalism recognizes that the grave and increasing e economic inequalities, between a class of at most 1–10% of the Western population that owns more than 90% of assets and the 90–99% of the population that owns the remaining 1–10% assets,[129] are destructive not only of liberal democracy but also of economic development.[130]

The culturalist care for any vulnerable minority perverts the original intent of minority protection, which could be implemented only at a cost of either liberalism or democracy, into political arrangements that can be neither liberal nor democratic nor, for that matter, functional as legal institutions; abstracts the emancipation of women and LGBTIH persons from its socio-economic context; and, most imortantly, diverts attention away from problems and prospects of financial capitalism.

(BD) Banking

In financial capitalism banks operate according to the principle that banks privatize their profits but nationalize their debts. The principle, which has been ascribed — allegedly wrongly — to Andrew Jackson, the seventh USA

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[127] European Commission / Eurostat, General government expenditure in 2011 — Focus on the functions 'social protection' and 'health', http://ec.europa.eu/eurostat/statistics-explained/index.php/General_government _expenditure_on_social_protection_and_health (read: 8.03.2015).

[128] Ph. Allott, *The emerging Interntional Aristocracy*, "New York University Journal of Interntional Law and Politics" 2002, Vol. 35, p. 309–338, esp. at p. 324 ff.

[129] Edward Fullbrook, *The Political Economy of Bubbles*, "Real-World Economics Review" 2012, No. 59, http://rwer.wordpress.com/2012/03/12/rwer-issue-59/ (read: 22.03.2012).

[130] E.g.: Joseph E. Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future*, Norton, New York 2012; Ferdinand Mount, *The New Few or a Very British Oligarchy*, Simon & Schuster, London 2012; Thomas Piketty, *Le capital au XXI siècle*, Éditions du Seuil, Paris 2013.

President,[131] was implemented by the government bail out of banks in 2008–2009 and justified by ideologues of financial capitalism as a self-explanatory necessity[132] and by critics as a necessity created by inadequate government regulation.[133] According to an account critical of financial capitalism, 40% of every price paid, by cash as well as credit, is interest rates and provisions to banks.[134]

Culturalism, by undermining the role of family as a social unit undermines also the role of family as a lender — often of the first and last resort — and thus exposes people to an even greater dependence on banks.

(BE) Culturalism

The old (Marxist and/or communist) left explained the social structure and development according to the basis-superstructure formula, whose gist runs as follows:

> In the social production of their existance, men inevitably enter into definite relations, which are independent of their will, namely relations of production appropriate to a given state in the development of their material forces of production. The totality of these relations of production constitutes the economic structure of society, the real foundation, on which rises a legal and political superstructure and to which correspond definite forms of social onsciousnes. The mode of production of material life conditions the general proccess of ocial, political and intellectual life. It is not the consciousness of men that determines their existence but their social existence that determines their consciousness.[135]

Stalinism reversed the formula in socialism in the following way:

> The superstructure is the product of the base, but this does not mean that it merely reflects the base. On the contrary, no sooner does it arise than it becomes an exceedingly active force, actively assisting its base to take shape and consolidate itself, and doing everything it can to help the new system finish off and eliminate the old base and the old classes.[136]

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[131] John Carney, *Sorry, Andrew Jackson Probably Never Said That 'Den Of Thieves' Quote*, "Business Insider", 27 Jan 2010, http://www.businessinsider.com/sorry-andrew-jackson-probably-never-said-that-den-of-theives-quote-2010-1 (read: 10.03.2015).

[132] *Bank Bail-Out: Leaving Las Vegas*, "Economist", 22 Nov 2008, p. 21.

[133] Anat Admati, Martin Helwig, *The Bankers's New Clothes: What is Wrong with Banking and What to Do about It*, Princeton University Press, Princeton, NJ 2013, p. 129–147, esp. at p. 139.

[134] Ellen Brown, *It's the Interest, Stupid! Why Bankers Rule the World*, "Global Research", http://www.globalresearch.ca/its-the-interest-stupid-why-bankers-rule-the-world/5311030 (read: 8.11.2012).

[135] Karl Marx, Friedrich Engels, *From Preface to "A Contribution to the Critique of Political Economy"*, in: Karl Marx, Friedrich Engels, Lenin, *On Dialectical Materialism*, Progress, Moscow 1977, at p. 43.

[136] Josef Visarionovič Stalin, *Concerning Marxism in Linguistics*, in: *idem*, *Essential Stalin: Major Theoretical Writings*, ed. by B. Franklin, Anchor Books, Garden City, NY 1972, at

The formula was reversed by stalinists to serve their revolution from above,[137] which was rightist so that it "cast the country deep into its imperial, autocratic past".[138]

There is an interesting parallel between stalinism and culturalism. Stalinism reversed the basis-superstructure formula after the communists had built the institutions (chiefly the Communist Party) they considered to belong to the political superstructure and used them to change the inherited — capitalist — relations of production. The change did not necessarily facilitate transition to communism and thus far has ended where it started, namely, in capitalism. The historical events that could be ascribed to culturalism, such as the Croatian left liberal decisions on human reproduction, have assumed a reversed basis-superstructure formula after it had became apparent that the relations of production in the countries of the actually existing socialism would not develop into communism. Hence the proximity of culturalism to Engels's criticism of the family but not to his criticism of private property and the state.[139]

Cognitive fecundity of the parallel can be noticed if cultural studies, as an empirical or historical activity, are ascribed to culturalism as the ideal type construed in this inquiry. The resurrection of interest in the study of culture is due largely (though by no means exclusively) to "The decline of the materialist impulse in general and the classical Marxian emphasis" and "The simultaneous resuscitation of Marxian scholars such as Gramsci […] who insisted on the independence of the cultural factor in the historical process."[140]

(BF) Moralism

Globalisation of capitalism[141] and weakening of the state in the past forty years[142] have changed dramatically the relation of law to morality in both nation states and international relations.

In Ancient Rome law was considered to be, in modern terms, a minimum morality. The idea was expressed by the maxim *Not omne quod licet honestum*

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p. 408; cit. acc. to Ivan Padjen, *Marxism and Positivism in Soviet Theories on the Foundations of International Law*, Dalhousie University Faculty of Law, LL.M. thesis, 1975, at p. 45.

[137] Robert C. Tucker, *Stalin in Power: The Revolution from Above, 1928–1941*, Norton & Co., New York 1992.

[138] *Ibidem*, a summary at http://books.wwnorton.com/books/978-0-393-30869-3/ (read: 8.03.2015).

[139] Friedrich Engels, *Der Ursprung der Familie, des Privateigenthums und des Staats. Im Anschluss an L. H. Morgan's Forschungen*, 6. Aufl., Dietz, Stuttgart 1894; repr. in: Karl Marx, Friedrich Engels, *Werke*, Bd. 29, Dietz, Berlin 1990.

[140] Richard Muench, Neil. J. Smelser, *Preface*, in: *idem* (eds.), *op. cit*., at p. X. See also Andrew Edgar, Peter Sedgwick (eds.), *op. cit*., *Introduction*, p. 1–9 and *Cultural Studies*, p. 100–103.

[141] E.g. Joseph Stiglitz, *Globalization and Its Discontents*, Penguin, London 2002.

[142] See esp. Susane Strange, *The Erosion of the State*, "Current History" 1997, Vol. 96, No. 613, p. 365–369; eadem, *The Westfailure System*, "Review of International Studies" 1999, Vol. 25, No. 3, p. 345–354.

est.[143] Law as a minimum of morality is not a concession to libertarian anarchy but the very foundation of legal order. An essential ingredient of (objective) law, as a unity of general legal standards, are moral virtues and standards, such as *bonus pater familias* and truth telling, while an essential ingredient of (subjective) right is moral autonomy of the individual. For the same reason, law as a minimum morality, which implies separation of church and state (or religion — including religious moralities — and laws, on the one hand, and secular laws, on the other), is an essential ingredient of freedoms of consciousness and religion.

In the international community as it was thirty years ago, the question about the relation of international law to morality would be pragmatically odd. Since every discourse on law necessarily includes some principles of the distribution of benefits and burdens, that is, a notion of justice, in the context of thirty years ago, in which a mass of discussions presupposed perceptibly different but inarticulated notions of justice, it was beside the mark to ask which of them was valid. A less obvious reason of the oddity was the positivisation of international legal studies, which trivialised the question by implying that answers to it could be arbitrary stipulations only.[144]

Culturalism substitutes the issues that in earlier modes of capitalism were recognized as political and legal by moral problems. By presenting its own beliefs and demands as universally morally valid and by imposing them all on others as law, culturalism creates an illiberal legal order that is comparable to the unity of the Catholic Church and the state or of the Communist Party and the state. Such a moralisation of law without politics is, needless to say, serviceable to financial capitalism, which is even without such a generous service lapsing into totalitarianism.[145]

2.4. Forecast

Under the conditions *supra* at 2.3, in the West, that is, North America and EU, including Croatia, there is a growing acceptance of the beliefs and demands that can be ascribed to left liberalism, including culturalism. There are no signs that the conditions and, consequently, the tendency of acceptance could change significantly in a forseable future. Croatian ethnical traditionalists and other conservatives, and even non-conservatives such as plain liberals and plain leftists, are likely to react to the tendency by one or more of the following activities:

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[143] *Digesta*, 50, 17, 144.

[144] Ivan Padjen, *(Ne)ćudorednost (međunarodnog) prava*, sect. 2.1.2.1.ga-gb, at p. 64.

[145] On the lapse see e.g. D. Strpić, *Moderna normal: kontekstualne teorijske osnove političke analize socijetalnih ciklusa i kriza u Matrix-kapitalizmu* [*The Modern normal Contextual Theoretical Basis of Political Analysis of Societal Cycles and Crises in Matrix-Capitalism*], "Politička misao/Croatian Political Science Review" 2009, Vol. 46, No. 3, p. 9–38.

persisting in the culture war; engaging in a crusade, perhaps strengthened by an alliance with jihadists; retreating into pre-political communities; acquiescing to and assimilating the emerging neo-liberal totalitarianism. Hardly any of the just listed reactions could result in laws and actions in accord with the constitutional principles *supra* at 2.1.

2.5. De lege ferenda

Legal responses to left liberalism, including culturalism, that would be more in accord with constitutional principles *supra* at 2.1 than the probable responses *supra* at 2.4, may be one or more of the following (*comp. supra* 1.2.2.DG):

(A) Government agreement with proponents of culturalism, incorporated as a civic association, on the instruction of culturalism as an optional course in public schools, comparable with confessional religious instruction (Catholic, Orthodox, Islamic etc.).

(B) Negative sanctioning of possible culturalist destructive practices comparable to negative sanctioning of practices of destructive groups, including destructive religious sects, already advocated in Croatia.[146]

(C) A tradeoff between the rights of legally recognized religions to provide optional confessional religious instruction in Croatian public schools and the rights of culturalist associations that their beliefs and demands are taught in public schools.

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[146] Zaključci usvojeni na Međunarodnoj konferenciji "Destruktivne skupine i mladi" pod pokroviteljstvom Primorsko-goranske županije i Grada Rijeke [Resolution of the International Conference "Destructive Groups and the Young" Under the Auspices of the Primorsko-Goranska County], http://www.cisk.hr/2011/03/rijecka-deklaracija/ (read: 9.03.2015).

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PART III

RESPECTING THE PRINCIPLE OF EQALITY CASE STUDIES

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Chapter IX

Judicial impartiality and independence in the documents of the Council of Europe

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1. General comments

Judicial impartiality and independence are considered as essential elements of a fair trial as defined in Art. 6 paragraph 1 of the European Convention on Human Rights of November 5, 1950 ("Journal of Laws" of 1993, No. 61, item 284). It shows that everyone is entitled to a fair and public trial without undue delay by a competent, impartial and independent court.

According to Jacek Gołaczyński and Alicja Krzywonos, independence must stand for the autonomy of the judge both in respect to the litigating parties as well as to the state bodies. The obligation of impartiality goes beyond the scope of protection of the principle of independence, since it obliges the judge to oppose the assessments stemming from his experience, stereotypes and prejudices. In contrast, a judge's conflict with the principle of the independence must stand for such a lack of impartiality that results from making the content of the judicial decision conditional upon the external entity.[1]

The principle of judicial independence constitutes the guarantee of civil rights and freedoms, indispensable for a democratic rule of law. Therefore, this principle should be defined broadly. In addition, it is important that the right of the litigating party to have the case adjudicated by an independent and impartial court was respected at every stage of the proceedings, both by the court of first instance as well as by the highest tribunals adjudicating in a given country. The right to an

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[1] Jacek Gołaczyński, Alicja Krzywonos, *Prawo do sądu* [*The Right to Court*], in: *Prawa i wolności obywatelskie w Konstytucji RP* [*Civic Rights and Freedoms in the Polish Constitution*], Bogusław Banaszak, Artur Preisner (eds.), Wydawnictwo C.H. BECK, Warszawa 2002, p. 725–243.

impartial and independent trial is not given once and for all. For this reason, respect for that right must be monitored both by the jurisprudence, ombudsmen and non-governmental organizations dealing with human rights. It is also in the interest of the justice system itself to maintain the standard of a fair court trial at the highest level. Therefore, the judges themselves should be interested in observance of this right and in responding to a question whether their actions guarantee the party to the proceedings the right to an impartial and independent trial.

According to Bogusław Banaszak, the principle of independence means that the judge makes an independent interpretation of the legal provisions and the assessment of facts and evidence while undertaking the activities in the area of the enforcement of justice. The independence determines the autonomy of the adjudicating judge in relation to any other person, regardless of whom they represent, and to all other state bodies. Accordingly, judicial independence is thus understood as the inadmissibility of any outside interference or pressure on the judge towards a certain adjudication of the case.[2]

Andrzej Rzepliński pointed out that the concept of the judicial independence also entails a participatory influence of judges on the recruitment of new judges, tenure of judges, their disciplinary liability only before the court and the co-decisive role of the judicial self-government in creating the content of the judicial structure determined by law. It is expected, moreover, that carefully chosen judges, with respect to their traits of character, will refrain from any and all political activity.[3]

2. The European Convention for the Protection of Human Rights in the context of impartial and independent court

The most important document in the European system of the protection of human rights is the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR), signed on 4 November 1950 in Rome by the Member States of the Council of Europe. The Convention entered into force on 3 September 1953.[4] The aim of the signatories of the signed international agreement was the protection and realization of human rights and fundamental

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[2] Bogusław Banaszak, *Konstytucyjne ujęcie zasady niezawisłości sędziowskiej w Polsce* [*The Constitutional Recognition of the Principle of Judicial Independence in Poland*], "Zeszyty Naukowe Sądownictwa Administracyjnego w Polsce" ["Scientific Papers of the Administrative Judiciary in Poland"] 2009, No. 6 (27), p. 13.

[3] Andrzej Rzepliński, *Sądownictwo w Polsce Ludowej. Między dyspozytywnością a niezawisłością* [*The Judiciary in the People's Republic of Poland. Between Dispositiveness and Independence*], Oficyna Wydawnicza „Pokolenie", Warszawa 1989, p. 6.

[4] Marek Antoni Nowicki, *Wokół konwencji europejskiej* [*Around European Convention*], Biblioteka Palestry, Warszawa 1992, p. 11–12.

freedoms. The catalogue of the established rights was intentionally limited to the most important rights that gained consensus among the states — founders of the Council of Europe.

As previously mentioned, the right of a party to a fair trial, including the right to impartial and independent court, was regulated in Art. 6 of the ECHR. According to Rzepliński, we can speak of the independence of the judiciary in a double sense, taking into account both the independence of the judiciary from all other authorities and the independence of judges in settling disputes and matters submitted to them by the parties for adjudication. In the context of judicial independence there arises the issue of the impartiality of a judge, which is not an equal notion. Judicial independence is the feature of the relation of a judge to the executive and the legislative power as well as to the judicial administration and political pressure groups or party authorities. Impartiality, in turn, as the term itself suggests, is a feature of the relation of the judge to the litigating parties.[5] There should be taken into consideration both the subjective and the objective elements of independence and impartiality. The subjective element concerns the determination of whether the judge's personal beliefs indicate the concern as to his independence and impartiality. There is presumed the impartiality of the judge until his partiality has not been proven. In practice, the evidence for the latter is considerably difficult to present. The objective component is determined by the fact of whether in the eyes of the litigating party the judge does not present himself as biased.[6]

A new phenomenon occurring in the modern world is to exert pressure through the media, referred to as the fourth power, next to the legislature, the executive and the judiciary. Hans Joachim Schneider draws attention to the often false image presented in the mass media, influencing public opinion and judicial decisions.[7] Therefore, judges should be particularly attentive to the fact whether publications, especially published in the electronic media, do not affect the rulings issued by the judiciary. In order for the judge not to yield and to resist such pressures, he must know the mechanisms for creating the views of the public through the mass media and seek to establish the objective truth. Therefore, justice system must be independent not only from the public authorities, but also from "the fourth power, namely the mass media".

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[5] Andrzej Rzepliński, *Zasada niezawisłości sądów i jej ustawowa aplikacja w Rzeczypospolitej Polskiej* [*The Principle of Judicial Independence and its Statutory Application in the Republic of Poland*], in: idem (ed.), *Prawa człowieka w społeczeństwie obywatelskim* [*Human Rights in Civil Society*], Wydawnictwo Helsińskiej Fundacji Praw Człowieka, Warszawa 1993, p. 118.

[6] Clare Ovey, Robin C.A. White, *European Convention on Human Rights*, 3rd Edition, Oxford University Press, Oxford 2002, p. 160.

[7] Hans Joachim Schneider, *Zysk z przestępstwa. Środki masowego przekazu a zjawiska kryminalne* [*Profit from Crime. Media and Criminal Phenomena*], Wydawnictwo Naukowe PWN, Warszawa 1992, p. 135–140.

It is equally important to show both to the litigating parties and to the public opinion that the judiciary is independent and impartial. This objective can be achieved through clear communication related to the trial, by holding a dialogue with the litigating parties and their attorneys, but also in the form of a clear system of providing the statements of reason of court judgements, both in oral and written form. In particular, a judge should be aware of the addressee of his decisions and identify what values he was guided by in presenting a particular adjudication. Marek Antoni Nowicki notes that the judicial power should not only be exercised, but it should be shown that the latter indeed takes place.[8]

It should be kept in mind that the judicial trial is not carried out in a democratic society in an utter isolation. Rather, it is integrated with the structure of the separation of powers and in the democratic public sphere with its own control mechanisms. Control instruments on the part of the public assume the form of the media and therefore the fundamental power of a judge should be the ability of handling the media in a competent and skilful manner. Therefore, judges should have a proper education in public relations. They should be able to explain their own decisions (judgments) in simple and understandable words. They should appreciate journalists as important players in the game of freedom and democracy.[9]

3. Recommendations of the Committee of Ministers of the Council of Europe and the independence and impartiality of the judge

An important role in shaping a fair trial can be played by the recommendations of the Committee of Ministers of the Council of Europe. In fact there is a dispute as to the legal nature of the recommendations. They are not mandatory law, but they are especially important from moral and political point of view, as well as they are crucial in the development of international law. They affect the formation of legal opinions and the positions of other states, and they may also contribute to shaping the norms of customary law.[10]

The recommendations of the Committee of Ministers of the Council of Europe as a kind of soft law are addressed to the Member States. Although they are not formally binding, the Committee of the Council of Ministers has the right

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[8] Marek Antoni Nowicki, *Europejski Trybunał Praw Człowieka. Orzecznictwo*, t. 1: *Prawo do rzetelnego procesu* [*The European Court of Human Rights. Case Law*, Vol. 1: *The Right to a Fair Trial*], Kantor Wydawniczy Zakamycze, Kraków 2001, p. 279.

[9] Paul Tiedemann, *Wyzwania stawiane przed sędzią XXI wieku* [*The Challenges Posed before a Judge in the XXI Century*], "Zeszyty Naukowe Sądownictwa Administracyjnego" 2012, No. 6 (45), p. 90.

[10] Remigiusz Bierzanek, Janusz Symonides, *Prawo międzynarodowe publiczne* [*Public International Law*], Wydawnictwo Naukowe PWN, Warszawa 1992, p. 286–288.

under Art. 15 point b of the Statute to address the Member States for information on how the case proceeds. The standards of the soft law are made use of when the Council of Europe is not yet ready to agree on convention-based solutions. Therefore, the recommendations inspire the creation of treaty-based standards (then their significance is of temporary nature), or they complement the latter (in such case their significance is permanent).[11] In the case of recommendations on fair trial the recommendations are of permanent character and they complement the understanding of the said issues contained in Art. 6 of the ECHR.

According to Z. Kmieciak, the provisions of the European soft-law entail the recommendations addressed not only to the national legislator, but also to practice. In the situation when there can be inferred adequately substantiated rules of conduct from the said soft-law, they can be regarded as an important source of interpretative directives that fill in the content of the framework of the national procedural regulations.[12]

The recommendation concerning the right to a fair trial was devoted to the excessive workload in courts and solutions to reduce the latter. The recommendation No. R (86) 12 of the Committee of Ministers dated 16 September 1986 on measures to prevent and reduce the excessive workload in courts drew attention to the possibility of an amicable settlement of disputes both in pre-court proceedings and in court. Moreover, it was recognized that some activities do not need to be performed by judges, e.g. maintaining business records and collecting court fees. Additionally, there was pointed out the need to regularly monitor the cases in terms of their number and degree of difficulty, thus ensuring the balance in the workload to ensure to the parties the safety in the adjudication of cases on the adequate legal level[13]. It should be stressed at this point that an excessively overloaded judge is not able to guarantee to the litigating party a fair conduct of the proceedings, i.e. to mobilize the appropriate time to prepare for the hearing, to secure the freedom of expression, to devote the adequate time for a hearing, and finally, to adjudicate the case within a reasonable time.

One of the most important documents of the Committee of Ministers of the Council of Europe is the Recommendation R (94) 12 of 13 October 1994 on

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[11] Jerzy Jaskiernia, *Rada Europy jako organizacja międzynarodowa kreująca i oddziałująca na implementację standardów demokratycznych* [*The Council of Europe as an International Organization Creating and Influencing the Implementation of the Democratic Standards*], in: idem, (ed.), *Rada Europy a przemiany demokratyczne w państwach Europy Środkowej i Wschodniej w latach 1989–2009* [*Council of Europe and the Democratic Transitions in the Central and Eastern Europe in the years 1989–2009*], Wydawnictwo Adam Marszałek, Warszawa 2010, p. 35.

[12] Zbigniew Kmieciak, *Postępowanie administracyjne i sądowoadministracyjne, a prawo europejskie* [*Administrative and Court-Administrative Proceedings*], Wolters Kluwer, Warszawa 2010, p. 93–94.

[13] Recommendation No. R (86) 12 of the Committee of Ministers of the Council of Europe concerning measures to prevent and reduce the excessive workload in the courts.

independence, efficiency and role of judges.[14] The latter constitutes a kind of soft law and draws attention to an important element of fair trial. In the analysed document the emphasis was primarily put on Art. 6 of the ECHR, i.e. that "everyone has the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" as well as on the Basic principles of independence of courts and judges adopted by the UN General Assembly in November 1985. The introduction to the recommendations pointed out the important role of judges in protecting human rights and fundamental freedoms, since the independence of judges aims at strengthening the rule of law in democratic states in order to achieve an efficient and fair legal system. In the preamble it was recommended that the governments of the member states should adopt or consolidate any and all measures necessary to increase the role of individual judges and the entire judiciary and to strengthen the independence and autonomy, as well as efficiency.

An integral part of these recommendations is the Explanatory Memorandum,[15] which stated that the independence of the judiciary is one of the main pillars of the rule of law. The need to strengthen the independence of judges not only refers to individual judges but it may be also relevant for the entire system of justice.

The recommendation applies to all persons exercising judicial functions, including those appointed to adjudicate cases related to constitutional law, criminal, civil, commercial and administrative law. In general, the recommendations were divided into six principles:

1. General principles of judicial independence;
2. The authority of judges;
3. Adequate working conditions;
4. The right to associate;
5. Duties of judges;
6. Violation of duties and disciplinary offences.

The General Rules governing the judicial independence set forth that there should be applied any and all the necessary measures to comply with the protection and strengthening of independence, and in particular the independence of judges should be guaranteed in accordance with the provisions of the Convention and constitutional principles. Each state should create appropriate conditions so that:

1) judicial decisions could not be altered in any procedure other than that provided by law for the appellate proceedings;

2) the conditions of the terms of office of judges and their remuneration were statutorily defined;

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[14] Recommendation No R (94) 12 of the Committee of Ministers of the Council of Europe on the independence, efficiency and role of judges.

[15] Recommendations and explanatory memorandum issued in the form of a separate brochure "Independence, Efficiency and Role of Judges", *Legal Issues* (Council of Europe Publishing 1995).

3) no non-judicial body could take a decision on the court's jurisdiction under the law;

4) the government or the administration could not take any decisions derogating previously issued court decisions, apart from the use of amnesty, pardon or similar measures.

Judicial independence is mainly connected with the maintenance of the separation of powers (Art. 2 paragraph 2b of the Rules). The executive and legislative authorities have a duty to ensure the independence of judges. Some of the measures taken by these authorities may directly or indirectly interfere with the exercise of judicial power or modify it. Therefore, the executive and the legislative authorities should refrain from any steps that could undermine the independence of judges. This also applies to pressure groups and other interest groups (paragraph 15 of the commentary to the Rules).

What arises as the essential issue is the necessity of ensuring the independence of judges at the time of their appointment and during their entire professional career (Art. 2 paragraph 2c of the Rules) as well as avoiding any discrimination. The decisions in respect of appointing a judge and to promote him should be transparent in nature and be evaluated by independent bodies (paragraph 16 of the commentary to the Rules).

The recommendation contains the proposals (Art. 2 paragraph 2d) of the standards which should be preserved by all Member States so that these decisions were undertaken in a manner free from any undue influence from the executive power or the administration. In addition, judges should have the legal education, appropriate theoretical or practical knowledge and high skills, which — according to the authors of the commentary on the Rules — will guarantee greater independence from the administration (paragraph 16 of the commentary to the Rules).

Judges, when making their decisions, should be able to act independently (Art. 1 paragraph 2d of the Rules). The judge should have unlimited freedom to impartially adjudicate in the case, guided by the applicable law, in accordance with his conscience and understanding of the circumstances of the case. The aim of this recommendation is to ensure that there will not be any kind of pressure exerted on the judge to make him issue the ruling in accordance with the wishes of one of the litigating parties, the administration, the government, or any other authority. Attempted bribery of a judge should be prosecuted under criminal law. In some states, judges are obliged to inform the chairman of the court or other authorities, for example about delay in the examination of cases. The latter is thought to be necessary for the efficient management of limited personal resources in court and for planning and is, naturally, consistent with the idea of judicial independence. Since, however, it can be sometimes used to influence the judges, they should not be obliged to provide information about the merits of cases in justifying the decisions (paragraph 17 of the commentary to the Rules).

An important guarantee of judicial independence is the way of allocating cases. There are many ways of distributing the cases, for example, by a draw, according to the alphabetical order of the names of the judges, by allocating cases to specialized sections in court, according to a predetermined sequence (i.e. automatic division of cases) or assigning cases to judges by the chairman of the court (Art. 2 paragraph 2e of the Rules). What is important is obviously not the very system of distributing cases, but that it was not subject to external influence and that it did not provide an advantage to one party. In some cases (illness of the judge or conflict of interest, it is permissible to transfer the case to another judge (paragraph 18 of the commentary to the Rules).

In addition, the judges, both elected and appointed, should be guaranteed the performance of the office until retirement age or the expiry of the period of appointment, if it exists (Art. 3 of the Recommendations).

Rule II of the Recommendations concerns the authority of judges. To ensure the respect due to the judge's office as well as efficient proceedings, all participating entities (parties, witnesses, experts) must be, in accordance with the national law, subject to the judicial authority. Public authorities and their representatives must also be subject to the judicial authority. Judges should be provided with practical measures and appropriate powers to ensure order in the proceedings. If they are provided with such powers they have the duty to prevent any situation that would call into question their independence. As an example, there could be indicated the proceedings, existing in some Member States, in respect of the contempt of court. Moreover, during the trial it may prove necessary to guarantee the presence of the guards to remove the people who cause disturbances (paragraphs 22–25 to the commentary to the Recommendations).

The third part of the Recommendations is devoted to creating appropriate working conditions for judges. Suitable working conditions are a noteworthy element of the projects aimed at improving the efficiency and fairness of justice. Judges' right to such working conditions stems from the authority vested in them and from the requirement of its independent implementation. It is necessary to acquire the appropriate number of judges to prevent excessive workload and allow them to bring to an end the instituted proceedings in a reasonable time, regardless of their number (Art. 1 paragraph 1a). The states could also consider the possibility of hearing cases in one-judge panel in the first instance. In order to ensure the proper application of the law one cannot just limit to set forth the requirement, at the recruitment stage, of the judges holding appropriate qualifications; they must be properly trained before their appointment and during their professional careers. Important elements of appropriate working conditions are the status and the remuneration. The status granted to the judge should relate to the dignity of his office, and the salary should sufficiently compensate the weight of his responsibilities. These factors are important for the independence of judges. What is of utmost importance is the recognition of the importance of their role, expressed in terms of the respect

due to them and adequate remuneration (paragraphs 25–29 of the Commentary to the recommendations). Besides, there should be taken all measures necessary to ensure safety of judges, such as the presence of the policing service in courts and providing police protection to the judges who may become or have become victims of serious threats (Art. 2 of the Rule III of the Recommendations).

In addition, Rule IV of the Recommendations indicates the right of association of judges in their own groups that guard the independence of judges.

Rule V of the Recommendations was devoted to the obligations of judges. In the course of the proceedings judges have a duty to protect the rights and freedoms of all people. Judges have the duty and should be equipped with powers enabling them to fulfil the judicial duties in such way that they can ensure the proper application of the law and the impartial, efficient and quick adjudication of cases.

Judges should in particular be required to:

a) adjudicate all cases independently and without any external influence,

b) adjudicate all cases in an impartial manner in accordance with one's own assessment of facts and understanding of the law, to ensure that all the parties are duly heard and to respect the procedural rights granted to the litigating parties under the provisions of the Convention,

c) withdraw from the adjudication of the case or to refrain from a specific action when this is justified by legitimate reasons, and only in such cases. Such reasons should be prescribed by law and may refer, for example, to serious health problems, conflicts of interest or conflict of the interests of justice,

d) to impartially explain to the litigating parties the procedural issues, if such need arises,

e) to encourage parties, where appropriate, to conclude a settlement,

f) to provide clear and complete as well as easily understandable motives of the decisions, unless the law or established practice prove to the contrary.

In turn, Rule VI of the Recommendations applies to misconduct and disciplinary offences. It provides for the responsibility of the judge when he does not carry out his duties efficiently and properly or in the event of disciplinary offences. In respect of disciplinary liability of judges the law should establish appropriate procedures to ensure all the procedural guarantees provided for the ECHR, for example, the adjudication of cases within a reasonable time and the right to respond to any objections (Art. 1 and 2 of Rule VI of the Recommendations).

4. The European Court of Human Rights in Strasbourg as a guarantor of a fair trial

The most important role in the area of setting the standards for the protection of human rights in practice is played by the European Court of Human Rights in Strasbourg (hereinafter ECHR), which operates in the structures of the

Council of Europe. The case law of the Court has most often taken the issue of the interpretation of Art. 6 of the ECHR, including the right to an impartial and independent court.

In its judgment of 10 January 2012 on *Pohoska vs. Poland* (application no. 33530/06),[16] the ECHR has made attempts to define an independent and impartial court. The Court pointed out that in deciding whether a given body can be considered 'independent' — notably independent of the executive power and of the parties involved in a case — there should be taken into account, among other things, the appointment of its members and the duration of their term of office, the existence of guarantees against outside influence and there should be also settled the question of whether this body has external attributes of independence (see case *Campbell and Fell vs. United Kingdom*, June 28, 1984, § 78, Series A no. 80; *Findlay vs. United Kingdom*, 25 February 1997, § 73, *Reports of Judgments and Decisions* 1997-I; *Incal vs. Turkey*, 9 June 1998, § 65, *Reports* 1998-IV; *Brudnicka and Others vs. Poland*, No. 54723/00, § 38, ECHR 2005-II; and *Luka vs. Romania*, No. 34197/02, § 37, 21 June 2009). Moreover, the requirement of the irremovability of judges by the executive during their term of office must be generally regarded as a natural consequence of their independence, and therefore it must also be subject to the guarantees provided in Art. 6 § 1 (see *Campbell and Fell* case, cited above, § 80). The Court further reminded that the required guarantees of independence are applicable not only to 'court' within the meaning of Art. 6 paragraph 1 of the Convention, but they extend also to "judge or other officer authorized by law to exercise judicial power", as referred to in Art. 5 paragraph 3 of the Convention (see *McKay vs. United Kingdom* [GC], No. 543/03, § 35, ECHR 2006-X). The Court also notes that in a democratic society the issue of fundamental importance is the existence of public confidence in the courts. To this end, Art. 6 requires impartiality of the court under its scope. Normally, impartiality stands for no bias and prejudice, and its existence or its absence can be checked using various tests. The Court has made, therefore, a distinction between a subjective approach — that is the desire to determine whether in a particular case there are any judicial beliefs or interests of a personal nature, and an objective approach — that is, determining whether a judge provides guarantees sufficient enough to rule out any reasonable suspicion in this respect (see *Piersack vs. Belgium*, 1 October 1982, § 30, Series A No. 53, and *Grieves vs. United Kingdom* [GC], No. 57067/00, ECHR 2003-XII (exceptions)). The Court in its judgments consistently argued that the existence of personal impartiality of a judge should be adopted as early as the premise, unless

[16] The analysis of the judgment: Agnieszka Wilk-Ilewicz, *Definicja niezawisłego i bezstronnego sądu oraz dostęp do sądu administracyjnego* [*Definition of an Independent and Impartial Court and Access to the Administrative Court*], "Zeszyty Naukowe Sądownictwa Administracyjnego" 2012, No. 2 (41), p. 96–99, and the full text of the judgment and its translation on www.ms.gov.pl.

there is evidence to the contrary (see *Hauschildt vs. Denmark*, 24 May 1989, § 47, Series A No. 154). Regarding the evidence required in this respect, the Court, for example, seeks to ascertain whether a given judge shows hostility or ill will or has arranged to assign him with a specific case for consideration for personal reasons (see *De Cubber vs. Belgium*, 26 October 1984, § 25, Series A No. 86). The principle, according to which the court is deemed to be free of prejudice and bias, has for long time been perpetuated in the case law of the Court (see, for example, *Le Compte, Van Leuven and De Meyere vs. Belgium*, 23 June 1981, § 58, Series A No. 43). The Court noted that in some cases it will be difficult to provide evidence to rebut such an assumption, however, it should be remembered, at the same time, that the requirement of objective impartiality provides a further important guarantee (see *Pullar vs. the United Kingdom*, 10 June 1996, § 32, *Reports of Judgments and Decisions* 1996-III). In other words, the Court recognized the difficulty of finding a violation of Art. 6 due to the subjective bias of the judge, and therefore in most cases concerning the issues of the impartiality of the court — it focused on the objective test. However, one cannot strictly separate these two concepts here, since the specific conduct of a judge may not only lead to an objective fear as to his impartiality from the point of view of an external observer (an objective test), but it may also touch on the question of his personal conviction (a subjective test) (see *Kyprianou vs. Cyprus* [GC], No. 73797/01, § 119, ECHR 2005-XIII). Regarding the second type of test — in the situation when we apply it for the entire panel of the judges, it consists of determining whether — regardless of the personal conduct of any of the members of this panel — there exist verifiable facts which may raise doubts as to its impartiality. In this regard, external attributes may also be of some significance (see *Castillo vs. France*, 28 October 1998, § 45, Reports 1998-VIII; *Morel vs. France*, No. 34130/96, § 42, ECHR 2000-VI and *Kyprianou vs. Cyprus* [GC], cited above, § 118, ECHR 2005-XIII). In deciding whether in a given case there is a legitimate reason to fear that a given body is not impartial, the position of the people raising the objection of impartiality is important, but not decisive. The decisive factor is indeed the fact whether such a fear may be regarded as objectively justified (see *Ferrantelli and Santangelo vs. Italy*, August 7, 1996, § 58, Reports 1996-III, and *Wettstein vs. Switzerland*, No. 33958, § 44, ECHR 2000-XII).

In the context of the analysed case, the Court noted that the applicant's neighbour, and at the same time the opponent, in some cases turned out to be the brother of inspecting judge in the Regional Court in Elbląg. In the Polish judicial system the inspecting judge is responsible for the quality of rulings rendered by judges of the Regional Court and the district courts, as well as for the manner in which they perform their duties in the framework of the cases adjudicated by them. The functions of the inspecting judge can influence the course of the careers and promotions of other judges. The Court of Appeal in Gdańsk, bearing in mind the relationship between D.Ł. and an inspecting judge, repeatedly held that the

judges adjudicating in Elbląg courts should be excluded from cases involving the applicant. The Court considers that it cannot be ruled out that the situation in which national courts deem appropriate to exclude judges from adjudicating a given case and then the same judges are appointed to examine another case involving the same parties—may raise questions in the light of Art. 6 of the Convention. The Court notes, however, that in the particular circumstances of the present case it is not necessary to undertake a detailed examination of this particular aspect of the case, due to the following reasons. The Court notes that in the case initiated by the applicant, the assessor E.M. dismissed the applicant's request for excluding K.S., i.e. another assessor appointed to examine the case. The said ruling did not refer either to the links between D.Ł. and the inspecting judge, or to the earlier decisions of the Court of Appeals in Gdańsk. In this context, the Court observes that at the material time the inspecting judges were responsible for the evaluation of the suitability of assessors to perform judicial functions. Furthermore, the Court observes that at the material time the assessors were appointed by the Minister of Justice, provided that they meet a number of conditions specified in the Act of 27 July 2001 (as amended) on common courts ('the Act of 2001'). The Minister could trust the assessors the performance of judicial duties in the district court, subject to the approval by the college of regional court judges, for a period not exceeding four years (Art. 135 paragraph 1). In accordance with Art. 134 paragraph 5 of the Act of 2001, the Minister could have dismissed the assessor, including the assessor performing judicial duties.

The Court has previously held, bearing in mind the position of the Constitutional Court, that the court consisting of assessors was not independent within the meaning of Art. 6 paragraph 1 of the Convention, due to the fact that the Minister of Justice could have dismissed the assessor at any time during his term of office, and that there were not sufficient guarantees to protect him against the arbitrary exercise of the Minister's privileges (see *Henryk Urban and Ryszard Urban vs. Poland*, cited above, §§ 51–53). In conclusion, the Court therefore held, having regard to all the circumstances of the case, that there has taken place the violation of Art. 6 paragraph 1 of the Convention.

In another judgment as of 29 February 2012 on *Kinský vs. the Czech Republic*, application number 42856/06 (published in SIP LEX No. 1107808), the ECHR held that Art. 6 of the Convention requires that the courts were independent and impartial. The existence of impartiality for the purposes of Art. 6 paragraph 1 of the Convention must be settled in accordance with the subjective criterion, namely based on the personal conviction of a particular judge in a given case, and also according to an objective test, namely, after assessing whether a given court gave guarantees sufficient to exclude any legitimate doubt in this respect. This case concerns an objective criterion, since the applicant had not raised in his application the question of personal prejudice against him on the part of the judges. As for the objective criterion, it must be decided whether apart from judges' behaviour

there exist the facts — subject to assessment — that may raise doubts as to their impartiality. This means that when deciding on the existence in a given case of a justified reason to fear that a particular judge or authority exercising the function of the adjudicating panel lacks impartiality, the position of the person concerned is important but not decisive. The decisive question is whether this fear can be objectively justified. In this respect even appearances may be of some importance or, in other words, justice must not only be served, it must be also visible. What is at stake here is the confidence which the courts in a democratic society must inspire in society. In this case the applicant's statements show clearly that in his opinion, the judges were not impartial. It should, however, be decided whether those doubts were objectively justified. The Court understands that the media and the politicians are interested in the issue of the return of property confiscated before 1990 due to general action aiming to determine the owners of the property. The success of such activities could lead to the return of trillions-worth-of assets not only to the applicant, but to many other people who lost their property before 1990 and to whom the (national) regulations in respect of restitution did not apply. Consequently, one must agree with (the respondent) Government that the interest of politicians in this question and their meetings aiming at finding solutions to this situation were legitimate and, as such, they did not raise questions under the Convention.

In another judgment as of 29 May 2012 *Ute Saur Vallnet vs. Andorra*, application number 16047/10 (published in SIP LEX No. 1164656), the ECHR decided that in the present case it was beyond dispute whether Judge S. was a partner of a law firm that provided legal services for remuneration to the respondent Government at a time when the proceedings were pending under appeal. This follows from a decision of a national criminal court as of June 15, 2011, which states that at a time when S. was a partner in the law firm concerned, the respondent Government paid to the company conducting audits the amount corresponding to invoices issued for various services rendered. Although the respondent Government maintained that the law firm's invoices for the respondent Government covered the period that did not coincide with the period specified in this judgment, and the national criminal court erred in this respect, the Court cannot ignore the position of this court, according to which "the legal representative [of the applicant] submitted certain invoices issued to the respondent Government by the law firm R., where S. was a partner, in respect of the period in question, namely the year 2004, which coincides with the peak of the crisis between [the applicant company] and the Government [concerning the wastewater treatment plant]", which proves "the existence of an economic relationship at the material time between the law firm R. […] and one of the parties". In any case, it should be noted that in his letter as of 27 May 2005, "the Minister responsible for planning [of the respondent State] referred to the letter as of 29 July 2004 in which the applicant [the company] has been informed about the

displeasure of the administrative bodies due to the lack of non-compliance by the said wastewater treatment plant with the minimum requirements of wastewater disposal, set forth in the contract, indicating that the 'crisis' mentioned by the criminal court, began in 2004 at the latest".

5. Conclusion

The right to an impartial and independent court is an essential element of a fair trial as defined in Art. 6 of the ECHR.

One of the most important documents of the Committee of Ministers of the Council of Europe is a type of soft law that draws attention to a crucial element of due trial, namely Recommendation R (94) 12 of 13 October 1994 on independence, efficiency and the role of judges.[17]

The European Court of Human Rights in many of its judgments aimed to interpret Art. 6 of the ECHR for the impartiality and independence of the judiciary.

Judges themselves should put efforts that their work does not raise questions as to judicial impartiality and independence both in objective and subjective terms.

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[17] Recommendation No. R (89) 8 of the Committee of Minister to Member States on the independence, efficiency and role of judges.

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Chapter X

Facing human rights attributes of copyright in Europe in the context of the EU Digital Single Market

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1. Subject and Purpose

The focus of the article is the initial development of the study on the human rights attributes of copyright in Europe in the context of the EU Digital Single Market. The article is written in the form of a condense research proposal and consists of three parts: 1. Subject and Purpose; 2. Description of issues and organization; 3. Validity for research and results.

German cultural philosopher, Walter Benjamin in the 1930s believed that the aura surrounding artistic work and its protection would diminish with the increase of reproduction techniques. But as our experience of today tells us nothing could be further from the truth. On the contrary, that aura and the assumption of genius and authenticity has increased thousands of times.[1]

As opposed to what is the case with other traditional areas of law such as property law, copyright law has historically been an international discipline. The profound and gradual development of copyright is a recent internationalizing factor. Copyright has great political, economic and cultural significance recognizing no national borders. The sources of copyright origin in the different relationships of copyright within and outside the European Union. They consist of international copyright treaties as well as regulations having unitary effect and harmonizing directives to be implemented in national law. The main principles and rules of modern copyright law are enshrined in the Berne Convention of 1886 for the Protection of Literary and Artistic Works. Copyright are the rules

[*] Lund.

[1] Joost Smiers, Marieke van Schijndel, *Imagine There is No Copyright and No Cultural Conglomerates Too,* Institute of Network Cultures, Amsterdam 2009, p. 13.

for protection of original expressions that has been among the legal disciplines most powerfully affected by the new digital environment. Therefore the Berne Convention has been reviewed few times after that to adapt it to emerging technologies, but the essence of the rights of the authors and the users as well as the principles by which these rights are awarded have not attracted any significant changes. The subsequent developments, for instance the WIPO Copyright Treaty or the INFOSOC Directive did not introduce any changes to the main concepts of copyright and copyright protection. They, instead, insisted on keeping the same standards and rules of protection as in the XIX century, accompanied by skepticism about the proposition that new developments in technology implies the need for new laws or rules.[2]

Now, copyright in Europe is facing something profoundly new, and that is the EU Digital Single Market — which is the consequence of the growing concepts of European Knowledge Society and Digital Europe that were in particular supported and developed during the Swedish Presidency of the European Union. This type of a market gives Europeans previously unimagined opportunities for distribution of and access to copyright protected material to the benefit of both authors and users. On the negative side, the new technology facilitates massive copyright infringements, and, conversely, enables technical control potentially intervening with legally recognized 'fair use' rights. The remaining question is whether copyright of today is still in a position to maintain the delicate balance between proprietary rights and public access.

The EU Digital Single Market emerged as a result of three major developments in modern technology: the possibility to transform knowledge (including data and information) to a digital format, to communicate information through computer network systems and to use standard communication protocols (e.g. the Internet Protocol) and application protocols (e.g. World Wide Web). Therefore, in this type of the Market, data, information and knowledge are the main assets and thus legal rules determining their use and exploitation are of utmost importance. At the beginning of 2014, we are witnessing vivid debates on copyright in Europe as a threat to: public open data, open access to knowledge and also guaranteed access to the open Internet. According to Member States that calls for consultations on emergent copyright law in order to modernize those rules and to make them fit the requirements of the new open era, fit the EU Digital Single Market.[3]

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[2] Frank H. Easterbrook, *Intellectual Property is Still Property*, "Harvard Journal of Law and Public Policy", Winter 1990, Vol. 13, No. 1, p. 108–118, esp. p. 108; see also Makeen Fouad Makeen, *Copyright in a Global Information Society. The Scope of Copyright Protection Under International, US, UK and French Law*, Kluwer Law International, Hague–London–Boston 2000, p. 27–30.

[3] See recent e.g. Neelie Kroes, *A vision for Europe*, World Economic Forum Davos, January 2014. See also *Digital Agenda for Europe*. Available at http://ec.europa.eu/digital-agenda/en/digital-agenda-europe (access: 05.04.2015).

What creates the background of the study on the identification of the human rights attributes of copyrights in the context of the EU Digital Single Market is the relation between international human rights and copyrights. Both sets of rights have been isolated from each other for a long time.[4] There is only one explicit reference to intellectual property in the Charter of the Fundamental Rights of the European Union that says that copyright as a main part of intellectual property shall be protected.[5] Moreover there are no references to human rights in the major copyright treaties.[6]

> While the international community was concerned with guaranteeing the human beings dignity and well-being by the means of human rights treaties, copyright, has remained a normative backwater in the burgeoning post-World War II human rights movement, neglected by international tribunals, governments, and legal scholars while other rights emerged from the jurisprudential shadows. For many years since the formation of human rights and copyrights (irrespectively also intellectual property rights), no one was exploring the clash, if any connection at all, of these two set of laws. This inattention can be due to the fact that at least in their facade and from a dogmatic point of view they are highly dissimilar and separate, one belonging to the area of public international law and the other mainly bearing the characteristics of a private law member.[7]

The International Committee on Economic, Social and Cultural Rights (ICESCR) in 2001 for the first time interpreted the relationship between copyright provisions and economic, social and cultural rights, when presenting a Statement on Human Rights and Intellectual Property.[8] In this statement, copyright protection was introduced as one that should serve the objective of human well-being, to which international human rights instruments give expression. The Committee also pointed out that copyrights must both promote and protect all human rights. What was crucial for the Committee was the fact that e.g. Article 15 of the Covenant on

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[4] Willem Grosheide (ed.), *Intellectual Property and Human Rights. A Paradox*, Edward Elgar, Northampton 2010, p. 3–37; Laurence R. Helfer, Graeme W. Austin, *Human Rights and Intellectual Property. Mapping the Global Interface*, Cambridge University Press, Cambridge 2011, p. 64–81.

[5] See Article 17(2) of the Charter of the Fundamental Rights of the European Union. See also Ronan Deazley, *Rethinking Copyright. History, Theory, Language*, Edward Elgar, Northampton 2007, p. 135–139.

[6] See Paul L.C. Torremans (ed.), *Intellectual Property and Human Rights*, Wolters Kluwer Law & Business, Austin 2008, p. 36–38; see also Agreement on Trade-Related Aspects on Intellectual Property (TRIPS Agreement) of 1994. TRIPS is recognizing intellectual property rights as private rights; Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?*, "Minnesota Intellectual Property Review" 2003, Vol. 5, p. 47–61, esp. p. 50.

[7] Clare Ovey, Robin C.A White, *The European Convention on Human Rights*, 4th Edition, Oxford University Press, Oxford–New York 2006.

[8] See the UN Economic and Social Council, Comm. on Economic, Social and Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UN Doc. E/C12/2001/15, 14. Available at www.unhchr.ch/tbs/doc.nsf/0/lelf4514f8512432c1256ba6003b2cc6 (access: 02.03.2015).

Economic, Social and Cultural Rights (CESCR) includes the requirement to balance the protection of private and public interest in data, information and knowledge. Therefore, the private interest should never be unduly advantaged. According to the Committee the public interest in enjoying broad access to data, information and knowledge should be given due consideration. In this Statement the Committee introduced an agenda to draft General Comments on each of the CESCR's copyright clauses. Up to this date the majority of the Comments are developed and binding for the governments that often do not pay them sufficient attention, or even do not pay attention at all to this fact while progressing with copyright provisions, e.g. General Comment No. 17, "The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author", Art. 15 (1) (c) of 2005; General Comment No. 13, "Right to education", Art. 13 of 1999; General Comment No. 21, "Right of everyone to take part in cultural life", Art. 15, para. 1 (a), of 2009.

In that context, the purpose of the proposed study would be to explore the human rights attributes (and at the same time distinguishing them from the non-human rights aspects) of copyrights' law in Europe in the context of the emerging EU Digital Single Market in order to suggest new approaches that could be introduced into present copyright law in Europe. These approaches would focus on the specification of the minimum outcomes that human rights law requires of EU Member States in terms of public open data, open access to knowledge and also guaranteed access to the open Internet. The research eventually will approach the question whether copyright in Europe in the context of the emerging EU Digital Single Market is in a position to maintain the delicate balance between proprietary rights and public access on behalf of creators, inventors and users. The focus of the study will remain not on the companies that own copyright but on creators and consumers—as human beings and citizens of Europe that freely create, use and disseminate data, information and knowledge.[9]

2. Description of issues and organization

First of all, the research will aim to provide an overview and synthesis of the meaning and principles of the EU Digital Single Market. In order to do that firstly the EU Digital Single Market will be presented as a natural consequence of the ongoing development of the Knowledge Society with the accompanying idea of the Information Society and even the Industrial Society in the past.[10] This

[9] See Lior Zemer, *The Idea of Authorship in Copyright*, Ashgate Publishing Limited, Aldershot 2007.

[10] Rochelle Dreyfuss, Diane Leenheer Zimmerman, Harry First, *Expanding the Boundaries of Intellectual Property*, Oxford University Press, Oxford 2001, p. x–xxiv.

will be analysed in light of the theories of knowledge and also in the light of the implications of knowledge and value based approaches in Europe.[11] Secondly the new *Digital Agenda of the EU, A Europe 2020 initiative* will be introduced as a tool that focuses on the update of the EU Single Market rules for the digital era. The framework conditions of this type of market will be clarified together with the need for action in various areas of copyright that relate to: public open data, open access to knowledge and guaranteed access to the open Internet. The alternative is that the entire system will lose in credibility and confidence. The threat of different Member States heading in different directions will be suggested as a dangerous development, and a negative force towards coherence and capability of one Internet: single, unified, innovative.[12]

The focus of this overview and synthesis will stay within the content of the number of areas of legal concern and future legislative reform proposals. The areas that might be chosen for the purpose of this research are the following: establishing a way forward regarding transformation in copyright in Europe; simplifying the distribution of creative content; simplifying pan-European licensing for online works; preserving orphan works and out of print works; opening up public data resources re-use; simplifying the distribution of creative content; protecting copyright online.[13]

For example the problem related to the fact that legal online use of creative content, especially films is tough in Europe. European online platforms are an easy way to distribute and exchange all kinds of creative content: music, films, pictures and more. Individual consumers have high expectations — they want to access content of their choice anytime and on a range of devices. But Europe lacks unified markets for online content. It can be difficult, for example, for a Maltese consumer to download or stream from a Swedish website. In this situation both creators and consumers lose out: consumers do not have access to diverse European content, and creators are losing revenue because of the illegal markets which spring up to bridge the gaps. Often, difficulties with accessing content online are due to licensing issues. Industry-led changes combined with the improvement of the legal framework will enable innovative and consumer-friendly content distribution across Europe. The European Commission proposed legislation on collective rights management in 2012 and is working with the European Parliament and the Council to ensure its swift adoption. A structured stakeholder dialogue "Licenses for Europe" started in 2013 and will continue with the objective of identifying practical solutions to ensure that copyright management stays fit for purpose in the digital world. The Commission will complete its on-going review of the EU copyright framework, based on market studies and legal drafting work, with a view to deciding in 2014–2015 whether to table the resulting legislative reform proposals.

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[11] See Peter Drucker, *The next society*, available at www.economist.com/surveys (access: 20.03.2015); see Zygmunt Bauman, *Socjologia*, Wydawnictwo Zysk i S-ka, Poznań 1996; see also idem, *Globalization: The Human Consequences*, Columbia University Press, New York 1998.

[12] See *The Digital Single Market EU Agenda. Pillar I.* Available at http://ec.europa.eu/digital-agenda/en/our-goals/pillar-i-digital-single-market (access: 17.08.2015).

[13] *Ibidem.*

One more example, with regard protecting copyright online can refer to MMORGs.[14] They characteristics lies in the fact that they offer their users the tools to create their own content e.g. cloths, houses, designs, texts. These worlds are taken very seriously by many of their users and can be the main arena for expression of their creativity. Unfortunately, despite the originality of such work the things that users create do not give them rights because they create by using the tools that are provided by the owner of the virtual world. Before using the MMORG a user is asked to agree on the terms and conditions that most usually state that all intellectual property rights belong to the company. [15]

The second step in the research would be to specify the concrete minimum outcomes that international human rights law requires of Members States of the EU states in terms of data, information and knowledge protection and dissemination, works preservation, freedom of expression, cultural participation and benefit from scientific advancements, copyright in learning material, adequate standard of living, self-determination and also human development.[16] What will be crucial for the research is that copyright in Europe plays only a secondary role in this version of the studies. However where necessary, for the validity and coherency of the arguments, some copyright issues might take over, like e.g. copyright limitations and 'free uses' or new protected subject matter: databases and computer programs. Both protective and restrictive dimensions of human rights framework will be analysed in this regard.

It will then be vital for the research to make the claim that where copyrights help to achieve human rights outcomes, governments should embrace it and where it hinders those outcomes, its rules should be modified. However the main focus of the research will remain on the minimum levels of human well-being that states must provide, using either appropriate copyright rules or other means.[17] Alongside the human rights framework it may also be interesting to touch upon the development of the copy-duty approach to copyright in Europe alongside the more developed copy-right approach. This approach also brings more attention to a few more issues that might be brought to the fore such as the role of the Access to Knowledge (A2K) movement as a social movement for the European market and its roots in the environmentalism. Then it might be interesting to touch upon the issue of the minimum outcomes that international human rights law requires of EU Members States in terms of environmental protection and what might be the lesson learned for the purposes of this research.

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[14] Massive Multiplayer Online Role-playing Games, for instance, the World of Warcraft. Available at http://eu.battle.net/wow/en/ (access: 04.03.2015).

[15] Thomas B. Ward, Marcene S. Sonneborn, *Creative Expression in Virtual Worlds: Imitation, Imagination, and Individualized Collaboration*, "Psychology of Aesthetics, Creativity and the Arts" 2009, Vol. 3, No. 4, p. 211–221; see also Erez Reuveni, *Authorship in the Age of Conducer*, "Copyright Society of the USA" 2007, Vol. 54, Issue 218, p. 1801–1859, esp. p. 1827.

[16] Asbjørn Eide, Catarina Krause, Allan Rosas, *Economic, Social and Cultural Rights*, 2nd Edition, Martinus Nijhoff Publishers, Dordrecht–Boston–London 2001, p. 87–90.

[17] Laurence R. Helfer, Graeme W. Austin, *op. cit.*, p. 513–522.

In the last part of the study a profound analysis of the General Comments on each of the CESCR's copyrights' related clauses (that are binding to governments of the state members signing the CESCR) will follow and hopefully will enrich the results of the minimum outcomes as such. Where necessary, this analyses will be deepened by a study of the notion of dignity and the minimum level of human well-being as pillars for a human rights moral stand drawing on practical examples of adequate legal mechanisms and where possible, case law. This might for example lead to an analysis of the broad topic of adequate remuneration of the author or the variety of new legal mechanisms within the copyright system, which are relevant for the stimulation of technology and the spreading of technology in the context of the EU Digital Single Market, e.g. *reverse engineering* or *creative commons;* and try to answer the question what are the human rights attributes vis-à-vis these concrete mechanisms.[18]

For example as one of the General Comments suggests, the question "how does the creative worker get paid?" can itself be characterized as a human rights issue. In this context it is interesting to observe that often markets help e.g. writers find a paying audience for their work. Under some legal regimes in Europe these private sources of income may be more protective of the creator's rights than alternative means of payment, such as government-controlled systems of patronage, which might be accompanied by opportunities for abuse. If so, acknowledging and protecting the creator's human rights may in some cases also invite recognition of ways that markets (created and sustained by economic vehicles such as copyright) can protect creative workers from governmental censorship and, in so doing, even further a human rights agenda.[19]

Another example might be in relation to the variety of new legal mechanisms within the copyright system. One of them is the process of reverse engineering that allows engineers to create a computer program on the basis of another program. *Reverse engineering* is starting with a known product and working backwards. This process is like 'taking out' knowledge from what we already have. In fact reverse engineering creates new knowledge, which has been 'transformed'.[20] The aim of the reverse engineering process is to get to the computer program's source code. Then this code is the subject of further development of a certain computer program. According to the new European Computer Program Directive only interoperability of independently created computer programs with original computer programs constitute the only reason to perform reverse engineering legally. Taking this into consideration, reverse engineering is a legal tool encouraging software engineers to independently develop computer programs which seamlessly interact with each other. *Reverse engineering* is often perceived as a process of 'depending creation'. It is depending because it is based on the knowledge of others, but it is not less valuable due to that it stimulates the development of digital technologies.

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[18] See Christopher S. Brown, *Copyleft, the Disguised Copyright: Why Legislative Reform is Superior to Copyleft Licenses*, "University of Missouri Kansas City Law Review" 2010, Vol. 78, p. 749–785.

[19] Laurence R. Helfer, Graeme W. Austin, *op. cit*., p. 196–196.

[20] See Pamela Samuelson, Suzanne Scotchmer, *The Law & Economics of Reverse Engineering*, "Yale Law Journal" 2002, Vol. 111, No. 7, p. 1575–1663, p. 1578; see also: Andrew Johnson-Laird, *Reverse engineering of software: separating legal mythology from actual technology*, "Software Law Journal" 1992, Vol. 5, Issue 2, p. 331–354, esp. p. 331; Chris Reed, *Reverse engineering computer programs without infringing copyrigh*, "European Intellectual Property Review" 1991, Vol. 47, No. 1, p. 51.

A final conclusion will be made regarding whether the human rights attributes of copyright in Europe in the context of the emerging EU Digital Single Market are suitable to assist in satisfying a fair balance between private and public interests in data, information and knowledge protected by the system of current copyright law, valuing both individual and collective emancipation. And at the same time if the framework can be applied not only in theory but also in practice of governments, creators, artists, consumers involved so they are able to argue human rights and use human rights instruments in a more applicable manner. It will hopefully mean that finally human rights will stop being just something only blurry and not legally comprehensible with regard to copyright in today's Europe. Proposed study will further aim to propose guidelines on how the legal norms of copyright in Europe could be changed. It is hard to predict the level of concreteness of such guidelines, since main emphasis will be given to the role of a new phenomenon in copyright in Europe and that is namely the phenomena of human rights. To give more credible suggestions a comparative analysis of several different legal systems (USA and Russia, for instance) might prove necessary.

3. Validity for research and results

It is quite obvious that something is not completely right with the copyright of today. There are of course different perspectives and ways of consulting on copyright in Europe in order to modernize those rules and to make them fit for the new open era and fit for the *EU Digital Single Market*. The ongoing research question is whether copyright of today is still in a position to maintain the delicate balance between proprietary rights and public access. The majority of the research now addresses copyright from the perspective of the intermediaries or researchers center their studies' questions around the changing idea of authorship in the digital society or are choosing to focus only on the issues related to access such as e.g. access to culture, where they believe human rights play a secondary role or are not even considered and perceived as an incomprehensible, impractical framework for the needs of the markets of today. The proposed research is, on the contrary, aiming at analyzing this problem from the perspective of human rights. That perspective is unique as such since it takes under consideration the initial creator such as e.g. an artist or researcher as a human being who actually creates work, as well as users who today are consumers and who apply the data, information and knowledge in various ways.

In this way this study proposal aims to find a sustainable and peaceful approach to the transformation of copyright in Europe in the EU Digital Single Market which is, in any case, bound to happen soon. In this process some even go as far as suggesting that there should be no copyright at all and that if e.g. an artist cannot live without creating, he or she will create despite that no guarantees

will be given to them.[21] However, if one wants to speak about any kind of dialogue while reshaping the copyright law in Europe, human rights has to be taken under consideration in a systematic way. This research is precisely aiming to address this side of the dispute and, contribute to the comparatively small amount of scholarly thought on this topic. The overall ambition of the research is also to involve the European public in a critical discussion on the future of copyright looking at its economic, political and cultural implications in a systematic and interrelated manner that the human rights framework offers.

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[21] See Joost Smiers, Marieke van Schijndel, *op. cit.*, p. 12–20; see also Lawrence Lessig, *Free Culture. How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, The Penguin Press, New York 2004, p. 38–39.

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Chapter XI

Legal paternalism and the identity of Polish legal culture

Paweł Skuczyński[*]

1. Constitutional identity is a broadly discussed issue on the border of philosophy of law, political philosophy and doctrine of constitutional law. The significance of this issue goes beyond the problem of how organs of public authority are organised, which after all is the basic constitutional matter. The issue is more about the consciousness of separateness and legal-constitutional uniqueness. The key question in this respect, is whether there is a single universal and rational constitutional model — meaning the Western model of liberal democracy — or whether this rationality depends on the system being adapted to historically formed constitutional identity.

This question was of fundamental importance in times of the creation of new states due to decolonisation, when systems were being built from scratch. Systems based on the Western model of liberal democracy often proved dysfunctional precisely because of maladjustment to local legal and political culture. The issue is also vital in a time of integration of states. In Europe, for instance, states — being part of the union's legal system and adjusting their laws accordingly — aim to preserve their legal identity at the same time. Tension between the constitutional independence of EU member states and the primacy of union law is a manifestation of this. The main sphere in which the tension is visible is the way of understanding the rights of an individual, when legal systems of particular states meet that of the European Union and the system based on the European Convention on Human Rights. Thus, the attitude to an individual's rights may be treated as the basic indicator of constitutional identity.[1]

Constitutional identity may be regarded as the central element of a broader category of legal culture identity, because the way in which a given society

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[1] Marek Zirk-Sadowski, *Tożsamość konstytucyjna a prawo europejskie*, "Analizy Natolińskie", 1/2012, p. 3–5.

understands its own constitutional and political institutions as well as the status of the individual and their rights determines basic meanings in legal culture. Legal professions may also be indicated as a category deciding on cultural identity. The aim of these reflections is to explain the predominant way of understanding the identity of Polish legal professions, through interpreting their history in relation to fundamental transformations of Polish political and constitutional ideas, which may reveal both functional and dysfunctional elements of this professional identity.

Primarily, legal paternalism is such an element. Most generally speaking, it is to be seen as lawyers' attitudes when they take independent actions on behalf of and for the good of a client, without prior approval from that client, and often against the client's will. In normatively understood legal ethics, paternalism in this sense is present in the way that client-lawyer relations are formed despite the existence of various limitations protecting the client's autonomy.[2] The present discussion attempts primarily to analyse historical sources of this paternalism in the development of the identity of Polish legal culture, and in the history of legal professions within it.

This analysis shows that deep roots of legal paternalism in our legal culture are due to combination of two discourses, the egalitarian, in the social and political spheres, and the elitist, in regard to the social status of legal professions. According to the former, the main task of lawyers is to provide all citizens with equal legal assistance in order to protect rights and freedoms, while in the latter this is possible only via the special intellectual and ethical competences of lawyers. Hence the tension between, on the one hand, the universal character of rights, and on the other, their comprehension, and consequently the sole possibility of protecting them effectively, which are limited to professional lawyers.

2. However, deliberations on Polish legal culture should be preceded by discussing another way of explaining this phenomenon. It draws on sociological theories pointing to the sharp increase in the importance of expert systems and the role of experts in modern societies; as Przemysław Kaczmarek points out, accepting that lawyers are one of the professional expert groups allows such fundamental issues of legal ethics as the moral responsibility of lawyers, trust in them and the problem of their identity, to be shown in a new light.[3]

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[2] See Paweł Łabieniec, *Paternalizm w prawie i etyce prawniczej*, "Filozofia Publiczna i Edukacja Demokratyczna", 2013, Vol. 2, No. 2, p. 181–195. Legal paternalism may be discussed analogically to paternalism in medicine. For more about this, see Paweł Łuków, *Granice zgody: autonomia zasad i dobro pacjenta*, Wydawnictwo Naukowe Scholar, Warszawa 2005, p. 104 et seq.

[3] Paweł Kaczmarek, *Zaufanie do zawodów prawniczych w społeczeństwie ryzyka*, in: Hubert Izdebski, Paweł Skuczyński (eds.), *Etyka prawnicza. Stanowiska i perspektywy 2*, LexisNexis, Warszawa 2011, p. 11 et seq.

Most generally speaking, "an expert is a person who can successfully claim the right to certain skills or to a command of certain spheres of knowledge that are inaccessible for a laic".[4] Simultaneously, each expert is a specialist and beyond his specialisation is a laic. Moreover though expert services are rarely used, expert systems function continuously. Therefore they replace tradition as a source of knowledge.

Expert systems are systems of every area of specialist knowledge. They are passed on from some individuals to others. They are also based on procedural rules.[5] In order to function, they rely on the constant trust of laics, which is a kind of entrustment, so it is not only based on generalisation of hitherto experiences in which trust was not abused. Characteristically, what is more crucial here is the general trust in expert systems, rather than in any individual expert. For one may lose trust in a particular expert, who simply loses the status of an expert in the eyes of the laic, but this need not lead to loss of trust in the whole expert system, while the consequences of losing trust in the whole system are typically enormous, and may entail its collapse.[6]

In the presented view, legitimisation of practice relies on the expert's claim to knowledge. However, disputes are frequent in expert systems. There are no ultimate authorities, and for this reason, experts in mutual relations resemble laics.[7] Apart from the post-traditional character of expert knowledge and the significance of trust in expert systems, the following traits of such systems also draw attention. First, knowledge is embedded in methodological scepticism, assuming the possibility of advancing knowledge, and accumulation of expert knowledge is connected with specialisation. This means that expert systems improve themselves by incessant criticism and specialisation of experts, and this is accomplished by their joint, and in fact impossible to co-ordinate, effort. Such a dispersed nature of expert knowledge does not preclude the existence of professional organisations, the aim of which is primarily protection of 'impartiality of knowledge' and trust in the expert system.[8] From this perspective, their role is not the supervision of experts and control of their actions — which may be significant as regards protection of laics' trust — but the creation of conditions for the development of the entire expert system.

Thus expert knowledge is connected with reflexivity of institutions. The term is crucial for the discussed concept.[9] Put simply, it means that experts in

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[4] Ulrich Beck, Anthony Giddens, Scott Lash, *Modernizacja refleksyjna. Polityka tradycja i estetyka w porządku społecznym nowoczesności*, trans. by Jacek Konieczny, PWN, Warszawa 2009, p. 114.

[5] Anthony Giddens, *Nowoczesność i tożsamość: „ja" i społeczeństwo w epoce późnej nowoczesności*, trans. by Alina Szulżyńska, PWN, Warzawa 2010, p. 310.

[6] Ulrich Beck, Aanthony Giddens, Scott Lash, *op. cit.*, p. 120–122.

[7] Anthony Giddens, *op. cit.*, p. 191.

[8] Ulrich Beck, Anthony Giddens, Scott Lash, *op. cit.*, p. 115.

[9] *Ibidem*, p. 36.

development of expert knowledge must constantly consider the consequences of actions relying on this knowledge, which is why it may never be complete. This phenomenon is also related to the existence of double hermeneutics, which means that advancement of knowledge is based on terms set by laics, on the basis of which terms in scientific meta-languages are formulated, which in turn influence the reality and are reused by laics.[10]

In applying the above reflection to lawyers, it should be noted first of all that they may naturally be seen as experts, and law as an expert system. Their primary task in this view is providing society, that is, laics as regards law, with knowledge allowing various kinds of decisions to be made. Laics expect that, by drawing on knowledge provided by lawyers, they avoid many sorts of risk concerning their future cases. So they trust lawyers in general. By this they gain a sense of security as regards their cases. However, lawyers' tasks are not limited only to applying law to specific situations. This is due to the connection between action and knowledge. Thus the task of lawyers is also a reflexive development of legal knowledge through constant criticism, taking into account the consequences of actions using this knowledge.

For this reason such an explanation of legal paternalism may be regarded as interesting, though it raises some doubts too. Fundamentally, it seems that the domination of experts need not necessarily be paternalistic. For specialisation and professionalisation are common phenomena, and each expert is simultaneously a laic in other spheres. This is why the indispensability of expert systems need not lead to elitism, as experts realise that their advantage occurs only in a professional context, and bestows no extraordinary social status.

Moreover, it is not fully possible in this explanation to grasp a gradable and historical nature of paternalistic relations between lawyers and their clients. For it turns out that a higher level of paternalism, that is less sensitivity to client's expectations and lower standards of communication with them, occurs in societies less advanced in development of modern forms of society, thus with a lower degree of specialisation of particular professional groups.

Hence it may be assumed that legal paternalism flows rather from a given culture's identity and is related to its history, and modernity may either foster or diminish it. That appears true as regards Polish legal culture.

3. The identity of the Polish legal professions, and of the whole legal culture, was formed from the age of noble democracy, through the insurrection epoch and the formation of modern political movements, until the times of Solidarity. This tradition determined the understanding of politics, state and citizenship, which is present in our comprehension of them and remains influential today.

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[10] Anthony Giddens, *Konsekwencje nowoczesności*, trans. by Ewa Klekot, Wydawnictwo Uniwersytetu Jagiellońskiego Eidos, Kraków 2008, p. 11.

It appears that the age of noble democracy is, apart from the debates of professional historians of law, especially underestimated in this respect. However, it has recently begun to be regarded as a source of original legal and political concepts characteristic to our identity. What is meant is that the so-called Polish republicanism is in great measure a contemporary interpretation of the achievements and significance of noble democracy for contemporary identity.[11] This significance can apparently be expressed by three basic claims. First, we have the historical heritage of Polish republicanism, which is original in comparison to other epochs and cultures. Second, the despite difficult and distinctive history of Polish statehood, this heritage carried on, and its continuity was never broken. Third, its democratic character means that it is worth propagating in contemporary conditions. All these statements jointly form a thesis on the republican nature of Polish constitutional identity.

The classic republican idea is based on an antique ideal expressed by Aristotle and Cicero, in which the state is seen as something held in common by all free and equal citizens. A state is an organisation of primary character in relation to other communities such as family or commune. Managing state affairs is allocated to the political sphere, as a distinguished kind of activity within which the common good is realised. Such management requires special preparation and ethical virtues. Citizens cherish equal freedom of political character, namely opportunity to participate in making political decisions. In relation to this, decisions taken have primacy over individual interests, since the former are means of enjoying freedom serving the accomplishment of the common good.

This idea relies significantly on the notion of an assembly engaging in debate involving equal citizens, and reaching consensus, which, thanks to the engagement of citizens, is always a concretisation of the idea of the common good in given circumstances. Simultaneously, all citizens are responsible for achieving this. Thus they have duties to the state, which in this tradition are heavily stressed. Fulfilment of one's civic duties is a condition of freedom. In this, the republican idea differs from, for example, the liberal understanding of freedom.

For instance, this way of making and executing political decisions could concern warfare. In practice this meant that everyone shared responsibility for the outcome of the debate, since all citizens are obliged to engage equally in an armed struggle, even if they were previously against starting war. Historically, the ethos of deliberation was here tightly connected with the ethos of warfare.

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[11] It is worth stressing that in American debates on legal ethics its sources may be clearly indicated in the role of lawyers they played in the period when the republican model of society dominated, namely mainly in the first half of the 19th century. Similarly to the situation in Poland, this was connected with the elitist character of these professions; however, due to some social and political changes this model has been replaced with a more egalitarian one. See, for example, Anthony T. Kronman, *The Lost Lawyer. Failing Ideas of the Legal Profession*, Harvard Universiry Press, Cambridge, MA1995.

The republican idea thus understood was markedly present in noble democracy, but it was complemented with one very important trait, which gave the idea its originality and contemporary value. It contains a mechanism for the constant spread of its fundamental terms, such as citizen, nation, etc., to successive social groups. The inclusion of groups into the political nation, first vast groups of nobility, then, at the time of the Four Year Sejm, the bourgeois, and, during the 19th century, the peasantry, is evidence that a very significant mechanism of inclusion was integrated in the Polish republican identity. The mechanism is decisive for relevance of this tradition.

In this tradition, equal freedom of particular individuals is thus in the centre of interest. There are mechanisms of inclusion and deliberation serving achievement of settlements on the community level. However, from perspective of lawyers, a series of drawbacks becomes noticeable, but only on the grounds of political and constitutional practice.

The most obvious weakness of this tradition is its ineffectiveness. Naturally, the weakness meant here comes not from the very understanding of the core of politicality, but rather from its concrete materialisation in the constitutional model of nobility. For, in practice, equation of the common good with protection of each individual's freedom, along with narrowing down the understanding of civic duties, caused weakness of political institutions. This was because a strong institution appeared as a threat to, rather than precondition of, freedom. Practically, this meant fear of a monarch's absolute power, and attachment to the principle of unanimity in making political decisions.

In consequence, all sorts of extraordinary institutions flourished. For example, confederations were set up to prevent the General *Sejm* being thwarted and disrupted by *liberum veto*, since a confederated *sejm* could pass laws by a simple majority. Therefore it may be said that "confederations became a by-form of state parliamentarianism".[12] During the whole period of noble democracy, the postulate of convoking a *sejm* of the Crown, in which all members of the noble estate could participate in order to carry out reforms, was raised.[13] The lack of a standing army was compensated for by *levée en masse*, which is an extraordinary institution by nature. Even the Executionist movement, being a major political achievement, shows that execution of a monarch's rights required an extraordinary movement rather than a standard, institutional practice.

The focus on extraordinary institutions is reflected in the domination of the social ethos of deliberation and the ethos of struggle, over ethos of work. In the Sarmatian culture, reluctance towards systematic effort, postponing consumption and actions other than military defence of the Commonwealth are widely known and characteristic. It may be said that

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[12] Julisz Bardach (ed.), *Dzieje Sejmu Polskiego*, Wydawnictwo Sejmowe, Warszawa 1997, p. 20.

[13] *Ibidem*, p. 62 et seq.

In the eyes of the gentry, not only was the very fact of being born without a coat of arms disgracing, but also the profession [one] practised. From the so called free professions, only the lawyer found approval among members of this estate […] [because] this profession was related to the functioning of the noble state.[14]

Engagement in legal disputes, and ability to win them, were hence to some extent valued the same as military activity. However, they were not related solely by the function, namely an effort for the common good, but also the extraordinary or even incidental nature of this effort, and the ethos of struggle.

4. The next two centuries witnessed reinforcement of certain elements of Polish republicanism, especially of focusing on extraordinary actions and the ethos of struggle in defence of the rights of the individual. Nevertheless, this was accompanied by a reversal of the scheme of action, primarily due to changed circumstances. Lack of sovereignty was naturally of utmost significance and had a series of consequences. The first, in terms of the extraordinary, arose from both political and social institutions, including the legal profession, which significantly improved its functioning in comparison to the previous age, and was now beginning its golden age. Apart from simple legal aid provided to various entities, it focused on three other areas. This additional activity was decisive for the identity of lawyers, and is still visible now.

The first area is defence in political trials. The category of political trials in itself is not naturally homogeneous and encompasses all kinds of legal cases — not only criminal — connected with deeds that are both political crimes, including against the state and against the constitution, as well as common crimes inspired by some extrajudicial subjects in order to further some specific political interest. So the political character of a legal case is always due to the context. Therefore, lawyers acting for the defence in such cases meant not only the necessity to show courage in the face of threats of repression, but typically required the lawyer to take a clear stance towards the circumstances that draw the political character of a case from the context.

In consequence, participation in political trials, though part of lawyers' activities, was a form of their involvement in public affairs. It was regarded by society as an expression of patriotism, and contributed to the significant growth in respect to particular lawyers and the prestige of the whole professional group. In Poland's difficult situation in the 20th century, this element of a lawyer's identity proved important and was additionally reinforced.

Another area of the activity of lawyers was direct public activity in various forms. The legal profession was also troubled by dilemmas of the time, which demanded a choice between military service in successive uprisings and peaceful

[14] Janusz Tazbir, *Kultura szlachecka w Polsce. Rozkwit — Upadek — Relikty*, Wiedza Powszechna, Warszawa 1978, p. 32.

social and political activity, such as grassroots work. Lawyers engaged in both kinds of activity. They could be found in conspiratorial organisations, on uprising committees, among deportees to Siberia, in countless social organisations acting openly, and also in Berlin, St Petersburg and Vienna, for example, where circles of Polish lawyers functioned.[15]

It may be said that

> in altered conditions, new tasks, which exceeded normal professional functions, emerged before lawyers. Lawyers undertook political tasks. Having had a formal education they served a considerable role in independence movements, which was seen in the November Uprising and January Uprising. The position of the legal profession in society increased, and with it the associated responsibility.[16]

Later, just as the role of Polish lawyers in Russia "ended almost abruptly in short period between the 1917 Revolution and the 1920 War",[17] it also ended in other occupying states.

The third sphere of activity of Polish lawyers in the 19th and beginning of the 20th century were endeavours to establish professional self-regulation and self-organisation among the community, compensating for the lack of a professional body to fulfil these roles. It is noticeable that all of these areas are decisive for the identity of Polish legal professions, to an extent that is probably greater than the mere provision of legal aid.

Another consequence of the change in political circumstances for the nonetheless preserved modus operandi was the perception of state institutions as opponents. Whereas in the previous age, the effort was primarily to strengthen the emaciated and endangered state (the weakness of which was seen as an advantage, or even strength, as it guaranteed freedom of an individual), during times of struggle for independence the perception was just the opposite — it was all about weakening the occupying states and ultimate liberation from them.

Among many various effects of this state of things, which are perceptible even today, one should point out that, in the sphere of legal professions, this caused a separation of the legal community into lawyers, focused on the principle of helping an individual, and a body of judges and prosecutors, threatening an individual. Political trials characteristic of the time also caused the formation of a lawyer's moral responsibility for an individual, as opposed to an expectation of help from the law or the state. Consistent law enforcement seemed a threat.

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[15] Roman Łyczywek, *Adwokaci polscy w b. Cesarstwie Rosyjskim na przełomie XIX i XX wieku*", in: idem (ed.), *Szkice z dziejów adwokatury polskiej*, Wydawnictwo Prawnicze, Warszawa 1976, p. 17–19.

[16] Zdzisław Krzemiński, *Historia warszawskiej adwokatury*, Wydawnictwo C.H. Beck, Warszawa 2005, p. 13.

[17] Roman Łyczywek, *op. cit*., p. 29.

This situation recalls circumstances in which the French tradition of legal ethics was formed,[18] and indeed this tradition had a great influence on the identity of the Polish bar. However, the sources of these influences are not only the historically strong contacts between both societies, but the similarity of circumstances. Namely, the French bar was formed during the *ancien régime*, and it understood its task to be the protection of individuals against the absolute power of a monarch. It was a kind of buffer between state and society.

Now we near the third consequence of the changed political situation, namely further reinforcement of the ethos of struggle at the expense of ethos of work, and moreover — with no institution of political deliberation — also at the cost of ethos of deliberation. The professional ethics of Polish lawyers, like those of their French colleagues, began to be understood in the categories of typically chivalric virtues: courage, honour and disinterestedness. Simultaneously, lawyers had to be entirely independent and build a strong community of equal individuals. Jointly, this created a vision of an elite profession held in the highest respect by society. Because of this, it was possible to help endangered individuals. The already formed elitist mechanism of protecting elementary equality before law is clearly visible.

As an aside, one may remark that the aforementioned mechanism of inclusion in the political nation during the time of a fight for independence cannot be seen in the categories of including successive strata in deliberation, but rather into the fight itself, for such institutions of deliberation did not exist. Inclusion was connected with accepting a certain ethos and, typically, at the same time with engaging in a struggle. Because of this, it is hard to describe it as democratisation in the strict sense. This way of reasoning may be described as an insurrection tradition, which began in the end of the 18th century, lasted through successive 19th-century upsurges, and had its epilogue in the Warsaw Uprising. What is characteristic of this is the military mode of action. From the turn of the 19th and 20th centuries, yet another tradition emerged — that of a mass movement of deliberation, rather than physical struggle, which reached its culmination in the Solidarity movement.[19] Naturally, the extent to which these traditions differ is an open and debatable issue. In other words, to what extent is replacing one with another a rupture of the identity of Polish legal culture, which occurred under the influence of Western constitutionalism, and to what extent is it the evolution of the same modus operandi due to a once more changed political situation.

5. In this way, one may see the formation of two discourses: egalitarian in the social sphere and elitist in reference to the social position of the legal professions.

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[18] See Paweł Skuczyński, *Status Etyki Prawniczej*, LexisNexis, Warszawa 2010, chapter 1.3.1.

[19] See controversy about this view, among others, in: Paweł Rojek, *Semiotyka Solidarności. Analiza dyskursów PZPR i NSZZ Solidarność w 1981 roku*, Nomos, Kraków 2009.

The former is concentrated on protecting the individual and their freedoms and rights, while the latter on the mechanisms of this defence, which require the existence of a group of people undertaking extraordinary actions of supporting character, doing it with courage, honourably and with disinterestedness.

Today, they are greatly present in our legal culture, and lead to a specific approach to human rights, which are the key element of contemporary constitutionalism of Western countries. This attitude is based on understanding the protection of these rights and quarrels over the interpretation in the category of struggle, or at least of dispute. This gives rise to many more specific consequences.

First, conferring protection of rights to professionals means that, of necessity, paternalism becomes an element of the lawyer-client relationship. Laws are treated not as a constitutional element of civic identity but as a complicated instrument safeguarding against the actions of public authorities. Clients expect form lawyers that this instrument is operated effectively. It may be said that they resign in this way from an element of their legal personality, treating it only as objective means of protecting their real personality. Legal paternalism leads therefore to a lack of identification with law, treating it as source of threat, which may be countered only by similarly alien legal instruments.

Second, the issues of legal professions, especially of professional associations as guarantors of this independence, are brought strongly into focus. This focus, understandable to lawyers, is nevertheless often regarded as seeking privileged status for professional groups, replacing real care for a client's legal protection.

Third, paternalism is a stable element of the social image of lawyers. Stereotypes of lawyers found in source literature are not, from this perspective, accidental. Especially opinions concerning the self-interest of lawyers and orientation of their activity towards profit-making in collision with understanding their own activity as based on chivalric values of honour and disinterestedness gain a new dimension when perceived as an expressed reaction of a society attuned to egalitarianism towards paternalism of groups defining themselves in elitist categories.[20] Thus it is an expression of deep irony to lawyers' claims understood as paternalistic. Therefore, all attempts at managing this image and its change by using simple tools will meet a barrier which will make them unconvincing.

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[20] See Ryszard Sarkowicz, *Amerykańska Etyka Prawnicza*, Zakamycze, Kraków 2004, p. 301 et seq.

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Chapter XII

Barriers of women's political promotion in Poland

Małgorzata Niewiadomska-Cudak[*]

Poland's access to the European Union was related to implementation of regulations obligatorily imposed on all member countries. One of the priorities of the EU politics is equality of chances for women and men and introduction of changes which will influence the quality of life of women and men in a variety of disciplines. New countries especially require all necessary pro-equality changes embracing elimination of violence forms conditioned by the sex, sex stereotypes, promotion of women and men equality executed by means of state's politics.

A low level of women representation in Polish decisive bodies imposes a necessity for a closer look on varied conditions influencing status quo. The following article is an attempt to answer queries regarding barriers which hamper women from functioning in disciplines lately reserved exclusively for men. The undertaken analysis aims to verify the assumption on how differentiated factors can influence the degree of involvement of women and men in decision-making structures on a central and local level. The analysis will be conducted on the basis of available subject literature and statistical data reflecting women and men representation in Polish elective bodies.

In parliament of the Republic of Poland there are 110 women out of 460 MPs which constitutes 23.7%. In the Senate (the upper house of the Polish parliament) there are only 13 female senators out of 100 senators in total.[1] In local decision-making government bodies women constitute 25% and men 75%.[2] During last European Parliament elections, Polish women acquired 11 mandates out of 51 available for Poland which amounts to 21.5%.[3] The reasons for a low political women representation in Poland are multiple. Underrepresentation

[*] University of Finance and Management in Warsaw.

[1] Państwowa Komisja Wyborcza (National Electoral Committee), http://wybory2011.pkw.gov.pl (access: 02.02.2015).

[2] On the basis of data http://www.pkw.pl (access: 13.05.2015).

[3] http://pe2014.pkw.gov.pl (access: 11.05.2015).

of women in political life is a consequence of a general women position in the society. It is worth to point out that throughout the world, women have joined already established and shaped, men-made parliaments. Their low participation in authorities was not questioned as it was perceived as an effect of a traditional division into a male sphere (public) and a female one (private).[4] Poland's access to the European Union's structures resulted in more frequent and louder discussions about barriers for women political promotion.

Women political activity has been influenced by cultural circumstances, deeply rooted in Polish society. Traditional upbringing determines the position of a woman and a man which only deepens the phenomena of unequal women and men representation in politics. Parents execute and pass on sexual roles unwittingly.[5] They encourage children to pursue activities and actions sexually marked. John Stuart Mill states that "all women since childhood are brought up in the belief that the ideal of their character is to be wholly different to a male character; they are educated in a way not to have their own will and not to follow their whim but to surrender to others' will".[6] For some women, political activity seems abstract and detached from daily life. Such an assumption regarding cultural differences is strengthened by school books. According to many scientists, they have enormous influence on sexual classification. Adam Buczkowski claims that a literary portrait of a woman doing household chores and a man spending all day out or tinkering with something, has not changed for years.[7] Małgorzata Fuszara has pointed out a neglectful exclusion of women figures in history and while portraying outstanding people which builds up an assumption of a lack of women participation in shaping reality. School books portray women as people of narrow interests, most frequently occupied with household chores while professional work, attractions, wide interests and power are assigned to men. Women are presented as figures of low general knowledge, low ingeniousness and creativity.[8] In a new school book for first grade students we can read a *Legend of Wars and Sawa* in which Wars is a young fisherman who has to defend the river, city and

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[4] Małgorzata Fuszara, *Kobiety w polityce w okresie transformacji w Polsce* [*Women in politics during transformation period in Poland*], in: Monika Frąckowiak-Sochańska, Sabina Królikowska (eds.), *Kobiety w Polsce w okresie transformacji 1989–2009* [*Women in Polish transformation 1989–2009. Summaries, interpretations, prognosis*], Wydawnictwo Adam Marszałek, Toruń 2010, p. 21.

[5] Adam Buczkowski, *Dwa różne światy, czyli jak socjalizuje się dziewczynkę i ch*łopca [*Two different worlds: how to socialize a girl and a boy*], in: Jolanta Brach-Czaina (ed.), *Od kobiety do mężczyzny i z powrotem: rozważania o płci w kulturze* [*From a woman to a man and back. Considerations about the sex in culture*], Trans Humana, Białystok 1997, p. 175.

[6] John Stuart Mill, *Poddaństwo kobiet* [*The Subjection of Women*], in: idem, *O rządzie reprezentatywnym* [*Considerations on Representative Government. The Subjection of Women*], trans. by M. Chyżyńska, Znak, Warszawa 1995, p. 298.

[7] Małgorzata Fuszara, *Kobiety w polityce* [*Women in politics*], Wydawnictwo TRIO, Warszawa 2006, p. 56.

[8] *Ibidem*, p. 56, 57.

a beautiful girl into which the mermaid has transformed. The man is presented as a power-holding entity while the woman is a feeble creature in need of a strong man's support. There arises a question: is it worth to give power to weak creatures who cannot survive without man's support?[9] Underlining such discrepancies strengthens sexual stereotypes which are difficult to alter. And sexual stereotypes are nothing different as "simplified assumptions and behavior concepts of male and female representatives, shared by whole society and taught during the process of growing up and socializing in this society".[10]

According to Bogdan Wojciszke, interpersonal consequences of stereotypes are visible in alternative treatment of women and men by people and various institutions which consequently results in choices and experiences of entities.[11] Women are expected to realize their functions in private lives while men are expected to get involved in public life.[12] That is why the sphere of politics seems reserved exclusively for men. As it is aptly noted by Agnieszka Sznajder "stereotypical perception of people belonging to various social categories is acquired during the process of socialization, it also has additional strong emotional weight".[13] According to the researcher this fact makes it difficult to eliminate stereotype-based way of perceiving social phenomena. Sexual stereotypes are one of determiners of women representation in the field of politics.

Family's influence on women and men participation in the structures of authority bodies is another important factor resulting in a low women representation in the field of politics. Fuszara points out on patriarchal culture that hampers women's activities especially on the level of local authorities which manifests itself by a man forbidding his wife to participate in elections.[14] Without the support of close friends, political activity is not possible.[15] However, for male politicians, a wife is a main source of support in a decision-making process. The support has both emotional and intellectual dimension. From such women, often presidents' wives, it is expected to underline their dependency on their husband,

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[9] *Elementarz* [*New School Book*], cz. 4: *Lato* [Part 4: *Summer*], http://www.wykop.pl/ramka/1954170/nowy-elementarz-men-do-pobrania-w-pdf/ (access: 29.02.2015).

[10] Eugenia Mandal, *Kobiecość i męskość. Popularne opinie a badania naukowe* [*Femininity and masculinity. Popular opinions and scientific research*], Wydawnictwo Akademickie Żak, Warszawa 2003, p. 38.

[11] Bogdan Wojciszke, *Człowiek wśród ludzi* [*A man among people*], Wydawnictwo Naukowe Scholar, Warszawa 2004, p. 276, 420–422.

[12] Joanna Nawrocka, *O liderach i płci* [*About leaders and the sex*], Wydawnictwo Pomorskiej Akademii Pedagogicznej, Słupsk 2005, p. 21.

[13] Agnieszka Sznajder, *Kobiety i władza — analiza czynników sprzyjających większej aktywności kobiet* [*Women and power — analysis of factors conducive for a bigger political activity of women*], in: Magdalena Musiał-Karg (ed.), *Kobiety we współczesnej Europie* [*Women in contemporary Europe*], Wydawnictwo Adam Marszałek, Toruń 2009, p. 60–76.

[14] *Ibidem*, p. 23.

[15] Małgorzata Fuszara, *Kobiety w polityce*, p. 162.

surrendering to his ambitions, diminishing her value when compared to her husband, admiring and[16] supporting him.[17]

Household chores limit time availability. Daily engagement of women into activities related to housekeeping and childcare constitutes approximately 6 hours and 58 minutes while men devote to the very same duties only 2 hours and 47 minutes.[18] Lack of time caused by multiple tasks in the house is a barrier that women face in a bigger activeness on a political arena. As a result, political activity is often undertaken by mature women in their forties who have brought up their children and are mentally fit.[19] According to Anne Phillips:

> Providing political equality of women and men must embrace significant changes in the sphere of home life: for example leveling work time: transferring partial responsibility for household and children to a man: breaking patterns leading to uneven work division at home and outside by women and men. Whether on a basic level — due to lack of time or more complex phenomena which is permanent telling women what to do, household experience of women still limits their chances of equal participation in democracy.[20]

Phillips reasons that men should enter traditional women roles. Sharing household duties will help women to make decisions regarding their activity in the public sphere. Household duties limit women time span so without the help of a family, it is impossible for a woman to exist politically. The first limitation shows that a woman active politically needs family support as she cannot act against her family. In Poland, after introduction of parental leave, demand for father care is not small. In 2012, almost 30,000 men made use of shorter maternity leaves — twice as many as in the previous year. From the research of Beata Łaciak from the Department of Sociology and Anthropology of Custom and Law at University of Warsaw it seems that a Polish man does not get involved in household chores more often than a few years back but he spends more time with children.[21] Steffan Herrström, the ambassador of Sweden in Poland convinces

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[16] Bogusława Budrowska, Danuta Dyduch, Anna Titkow, *Szklany sufit: bariery i ograniczenia karier polskich kobiet* [*Glass ceiling: barriers and limitations of careers of Polish women*], Instytut Spraw Publicznych, Warszawa 2003, p. 32.

[17] Urszula Kluczyńska, *Kobiety na 'drugiej linii' władzy? Wizerunek kobiet (bez)pośrednio angażujących się w politykę* [*Women on the 'second line' to authorities? Portrayal of women (in) directly involved in politics*], in: Joanna Marszałek-Kawa (ed.), *Kobiety w polityce* [*Women in politics*], Wydawnictwo Adam Marszałek, Toruń 2010, p. 73, 74.

[18] Report *Nieopłacalna praca kobiet — jak ją traktować, żeby skutecznie tworzyć podstawy opiekuńczego społeczeństwa* [*Unprofitable women's work — how to treat it to successfully create the base of a social society*], Instytut Spraw Publicznych [Institute of Public Affairs], Łódź 2006, p. 8.

[19] Małgorzata Fuszara, *Kobiety w polityce*, p. 161.

[20] Anne Phillips, *Przestrzeń publiczna, życie prywatne* [*Public sphere, private life*], in: Renata Siemieńska (ed.), *Aktorzy życia publicznego. Płeć jako czynnik różnicujący* [*Actors of public life. Sex as a differentiating factor*], Wydawnictwo Naukowe Scholar, Warszawa 2003, p. 31.

[21] Joanna Drosio-Czaplińska, *Kto to tata?* [*Who is a dad?*], "Polityka", No. 42(2929), p. 24–26.

that introduction of parental leave in his country in 1970s and lowering prices of day nurseries together with work time flexibility have proved beneficial for social sensitivity. According to Swedish research it seems that men who have made use of paternity leave, drink less, take more care of a diet and health, share their duties with partners and their marriages are more stable.[22]

In the sphere of social conditions, there is also an issue related to a level of education. A right to education used to be one of elements of a wide process of providing equal rights for women and men. It was also a condition enabling undertaking of professional work which allowed women to obtain their own income and independent livelihood. Cultural stereotypes relate to the sex, imposing roles of wives and mothers on girls, limited educational possibilities among young females. Heated discussions and harsh attacks accompanied women's attempts in XIX century to be accepted to universities. The right to study at Polish universities was obtained gradually by women. In the nineties of XX century, the hundredth anniversary of accepting first women at Polish universities was celebrated.[23] In the mid- nineties of XX century, participation of people with university degrees was almost identical among women and men. In 2009 the number of women who graduated from universities was 24% in the whole population between 24–64 years of age and was higher by 6.7 percentage points than in case of men.[24] Girls usually perform better at school than boys and receive better results and more often obtain university diplomas. In 2009 and 2010 women constituted 58.2% of students' population. As it is written in the report on the state of education[25] women tend to study disciplines that do not ensure a high level of employment possibilities. They are still underrepresented on technical universities.[26] Polish women are still associated with better disposition for humanities and men are associated with technical disciplines.[27] More and more women continue their PhD careers at universities graduating successfully. Women's educational achievements are not, however, reflected on the job market.

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[22] *Ibidem*, p. 24.

[23] *Ibidem*, p. 39.

[24] *Społeczeństwo w drodze do wiedzy. Raport o stanie edukacji 2010* [*Society on the way to knowledge. Report on the state of education 2010*], Michał Federowicz, Michał Sitek (eds.), Instytut Badań Edukacyjnych [Institute of Educational Studies], Warszawa 2011, p. 22.

[25] *Ibidem*, p. 218.

[26] Among IT students there was only 10% women and among students of engineering only 19.2%, see more: *ibidem*, p. 219.

[27] On Harvard website (www.implicit.harvard.edu/poland) one can find a research on the sex stereotype. The test was answered by over 3,000 Poles and 7,500 Germans. A stereotype regarding women's better disposition for studying humanities was supported by 80% of Poles and 74% of Germans. Contrary to Germans. Contrary to Germans, as pointed out by Norbert Maliszewski, Poles do not do a lot to unroot sex stereotypes, see more: Norbert Maliszewski, *Jak zaprogramować wyborcę* [*How to program a voter*], Centrum Doradztwa i Informacji Difin sp. z.o.o., Warszawa 2008, p. 117.

They are more often unemployed and poorly remunerated. As it is underlined by the authors of the aforementioned report

> educational achievements are somehow influenced by biological differences between women and men but it is environmental factors related to socializing that are decisive: acceptance of sexual roles in families, peer groups and copying stereotypical sexual roles in media and school education.[28]

All undertaken activities within educational politics which aim at balancing chances should be, therefore, targeted on reducing inequalities between sexes on the job market. Attention is paid to improvement of boys' educational performance and creating interest among girls to pursue education in mathematics and sciences.[29]

By analyzing social conditioning, it has to be underlined that Catholic religion plays a major role in the country. Catholic church unwillingly looks on the phenomena of women emancipation and sees women's role in the family sphere.[30] An indicator of professional activity is also closely related to a dominant religion of a country. The highest indicator can be observed in secular countries and in countries promoting protestant values. The indicator is lower in the countries in which Catholic religion dominates.[31] Łukasz Wawrowski rises an argument that one of important factors influencing women's position in the society and political life, is Catholic religion. Countries such as Denmark, Sweden, Finland, Norway and Iceland are generally protestant countries. Catholicism which is a more hierarchy-based and authoritarian religion seems less friendly towards sex equality than Protestantism.[32] For some time now, the number of people attending Sunday mass in Poland, has been diminishing. It is attended only by 40% of Catholics. Analysts warn that if the trend continues, within a couple of years, churches will become empty. Witold Zdaniewicz, a sociologist from Institute of Statistics of Catholic Church, claims that religiousness decreases and we face its changes. It can be partially explained by emigration to other countries. It can also be partially explained by the fact that there is less piety shown in daily practices. It is also accompanied by liberal changes.[33] Moral

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[28] *Ibidem*, p. 217.

[29] *Ibidem*, p. 223.

[30] Anna Sznajder, *op. cit.*, p. 69.

[31] An exception here is Spain where mechanisms positively influencing women's public activity has been implemented. Furthermore, the highest indicator of professional activity can be observed in Scandinavian countries, see more: Anna Sznajder, *op. cit.*, p. 72; and *Report on equality between women and men — 2007*, Luxembourg 2007, p. 30.

[32] Łukasz Wawrowski, *Polityka równych szans. Instytucjonalne mechanizmy zwiększenia partycypacji kobiet w strukturach politycznych na przykładzie państw Unii Europejskiej* [*Politics of equal chances. Institutional mechanisms of increasing women participation in political structures on the example of the European*], Wydawnictwo Adam Marszałek, Toruń 2011, p. 181.

[33] See more: Katarzyna Wiśniewska, *Kościelne badania: Tylko 40 proc. katolików uczestniczy w niedzielnej mszy* [*Church research: Only 40% of Catholics participate in Sunday mass*], available at http://wyborcza.pl/1,76842,12034409 (access: 20.06.2012).

changes have as well contributed to this status quo. A bigger secularization of Polish society is inevitable.

Economic situation is yet another barrier that places women on a lost position. It is underlined that a rising level of urban development and economic progress is accompanied by a rise in education level and women participation in the job market which leads to weakening traditional values regarding the role and place of women in the society, and therefore their emancipation.[34] In countries such as Poland, women are discouraged from participation in the public sphere by problems on the job market, insufficient day nurseries and kindergartens, inequalities in remuneration and traditional division of family duties sanctioned by the state's tradition. A different situation of women and men on the job market regarding: level of received remuneration, indicator of professional activity, indicator of unemployment, does not remain indifferent to political involvement of persons representing both sexes. An average monthly salary of men in 2013 revolved around PLN 4,500, that is around EUR 1,000.[35] Women earned PLN 900 less, that is EUR 200 less. Every four of them received a salary lower than PLN 2,500 (around EUR 600). Remunerations of 25% of men were above PLN 7,500 (EUR 1,750).[36] The highest differences between women's and men's remunerations were observed on the level of a director/management. On average, women earned PLN 3,200 less (about EUR 740). Half of the men employed as managers earned from PLN 4,400 to PLN 10,000 (around EUR 100–230). Women received salaries of about PLN 5,800 (approximately EUR 1,300). It looked similar regarding education. In the group of people with MA or MSc degrees, women earned PLN 1,716 less than men (about EUR 400). The difference was shaped on the level of about 30%.[37] A household pays attention to economy, aiming at minimizing losses and maximizing profits which contributes to keeping existing status quo — a man provides funds to make a living for the family and a woman looks after home. Without financial backup, an active participation in public life is not possible. Present electoral campaigns are very costly and political parties do not have special funds that could be used to finance initiatives supporting women. Division of political parties' financial means to allow more women to make use of them could contribute to their more active presence in politics.

In political emancipation of women in Poland, historical factors have played a major role. Although Polish women obtained active and passive voting right in

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[34] Richard E. Matland, *Women's Representation in National Legislatures Developed and Developing Countries*, "Legislatives Studies Quarterly" 1998, No. 23; after Anna Pacześniak, *Kobiety w Parlamencie Europejskim, Przełamywanie stereotypu płci w polityce* [*Women in European Parliament. Breaking the stereotype of the sex in politics*], Wydawnictwo Atla 2, Wrocław 2006, p. 11.

[35] Poland has not introduced euro currency yet.

[36] Remuneration of women and men in 2013, published at http://www.wynagrodzenia.pl/payroll/artykul.php/typ.1/kategoria_glowna.503/wpis.2867 (access: 06.05.2015).

[37] *Ibidem*.

1918, their participation in authority bodies was not and is still not proportional to their number in the whole society. The presence of Polish women in political sphere since democratic changes in 1989, evolved in multiple directions. Regaining by parliament the role of political representation in times of system transformation was not taking place simultaneously with a balanced participation of both sexes. The rise of acceptance of women in politics, decreasing number of followers of the belief in which a woman is supposed to take care of home and family and a man should provide financial means[38] but also an organized action of feminine organizations and groups aimed at creating a positive view of a candidate, resulted in a bigger number of female candidates in parliamentary elections in the following years. Until this moment however, the critical level of 30% of women presence in authority bodies has not been exceeded. In Polish parliament we still have around 24% women among all members. It is pointed out in the scientific literature that as a result of system changes, new barriers have emerged. They limit women's self-realization in public life. The role of a woman has become to be described by conservative political forces in relation to family context, not her activity in the public sphere.

Political parties' attitude participating in elections towards the issue of equality of women and men is another factor that influences the level of women's political activity. Ideological perception of groups participating in elections is very important. Right-wing parties are not willing to promote the idea of equality of chances in politics. Polish two social democratic parties — SLD (Democratic Left Alliance) and UP (Labour United) together with Partia Zielonych (Green Party) and Unia Wolności (Freedom Union) — central right party with liberal orientation,[39] have introduced in Poland, within their regulations, quota amounts regarding representation of each sex in public authority bodies. It was an interesting marketing action that triggered a discussion about equality rights in Poland. A 'fashion for women' has emerged and this change of mentality was necessary to treat the matter of women's political participation more seriously.[40] Right wing parties cared and still care more for maintaining a traditional authority relation between sexes and stereotypical division into male — public sphere and female — private sphere. Unwillingness for 'equal chances' politics leads to a situation when a party's political orientation, its location on left-right wing scale, influences the process of selecting candidates for electoral registers regarding their sex. Voters however, by

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[38] In 1992 the percentage of followers of this model was 85% and in 2002 — 61%, after Renata Siemieńska (ed.), *Płeć, władza, wybory* [*Sex, power, elections*], Wydawnictwo Naukowe Scholar, Warzsawa 2005, p. 42.

[39] Krystyna A. Paszkiewicz (ed.), *Partie i koalicje polityczne III Rzeczypospolitej* [*Parties and political coalitions of III Polish Republic*], Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław 2000, p. 145.

[40] Sylwia Spurek, *Kobiety, partie, wybory* [*Women, parties, elections*], Wydawca: Fundacja Centrum Praw Kobiet, Łódź 2002, p. 63.

giving their vote decide who will represent them in legislation, but they do not have influence over electoral registers. It's political parties that decide on the contents of electoral registers and sequence of people running for elections, about women and men chances in elections and their representation in collegial bodies.

It is worth to look closer at legal conditions and their effects on women electoral representation in Poland. They regard records in enacted new Electoral Code passed by the Sejm of Republic of Poland on 5th January 2011 which introduced an obligation of using quotas on electoral registers. A regulation that a list consisting of less than 35% of women cannot be registered is applied within list-making to the Sejm because in the Senate, single member districts have been introduced. A similar solution has been accepted with regards to local elections' electoral registers and during elections in 2014, single member districts will be in force in communes not being cities on laws of the district.[41] It turns out that application of proportional system increases chances of women to obtain nominations to representative bodies in Poland. The majority statute systematically excludes minorities from the political representation. Introduction of binding quota statute resulted in a double increase in the number of women on electoral registers in elections to the Sejm in 2011. In 2011, 3,063 women stood for election to the lower chamber of Parliament and the number constituted 44% whereas in the Senate with its single member districts, women constituted only 14% of all candidates.[42] Introduction in Poland obligatory quotas on electoral registers gave rise to a fresh look on women's political activity. Right wing parties began to notice that an increase in number of women on electoral registers can contribute to expansion of electorate and result in a better electoral result. Sanctions for lack of application of quotas on electoral registers obliged political groups to search for active candidates willing to act in the public sphere.[43]

One of the barriers that hamper women's functioning in politics is also the fact that political parties are not willing to place their female members in typically male disciplines such as constructions, state's defense, finances, international and domestic affairs. Access to ministerial positions in male disciplines requires from women facing stereotypes regarding their qualifications and competencies, their mentality or 'biological nature'.[44] Political groups place their female members in positions related to the so-called 'female' disciplines which comprise: education, healthcare, welfare, counteracting unemployment, equality of chances for women and men, family life.[45] Committees in parliament or in local governments are often filled by women. Men are not expected to have any special qualifications in

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[41] See Bill from 5.01.2011 — *Electoral Code* (Dz.U. Nr 21, poz. 112, art. 418 § 1).

[42] Małgorzata Niewiadomska-Cudak, *Kobiety w organach kolegialnych w latach 1919–2011* [*Women in Polish Collegia Bodies in 1919–2011*], Wydawnictwo Adam Marszałek, Toruń 2013, p. 233.

[43] See more: *Electoral Code*.

[44] Anna Sznajder, *op. cit.*, p. 64.

[45] *Ibidem*.

female disciplines because they are believed to perform well. This dichotomous division into female and male world is preserved in social perception. In a research conducted in 2004 by CBOS (Centre for Public Opinion Research) requested by Fuszara, respondents stated that among the reasons for a smaller participation of women in politics, one can point out maternity and numerous household duties. The second position was occupied by discrimination and barriers posed by men such as favouring men, threat of competition from women's side, male chauvinism. A stereotype of 'men wielding power'[46] in the society was also mentioned. Another research conducted by Fuszara in 2010 confirmed that respondents saw the reasons for unequal women representation in politics in tradition and habits (49%) and household duties overload (49%).[47] This burden of tradition places men in authority bodies. On the other hand, assigning women exclusively to the private sphere leads to an assumption regarding woman's responsibility for this sphere and to a larger activity in household duties than men. Women are perceived as entities willing to help, compassionate, having good heart and devoting for others. Men are seen as strong, ambitious and possessing leadership skills. As a result of a division of roles of both sexes, men in the process of socializing are encouraged to hold power and that is why they are more favoured during elections. Electorate is certain of their higher political competency. On the other hand, the stereotype makes women hold roles related to weakening hierarchy.[48] Women also less frequently participate in elections. According to Polish General Election Project (PGSW), less than 10% of women cast their votes. Women admit that they do not go to elections because "they don't have knowledge about politics". Every third woman as well as every third man explains that "elections don't decide about anything important for people like me". Women, who do not go to elections, claim that they take care of solid issues, children, home, professional work, they have many things to do and they concentrate on them. Therefore, politics still seems a sphere in which women can find themselves if, to some extent, they will accept male rules of the game. The roles that are assigned to women in political parties are not far from stereotypical perception of women. On the one hand, they are to warm and sooth the image in perception of a particular political group, on the other hand women are used for 'unpunished' attacking political opponents. Women are also assigned a role of 'busy bees' whose task is to do a necessary but not spectacular work.[49] Femininity is still associated with carnality. If a female politician is attractive, her beauty remains in contradiction with the gravity of a function she holds. If she lacks beauty — she will

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[46] The research was conducted on a representative group of 1002 adult Poles; see more: Małgorzata Fuszara, *Kobiety w polityce*, p. 22.

[47] *Ibidem*, p. 22.

[48] Anna Pacześniak, *Potrzebne na gwałt, czyli kobiety w polskich partiach politycznych* [*Needed urgently — about women in Polish political parties*], in: Joanna Marszałek-Kawa (ed.), *op. cit.*, p. 256.

[49] *Ibidem*, p. 258

be classified as a freak and a frustrate.[50] This excessive concentration on the looks is not conducive for holding leadership functions in the country. Norbert Maliszewski accused women who were members of parliament in previous parliament created by Donald Tusk, that they do not make use of their positions as it is done by their counterparts in Spain, Italy, France and are merely men wearing skirts. Maliszewski wrote that in order to improve the image of Donald Tusk's parliament in years 2007–2011 and weaken a critical blade aimed at him, it is necessary to call in female MPs, pretty and sexy. For a particularly pretty woman he chose Joanna Mucha who became a minister in next term of office.[51] Mucha became famous for proposing to call her 'lady minister' instead of simple 'minister'. A debate began around the nickname which was soon supported by Polish Language Council. According to professor Andrzej Markowski, the chairman of Polish Language Council, female forms of names of professions and titles are allowed. However, such forms often raise negative emotions among Polish speakers.[52] In his perception of women in politics, Maliszewski was not alone. A woman is perceived by the society through features of character such as passivity, submissiveness, trustworthiness, stereotypical social roles and attractive looks.[53]

Another barrier is a lack of women solidarity in promoting other women's careers. Magdalena Środa, when asked as to how she would comment on CBOS results that only 17% of women would like to work closely with other women but 70% in a situation of a female-male conflict supports a man, responded that she is not surprised because women do not have experiences of common activities. Women, according to Środa, are rarely loyal.

If a woman is lucky and makes it to the top, she is a rarity and proudly defends her uniqueness, forgetting who she is. Other women remind her of her old oppression so she denies solidarity with them.[54] The ones who manage to obtain higher positions, forget about other women in fear of losing achieved position, which does not influence an increase in women political representation. What is interesting, Hanna Suchocka, first female prime minister in the history of Poland, despite numerous petitions from female groups and organizations, did not decide on establishing

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[50] Agnieszka Graff, *Świat bez kobiet. Płeć w polskim życiu publicznym* [*World without women. Sex in Polish public life*], Wydawnictwo W.A.B., Warszawa 2001, p. 40.

[51] Norbert Maliszewski, *op. cit.*, p. 94–96.

[52] Magdalena Fris, *Wikipedia: żeńskie nazwy zawodów? Nie w Polsce!* [*Wikipedia: female names of professions? Not in Poland!*], available at http://media2.pl/internet/92302-Wikipedia-zenskie-nazwy-zawodow-nie-w-Polsce.html (access:15.07.2015).

[53] Dorota Zaworska-Nikoniuk, *Uczestnictwo kobiet w polityce i kariery polityczne kobiet upowszechniane w magazynach luksusowych i prasie feministycznej* [*Women participation in politics and women political careers popularised in women magazines and feminist press*], in: Joanna Marszałek-Kawa (ed.), *op. cit.*, p. 180.

[54] Magdalena Jankowska, *Dlaczego kobiety przegrywają w wyborach?* [*Why do women lose in elections?*], a conversation with Magdalena Środa available at http://www.newsweek.pl/styl-zycia/dlaczego-kobiety-przegrywaja-w-wyborach-,41318,1,1.html (access: 12.04.2015).

a position of a Female Proxy. She claimed that she could not see the need for actions regarding women promotion and filling in an open position.[55] A woman entering political life has a choice — she can either become similar to men[56] or remain 'a true woman'. According to Agnieszka Graff, if a woman "creates her image opposing stereotypes, she is accused of 'lack of femininity' (case of Suchocka) and if she does not resign from her sex, she will be blamed for excessively 'feminine' attitude to politics (that was the case of Hanna Gronkiewicz-Waltz when she was running for presidency)".[57] Women who have obtained high positions are afraid of other women. It stems from a couple of reasons. First of all, working with men seems less conflict and what is more, they treat other women as rivals and thirdly, they cannot implement equality policy through their actions. There is also one more reason regarding men's attitude towards women on high positions who can replace them in fulfilling office duties. Men often in presence of women speak with irony about introduction of equality politics because they are afraid of being excluded from public life. The problem is that all actions undertaken to balance chances are perceived by men as a threat, not as support of a female group.

What needs to change are the relations among women which are characterized by lack of solidarity and competition. Lack of women solidarity is described by Joanna Marszałek-Kawa. She claims that it is a problem of psychology as women do not like being 'managed' by women. Psychologists point out that women treat one another as rivals.[58] It is not difficult to agree with these statements as many women who existed in politics, held high positions in authority bodies, did not practically supported other ladies. They tended to cooperate more with men than with women. Hanna Suchocka frequently underlined her attitude towards Catholic Church and promotion of traditional division of roles. In Hanna Suchocka's parliament all ministerial seats were occupied by men. Central celebrations of Women's Day were abandoned by her although as many as 78% of Polish females still celebrates 8th March as Women's Day.[59] Renata Siemieńska thinks however that her assessment as a good politician was more important than her unwillingness to change a traditional concept of women role in the society together with supporting restrictive antiabortion

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[55] Urszula Nowakowska, *Instrumenty państwa na rzecz awansu kobiet* [*State's tools for women promotion*], in: Barbara Gadomska, Maja Korzeniewska, Urszula Nowakowska (eds.), *Kobiety w Polsce w latach 90.* [*Women in Poland of the nineties*], Wydawca: Fundacja Centrum Praw Kobiet, Warszawa 2000, p. 10.

[56] Magdalena Środa, *Król jest nagi! Niech żyje królowa* [*The emperor has no clothes! Long live the queen*], OŚKa — Ośrodek Informacji Środowisk Kobiecych, available at http://www.oska.org.pl/biuletyn/b11/srodapolit.html (access: 17.06.2015).

[57] Agnieszka Graff, *op. cit.*, p. 41.

[58] Joanna Marszałek-Kawa, *Brakuje nam solidarności, czyli dlaczego kobiety nie głosują na kobiety* [*We lack solidarity — why women don't vote for women?*], in: eadem (ed.), *op. cit.*, p. 233.

[59] Data according to a report from Internet research „Women's Day" (2004) 80% respondents below 25 years of age, after: Marcin Milczarski, *Marzenia nie tylko od święta* [*Dreams not only once in a blue moon*], available at www.magazynfamilia.pl (access: 12.02.2015).

act.[60] Since the end of September 2014, Poland had a new Prime Minister because the president of Republic of Poland, Bronisław Komorowski, designated Ewa Kopacz (the previous Chairman of the Sejm) on 15th September, to form a new parliament. Ewa Kopacz, as a second woman in the history of Third Republic of Poland, started to execute duties of the Prime Minister[61].

Psychological factors have a significant influence on making a decision of entering political activity. Lack of faith in one's competencies, strengthened by the group which certainly and loudly accentuates that women do not have necessary features enabling them to hold power effectively because these features are common for men, leads to resignation from functions considered manlike.[62] Women face higher expectations than men who apply for the same position. These who express postures and behaviours stereotypically assigned to representatives of the other sex such as entrepreneurship, self-confidence, the rule of 'iron fist' are considered 'men in skirts'.[63] According to D. Zaworska-Nikoniuk a woman to shine in politics has a few strategies to choose from. The author names seven of them:

1) masculinization — erasing features associated with femininity and acquiring features associated with masculinity;[64] 2) Azrael cat — supporting male projects and conformity;

3) 'remaining in the shade' — being in company of a well-known male politician allows a woman to appear in the media sphere;

4) 'a neck shaking a head' — realization of her own projects by means of male support from a friend from the same political option;

5) a strategy of the seeming feminism — interest in female issues to gain women's support as voters;

6) non-conformism strategy — building own political career by means of independent projects without men's support;

7) an attempt to create her own female party and struggle with multiple social stereotypes. According to Dorota Zaworska-Nikoniuk, first five strategies enlarge women's chances to pursuit political careers. They do not, however, influence a real change of living conditions of women and their engagement into political life.

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[60] Renata Siemieńska, *op. cit.*; after: www.miastokobiet.art.pl/Plec_a_wybory/Postawy.html (access: 09.04.2015).

[61] See http://www.prezydent.pl/aktualnosci/wydarzenia/art,3023,prezydent-desygnowal-ewe-kopacz-na-premiera.html (access: 12.02.2015).

[62] Małgorzata Fuszara, *Kobiety w polityce*, p. 160.

[63] Norbert Maliszewski, *op. cit.*, p. 96.

[64] The classification proposed by Dorota Zaworska-Nikoniuk, see more: Dorota Zaworska-Nikoniuk, *Uczestnictwo kobiet w polityce i kariery polityczne kobiet upowszechniane w magazynach luksusowych i prasie feministycznej* [*Women participation in politics and women political careers popularised in women magazines and feminist press*], in: Joanna Marszałek-Kawa (ed.), *op. cit.*, p. 180.

The role of media regarding keeping up stereotypical perception of roles in the society is also underlined.[65] Fuszara points out on the way of presenting female candidates in television programs.[66] Researches of pre-election television campaigns prove that figures of women are shown on TV less frequently than men and less time is assigned to broadcasting female speeches when compared to men. Statistical data prove that in programs which are free of charge for parties and committees — paid for by taxpayers of both sexes, time distribution is less favourable for women than their position on electoral registers[67]. Mass media can therefore contribute to elimination of women in political life. From the data provided by the management of Polish Radio station in Lodz 'Radio Lodz' it turns out that broadcasts of Radio Lodz in July 2014 such as: 'Good morning', 'Pulse of the city and region', 'I ask so I am', 'My radio, my music', 'Our children', 'Parliamentary Monday', 'Upbringing is a challenge', 'Local government from A to Z' were attended by 410 women and 765 men. It has to be pointed out that to programs such as 'Parliamentary Monday' or 'Local government from A to Z' mainly men were invited and in the last program there we no women at all.[68]

Sonia Szczepańska, the author of an article *Kobieta — zwierzę polityczne?* [*Woman — a political animal?*] notices that questions which are asked of female candidates, regard personal life and not qualifications, disposition for professional achievements through which there is a stereotype built up that "women know nothing of politics".[69] The role of the media in perception of the world is immense. Knowledge and image of an entity about political reality is more often based on its representation by the media. This repetitive and short-term perception of reality happening on the basis of the media leads to creation of solid pictures about reality, considered typically as the right version of reality.[70] It can influence modification of stereotypical perception of women.

To sum up, it has to pointed out that we cannot talk about improvement of a situation in the sphere of public life without eliminating barriers which cause uneven treatment of women and men willing to prosper actively in public life. Despite numerous declarations regarding willingness and necessity of transforming existent status quo, results in the form of achieving equality of women and men are far from ideal. What changes should be introduced that would limit not institutional barriers? Only a long-term strategy will allow for a change

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[65] Joanna Marszałek-Kawa, *Brakuje nam solidarności…*, p. 233.

[66] Małgorzata Fuszara, *Kobiety w polityce*, p. 105.

[67] Eadem, *Kobiety w polityce w okresie transformacji…* p. 27.

[68] Data provided by management of 'Radio Lodz'.

[69] Sylwia Szczepańska, *Kobieta — zwierzę polityczne?* [*Woman — political animal?*], in: Małgorzata Radkiewicz (ed.), *Gender — culture — society*, Rabid, Kraków 2002, p. 29.

[70] Hans Mathias Kepplinger, *Demontaż polityki w społeczeństwie informatycznym* [*Deconstruction of politics in the society of information*], trans. by Artur Kożuch, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków 2007, p. 179.

of social awareness regarding women's participation in decision-making processes and holding authority seats. A strong social will to introduce innovations within the model of social relation plays a significant role in this process. The change of self-awareness that would enable them to think they can pursue political careers should be based on popularization of a model of a woman who is active socially. For some women, political activity seems abstract, detached from daily life. The change of awareness of women themselves regarding legitimacy of the division of social roles according to sex can only help in making a decision about participating in making decisions.

Political parties play a major role in the change of social awareness regarding women political participation. Creating in parties female sections can only help women to find an equal place in a democratic society. Such sections which were created in social democratic parties, led to introducing changes in statutes and defining 30% participation of both sexes in decision making bodies. Success achieved on a small scale has encouraged to pursue a larger activity regarding taking political-social actions supporting and promoting women.[71] An increase in awareness regarding women and men equality in the society on all levels of authorities, non-governmental organizations, educational system and the media can contribute to limiting barriers which influence political involvement of women.

"Women's time has come. Not for women themselves but for the life harmony and well-being of women and men" — said Ségolène Royal running for the presidency seat in France in 2007.[72] According to the principle of fairness, women and men should have equal access to decision-making bodies. Zofia Daszyńska-Golińska used to wirte: "The equality rule itself […] seems to base female rights on fairness only. People are equal so they should have equal rights, regardless of the sex."[73]

A postulate to represent women by other women is an obvious realization of the declaration "nothing about us without us".[74]

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[71] Ewa Malinowska, *Feminizm europejski. Demokracja parytetowa a polski ruch kobiet. Socjologiczna analiza walki o równouprawnienie płci* [*European Feminism. Parity democration versus Polish female movement, Sociological analysis of a fight for gender equality*], Wydawnictwo Uniwersytetu Łódzkiego, Łódź 2002, p. 193.

[72] Christine Ockrent, *Kobieta i władza* [*Women and power*], trans. by Katarzyna Resztak, Jolanta Kurska, Wydawnictwo Prószyński i S-ka, Warszawa 2007, p. 178.

[73] Zofia Daszyńska-Golińska, *Kobiety we współczesnym życiu publicznym* [*Women in contemporary public life*], in: Aneta Górnicka-Boratyńska (ed.), *Chcemy całego życia. Antologia polskich tekstów feministycznych z lat 1870–1939*, [*We want a full life. Anthology of Polish feminist texts from 1870–1939*], Res Publica, Warszawa 1999, p. 268.

[74] Bernadetta Darska, *Kobiety w przestrzeni publicznej, czyli to, co niewidoczne, jest znaczące* [*Women in public sphere – what is invisible is important*], in: Joanna Marszałek-Kawa (ed.), *op. cit.*, p. 168.

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