The 23rd IVR Congress

Law and Legal Cultures in the 21st Century: Diversity and Unity

Special workshops

Students and Young Researchers

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edited by
Marcin Pieniążek

Andrzej Frycz Modrzewski Krakow University

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tel./faks: (012) 252 45 93
e-mail: ksiegarnia@kte.pl

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Preface

I was given the honour of editing the volume which constitutes the outcome of Workshops "Students and young researches", organized during the 23rd IVR Congress in Kraków.[1] As we remember, the main theme of the abovementioned Congress was "Law and Legal Cultures in the 21st Century: Diversity and Unity". The content of this volume, very diversified in its subject matter, perfectly conveys this central theme.

W. Cyrul compares text – making mechanisms implied by traditional legal media with the electronic media, discussing, among others, the concepts of linear text and the idea of hypertext. M. Del Mar, following the criticism made by Sundram Soosay presents examination of the status and role of models of behavior's explanation in some of the most prominent works of contemporary Anglo – Saxon theory (Hart, Ratz, Dworkin, and MacCormick). S. Häußler, following the theories of Freud, Lacan and Legendre provides the analysis demonstrating the extent to which legal theory takes part in shaping our emotional disposition towards the law as well as legal and resolution process. S. A. Leahy Stone analyses the precedential decision made by American court forbidding segregated education (Brown v. Board of Education, 1954) and reveals crucial role being played in by Aristotle's concept of virtue of friendship. R. Kazanavièiłtë presents Lithuanian experiences of the society in transition and discusses the complex role being played in this process by the judges. M. Könczöl acting in the province of "law and literature" revises the evidence which Cicero's works provide about *Causa curiana* to examine the role which is being played by narratives not only in the adjudication but also in later interpretations. M. Pieniążek uses the example of contradictory requirements of legal, medical and business ethics to pose the question of exist-

[1] The Workshops were run by Prof. Luc J. Wintgens from the European Academy of Legal Theory and the editor of this issue.

ence of the universal values in postmodern society. A. Santacoloma Santacoloma develops the analysis of the issue of defeasibility in law and the probability of making a system with defeasible norms, aiming to provide a logical characterization of the interrelation between law, defeasibility and legal norms. S. Tattay traces roots of Hobbes' natural rights theory and examines the latter from the perspective of medieval and early modern scholastic rights' theories (by Ockham, Vitoria, Suarez, and others). R. Thamair analyses relationships between the concept of Homo europaeus and axiology of the Treaty establishing Constitution for Europe and wonders to which extent human dignity is recognized as foundation of "European values". Li Yanping considers possible ways of influencing Chinese constitutionalism by the phenomena of coexistence of different legal systems (and consequently, different concepts of rule of law, civil rights, etc.) in one Chinese state.

All that I can do is to thank all the Authors for preparing the texts which reveal wide imagination, big knowledge and good skills of young law philosophers who included their texts in this volume. Although it is difficult to claim that the essays, presented below, constitute a representative sample for young theory of law in general, they make it possible to think with optimism about the future of our field of knowledge. Last but not least, I deeply thank everybody for creating an unforgettable, friendly atmosphere which has accompanied the work of our Workshop.

*Wojciech Cyrul**

Legal Drafting: From Text to Hypertext

Introduction

An analysis of legal drafting is hard to imagine without taking into consideration the requirements of textuality. The reason is that legal texts have to meet not only certain formal requirements, provided for in the law, but also some general demands imposed on texts. As Brinker observed, the "text" means a limited and coherent sequence of linguistic signs which, as a whole, signal a recognisable communicative function.[1] Thus, general requirements of textuality uncompromisingly limit and determine the law-making process. Moreover, the assumptions and requirements of communication, underlying a given text format, impose a number of conditions on the legislative process. As a result, compatibility between the rules of composing legal texts and those requirements, as well as compliance with assumptions connected with the mechanisms of writing and reading a text implied by the character of a text medium, condition the communication effectiveness of legal regulations.

Traditionally, the text notion is associated with the phenomenon of written communication, that is not only with the idea of executed speech, but also recorded and separated speech.[2] From this perspective, rather than interaction, a text is a product of communicative actions.[3] This means, that

* Wojciech Cyrul J.D. (LL.M. EALT) Adjunct Professor Jagiellonian University, Department of the Philosophy of Law and Legal Ethics; cyrulwojciech@hotmail.com.

[1] K. Brinker, *Linguistische Textanalyse. Eine Einführung in Grundbegriffe und Methoden*, Erich Schmitt, Berlin 1988, p. 17.

[2] See: A. Okopień-Sławińska, *Semantyka wypowiedzi poetyckiej*, Kraków: Universitas, 2001, p. 16.

[3] D. Viehweger, *Zur semantischen Struktur der Texts*, [in:] F. Danes, D. Viehweger (Hrsg.),

a text is not an accidental event taking place here and now. In other words, it is not necessarily interaction-oriented. The text notion associated with printed word tends to seem a self-sufficient, semantically autonomous, continuous and finite entity.[4] Consequently, a text is a ready-made product and has a linear structure. Oral texts, on the other hand, do not have such characteristics. They are open, often without a definite beginning or end, structurally discontinuous, and, on the linguistic level, clearly dependent on a pragmatic context. Thus, it can be suggested that a number of features or assumptions as to what characteristics an intentionally effective text should have, are conditioned by the medium through which a given text is to be communicated. Given the fact that the contemporary notion of law is largely connected with the concept of linear text implied by writing and print, it is important to analyse a potential impact the electronic medium might have on writing and reading legal texts. The problem is the more attractive as the electronic medium enables application of a new text format, i.e. the so-called hypertext, which seems to suit the requirements of the contemporary system of law better that the traditional linear text paradigm.

Text and Hypertext

From the point of view of analysing a legal text, it is justified to claim that even though the most basic element of a text constitutes a single sentence, or a phrase not having the form of a sentence, a text is a hyper-sentence construct.[5] Such approach enables us to adequately allow for the relations between the rules of law and the entire text of law. Thus, I do not determine here whether it is possible to speak of a text on the level of simple sentences.[6] Neither do I assume that a text is a linguistic structure comprising at least two sentences, given that compound sentences constitute a text themselves.[7] Consequently, I only assume that the essence of a text is expressed not in grammatical rules governing a sentence, but in relations between linguistic units more complex than simple sentences.[8] Even though such relations may not have a formal character, they still determine text-making mechanisms and text reading processes, and as such are important for a legislator's practice and legal practice. We will see it the best if we con-

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Probleme der Textgrammatik II. "Studia grammatica XVIII", Berlin: Akademieverlag, 1977, p. 107, S. J. Schmidt, *Texttheorie*, München: Fink, 1973, pp. 145 ff..

[4] See: A. Wilkoń, *Spójność i struktura tekstu*, Kraków: Universitas, 2002, pp. 43 ff.

[5] I. Rosengren, *Texttheorie*, [in:] P. Althaus, H. Henne, H.-E. Wiegand (Hrsg.), *Lexikon der germanistischen Linguistik*, Tübingen 1980, pp. 275 ff.

[6] T. Dobrzańska, *Tekst próba syntezy*, Warszawa 1993, pp. 8.

[7] J. Bańczerowski, J. Pogonowski, T. Zgółka, *Wstęp do językoznawstwa*, Wrocław 1982,

sider what it actually means that textuality is expressed in structures more complex than a sentence, and how to demarcate such structures.

Against all appearances, an answer to the question of text borders is far from unambiguous. Indeed, a number of problems and intuitions as to the law concept might be explained exactly through an analysis of this problem, since the issue of the text-hypertext relation is, in the theory of law, analogous to that of the statute-legal system relation. An analysis of the first relationship may prove extremely attractive for a lawyer, as it puts old problems in a new light. It is particularly evident if we notice that an answer to the question of the limits of a text, like to that of the limits of a statute, oscillates between two extremes. On the one hand there are trends, influenced by structuralism, to perceive a text as a closed and finite structure, and on the other – tendencies, under the impact of deconstructionism, tending to blur, or even obliterate the limits of a text.[9] Between these extremes, as usual, there is the whole spectrum of theories attempting to reconcile a text's immanent potential to cross its borders with the postulate of its closed and finite character. These latter theories could be divided, after Kalaga, into the following groups: the first group comprises theories defending the view of text polarisation. The idea of this view is grounded on the assumption of invariability and structural limitation of a text, and on simultaneous acceptance of permanent changes in the relation between a text and what is external to a text. The meaning of a text is fixed and determined by a specific sequence of characters used by an author. What differs is the significance of a text depending on an interpretative context. A text remains unchanged, only its concretisation varies. The second group contains theories assuming osmotic character of a text. A text remains a separate entity, but its content is in permanent "dialogue" with other texts. Thus, text limits are subject to incessant perforation. The third group includes theories assuming a nebulous nature of a text. From this perspective, a text is a sign, and the problem of its limits disappears. A text becomes a resultant of two opposing forces: a diffusing power of interpretation and a gravitation of a text teleology.[10]

An analysis of the text notion from the perspective of a communication medium shows that certain text features are in fact determined by the medium through which we perceive a text. In any case, different media imply different ways of meeting textuality requirements. In particular, they impose on a text various consistency and coherence conditions and various

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pp. 322 ff.

[8] See: E. Agricola, *Semantische Beziehungen im Text und im System*, Halle 1969, p. 88.

[9] See S. Critchely, *The Ethics of Deconstruction: Derrida and Levinas*, Oxford and

means and mechanisms of creating coherence. However, it is not about grammatical consistency of sentences, but consistency seen as structural dependence between hyper-sentence text structures. Because of a text intentionality they are arranged by authors in a way that suggests the proper way of their reading. For example, traditionally, text writing assumes that reading is a sequential and continuous process. As a result, written texts are usually linear. Such structure enables an author not only to maintain semantic consistency of broader fragments, but also to control thematic consistency of an entire text.[11] Moreover, a linear text format allows an author to unilaterally organise a text content into specific hierarchic and horizontal structures strengthening its coherence. By way of example we could mention text segmentation, elements structurally beginning or closing a text, such as title or conclusion, complex developments or references to preceding or subsequent elements, introductions, tables of content, indexes, division into paragraphs, parts, books, titles, chapters, etc. The possibility to apply the above measures results both from linear structure and the mechanisms of composing written texts. Consequently, a written text is two or, at the most, three-dimensional, which makes it seem a static structure enabling synchronic analyses. It becomes, like it did for Isenberg, a specific, invariable sequence of sentences interlinked by text tools.[12]

The notion of hypertext refers to the non-sequential arrangement of text-based information.[13] Hypertext, however, constitutes not only a system of interlinked nods, i.e. arranged information appearing on the screen. Hypertext is a dynamic system which supports a user in creating, obtaining, applying and managing a set of interconnected information.[14] Thus, the specific character of hypertext is determined not by the quality or quantity of information, but by the way it is arranged. Its interactive nature changes the cognitive processes characteristic of interpreting a linear text.[15] In particular,

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Cambridge, MA, Blackwell 1992, p. 38.

[10] More in: W. Kalaga, *Mgławice dyskursu*, Kraków: Universitas, 2001, pp. 209 ff.

[11] For ways of creating thematic unity see: A. Wilkoń, *Spójność i struktura tekstu...*, p. 74 ff.

[12] See: H. Isenberg, *Überlegungen zur Texttheorie*, ASG-Bericht No. 2, Berlin 1968, p. 4 ff.

[13] J. Janangelo, *Joseph Cornell and the Artistry of Composing Persuasive Hypertexts*, "College Composition and Communication", Feb 1998, Vol. 49, No. 1, p. 24.

[14] I use the notion of information, since a hypertext may include not only texts, but also multimedia elements. See M. P. Bieber, S. O. Kimbrough, *On Generalizing the Concept of Hypertext*, "MIS Quarterly", Mar., 1992, Vol. 16, No. 1, p.77 ff.

[15] M. J. Wenger, D. G. Payne, *Comprehension and Retention of Nonlinear Text: Consid-*

whereas a recorded text assumes linearity of thinking, hypertext intensifies associative and nonlinear thinking. This is due to the fact that text consistency in hypertext, other than in linear text, is not a quality determined by the text-forming categories themselves, but by the goal guiding a user who, upon reading a text, makes a number of decisions concerning its interpretation. A linear text is consistent, if its content is free of logical contradictions, and its structure has the right sequence. From such perspective, hypertext is inconsistent by nature. In hypertext, apart from the metalevel of the information management system, there exists *a priori* no natural order allowing us to speak of its logical or sequential consistency. Hypertext is dynamic and oriented at interaction with recipients. Consequently, it tends to diffuse, fragment and converge with the context in which it is read. Moreover, hypertext never appears as a whole to a user. As a result, from the perspective of a reader, we can talk about consistency, as to its principles, on the level of respective nods which are supposed to create and are designed for a reader as certain inherently consistent wholes.

Hypertext imposes on a text completely different demands as to the requirement of coherence. In the case of a linear text, coherence depends on a reader having the knowledge and experience assumed by an author and necessary to properly understand a text. If such knowledge is not explicitly expressed in a text itself, text coherence will depend on the context in which it is read. Thus, linear text coherence is conditional on a reader's vision assumed by an author. Nonetheless, this does not contradict an active role a reader has in reconstructing the meaning of a text. In hypertext, however, the role of a reader and author undergoes a significant transformation. Basically, we deal here with the possibility of a reader's actual participation in text creation. As a result, whereas the coherence of a structurally written linear text forces an author to verbalise a message as fully as possible and to ensure the highest degree of its semantic self-sufficiency, achieving the same effect in hypertext would additionally require an author to control the mechanisms of linking information. Text coherence, as a function of knowledge assumed by an author and a reader's knowledge, requires a hypertext author to control the links, i.e. to consistently link information on a given topic appearing in various nods. Thus, unless hypertext creators assume that each link constitutes a necessary means to read a text in hypertext, it will be hard to speak of its coherence in the traditional meaning of the word. Given the lack of an author's control over the ways of interpreting information included in hypertext, its coherence depends only on the actual knowledge of users determining their choice of the way they read.

From the point of view of the linear text coherence theory, hypertext should be assumed structurally incoherent. Yet, such incoherence of hyper-

text does not contradict possible coherence within its respective fragments or sets recorded in a linear form in a data basis. Even though hypertext as a whole can be a closed system, its structure and functioning substantially prevent a reader from taking all its elements simultaneously into consideration. Consequently, as long as information in hypertext is not generated and linked by a single entity or according to a certain principle anticipating reader's choices, it is impossible to ensure coherence of all possible interpretations. On the other hand, if, as it was suggested by Slatin, we take linkage of information for an equivalent of a linear text sequentiality, then a link may simulate a relation between an author's and a reader's mind.[16] Thus, coherent can be both entire hypertext and each of its nods. If information is not linked in anticipation of the way it is read, hypertext, or rather a fragment of hypertext, may only be subject to systematising and ordering by its users. The products of their operations, however, are not identical with hypertext. What is more, coherent as they might be on their own, together they will not necessarily create a consistent whole.

Hypertext changes the meaning of intertextuality, that is the relations of a text to other texts. In linear texts, intertextuality plays a role similar to that of a context, meaning that it determines the relations between a given text and other texts, which gives the text a specific meaning. An intertextual frame in which such text functions and to which it can refer, reduces ambiguity which would otherwise be caused by its full self-sufficiency and semantic explicitness. Consequently, a linear text requires of its reader not only knowledge of a language and the rules of its interpretation, but also of other texts to which a given text refers. In effect, it also assumes knowledge of certain generic rules and stylistic and utterance standards underlying specific texts.[17] As a rule, hypertext does not make such assumptions. Its dynamic character and openness to a reader means that it is the reader who decides in what systems a given piece of information will function. As a result, hypertext is immanently open, discontinuous and linguistically heterogeneous. The functioning of links, too, confirms the difference between intertextuality of a linear text and dynamic reference within a system of existing nods in hypertext. In the case of a traditional text, intertextual relations are usually neither formalised, nor obvious or necessary. It is only hypertext which justifies the claim that a text can become a product enabling a vast number of different, equally proper ways of reading, and vali-

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erations of Working Memory and Material-Appropriate Processing, "The American Journal of Psychology", Spring, 1996, Vol. 109, No. 1, pp. 93 ff.

[16] J. M. Slatin, *Reading Hypertext: Order and Coherence in a New Medium*, "College English", Dec 1990, Vol. 52, p. 877.

dates the statement that a text is created in the course of the reading process. Thus, the intertextual potential of a traditional text is practically represented and realised only via the electronic medium. In hypertext a text is no longer only an effect of its writing down, but it *de facto* becomes equally a result of the reading process. Linear text as such does not have this dynamic element. Consequently, a traditional text implies a sharp division between an author and a reader. In hypertext those roles are hard to distinguish. Moreover, hypertext may in practice be co-created or co-developed by several entities, or even by a system itself, capable of automatically linking respective hypertext fragments according to a user's requirements.[18]

The status of a text depends also on meeting the intentionality requirement. In the case of intentional communication, an author and a reader always take deliberate measures to realise their goals which they want to achieve through communicating or receiving information. As far as a linear text is concerned, its efficiency in mediating author's intentions depends both on the degree of complying with the textuality category and on the credibility of communication. In written and non-addressed texts, credibility of message is structurally guaranteed on the level of the assumed auditorium model. In written texts addressed to somebody, it depends on the relations between an author/communicator and a recipient.[19] Hypertext does not belong to the category of addressed texts and is for somebody rather than to somebody. Nonetheless, as to hypertext intentionality, it is hard to speak of an assumed model of auditorium or recipients. As it has already been mentioned, hypertext disrupts the division into an author and a reader. Contrary to a written text, it usually allows a reader to actively participate in the process of generating text meaning and enables a text to be read in a way not anticipated by the author.[20] Insofar as printed texts prevent interaction with readers, electronic texts give readers control. Thus, as long as links and nods creation in hypertext is not supervised or planned by an author, it is hard to speak of hypertext intentionality otherwise than as of an ability to effectively provide information required by a reader. Consequently,

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[17] See: R. Nycz, *Tekstowy świat. Poststrukturalizm a wiedza o literaturze*, Warszawa 1995, p. 62.

[18] M. P. Bieber, S. O. Kimbrough, *On Generalizing*..., pp. 82 ff.

[19] More in: E. Aronson, B. W. Golden, *The Effects of Relevant and Irrelevant Aspects of Communicator Credibility on Opinion Change*, "Journal of Personality" 1962, 30, pp. 135–146; J. S. Kerrick, *The Effect of Relevant and Non-Relevant Sources on Attitude Change*, "Journal of Social Psychology" 1958, 48, pp. 15–20; J. C. McCroskey, *A Summary of Experimental Research on the Effects of Evidence in Persuasive Communication*, "Quarterly Journal of Speech" 1969, 55, pp. 169–176.

hypertext intentionality comes down to the ability to create mechanisms supporting reader's decision-making processes, and as such it particularly depends on a system capacity to provide a user with texts interrelated in such a way as a reader expects them to be. Undoubtedly, hypertext ability to activate links only between documents containing certain features or pieces of information required by a reader determines a user's attitude to hypertext.

Text intentionality as a condition of communicative character is closely related to the problem of text informativeness. After all, linear text effectiveness depends not only on whether it contains information necessary for proper understanding of message, but also on whether it includes information which is new to a reader. Lack of *novum* discourages a reader from continuing communication and often causes its interruption. On the other hand, excess of information also reduces effectiveness of communication, making it impossible for a recipient to comply with its original complexity. At this level there emerges a vast advantage the electronic medium holds over printed text. It provides tools to analyse long texts, allowing for their full complexity.[21] Indeed, hypertext enables link management in a way that eliminates nods irrelevant from the point of view of user-determined criteria and application of text retrieval engines or intelligent agents technology. In the case of printed texts, the informativeness requirement imposes not only sequentiality, but also application of certain mnemonic tools, such as repetitions or references enabling the memory to embrace the entire text. The fact that such tools are applied, however, does not facilitate searching for specific pieces of information in a printed text; to the contrary – it imposes a number of requirements and restrictions on a text.

Text, Hypertext and Legal Text

Generally, the theory of law assumes a philological approach to a text and does not devote much attention to the problems connected with text functioning in communication processes. This is because of the assumption of message identity with its text understood to be a written record of a specific utterance. In such approach a text of a statutory regulation is identified with a recorded, finite and consistent statement, that is one in which the sequence of linguistic signs cannot be changed. It is a finite sequence of relatively complete and coherent linguistic utterances made in a form provided for by the law, by an entity authorised to do so. At the same time the basic locutory

[20] N. G. Patterson, *Hypertext and the Changing Role of Readers*, "The English Journal", Vol. 90, No. 2, Technology and the English Class (Nov., 2000), p. 76.

mode is regulating.[22] Taking into account, however, institutionally determined intertextual relations between respective statutory regulations and the impact of those relations on the meaning of respective legal rules, it seems that the notion of a text of a statutory regulation is not enough to describe the concept of a text of law which lawyers mean they speak of law.

In the theory of law, a text of a statutory regulation is a result of the choices made by a legislator. At the same time, it has a number of linguistic and structural features following from the formally accepted rules of constructing such texts. Nevertheless, the quality of a text depends also on the existence of certain cultural patterns of its "grammar" and certain archetypical ideas of this issue, functioning in the "collective awareness" of a given communication society.[23] They facilitate, or sometimes even enable its members to properly recognise a text or its function. Such mechanism is also visible in the case of the practice of writing and reading texts of statutory regulations, which realises a number of fundamental assumptions made by legislators concerning the law itself, as well as its creation and application. In effect, texts of statutory regulations receive such form, content and style as to be easily distinguishable as a subgroup in a general group of texts of official language.

An analysis of contemporary texts of statutory regulations shows that they have certain paradigmatic semantic, syntactic and stylistic features. Texts of statutory regulations contain specific legal terminology, statements are impersonal, i.e. not in the first or second person, and the length of sentences is unprecedented in other discourses. Moreover, we could mention a statistically large number of denominative verbs and usage of natural language notions in other than their colloquial meaning.[24] A feature char-

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[21] More in: R. Susskind, *The Future of Law. Facing the Challenges of Information Technology*, Clarendon Press, Oxford 1996, pp. 107 ff.

[22] See: J. Stelmach, R. Sarkowicz, *Teoria prawa*, Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 1996, pp. 72 ff. and the lit. quot. there.

[23] An illustration of the functioning of such patterns could be the requirements imposed on texts in scientific and legal discourses. In particular, they are required to be on a high level of semantic standardisation and compliance with accepted conventions as to the required form and structure of a text. More in: W. O. Hendricks, *Grammars of Style and Style of Grammar*, North-Holland Publishing Company, Amsterdam, New York, Oxford, 1976.

[24] More in: B. Wróblewski *Język prawny i prawniczy*, Kraków 1948; Z. Ziembiński, *Le langage du droit et le langage juridique. Les critères de leur discernement*, "Archives de philosophie du droit. Le langage du droit" 1974, 19, Paris, Sirey, pp. 25–31; T. Gizbert-Studnicki, *Język prawny i prawniczy*, "Zeszyty Naukowe UJ, CCXCII, Prace Prawnicze", Zeszyt 55, Kraków 1972, p. 36 ff; G. Kalinowski, *Sur le langage*

acteristic of English texts is the abundance of compound adjectives.[25] Also, the structural arrangement of texts of law is specific. Of course, the sequence of certain elements may vary depending on the requirements of a specific legal system and legal culture in which they are generated. Nonetheless, traditional texts of statutory regulations have a number of significant similarities. Usually, they are divided into a non-articled and articled component. The first usually specifies the type of regulation, title, date of adoption or year, often a preamble and the number of the regulation. Additionally, in many cases we can distinguish a proclamation formula. The articled component is divided into parts, numbered and organised into articles, sections, points or letters. An entire text is usually systematised in a certain manner. Consequently, sets of rules are grouped into books, sections, titles, chapters, etc. In most cases, at the beginning of a regulation there is a section containing legal definitions, followed by substantial, institutional and procedural provisions.[26] Characteristically, texts of statutory regulations lack metatextual operators, summaries, repetitions or commentaries immanently determining the comprehensibility, clarity or intentionality of printed linear texts. Additionally, such texts are edited disregarding cause and effect, chronological or result consistency. Nonetheless, they are required to be consistent, materially and formally complete, general in character, and at the same time concise, synthetic, unequivocal and clear.[27] As a result, texts of statutory regulations appear to be closed, ordered and formalised constructs, while the way those features are obtained and the way such texts function nowadays remind much more of "hypertextual" than linear text format. Thus, it could be claimed that a natural medium for the contemporary legal system should be the electronic medium, rather than print, which restricts the system potential to self-regulation.

A text of a statutory regulation should be complete and explicit, meaning that the content of the information on the addressee's rights and obligations provided there should be sufficient to specify the conduct expected of an addressee. In practice, this means that each text of a statutory regulation

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respectif du législateur, du juge et de la loi, "Archives de philosophie du droit – Le langage du droit" 1974, 19, Paris, Sirey, pp. 63–74.

[25] More in: V. Bhatia, *Cognitive Structuring in Legislative Provisions*, [in:] J. Gibbons (ed.) *Language and the Law*, London, New York: Longman, 1994, p.140 ff.; the same: *Systematic Discontinuity in Legislative Writing and its Implication for Academic Legal Purposes*, [in:] A. K. Pugh & J. M. Ulijn (eds.), *Reading for Professional Purposes – Studies and Practices in Native and Foreign Languages*, London, Heinemann 1984, p. 90 ff.

[26] See: W. Cyrul, *Podstawowe zasady legislacyjne tworzenia statutów samorządu te-*

should be as semantically self-sufficient as possible. However, it is very unlikely for this requirement to be met on the level of an individual text of a statutory regulation. Apparent semantic independence of texts of statutory regulations is actually due to the fact that they immanently function in a system of meanings already defined in other legal or non-legal texts to which they themselves directly or indirectly refer. Outside such broader intertextual context, a text of an individual statutory regulation would often be utterly incomprehensible. To guarantee its completeness, considering the restrictions imposed by the printed form, would mean to include all texts conditioning the meaning of the provisions made. Such solution, however, would be against the requirement of conciseness forbidding to repeat the same pieces of information in different statutory regulations. Thus, the traditional form of a legal text limits the realisation of the demand to make it complete, and imposes application of specific technical tools in order to reduce the resulting inconvenience. In effect, a text of a statutory regulation contains a number of internal or external references. In the first case, texts of respective provisions refer to other provisions or larger fragments within a given legal text. In the latter case, a text of a statutory regulation refers to texts of other statutory regulations or to texts without the status of a formal source of law. As a result, we can distinguish internal and external references within texts of statutory regulations. It should be mentioned here that all such references are clearly expressed in a text of a statutory regulation. Consequently, unlike in other forms of printed texts, a number of intertextual relations of a text of a statutory regulation are formalised and of systematic character. Constructing texts of statutory regulations in hypertextual format would simplify and make more efficient the process of creating and tracing the relations between texts of various statutory regulations or between respective rules, assumed by a legislator. Undoubtedly, this would be an important element in executing the rule of transparency of the law.[28] Moreover, it would enable regulating respective legal institutions in a comprehensive way, without the need to repeat the same information many times. Thus, creation of a consistent system of links and automatic information management mechanisms makes it possible to reconcile the requirement of completeness with that of conciseness.

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rytorialnego, [in:] *Statuty jednostek samorządu terytorialnego. Regulacje europejskie i amerykańskie*, ed. W. Kisiel, Kraków 2005, and the lit. quot. there.

[27] More in: S. Wronkowska, M. Zieliński, *Problemy i zasady redagowania tekstów prawnych*, Warszawa 1993; P. Noll, *Gesetzgebungslehre*, Hamburg 1973; H. Hill, *Einführung in die Gesetzgebungslehre*, Heidelberg 1982.

[28] J. Jabłońska-Bońca, M. Zieliński, *Aspekty jawności prawa*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1988, No. 3, p. 41 ff.

Even though in everyday interpretative practice the object of lawyers' interest are respective statutory regulations, often, in order to define the meaning of the rules contained therein, it is necessary to take into consideration a larger number of legal texts and to determine hierarchical, temporal and substantial relations between them. This phenomenon allows us to support the thesis that a text of law goes beyond an individual statutory regulation and becomes what we could provisionally call after Zieliński an aggregate of all regulations in force in a specific time and on a specific territory. The distinction between a text of a statutory regulation and a text of law, however, leads to a number of significant consequences. First of all, a text of law is subject to constant change, whereas texts of respective statutory regulations are much more stable. Secondly, a text of a statutory regulation and a text of law belong to different text categories, since they have different communication statuses and function differently in a discourse. The first have an explicit beginning and ending, and a specific topic determined by the subject of regulation. The latter appear in such approach as a "hypertextual" frame within which respective statutory regulations function. It is a text without either a formal or conventional beginning or ending. It is multithematic and multidimensional, at the same time being hierarchically and substantially organised. Unlike a text of a statutory regulation, though, it does not have a sheer outline of linear structure that could determine its interpretation. It is spatial and dynamic, and its structure opens it to numerous parallel ways of reading. However, the notion of a text of law, if combined with print, is not identical with the notion of a system of law. A system of law is a result of the operations of both a legislator and the system recipients, including, in particular, of the legal dogmatic and the authorities applying the law. A text of law in its present format is a result of a legislator's operations. Consequently, a text of law, formally determined by the texts of respective statutory regulations, may in itself be inconsistent. Consistency of a system of law, rather than the consistency of a text of law, is due to the rules of its interpretation, making it possible to remove inconsistencies and gaps from a printed text of law. A printed format of a text of law, however, means that the rules of its creation are not the same as the rules of its interpretation. Unlike print, the electronic format of hypertext enables the rules of law interpretation to be allowed for in an information and links management system, i.e. at the text-making mechanisms level. In effect, a hypertext system would facilitate a much more efficient supervision not only over creation but also over interpretation of a text of law, at the same time enabling better control over consistence and coherence of respective regulations and the entire system.

Considering the above, it seems that introduction of the electronic form will make it possible to halt the progressing atomisation of law. At the same time, given the fact that hypertext is impervious to problems caused by information overload, its introduction would facilitate "non-invasive" combination of a text of law with pieces of information traditionally unavailable in the process of its reading, such as: commentaries, opinions, examples, court sentences, etc. Exclusion of such information from texts of statutory regulations/texts of law is due to the implementation of the requirement to maintain conciseness and general character of law. Non-invasiveness of such information in the structure of hypertext is due to the fact that such information is available, and at the same time may have a form emphasising its non-binding or non-legal character. Such solution would undoubtedly make it easier for an inexperienced interpreter to properly reconstruct the standards of conduct taking into consideration the complexity of the entire system of statutory regulations. Moreover, it does not, at least overtly, pose a threat to legal certainty. After all, the process of reconstructing a standard could be actively supported by a hypertext system itself, controlled by a legislator. On the other hand, associating law with the printed medium prevents such operation, since introducing additional information to a text of a statutory regulation might lead to serious practical and theoretical problems as to the status of such information. Consequently, considering the limitations of a printed text, the only solution was to introduce a concept of a system of law which, *de facto*, is jointly created by linguistic, systematic and functional rules of interpretation of law, and at the same time takes into account a number of pieces of information not expressed openly in a text of a statutory regulation.

The fact that a specific text seems, *in abstracto*, formally concise and unequivocal does not mean that it will seem the same when put into practice. Formal completeness and consistency of a text of law, and its coherence and decision-making completeness are two different things. In the first case, a text makes it possible only to unequivocally, without falling into logical contradiction, determine what behaviour is compulsory or forbidden, and what is allowed. In the latter case, a text is supposed to enable unequivocal judgment in any given case within the scope of the relations regulated by such text, without falling into praxeological contradictions. With regard to the above, it should be concluded that formal and decision-making completeness of the text of entire law, as well as the requirement of its logical consistency and coherence imply an immanent lack of self-sufficiency or material confinement of respective texts of statutory regulations. The requirement of completeness and consistency of a text of a statutory

regulation is thus a relative one, and is subordinated to the requirement of completeness and consistency of the text of entire law.

Conclusions

Understanding a text as a whole with an arranged thematic structure, enclosed between a beginning and ending is evidently not paradigmatic for thinking about contemporary law. Rather, what unites the contemporary theory of law with a traditional approach in textology is associating a text with comprehensive, structurally arranged and consistent utterances. Such approach is usually explained by implementation of the legal certainty rule. Nonetheless, as follows from the above analysis, it is at least equally due to the requirements of linearity imposed on legal texts by the printed form. It is exactly the printed form that makes texts of statutory regulations seem ready-made products of the communication process.

Limitations imposed on the structure of statutory regulations by a printed text format currently lead to progressing fragmentation of law and dispersal of pieces of information necessary to reconstruct a rule of conduct among often very distant parts of a given statutory regulation, or even among different regulations. Even though it ensures consistency and conciseness of respective statutory regulations, it still causes a number of problems when it comes to maintaining and controlling the consistency of an entire text of law. After all, a high level of internal consistency in a text of a statutory regulation does not mean that such text will also make a consistent element of the text of entire law. Consequently, editorial limitations implied by the requirements of a printed text of law make it impossible to solve the problem of information management in law in a way that would enable simultaneous compliance with the rule of unequivocalness, clarity, conciseness and general character of texts of law. In practice, those limitations shift the problem from the level of creating law to that of interpreting law in the process of its application. It is particularly visible when we observe that a number of intertextual relations between printed texts of statutory regulations or their fragments are not explicitly indicated, even though assumed by a legislator.

The above considerations suggest that hypertext not only enables much more efficient creation and application of law, but also is not that removed from legal intuitions as to the functioning of the current system of law. Even though traditional legal media, i.e. writing and print, impose on texts of statutory regulations a basically linear character, in practice their interpretation has reconstructive and associative, rather than linear, character. Thus, the electronic medium is capable of putting a theoretical system of

law into practice. However, it challenges the traditional mechanisms of constructing texts of statutory regulations, and makes new demands as to ensuring authenticity and security of electronic information. Yet, it seems that the changes the law publishing processes are undergoing constitute the first step towards law-making in hypertextual format. The best example here is the fact that it has become common among legislators to provide legal texts in electronic form, or even to replace printed promulgation with electronic promulgation. We should be aware, though, of how very difficult and expensive it is to maintain consistency of hypertext and develop a system of links allowing for all possible ways of interpretation. Still, it goes beyond saying that the character of changes in law-making facilitated by the hypertext technology is revolutionary. All this urges a reflection on the rules of constructing and functioning of an IT system which would guarantee compliance with such traditional legal values as certainty or democratic character.

*Maksymilian Del Mar**

Modes of Explanation of Behaviour in Contemporary Legal Theory

Introduction

It is both philosophically and politically dangerous to think that any of our representations of behaviour are capable of describing human nature.[1] Adopting the view, for the purposes of the distribution of benefits in a polity, that human beings are, for example, essentially rational,[2] may result in the exclusion of persons with mental disabilities (not to mention persons from cultures some may consider irrational or indeed animals) from the

* School of Law, University of Edinburgh and Institute for the Sociology of Mass Communication, University of Lausanne; m.t.del-mar@sms.ed.ac.uk. I express my gratitude to Marcin Pieniazek for organising and chairing that workshop and for extending his invitation and hospitality to me. I also wish to thank Sundram Soosay for permission to cite his unpublished work. I am particularly grateful to Neil MacCormick for his comments on and our discussions of previous drafts of this paper. I have not sought to address all his concerns, and I naturally accept all responsibility for errors and misconceptions.

[1] For a historical overview of why appeals to human nature can be politically dangerous, see the first chapter, "Politics as a Descriptive Science", of Isaiah Berlin's recently published Mary Flexner Lectures (first delivered in the 1950's), under the title: *Political Ideas in the Romantic Age: Their Rise and Influence on Modern Thought*, London: Pimlico, 2007.

[2] There is a long philosophical tradition, no less robust today, that considers the capacity to engage in reason, deliberation and reflection to be the distinguishing mark of human beings. There are, however, other examples of the danger of the political uses of concepts of human nature: e.g., of the essential whiteness, or maleness, of persons.

polity.[3] Similarly, it would be dangerous to hold persons legally responsible for their alleged defective moral natures, e.g., the incapacity to experience empathy.[4] Although a more elaborate argument would be needed, it may be surmised that such a move would not only place in jeopardy many of the most fundamental features of the criminal law (e.g., innocent until proven guilty; *mens rea*, etc.), but would also attribute too much authority to science, and too little to society itself. The pursuit of the complete picture of human nature may be a suitable motivation for scientists and social scientists alike,[5] but we ought to think twice before translating scientific conjectures into legal norms. Certainly, we ought not to ignore the long history of the legal institutionalisation of folk psychology – i.e., of the attribution of accountability and responsibility on the basis of motives, and, in limited cases, on the basis of the consequences of actions (e.g., strict liability in torts law) – for, although that folk psychology may fall foul of recent studies in the cognitive, neuroscientific and behavioural sciences, it nevertheless belongs to and is administered by a community. Such a community may impose its own injustice, but at least the standards by which such a community evaluates wrongdoing will not be confined to scientific expertise (from which many are excluded), but to everyday common sense.

The purpose of this paper, however, is not to delve into the complicated and controversial issues of modes of explanation of behaviour, or the role of the idea of human nature, as these already are or may in the future be institutionalised in legal norms. It is, rather, to consider the role of modes of explanation of behaviour in contemporary legal theory.

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[3] As argued, for example, by Martha Nussbaum in her critique of John Rawls. See, Nussbaum, Martha, *Frontiers of Justice: Disability, Nationality and Species Membership*, Cambridge, Mass.: Belknap Press, 2006. The temptation to think there is an objective vantage point from which we (and it is crucial who the "we" are here, for it is the limitation of that specific "we" that is often forgotten) can adjudicate what is or is not rational has been overwhelming for many philosophers in the past. It is a temptation well critiqued by, for example, Michel Foucault.

[4] For a good discussion and overview of some of this literature (particularly with respect to the alleged incapacity of certain persons, e.g., psychopaths, to experience so-called moral emotions, such as empathy), see Nichols, Shaun, *Sentimental Rules: On the Natural Foundations of Moral Judgement*, Oxford: OUP, 2004.

[5] Indeed, it may be difficult to imagine theoretical inquiry that is not oriented towards truth – for more detail, see the debate between Pascal Engel and Richard Rorty, *What's the Use of Truth?* New York: Columbia University Press, 2007. As we shall see, however, this does not mean that we need to treat the results or outcomes of such theoretical inquiries as capable of being true.

A major source on which this paper relies is that of Sundram Soosay's recently completed PhD thesis, "Skills, Habits, and Expertise in the Life of the Law."[6] As a work that engages directly and carefully with the behavioural underpinnings of contemporary Anglo-Saxon analytical legal theory, it stands out as a *rare avis*. Space will not permit me to do Soosay's work proper justice. My aim, in the first part of the paper, is to sketch some of the main critical points raised by Soosay, while also making reference to some of the principal sources in legal theory that he focuses on.[7] I do so in order to make my own partial and by no means exhaustive assessment of the viability of Soosay's critique.

In the second and final part of the paper, I discuss a recent work of particular importance that includes and makes use of alternative behavioural underpinnings for a theory of law: Neil MacCormick's *Institutions of Law*.[8] Whereas, at least according to Soosay, HLA Hart, Joseph Raz and Ronald Dworkin place too much emphasis on the capacity of persons to engage in explicitly and strategically deliberative and conscious reasoning, largely in accordance with already articulated (or, at least, theoretically posited) norms, MacCormick, as we shall see, leaves room for an explanation of behaviour that emphasises the unreflective engagement of persons in practices and in the absence of articulated (or, as he refers to them, institutionalised) norms.

Ultimately, the paper hopes to make but a small step forward towards arguing for the adoption of pluralism about modes of explanation of behaviour – not only in legal theory, but in the social sciences generally. We may well strive, perhaps inevitably and necessarily, for one complete picture of human nature, but we will be better off to think that the results of our endeavours are such that each of the explanations of behaviour we offer are necessarily incomplete, revealing or constructing some features of behaviour rather than others.

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[6] Soosay, Sundram, *Skills, Habits and Expertise in the Life of the Law*, PhD thesis, University of Edinburgh, 2005. See also, Soosay, Sundram, 'Is the Law an Affair of Rules?' [in] Leskiewicz, Maksymilian (ed), *The 2005 Annual Publication of the Australian Legal Philosophy Students Association*, Brisbane: ALPSA, 2006.

[7] I will focus on Hart, H.L.A., *The Concept of Law*, Oxford: Clarendon Press, 2nd edition, 1994, Raz, Joseph, *Practical Reasons and Norms*, Princeton: Princeton University Press, 1990, and Dworkin, Ronald, *Law's Empire*, Oxford: Hart Publishing, 1986.

[8] MacCormick, Neil, *Institutions of Law*, Oxford: OUP, 2007.

Part I. Soosay and the objects of his criticism

The object of Soosay's criticism is directed to the "tendency always to imagine that intentional action is carried out in a wholly self-conscious and deliberate manner, with explicit decision-making included as an inevitable part of its structure" (Soosay, 10). In Soosay's view, this is a tendency that has dominated thinking within legal theory, "particularly, of analytic and positivist legal theory, the view championed by the likes of Hart, MacCormick[9] and Raz", but also Dworkin (Soosay, 10).

One preliminary matter must be addressed. In his description of the dominant tendency above, Soosay privileges the notion of "intentional action." In other words, it is not the paradigm of "intentional action" itself that Soosay sets out to criticise, but that of understanding "intentional action" in a particular manner (as above). However, I would wish to argue – though have no space for this here – that we ought to be more radical, i.e., that we cannot and should not take the notion of "intentional action" as in any way foundational. The notion of "intentional action" fits neatly into an intellectual history that carries with it the concepts of self-consciousness and strategic and explicit deliberation – it does not necessarily do so, but it traditionally has.[10] To make an effort at re-imagining legal life (both for citizens and officials) we must not be seduced by this notion: we must not think that we really are the kinds of creatures that "act intentionally." Instead, we ought to think that "intentional action" is just a way of speaking, and not a description of human nature that can be verified by its clarity and verisimilitude with reality or by its accordance with experience. Such an argument, however, would need to be made much more carefully – a task that falls outside the scope of this paper.

Joseph Raz

One of Soosay's examples of the above-mentioned dominant tendency to favour the self-conscious and explicitly deliberative mode of explana-

[9] Soosay's criticism of MacCormick is based on MacCormick's previous work – indeed, as we shall see in the next part, MacCormick acknowledges and discusses Soosay's criticism in *Institutions of Law*.

[10] It is interesting, though no doubt also provocative, to conjecture that the reason for this is that philosophy is itself a highly self-conscious, strategic and explicitly deliberate activity. According to this view, philosophers have privileged this mode of explanation precisely because it is the one they know best. A history of philosophy written with this in mind would emphasise that philosophers have thereby engaged in nothing more and nothing less than reflection upon the experience of leading a philosophical life.

tion of behaviour is Joseph Raz's *Practical Reason and Norms*.[11] Raz, says Soosay, exemplifies "unspoken adherence to the self-conscious, deliberative model" (Soosay, 14). He assumes "a thoughtful, self-conscious attitude on the part of human agents" and thus he speaks of action always and invariable being taken for reasons (Soosay, 14). Raz recognises that there "are occasions when decisions are made and action is taken where reasons do not appear to play the role we expect" – where there is, in other words, "no careful weighing up of reasons" (Soosay, 14). Nevertheless, in explaining this phenomenon Raz "does not depart from his scheme of reasons" and chooses, instead, to speak of "exclusionary reasons", i.e. "the idea… that among the reasons the individual has to work with, a special class of reasons exists which operates not by contributing to the process of reasoning, but by shutting the process down altogether" (Soosay, 14). An "exclusionary reason", then, "is a reason not to reason" (Soosay, 14), the latter being a reason undertaking deliberately and self-consciously (Soosay, 15). Raz reifies the concept of a reason for action – he promotes, in other words, the view that we really do act for reasons even when it would appear that we are not.

Soosay's dissatisfaction with Raz's approach is that an explanation that uses the concept of "exclusionary reasons" is not "representative of our experience of norms and of legal life specifically" (Soosay, 16). There is, however, another way to express criticism of Raz's approach that does not appeal, as Soosay does, to its alleged lack of verisimilitude with legal life. Such a criticism would be expressed in terms of the lack of modesty in Raz's approach. Raz thinks that we really are creatures who act for reasons – he doesn't leave any room for thinking that this way of speaking about ourselves may just be one out of many ways of explaining our own behaviour or that of others. The gripe, then, from the perspective of this paper is not so much with what Raz says – as it is for Soosay – but with how he says it, and what status he attributes to what he says. To the extent that the gripe *is* with *what* Raz says, it is not because what he says is wrong – e.g. as Soosay argues, that it does not correspond with our experience of legal life – but that he appears to believe that we really do act for reasons, that we are guided by reasons, even if it may appear at times that we are not. The problem, in short, is that there is no room for alternatives; there is no room for recognition of pluralism of modes of explanation of behaviour.

[11] Raz, Joseph, *Practical Reasons and Norms*, Princeton: Princeton University Press, 1990.

But let us consider Raz's *Practical Reason and Norms* from another angle. This work can be understood to be a response to – and an attempt at a solution of – the problems that Raz found with Hart's "practice theory of rules." The device of norms as reasons for action is designed to avoid the three major defects he argues that the practice theory suffers from: that "it does not explain rules which are not practices; [that] it fails to distinguish between social rules and widely accepted reasons; and [that] it deprives rules of their normative character" (Raz, 53). Consider the alleged third defect: the claim is that the practice theory "deprives rules of their normative character" (Raz, 56). This defect is tied to the understanding that Raz attributes to Hart of the use of an expression such as "it is a rule that one ought to" (Raz, 57). Raz takes it that Hart understands the use of such an expression to be warranted only if the practice of conforming to the rule exists (Raz, 58). In this way, Raz states, "rule sentences are used to make normative statements", but those normative statements are not statements that there is a reason to act in the manner prescribed by the rule, but "merely… that there is a reason" (58). In other words, rules understood by Hart, according to Raz, do not provide reasons for action. They simply describe the circumstances – by way of Hart's internal point of view – in which a member of a community can felicitously use the expression, "one ought to…" In that sense, says Raz, the internal point of view reveals to us when a speaker, the member of a particular community, is not alone (Raz, 58), but it contributes nothing to practical reasoning, i.e. it does not provide a reason *for* acting in accordance with the rule.

One of the points that can be made about this critique of Hart is that Raz identifies these three defects precisely because he thinks that legal normativity cannot be explained in any other way than through the rubric of reasons for action. The two go hand in hand: the privileging of the conscious and deliberative mode of explanation of behaviour lends itself to an explanation of legal normativity as exclusively reasons-based. Given that Raz thinks that we really do act for reasons, it makes very little sense for him to conceive of the problem of legal normativity as answerable in any other way. There are, however, other ways to conceive of legal normativity – e.g., a conception that appeals, at least partly, to practices, as Hart may been seen to be appealing, whose power to influence behaviour is not exhaustible by reference to the reasons for action of any one individual or the sum of individuals engaged in that practice. In other words, What Raz may be unwittingly revealing to us is the limitations (for example, in terms of conceptualising legal normativity) of that mode of explanation of behaviour that prioritises action for reasons.

Ronald Dworkin

Soosay's next example is Dworkin. Soosay applauds Dworkin for attempting a "transformation of the field" of legal theory, placing hard cases at the centre (where easy cases once were), and putting emphasis on an interpretative approach rather than on the "mechanical application of rules" (Soosay, 20). However, says Soosay, the "process envisaged is" still "one of conscious interpretation", so that "the overall change" of Dworkin's approach is "not really so dramatic" (Soosay, 20). Soosay's gripes with Dworkin are many. He argues that although Dworkin attempts to sell his theory as a theory of law generally, he in fact takes a narrow view – that of legal adjudication – such that Soosay does not see how the interpretive theory of law could possibly apply to the "our day-to-day experience of the law" (Soosay, 21). His example is as follows:

> When we stop at traffic lights or board public buses, is the law in these instances essentially interpretative or argumentative? In such cases, do we seek to interpret the law, to make it the best that it can be, or do we, rather, seek simply to fall in line with it? (Soosay, 21)

There are difficulties with Soosay's example: for, can we say that when we board buses or stop at traffic lights that we "seek" anything? The difficulty arises for Soosay because, as I have noted above, Soosay still privileges "intentional action." Ignoring these difficulties for the moment, however, let us return to Soosay's criticism of Dworkin. Even taking Dworkin on his own ground – that of legal adjudication – Soosay argues that "the theory is weak" (Soosay, 21). The problem, says Soosay, is with Dworkin's account of "easy cases", the reasoning of which, although Dworkin recognises is of an "automatic" nature (Soosay, 22), because of his alleged privileging of conscious and deliberative reflection, he is nevertheless forced to explain "as a species of self-conscious reasoning" (Soosay, 22). Soosay continues as follows:

> Predictably enough, the result is unconvincing. Indeed, to make his account work, Dworkin is forced to invoke a judge of superhuman abilities, Hercules. Under this view, the fully self-conscious account he offers is true only of this superhuman judge, who explicitly reasons through all of the cases which come before him, whether easy or hard. Real judges fall short of this, though, and instead must rely on intuition, experience and something like a 'common consciousness', a sort of social understanding these judges share with their fellow citizens (Soosay, 23).

Soosay's criticism is instructive: it shows just how much he is influenced by the possibility of an explanation that is "true of reality." He argues that

Dworkin is forced to "invent an alternative reality" (Soosay, 24) and that this sort of "contortion" is a "sign that the theory in question is profoundly mistaken in its design" (Soosay, 24). However, adopting pluralism about modes of explanations of behaviour, as this paper urges, allows us to respond in the following way: there is nothing but such "inventions" and "contortions" – all explanations of behaviour are just that, explanations; they allow us to see the phenomenon in one out of many possible ways. Soosay privileges the access of "real" judges – he says that "if real judges say that they rely on intuition, experience and a common consciousness of some sort, then surely the task of legal theory is to work out just what this means" (23). However, as is common to anyone familiar with debates in sociological method, it is by no means clear that such access – that of representations by the subjects themselves – should be privileged in any way.[12]

Soosay misses an alternative, and perhaps more charitable, reading of Dworkin, i.e. one that rephrases his view to be that *insofar* as we can think of our reflections on the law to be conscious and deliberate, then that conscious reflection is best understood, according to Dworkin, as interpretive and argumentative. Although Dworkin's conclusions are often drafted in terms of grandiose reflections on the nature of law in general, there is ample evidence that his principal aim, particularly in *Law's Empire*,[13] was the proposing of a "plausible theory of theoretical disagreement in law" (Dworkin, 6). There is not much room for theoretical disagreement when stopping at traffic lights or boarding buses, but if there were instances of such disagreement (e.g. two lawyers, discussing whether to stop or not at some particular traffic lights), then Dworkin's scheme – particularly the device of interpretive concepts – may go some way towards explaining what is going on in such disagreements. Again, however, what we may question is the exclusive characterisation of theoretical disagreements as conscious and reflective – in any event, there is obviously a lot more to be said here about the role of this particular mode of explanation of behaviour in Dworkin's legal theory.

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[12] Consider, for example, someone like Anthony Giddens who, despite placing a good deal of emphasis on the intelligence of agents, nevertheless argues that "what actors can say about what they do, and why they do it, [is] only one small part of the immense knowledgeability involved in the conduct of everyday life": Giddens, in Giddens, A, and Pierson, C, *Conversations with Anthony Giddens: Making Sense of Modernity* (Cambridge: Polity Press, 1998) at 83.

[13] Dworkin, Ronald, *Law's Empire*, Oxford: Hart Publishing, 1986.

H.L.A. Hart

Let us move on to Soosay's criticism of H.L.A. Hart. Soosay argues that "Hart insisted that our experience of… [law] was characterised by a 'critical reflective attitude,' going out of his way to distinguish this attitude from 'mere habits of behaviour'" (Soosay, 38). Similarly with the distinction between internal and external rules – here, says Soosay, "Hart sought to make clear that obedience to the law arises from a self-conscious commitment to the law, which is what the internal aspect amounts to. It describes not only cognisance of the rule in question, but explicit acceptance of it" (Soosay, 38). Finally, Hart's "preference for a deliberate, self-conscious view of law is reflected… in his insistence that law and morality be seen as separate", an insistence that Soosay attributes to the attempt to "make clear that legal life is not a matter of intuition or feeling or cultural inheritance", but rather, "a matter of self-conscious choice" – "a matter of taking a hand in our own destiny, approaching life in a thoughtful manner and making decisions as to how we will live" (Soosay, 38).[14] Soosay calls Hart's approach "a top-down, bureaucratic model", and one he wants to challenge by offering "instead a ground-up, experiential one" (Soosay, 40). Indeed, Soosay goes so far in his criticism of Hart as to radically contrast the approach he takes in the thesis to Hart's:

> The rule of thumb is: When Hart goes one way, I will go the other. Where Hart sought to remove or marginalise any suggestion of an existence for law that was intuitive, automatic, emotional or culturally derived, here we will embrace just these aspects of our experience, fashioning a view of law that is as far from deliberate and fully self-conscious as can be imagined. Where Hart took the law to have at its heart a critical reflective attitude, for instance, here I will offer a view of law built around mere habits of behaviour. Where Hart took the internal attitude to be characterised by a self-conscious attention to rules, here I will characterise internal and external in exactly the opposite way… And finally, where Hart sought to maintain a clear separation between law and morality, I will argue that the two are in fact inseparable. I will argue that the law must have a basis in morality if it is to be effective (Soosay, 40–41).

The alternative picture that Soosay seeks to offer is admirable, and much is to be gained for an effort at re-imagination through the use of less extensively utilised modes of explanation of behaviour in legal theory, such as

[14] In this respect, assuming Soosay's point to be correct, it is interesting to note the great degree of similarity – of course, noted by many scholars before – between Hart and JS Mill.

that of "mere habits." But aside from the difficulties I have already mentioned with Soosay's approach (primarily that he believes his picture is the correct one), we ought to ask: is his criticism of Hart in the terms above warranted?

A good part of Soosay's criticism, that I have not yet mentioned, is what Soosay calls Hart's "searching" investigation into "habits of behaviour" (Soosay, 41). Soosay argues that "for Hart, the unthinking, automatic character of such habits surely could not be sufficient to account for the complexity of legal life" (Soosay, 41). For Soosay, habits, "both of perception and behaviour" – or, in another way, "the embedding of the law in the environment the human agent perceives" (Soosay, 42) – are "central to the operation of the law… in the present day" (Soosay, 42). Again, a proper analysis of Soosay's own approach is not possible here: what can be said, however, is that in his criticism of Hart, Soosay privileges the task of the explanation of "compliance" and "efficacy" (Soosay, 41–42), and although he goes on, in later chapters (particularly, chapter six), to enlarge his account to that of judges and judicial reasoning, it is at very least arguable that at the heart of Soosay's thinking is the thought that a 'realistic' explanation of compliance with the law and the efficacy of law is of foremost importance for a theory of law. The very notion of "embedding of the law in the environment" and the method of proceeding "bottom-up" are both heavily influenced – at least it seems to me – by an interest in explaining not so much how law works, but how it works well, and further, not in spite of, but because of "our widespread failure to reason through our decisions" (Soosay, 43).

Now, can Hart be said to have had compliance and efficacy of legal norms as the problem that his theory was designed to solve? Even if Soosay is right to criticise Hart for privileging the model of conscious and deliberative action, is there a relevant distinction to be made between the uses to which such a model may be put? For it would seem at least *prima facie* problematic to criticise the alleged inability of Hart's model of conscious and deliberative action to explain compliance with and efficacy of legal norms on the ground, when Hart himself may be said to have used it for other purposes, e.g. to explain what goes on when the relatively fluid nature of social life breaks down, whereupon we may indeed need to revert (perhaps necessarily in a self-conscious and explicitly deliberative manner) to issues concerning the validity of law, or, more technically, to the conditions under which we can felicitously speak of the existence of law, laws or legal systems.

To make this point is not to argue that the validity of legal norms or the existence of law, laws or legal systems should be *the* problem of legal theory,

or perhaps even *a* problem – for much of what I have said about the status of explanations (I have focused on explanations of behaviour, but we can generalise) implies that establishing existence is a false problem, i.e. nothing can guarantee us access to the existence of things, for to seek to establish the existence of something is to seek descriptions that correspond correctly to reality – and, theoretical explanations are not capable of correspondence; there are just partial and incomplete explanations all the way down. But that is an aside: to make the point I have above about Hart, is simply to think of the role of modes of explanations of behaviour in the wider context of the purposes of a theory.

Let us consider those purposes in the context of Hart's theory very briefly. In *The Concept of Law*,[15] Hart described his own project as that of advancing "legal theory by providing an improved analysis of the distinctive structure of a municipal legal system and a better understanding of the resemblances and differences between law, coercion, and morality, as types of social phenomena" (Hart, 17). In that spirit, his theory is perhaps best taken as an analytical scheme that allows us to differentiate between types of rules, as well as different aspects of them, where, for example, the internal point of view is understood merely as a device that allows us to distinguish between the internal and the external aspects of rules. As Hart repeatedly stresses, "the ideas of orders, obedience, habits, and threats, do not include, and cannot by their combination yield, the idea of a rule, without which", he thought, "we cannot hope to elucidate even the most elementary forms of law" (80). The very fact that Hart's analytical schema led him to privileging what Soosay characterises as the conscious and deliberative mode of the explanation of action, is a cause for a concern – but perhaps it is not appropriate to evaluate Hart's theory on the basis of such privileging alone. In any event, we need to look more carefully at Hart's multi-faceted theoretical use of that mode of explanation of behaviour.

I am sympathetic to Soosay's project at undermining the reliance and privileging by legal theorists of the conscious and deliberative mode of the explanation of behaviour. I am not, however, altogether convinced that the theories of Raz, Dworkin and Hart can be criticised on that basis alone. They do privilege that mode, but we must consider the role of that mode in the wider context of the tasks they set for their legal theory. In other words, we must consider the relationship between the mode of explanation of behaviour adopted by a legal theorist and what they think of as the most important problems for legal theory.

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[15] Hart, H.L.A., *The Concept of Law*, Oxford: Clarendon Press, 2nd edition, 1994.

My aim, then, in considering Soosay's critique has been twofold: to convey his criticism of contemporary legal theorists on the basis of their privileging this mode of explanation of behaviour, but also to convey the complexity of the task – in other words, the complex and highly influential role of any one mode of explanation of behaviour in any one legal theory.

Part II. Neil MacCormick's *Institutions of Law*

In this second part of the paper I shall briefly discuss a recent work of legal theory that uses a variety of modes of explanation of behaviour: Neil MacCormick's *Institutions of Law*.[16] I read it with a view to showing the kinds of insights possible on the back of an understanding of behaviour different to that examined in Part I, but also to show that the exercise of identifying the use of modes of explanations of behaviour is useful in understanding a theory of law. It is useful to identify such modes and their uses because, as I have noted above by reference to Raz, Dworkin, and Hart, such modes always play an important role in any legal theory. Further, I have argued that one criterion for the evaluation of legal theory is that of the approach it takes to representations of behaviour, i.e., what status it ascribes to them, and whether it uses only one mode to the exclusion of all others. All these themes emerge neatly out of an all-too-brief engagement with Neil MacCormick's recent work.

Institutions of Law is a defence of a definition of law as "institutional normative order." MacCormick's strategy is to open with an intuitive illustration of a (non-institutionalised) normative order. He does this by reference to what he calls 'forming a queue' or the practice of queuing. His first point is that the practice of forming a queue "occurs very frequently in the everyday experience of contemporary human beings" (MacCormick, 14). Queuing, he says, is "a matter of common experience" (MacCormick, 14). Further, "to the extent that people 'take their turn' in a queue or line, there is an orderly movement through the checkout, or on to a tramcar or bus…" (MacCormick, 14). Of course, queuing need not work perfectly: either because "there may always be somebody with brass neck enough to jump the queue" or because "it is sometimes all right to go to the head of the line without waiting your turn" (e.g. in cases of medical emergency) (MacCormick, 14). Nevertheless, even if it may not work perfectly, "there is some minimum threshold of compliance below which the practice would be unsustainable" (MacCormick, 14):

> It would be literally impossible to be the only person that 'takes her turn' because 'turns' require a mutually co-ordinated practice of two or more.

[16] MacCormick, Neil, *Institutions of Law*, Oxford: OUP, 2007.

> When a substantial majority of potential competitors for a certain opportunity fails to acknowledge turn-taking, it amounts to pointless self-abnegation if one or a few act as though most others were ready to take their turn (MacCormick, 14).

From this it follows, says MacCormick, that "turn-taking or queuing is… normative" (MacCormick, 15):

> For where there is a queue for something you want, you ought to take your turn in it, and people who do take their turn do so because in their opinion that is what one ought to do–that is, ought to do in the given context. Such action-guiding 'ought' alerts us to the presence of some kind of norms, and to the normative character of the opinions that people hold in such a setting (MacCormick, 15).

It is possible to identify two features of this passage that may be characterised as modes of explanation of behaviour. First is the notion of beliefs. Second is the notion of beliefs of a particular type, namely beliefs as to what one ought to do. The point of identifying such features is not to criticise MacCormick's use of them: it is simply to point to their role in the explanation of the phenomenon of a queue, and thus, at least for MacCormick, that of a normative order. Let us consider another related passage:

> Queuing or standing in line also furnishes an example of 'order' in its presently material sense. People's positioning in a queue is ordered, not random. The 'order' here is not only an actual and predictable pattern that could be studied 'externally' and reported statistically. It is a 'normative order' because, or to the extent that, one can account for it by reference to the fact that actors are guiding what they do by reference to an opinion concerning what they and others ought to do. We can account for the externally observable order in a case of this kind by imputing it to actions of individuals who have a certain mutual awareness, together with mutual or reciprocal expectations. The result is a kind of common action by mutually aware participants (MacCormick, 16).

There are a further three modes of explanation of behaviour utilised in this passage. First, there is the notion of awareness. Second, there is the notion of mutual awareness. And third, there is the imputation to individuals of mutual or reciprocal expectations. In a subsequent passage MacCormick posits a fourth attribute, i.e. that of "each party ['reading'] the situation as s/he thinks others are reading it, and [forming] an opinion with regard to the opinion s/he thinks others hold, though," MacCormick adds, "this is not necessarily any kind of reflective deliberation about others' opinions" (MacCormick, 16–17). The last comments point to an important dif-

ference between what Soosay, as I have explained above, identified in Raz, Dworkin and Hart as the tendency to privilege a conscious and deliberative mode of explanation of behaviour. Indeed, it pays to stick with MacCormick to see just how much he is able to gain by not succumbing to that tendency.

One crucial idea in MacCormick's account of a normative order is the idea that "there can be normative order without explicitly formulated norms" (MacCormick, 18). In order to reach this insight MacCormick posits the existence of a normative order in which "implicit norms are in fact largely observed and respected, without any other element of supervision, direction or enforcement than that constituted by a pressure of common (not necessarily either universal or identically expressed) normative opinion among those who interact with each other" (MacCormick, 18). He does so, when he says, for example, in the case of the queue, that "People know how to queue, and can tell cases of queue-jumping, and protest about them, even if they have never articulated exactly what their governing norm is" (MacCormick, 15). MacCormick calls this kind of normative order an "informal normative order."

This does not mean, of course, that we "cannot reflect on how to make explicit an implicit norm of conduct apt to the situation or the type-case" (MacCormick, 15). Further, we can disagree on what sort of explicit formulation "satisfactorily captures in an abstract way the normative idea of turn-taking" (MacCormick, 15). Even more importantly, "the viability of the practice is obviously not dependent on the accuracy of this or any other particular attempt to put in explicit terms an implicit norm of conduct for queuing" (MacCormick, 15) – in other words, "informal normative orders" can exist despite the fact that there are no explicit formulations of the implicit norms at work. Informal normative order, then, is not dependent on "any kind of person or agency that holds authority over those who queue up and regulates or manages the queue in some way" (MacCormick, 14). Finally, it is no objection to this view to point to the many ways in which queuing manifests itself in various cultures. Quite the contrary, the existence of many different kinds of queuing practices simply shows "that normative order can exist in some cultural and social settings on the basis simply of mutual belief and inexplicit norms with overlapping mutual understanding and interpretation" (MacCormick, 19) and that the specific content of that understanding and interpretation need not be of any one particular kind, and the fact that it need not be of any one particular kind shows that that the viability of the practice is not dependent on the existence of any one explicit formulation.

However, as MacCormick points out, it is the case that queuing often is regulated and really does "come under the authority of some kind of man-

ager or governor, some person in authority" (MacCormick, 21). Further, there will be cases where it will be wise and appropriate to avoid "problems of a kind apparently endemic in informal orders" (MacCormick, 24) "by resorting to the issuance of expressly articulated norms, making explicit what is to be done or decided in expressly foreseen circumstances" (MacCormick, 14). Not only that, but in many cases, it may actually be right to resort to such formulation in order to avoid inconsistency – particularly where a set of employees has been given the task of managing an informal normative order. It might be best to unpack these ideas by the use of an example. Consider the case of queuing at a bank:

> In the case of queues with numerical rolls of tickets, there is an obvious possible difficulty about persons who are absent or inattentive when their number is called or displayed. If number fifty is called, and nobody shows up after a brief pause, fifty-one is called, and then, if nobody shows up, fifty-two–and so on. But what happens if, when fifty-four is called the holder of ticket number fifty appears and asks for service? Does the counter attendant accept that fifty is the lowest number present, and serve the holder before serving number fifty-five or some later number? Or is the correct answer to be that 'fifty' is now an expired ticket, and the holder must rejoin the queue at the end, taking the next number available on the paper roll? In such a situation, there is nothing for it but that a decision be made, and the decision-maker of first instance is the attendant at the counter. But the problem is a potentially recurring one, and inconsistency between different attendants at different times could be bad for customer relations. So, quite likely, the store proprietor or store manager makes a general rule and issues it expressly in writing or orally to all counter staff. It may even prove advisable to set up a notice by the ticket-roll explaining what the rule is, to avoid confusion or any sense of unfairness on the customers' part (MacCormick, 22).

It is worth spending more time here on MacCormick's account of the process of transition from an informal normative order to one regulated via the explicit formulation of norms. What are the virtues of such a transition, i.e. towards explicit formulation? One virtue has already been pointed to, namely, consistency in decision-making. But what is the bridge between that consistency and explicit formulation? The first point to note that is that MacCormick does not wish to rule out the task of interpretation. On the contrary, interpretation is often inevitable – but, "interpretation of norms in the form of explicit rules necessarily involves attending to the very words used by the rule-maker, and reflecting on the underlying point of the words

only where the words seem unclear or where what seems their obvious meaning leads to what seem weird results in practice" (MacCormick, 23). Secondly, however, it is important to note that the virtue of the transition does not rest entirely on this constraining of the inevitable practice of interpretation. For, following our example, it soon becomes obvious that there may be various sorts of explanations for why a ticket-holder was a 'no-show', and thus, that further rules may be required:

> …there is now a dilemma about how to treat the 'now show' who eventually appears from the lavatory, or from a reverie, or from the coffee shop, or from wherever. There can only be: either pure discretion on the supervisor's part, with no fixed rule, or a 'new head of the queue' rule or a 'back to the end again' rule, with or without discretion on the supervisor's part in special hardship cases (MacCormick, 24).

This is how MacCormick arrives at the notion of a rule, i.e. "an expressly articulated norm… made by a person who has a position of authority" (MacCormick, 24). Notice, too, that there is already a distinction made above between two different kinds of rules: first, rules about how to apply rules (MacCormick calls them "second-tier norms"); and second, rules that are "explicit norms that clarify or vary what was previously implicit and therefore also vague" (i.e. "first-tier rules) (MacCormick, 24–25). What is the general structure of rules, whether first or second tier? "The articulation in question," says MacCormick, "has two essential elements: the first specifies a kind of situation that may arise, and the second lays down what has to be done, or to come about, or to be deemed the case, whenever that situation arises" (MacCormick, 25). The first element MacCormick calls the "operative facts" and the second "the normative consequence" (MacCormick, 25). MacCormick also allows room for what he calls "an implicit rule", which he describes as a decision accompanied by an explanation that "may amount to a kind of partly explicit ruling on a point of doubt in interpreting the rules" (MacCormick, 25) – the paradigmatic case of which, as MacCormick himself notes, in our modern legal systems, is the practice of precedent (MacCormick, 26).

It is not within the scope of this paper to consider the details of the ensuing discussion concerning the 'practical force of rules' – i.e. distinguishing between the different ways in which a rule may be applied (MacCormick, 26–28) – or to delve into the problems raised by discretion (MacCormick, 28–30) or the puzzles that occur when rules incorporate standards (MacCormick, 30–31). It is worth, however, spending some more time on the nature and virtues of the transition from an informal normative order to an institutionalised one. Here is MacCormick on what he calls "a consequential feature of the formalised institution":

> Where the formation of a line or a queue is not simply a largely spontaneous response by particular people to a problem of co-ordination, but is organised in the context of the airport taxis or the post office or the railway ticket counter or the supermarket checkout, avoiding the queue or jumping it becomes very much harder, almost impossible. For those in charge of the service are most likely simply to refuse service to someone who has not waited his or her turn according to the rules that have been established. Let us imagine a person who conceives his or her status (albeit not recognised by the service-providers) to be so exalted that ordinary folks should give way to them. Even such a one, who refuses to recognise the legitimacy or fairness or even the existence of the queuing rule in relation to himself or herself, is faced with a disagreeable fact. He or she cannot get the service sought except by acting in accordance with that very rule. That is to say, he or she cannot do so unless prepared to take some kind of forceful action that goes the length of a breach of the peace, or even theft, or assault, or, in an extreme, murder. Many who might cheerfully enough jump queues draw the line at engaging in such relatively serious wrongdoing, hence they are constrained even by rules they would otherwise set at naught. In this way, institutional facts become hard realities, facts that constrain us, not merely norms that guide our autonomous judgement (MacCormick, 33).

What applies to the practice of queuing, according to MacCormick, "is replicated even more clearly in the even more formalised case of institutions that belong within the framework of municipal positive law, state law" (MacCormick, 33), with the important proviso that "under the law of a modern constitutional state, it need scarcely be said, the functions of legislation, adjudication, execution and administration and law enforcement are parcelled out to substantially differentiated agencies, though not always without some overlap among them" (MacCormick, 35).

We have here some of the basic elements of MacCormick's vision of law as institutional normative order. Having identified some of the modes of explanations of behaviour utilised by MacCormick, we are also in a position to see how effective a picture MacCormick paints of the life of the law: one that integrates forms of co-operation by reference to mutual awareness of mutual and reciprocal expectations, with that of more conscious reflection in some, but not all cases, where explicit formulation of norms may contribute to solving various co-ordination dilemmas and other practical problems. It is an impressive and distinctly novel picture of law – an excellent example of how the adoption of plural modes of explanation of behaviour can contribute to a greater array of insights about law itself.

There is another element of the picture that deserves particular mention, for it focuses explicitly on two different modes of explanation of behaviour. It is an element that is explicitly discussed by MacCormick in the fourth chapter, 'A Problem: Rules or Habits?' The first point MacCormick makes – and a very welcome one – is that there are many ways of conceiving of habits. MacCormick refers, for example, to an influential article by Martin Krygier,[17] in which Krygier points out that just as rules have an 'internal aspect' (referring, of course, to Hart's characterisation) so do habits. MacCormick also goes on to discuss the work of Soosay, to whom I have referred at length above.

What is MacCormick's answer to the call that Soosay makes for a greater recognition of the role of habits in the life of the law? MacCormick acknowledges that "there is a case for the re-evaluation of 'habits' in life and in law" (MacCormick, 67). His principal strategy is to incorporate the role of habits by saying that "institutionalised legal orders depend on habits about rules, that is, on habitual references in some contexts to special sorts of text like those in the statute book and those in law reports" (MacCormick, 69). MacCormick elaborates on this as follows:

> This involves the maintenance of a standing practical attitude towards institutionally established rule-texts… when these are cited and brought to attention as relevant some context… The habit or practical disposition of personnel engaged in legal work must include a disposition to give respect to and seek respect for any relevant provisions found in the texts of valid statutes and binding precedents, read in the light of the principles and values to which they give expression (MacCormick, 69).

Having acknowledged such a role for habits, MacCormick goes on to recognise that there are two kinds of gap between habits and law (conceived of as institutionalised normative order). The first is that knowledge of the law on the books does not capture the knowledge and, equally, respect of the law in practice: thus, the success of lawyers in practice "derives from a great deal more practical knowledge, know-how, and wisdom than could be gleaned from however voluminous a grasp of the whole body of statute law, whether or not supplemented with voracious reading of cases and precedents" (MacCormick, 71). The second gap is the efficacy gap, namely, that:

> However legal professionals and legal officials negotiate their way around the law, it is very much an open question how much of the official law is any part of the working consciousness of laypersons. It is also

[17] Krygier, Martin, "*The Concept of Law* and Social Theory" (1982) 2 *Oxford Journal of Legal Studies* 155–180.

> questionable to what extent their sense of what is right and proper depends on, and how far it divers from, what the official law enjoins either in the sense of abstract texts or in the mediated form filtered through professional and official practice (MacCormick, 71).

In answering these difficulties, MacCormick points out that "there is a large conceptual framework which is available to people to appeal to, and to which they do frequently appeal" (MacCormick, 71). People generally know they have rights (MacCormick, 71), he says, and they know there are things that are crimes (MacCormick, 71), and they can generally discern their own belongings from those of others (MacCormick, 72). Further, states increasingly acknowledge "international standards of acceptable conduct" (MacCormick, 72), and corporations "acknowledge legal conditions for recognition of corporate activity wherever they engage in trade" (MacCormick, 72). Finally, says MacCormick, there is such a thing as a "civil society" – such that "civility can obtain among persons who are relative [or complete] strangers to each other" (MacCormick, 72). All these elements encourage us to "consider whether [our] lived experience is not the best evidence [we] could have that law is at work to some reasonable extent in the state [we] live in" (MacCormick, 74).

It is interesting to note here that the discussion on habits – particularly in response to the work of Soosay – leads MacCormick into dealing with problems of compliance and efficacy. As I have noted above, one very compelling way of reading Soosay's emphasis on the bottom-up approach is to point to the importance he places on explaining how it is that law succeeds in organising our lives on a daily level. The brevity of the chapter, however, is a sign that MacCormick recognises one must not place too much emphasis on problems of compliance and efficacy. He is aware that the picture of law that he constructs is devoted primarily to a definition of law and legal systems insofar as, and in moments when, such institutionalised normative orders are of use precisely in cases of disobedience, of deviance from the social order, and of mistakes, errors or general breakdown of relations. Furthermore, MacCormick acknowledges that law conceived of as an institutionalised normative order is not in itself a complete description of the fluidity of life, for such a description would require recourse to concepts such as skills, habits and expertise, of the kind that Soosay protests have been ignored in contemporary legal theory.

Conclusion

Neil MacCormick's acknowledgement and use of an alternative mode of explanation of behaviour – i.e., unreflective and habitual behaviour, as opposed to self-conscious and explicitly deliberative behaviour – enriches

his theory of law. Nevertheless, his use of that alternative mode is largely restricted to the fluidity of social life for citizens or the fluidity of life in legal institutions for officials, i.e., insofar as matters are proceeding as expected, we ought not to describe such fluidity in terms of reasons for action (as, arguably, Raz attempts to do with his concept of exclusionary reasons). To account for the fluidity of social life by recourse to self-conscious rule-followers or autonomous deliberators is to risk reifying those modes of explanation (i.e., reflexive, deliberate) and those social structures (i.e., articulated norms, and articulated norms about articulated norms, etc.) that ought to be, instead, used to help us understand what goes on in cases of social breakdown, disagreement, or disorder.

There are, however, other theorists who do not believe that this neat correlation between, on the one hand, the non-conscious and conscious modes of explanation of behaviour, and, on the other, the fluidity and disorder of social life, respectively, is warranted. These theorists argue, more radically, that the capacity to engage in conscious reasoning and explicit and strategic rationality is very slim indeed.[18] At best, such a capacity is exercised post-facto, and not ex-ante, and its limits are those very limits we may experience when we try to justify our actions to someone who has found what we had done unwelcome – they are rare and uncomfortable. Adjudicating on this very recent controversy, however, is outside the scope of this paper. It is hoped, however, that the brief discussions of the work of Raz, Dworkin, Hart and MacCormick have shown the potential insights to be gained by considering the role of modes of explanation of behaviour in legal theories.[19] It is my further hope that readers may come to consider the

[18] A summary of such literature is outside the scope of this paper. A very modest list to begin with (not all of which is radical in the sense above) would include Soosay's work and the references he cites, as well as, in chronological order: Jackson, Bernard, 'Conscious and Unconscious Rationality in Law and Legal Theory', [in] *Reason in Law*, Proceedings of the Conference Held in Bologna, 12–15 December 1984, ed. Carla Faralli and Enrico Pattaro, Milan, Giuffrè, 1988, III. 281–299; Meyer, Linda Ross, "Is Practical Reason Mindless?" (1997–1998) 86 *Georgetown Law Journal* 647–675; Winter, Steven, *A Clearing in the Forest: Law, Life and Mind*, Chicago: University of Chicago Press, 2001; Johnson, Mark, "Law Incarnate" (2002) 67(4) *Brooklyn Law Review* 949–962; Robertson, Michael, "Telling the Law's Two Stories" (2007) 20(2) *Canadian Journal of Law and Jurisprudence* 292–52; and Lane, Kristin A, Jerry Kang, and Mahzarin R Banaji, "Implicit Social Cognition and Law" (2007) 3 *Annual Review of Law and Social Science* 427–51.

[19] There has been a spate of very recent and thorough research on modes of explanation of behaviour and legal (and other) policy making: see, e.g., Benforado, Adam, and

potential benefits of adopting a pluralist approach to such explanations: even if we inevitably and necessarily strive for the truth, for the essence, the nature of things (including our own human nature), what we produce, given our inescapable finitude and the inevitability of the limitations of our theoretical pictures, is but a fragment, but a glimpse of an infinitely complex reality.

Jon Hansen, "The Great Attributional Divide: How Divergent Views of Human Behaviour are Shaping Legal Policy" (2008) 57(2) *Emory Law Journal* 311–408, but there is still a looming gap in terms of the analysis of the role of modes of explanation of behaviour in the constructions of legal theories.

*Stefan Häußler**

Law and the Emotions – Psychoanalytical Theories of Law and the Reflection of Emotions in Legal Philosophy

Introduction – Arraying the field

For about a quarter of a century now, emotional dispositions towards the law and legal processes have found a renewed and even intensified interest. Alternative dispute resolution (ADR), restorative justice, truth and reconciliation a.s.f. have laid a considerable practical and theoretical weight on emotions of participants in legal and dispute resolution processes. It is my understanding that these tendencies are based on several coinciding criticisms of "classical" dispute resolution:

Firstly, recourse to personality, traumatic experiences, esp. of victimisation, wishes, dreams and desires have been drawn to the limelight of attention as possible means of enhanced effectiveness, individuality and flexibility of procedure, thus forming part of a general socio-cultural trend usually and roughly named "neo-liberalism", essentially based on an emphatic conception of personal freedom. Unfortunately, but probably not coincidentally, an adequate theoretical reflection of these references to emotional dispositions is missing or simplistic and often restricted to mere appeals for an understanding or caring inclusion of parties to a dispute and openness for the (majuscule) "Other".

Secondly, comparable criticisms have been articulated from a communitarian position. In my view, this overlap of criticisms only seems ironic at

* LL.M. (EALT), Research Fellow at the Institute for Comparative Law, Goethe-University of Frankfurt am Main, Germany; stefan.haeussler@gmail.com.

first glance: although their political agenda may differ considerably from neo-liberalists, communitarians share a concern for procedural effectiveness (namely that of harmonious social ordering), flexibility (with regard to cultural specificities), and thus even a (group-focussed) version of enhanced "individuality" of legal and dispute resolution processes.

These criticisms again coincide with older legal theoretical scepticism against positivist concepts of formal legal validity, for these criticisms are also based on references to emotional dispositions in the name of substantial legitimacy, effectiveness, and acceptance.

These strong, yet heterogeneous, tendencies present western legal theory and philosophy with a pressing, yet still largely unsolved problem: the question of emotions' adequate theoretical reflection.

Elements of genealogy

In my understanding, current developments may be much illuminated by reference to models of emotional dispositions toward the law in the history of western legal philosophy and theory. In a recent and very helpful taxonomy of the emerging research field of "law and emotions", the American scholar Terry Maroney draws one essential distinction that is more than often unduly overlooked: that of a "theory of law" approach to law and emotions on the one, and that of "legal actor" or "emotion-centred" approaches on the other side. "Legal" actor" and "emotion-centred" approaches would analyze the authentic and personal emotions of legal actors and parties to a dispute. Contrary to that, my own perspective on the role of emotional dispositions would strongly adhere to the "theory of law" approach defined by Maroney, thus seeking to analyse "which and how theories of emotion are embedded or reflected within a particular theoretical approach to the law".[1] In other words: an analysis of this kind would seek to demonstrate how legal theory and philosophy take part in the shaping and construction of our emotional disposition toward the law and legal and dispute resolution processes. In this perspective, theory and philosophy of law are analysed being themselves major, though mediated, "affectors" of dispute resolution.[2] This is by far no systemic or "natural" property of the law. A short glance into history illuminates how the interest

[1] Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, "Law Hum Behav" (2006) 30, 119, 126. I am grateful to Bart Du Laing for providing me with this interesting text.

[2] For the concept of "affector" see: Frank Fleerackers, *Affective Legal Analysis*, Berlin 2000.

in emotional dispositions and its theoretical reflection infiltrates legal thinking from as late as the 12th century on. Put differently, the notion of emotions in the sense we give it today is still undistinguished from sensuality, i.e. basically bodily sensations, in classical Greek-Roman and early medieval thinking. The very idea of emotions as an inner psychic state of persons, disconnected from the actual state of the world, most probably derived out of the disconnection of concepts and reality under nominalist influence. Its consequences for the legal sphere came about mainly via the new theological thinking in the 12th and 13th century concerning sin. It is only than that the evil intention, i.e. the inner psychic state, gets to the centre of intellectual attention, whereas before that all interest centred on the act and its consequences. From here also originates the idea of the act of faith as an emotional disposition instead of guidance for outward action.[3] And although Martin Luther already prepared the way in his theological thinking of individual responsibility in this sense, it is the religious practice of the Pietistic and Jansenism movements that leads to one of the foundations of modern subjectivity and also adds considerable content to a modern notion of the legal subject. In historical perspective, the specific qualities of these emotional dispositions varies and is usually inherently prescribed by the argumentative necessities of the theoretical system in question: for Thomas Hobbes for example, it is terror in face of the Leviathan that keeps subjects from setting themselves absolute, and namely absolutely free in a state of nature, and thus from existentially endangering their subjectivity.[4] For Rousseau, love of the Republic is supposed to compensate for the lost innocence of an uncorrupted original state of nature.[5] For Kant, reverence to the law is not only the emotional expression of reason respecting itself but, structurally pietistic, reverence to an absolute whose fallible and thus slightly inferior emanation the subject is.[6] For Schelling finally (who had a major influence on German and European legal development via one of

[3] Alois Hahn, *Identität und Selbtthematisierung*, [in:] Hahn, Kapp (eds.), *Selbstthematisierung und Selbstzeugnis: Bekenntnis und Geständnis*, Frankfurt a. M. 1987, 9 et seq.

[4] Leo Strauss, *On the Spirit of Hobbes' Political Philosophy*, "Revue Internationale de Philosophie" 1950 (4), 405 et seq.

[5] Jean Starobinski, *Jean-Jacques Rousseau und die List der Begierde*, [in:] Starobinski, Cassirer, Darnton (eds.), *Drei Vorschläge, Rousseau zu lesen*, Frankfurt am Main 1989, 79 et seq; Iring Fetscher, *Rousseaus politische Philosophie*, 7. ed. Frankfurt am Main 1993, 96 et seq. und 195 et seq.

[6] Heinz Kittsteiner, *Die Entstehung des modernen Gewissens*, Frankfurt am Main 1995, 267 et seq.

the founding fathers of German legal thinking, Friedrich Carl von Savigny[7]), manners, convictions, and inner motivations of legal subjects are constituent for the content of a legal order, but in themselves dependant on their fearful relation with a source of validity hidden in unreachable spheres of eternity.[8]

Though the content varies, the structure remains the same: from the 16th century on at the latest, western reflection of emotional dispositions towards the law and legal processes have been based a.) on the model of a lost or unreachable totality, namely "justice" and "truth", and b.) on a corresponding notion of a dynamic, yet partial legal subject, whose (legal) subjectivity depends on its adequate relation towards the absent static totality.[9] In my view. the latest actualisation of this western tradition are psychoanalytical theories of law (PTL), esp. those based on the works of Jacques Lacan and Pierre Legendre. I allow myself to expand on this last point as an example for a "theory of law" approach to emotion and its embedding in legal theory.

Psychoanalysis as a contemporary model

The foundation of a psychoanalytical theory of law in the sense proposed here is laid in Sigmund Freud's works on the theory of civilisation.[10] In them, Freud develops a theory of society[11] which attributes indestructible traces of the archaic history of mankind to human nature.[12] According to this theory, law developed as a reaction to a natural desire turned murderous. The rebellion of the united sons against their father ends with his death and the foundation of a first legal order, encompassing taboos of murder and incest. Whilst the sons could have been set free to enjoy the fruits of

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[7] Alexander Hollerbach, *Der Rechtsgedanke bei Schelling*, Frankfurt am Main 1957, 275 et seq.; Olivier Jouanjan, *Une Histoire de la Pensée Juridique en Allemagne: un essai d'explication*, Droits 2006 (42), 153 et seq.

[8] Stefan Häußler, *Der Ort der Sozialnorm: Zu einem topologischen Aspekt der Genealogie der Lacanschen Rechtsphilosophie*, Juridikum 2006, 204 et seq.

[9] On this intellectual development in general see: Marcel Gauchet, *Le désenchantement du monde*, Paris 1985, 325 et seq.

[10] *Totem und Tabu* (1913), *Zeitgemäßes über Krieg und Tod* (1915), *Massenpsychologie und Ich-Analyse* (1921), *Die Zukunft einer Illusion* (1927), *Das Unbehagen in der Kultur* (1930), *Warum Krieg?* (1933), *Der Mann Moses und die monotheistische Religion* (1939).

[11] L. J. Pongratz, *Hauptströmungen der Tiefenpsychologie*, Stuttgart 1983, p. 106 et seq.

[12] S. Freud, *Massenpsychologie und Ich-Analyse*, "Studienausgabe" Vol. IX, p. 114.

their rebellion (i.e. the women, so far monopolized by the father), the liberation – by way of fear and awe – instead gives birth to the first social organisation, with renunciation of desire, recognition of mutual obligations and social institutions.[13] One fundamental thesis has to be noted about this well-known tale: the law develops out of a previous natural desire which will have been considered as forbidden in retrospect. The origin of the fear and awe of the united sons, however, was left unclear by Freud.

The Lacanian Subject

This empty space in Freud's phylogenetical perspective is filled by Lacan. While Freud understood the first legal order as a mere reaction to natural desire, Lacan sees the law as the fundamental dialectical structure of desire itself. Even if law restricts and regulates desire (Freud), the transgression of the law is itself desired, so that desire presupposes the law and its restrictions. Like with Freud, it is the father who hinders the fulfilment of desire. But while, at Freud, the father is the "law" itself and finds his mere functional replacement in the first legal order, the father, at Lacan, is on the contrary a representative of the law and only the name of the forbidding legal function ("*nom-du-père*").

Under the conditions of dialectical relations between law and desire, submission to the paternal law does not just denote a restriction of desire; rather, it is also the liberation of the subjects own (or subjective) desire. Subjectivity is neither natural nor substantial, but a dialectical relation to and reflection of the world.[14] It presupposes the law even for the price of a lost access to immediate and unrestricted reality.[15]

But Lacan's dialectical reconstruction of law and its functions is not restricted to the liberation of subjectivity: The desire of the liberated subject aims at its recognition as a subject. Different from a real satisfaction of bodily necessities or an imagined claim to total presence of the Other (originally another subject, the mother), desire presupposes difference from the other and is therefore a condition of subjectivity.[16] Since the desire of the subject can only be realised beyond mere satisfaction or total presence and

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[13] S. Freud, *Der Mann Moses und die monotheisrische Religion*, "Studienausgabe" Vol. IX, p. 530.

[14] E. Ragland-Sullivan, *Jacques Lacan und die Philosophie der Psychoanalyse*, Weinheim–Berlin 1989, p. 30.

[15] R. Bernet, *Subjekt und Gesetz in der Ethik von Kant und Lacan*, [in:] Gondek (ed.), *Ethik und Pychoanalyse*, Frankurt am Main 1994, p. 27 et seq., 35.

[16] S. Häußler, *Der Ort der Sozialnorm*, "Juridikum" 2006, p. 204 et seq.

via communication with other subjects, it is necessarily submitted to the metonymical movements of signifiers and articulations in language. The language-form of this relating of subjects, however, alienates the subject from its own desire and submits it to the language order of the Other.[17] The Other is therefore not only another subject in its radical difference, but also the order itself, which relates the desiring subject with other subjects.[18] In other words: under the conditions of the law, the subject desires from an eccentric position, it is – qua being subject – always decentred.[19]

Yet, the desire of the decentred subject is aimed primarily to its recognition and thus to an acclamation of its fragile status. Its desire is not aimed at another object; it is rather directed to another desire that is imagined as desiring the desiring subject.[20] Since the imagined desire of the desiring can only be found in another subject, who desires desire itself, the object of desire must, in last consequence, be an empty space, a non-object, death. The subject tries to fill this empty space by imaginary identifications with objects. Since all these objects are partial and incomplete themselves, there are always accompanied by the total object of desire, called "the thing",[21] the forbidden mother, the necessarily frustrated desire; but the subject cannot escape this desire voluntarily.[22] This frustration of unfulfilled desire is not restricted to the sphere of the subject, but affects all social bonds as a serious, potentially violent competition for the imagined, but unattainable object of desire.

The resulting hostility of the competing subjects is tackled by Lacan with a psychoanalytical version of the *contrat social*. This contract entails the unfounded fiction that desire is not aimed at an empty space. This allows for the contracts only real content: the covenant to communicate.[23] Every act of speech reaffirms the content of the contract and the fiction, that "truth" is being said, even if, as demonstrated above, the covenant is

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[17] G. Pagel, *Lacan*, Hamburg 1991, p. 70 et seq.

[18] J. Lacan, *Subversion des Subjekts und Dialektik des Begehrens im Freudschen Unbewußten*, "Schriften" Vol. 2, Weinheim–Berlin 1991, p. 165, 190.

[19] Y. Stavrakakis, *Lacan and the Political*, London–New York 1999, p. 21.

[20] J. Lacan, supra note 18.

[21] For that concept see A. Juranville, *Lacan und die Philosophie*, München 1990, p. 274 et seq.

[22] J. Lacan, *Die Ethik der Psychoanalyse*, Weinheim–Berlin 1996, p. 89; R. Bernet, supra note 7, at p. 38; M. Verweyst, *Das Begehren der Anerkennung*, Frankfurt am Main–New York 2000, p. 389; C. Douzinas, *Law and the Emotions*, San Domenico 1998, p. 10 et seq.

[23] J. Lacan, *Die Psychosen*, Weinheim–Berlin 1997.

based on the neglected desire of the empty space and therefore untrue. The addressee of speech functions as witness in order to recognise the truth of the speaking subject and thereby secure its fragile status as subject.[24] It is the task of the law in this situation to uphold the fiction of a commensurability of subjectivity ("Truth") and peaceful society ("Justice") and to deliver a symbolic justification for the validity of the contract. It is not important in this regard whether the actual content of the contract be "just" – the contract is rather meant to uphold the fiction of Truth and Justice as such.[25] It is this point where poignant criticism of Lacan's "Catholicism", i.e. his theoretical absolutism was raised by poststructuralists.[26] Certainly, Lacan's position is questionable, especially since it is not theoretically open for the imagination of normative concepts other than homologies of paternal law.[27]

Legendre and the paternal/legal institution

This is at least partially remedied by the theory of Pierre Legendre, who is a critical follower of Lacan's general approach and introduces a more open perspective on legal ordering than Lacan himself. For Legendre, the conditions of perceived validity of the legal system depend not on abstract notion of the paternal law, but on historically contingent legal institutions representing it. For Legendre, the symbolic added value of legal ordering, i.e. its capacity for subject constitution, are also present in those institutions. This partially takes account of the criticisms that psychoanalysis has encountered, especially that of being an essentially time-bound bourgeois theory.[28] Transgressing Lacan's restriction to mere claims of validity of paternal law, Legendre occupies himself with the question of how paternal law realises itself concretely in legal institutions. In doing so, Legendre leaves the essential structural hypothesis of Lacan untouched; as with Lacan, it is lost access to identification with the object of desire via the intervention of paternal law that founds subjectivity. Yet, for Legendre, legal institutions themselves are able to fulfil this role of paternal law. Different from Lacan

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[24] M. Frank, *Was ist Neostrukturalismus?*, Frankfurt am Main 1984, p. 391 et seq.

[25] C. Douzinas, supra note 22, at p. 18–23.

[26] J. Derrida, *For the Love of Lacan*, "Cardozo Law Review" 16 (1996), p. 699 et seq.

[27] Manfred Schneider, *Es genügt nicht, Menschenfleisch herzustellen*, "Tumult" 26 (2001), p. 49; A. Engel, *Szenarien des Begehrens*, "Juridikum" 2006, p. 195.

[28] G. Deleuze, F. Guattari, *Anti-Ödipus*, Frankfurt am Main 1974. The interesting question has been raised though, whether radical anti-authoritarianism could be regarded itself as a static and restrictive "emotional" prescreption: L. Van Middelaar, *Politicide: de moord op de politiek in de Franse filosofie*, 3rd ed., Amsterdam 2002, p. 95 et seq.

thus, Legendre conceives of the oedipal conflict not as just the confrontation of abstract paternal law and the developing subject of desire, but rather as the confrontation of the developing subject and the law as such.[29] Granted, this is mainly due to "thematic homologies" of paternity of such legal institutions.[30] In this version of the foundation of decentred subjectivity too, the realisation of its destructive potential must be hindered and the fictions of "Truth" and "Justice" be upheld. Different from Lacan though, Legendre expects the securing of the original contract by institutional tradition and inherent legal logic, because it is those who make out the "legal" nature of western tradition.[31] The "truth" of these legal institutions is guaranteed by the tradition of their legal form, because they are able to successfully hide the violent other dimension of the law. In their public appearance, the law is not recognised as the paternal law of subjectivation and thus even more easily acceptable:[32] "Society must dream to live".[33] The potentially destructive desire of the subject has to be directed at these legal institutions and traditions in order to found an erotic bond of the subject with power and an aesthetic of submission to the law.[34] The efficiency of these symbolic bonds depends on the intuitive, yet unconscious trustworthiness of the representation of paternal law in legal institutions.[35] This departure from Lacanian theory has two seemingly contradictory consequences: the historical concretisation of legal institutions as indispensable instances in the hindrance of potentially destructive desire designates his theory as being a conservative legal theory *par excellence*.[36] Legendre himself articulates his according unrest:

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[29] N. Duxbury, *Exploring legal tradition: psychoanalytical theory and Roman law in modern continental jurisprudence*, "Legal Studies" 1989 (9), p. 84, 95.

[30] P. Goodrich, *'The Unconscious is a Jurist': Psychoanalysis and Law in the Work of Pierre Legendre*, "Legal Studies Forum" 1996 (20), p. 195, 203; M. Schneider, *Es genügt nicht, Menschenfleisch herzustellen*, "Tumult" 2001 (26), p. 45, 49.

[31] P. Goodrich, *'The Unconscious is a Jurist': Psychoanalysis and Law in the Work of Pierre Legendre*, "Legal Studies Forum" 1996 (20), p. 209.

[32] A. Pottage, *Crime and Culture: The Relevance of the Psychoanalytical*, "The Modern Law Review" 1992 (55), p. 421, 427 et seq.

[33] P. Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks*, London 1990, p. 294.

[34] P. Goodrich, *'The Unconscious is a Jurist': Psychoanalysis and Law in the Work of Pierre Legendre*, "Legal Studies Forum" 1996 (20), p. 198.

[35] P. Legendre, *Id Efficit, Quod Figurat (It is the Symbol which produces Effects)*, "Legal Studies Forum" 1996 (20), p. 247, 254.

[36] N. Duxbury, *Exploring legal tradition: psychoanalytical theory and Roman law in modern continental jurisprudence*, "Legal Studies" 1989 (9), p. 84.

> "We do not understand that what lies at the heart of ultramodern culture is only ever law; that this quintessentially European notion entails a kind of atomic bond, whose disintegration carries alongside the risk of collapsing the symbolic for those generations yet to come."[37]

It is this symbolic bond that Legendre sees endangered by the refutation of the original relation of institutions to the law (and be in the innocent name of "flexibilisation") and the abolishment of myths, "this absence of meaning, which is supposedly achieved by modern systems of production, in which human bodies produce and reproduce themselves: all of this is radically false and produces a discourse full of absurdities".[38]

On the other side though, the concrete historical localisation of the pertinent representations of paternal law allows for an opening that was impossible in the Lacanian conception of function and content of paternal law. By historicizing and localising it, Legendre's theory opens a space for difference and conflict that was still completely occupied by claims of absolute validity of paternal law at Lacan.[39] Thus, historical contingency allows Legendre to escape from claims of universality of the Lacanian analysis. Granted, Legendre shares Lacan's basic normative premise that validity of law depends on its adequate, though possibly mediated, foundation in paternal law. But by including the historical and traditional emanations of paternal law into the picture, a consequent openness for plurality of such institutional forms[40] gives Legendre's theory a less dogmatic form than Lacan's. There have been criticisms against Legendre, that his reconstruction of Lacan's paternal law underestimated the difference between the structural law of the unconscious and the "legal" law[41] and that his application of abstract claims of validity of paternal law to specific legal historical institutions was in fact un-Lacanian. Indeed, it has to be stated that Lacan himself (contrary to Freud) did not endeavour to interpret legal institutions. The status of Lacan's reference to the law is therefore anything but clear. Nevertheless, I do not share this critique of Legendre: According to my perception, the ambivalence in the concept of the subject in Lacanian theory has been one source of the great fruitfulness of Lacanian thinking, making the

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[37] P. Legendre, *The Other Dimension of Law*, "Cardozo Law Review" 1995 (16), p. 943.
[38] P. Legendre, *Der Tanz in der nichttanzenden Kultur*, "Tumult" 2001 (26), p. 33.
[39] P. Legendre, *Der 'Take-Off' des Westens ist ein Gerücht*, "Tumult" 2001 (26), p. 102, 110.
[40] P. Goodrich, *Maladies of the Legal Soul: Psychoanalysis and Interpretation in Law*, "Washington and Lee Law Review" 1997 (54), p. 1044 et seq.
[41] F. Chaumon, *Lacan: La loi, le sujet et la jouissance*, Paris 2004, p. 8 et seq.

subject the "locus of an impossible identity, the place were a whole politics of identification takes place."[42] Further, Legendre explicitly seeks this identification, because in western tradition the law is one of the self-techniques of the western subject; he does not claim any "authentic" interpretation of Lacan. Moreover, this partially takes account of the criticisms that psychoanalysis has encountered, especially that of being an essentially time-bound bourgeois theory.

Evaluation

PTL therefore may be of considerable value in opening the path to a deeper understanding of the Other as not only another subject to be encountered "there", but as an experience inside our own consciences, reflected and represented in ourselves. This is a crucial point for an application of this insight to contemporary legal thinking. Although contemporary legal thinking critically reflects the fact that we encounter the world from our own perspectives, even (or especially?) if we take a "universalistic" stance,[43] it is nevertheless still questionable whether a "cure" for this problem of self-, or western, or – legalist centricities may be brought about with psychoanalytical interpretations of law. In other words, the question would be whether the initial hope set into the potential of PTL, that it would be able to provide a common language for social science, ethics and philosophy is still justified.[44]

My evaluation is ambivalent: on the one side, PTL are an adequate reconstruction of a specific tradition in western legal philosophy and theory of references to emotional dispositions in law.[45] Moreover, their specific advantage lies in their flexibility as to the specific content of such emotional dispositions. On the other side, the structure of this western traditional scheme of legal thinking with its reference to abstract concepts of "Justice" and "Truth" and the basic premise that legal subjectivity rests on a necessary partiality and incompleteness *vis-à-vis* a hidden centre of the legal order, is reproduced by PTL. Even though the request for an adequate emotional disposition towards the law has usually been understood as

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[42] Y. Stavrakakis, *Lacan and the Political*, London 1999, p. 13.

[43] C. Eberhard, *Les Droits de l'Homme à l'Épreuve de la Contemporalité*, "Droits" 41, 2005, p. 223.

[44] Albert E. Ehrenzweig, *Psychoanalytical Jurisprudence*, "Columbia Law Review" 65 (1965), p. 1331 et seq.

[45] S. Zizek, *Die Puppe und der Zwerg: Das Christentum zwischen Perversion und Subversion*, Frankfurt am Main 2003, p. 79.

a dialectical process of desire and fear since Schelling's works and in PTL,[46] the idea of inscribing an emotional disposition as necessary part of a legal theory may still produce serious problems for contemporary legal thinking. Legal Anthropology as well as Alternative Dispute Resolution scholarship[47] have warned about the dangers of such structural rigidities. A preferable though painful questioning of this feature of the western legal tradition could prove to be a more efficient way of legal thinking in the future and under current post-modern and globalised conditions, based on a neo-pragmatist account of conflict management. The necessity and effectiveness of references to emotional dispositions of legal subjects towards the law and its hidden centres of "Truth" and "Justice" is thus open to discussion. Alternative approaches have to be constantly aware of the long tradition in legal thinking: Alternative Dispute Resolution theory may run the danger of simply replacing concepts of "empathy", "openness" or "inclusiveness" for the older concepts of "Truth" and "Justice", thus reproducing structures of emotional prescription. Legal anthropology on the other hand may be consciously avoiding rigid conceptualisation of what it perceives as a social practice of encountering the Other,[48] and applying a wide concept of "law" so as to avoid biased perceptions generated by the western tradition.[49] Still some doubt is raised by the fact that legal anthropology perceives the Other primarily as another subject in desire of recognition. The underlying model still runs the danger of reproducing dialectical models of imagined interactions of a mutual constitution of subjectivity in the western model, and thus its specific fragility[50] and necessity of reference to an abstract third instance of recognition.

Critical awareness of the genealogy of our new alternative paradigms is therefore crucial for avoiding unconscious reproductions; otherwise, even our most elaborated theories on law and emotions law may not be new paradigms at all.

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[46] A major difference from most classical examples in legal thinking which are full of counter-factual prescriptions of emotional dispositions a legal subject is *supposed* to have.

[47] F. Fleerackers, *Affective Legal Analysis*, Berlin 2000, p. 171 et seq.

[48] C. Eberhard, *Les Droits de l'Homme à l'Épreuve de la Contemporalité*, "Droits" 41, 2005, p. 223 et seq.

[49] C. Eberhard, *Towards an Intercultural Legal Theory: The Dialogical Challenge*, "Social & Legal Studies" 10 (2001), p. 176 et seq.

[50] Anton Schütz, *Sons of the Writ, Sons of Wrath: Pierre Legendre's Critique of Rational Law-Giving*, [in:] P. Goodrich (ed.), *Law and the Postmodern Mind*, Ann Arbor 1998, p. 219.

Rūta Kazanavičiūtė[*]

The Role of the Judiciary in the Transition Societies (Lithuania)

Introduction

In the days of social breakthroughs and changing value-systems a great responsibility is given to courts and judges. Courts in a democratic state are the main institution solving juridical litigations. That means the place where it comes out what is considered to be justice in a particular society. It has to be noted that courts are not only a branch of the government solving litigations on law issues. Now courts have jurisdiction not only over elementary juridical cases but also political and ethical questions (when a human life starts, euthanasia, religion, health care etc.). It is a natural and reversible process: a growing role of courts in the society causes a growing attention of the society to the courts as more and more people are contending with courts. Therefore the community is taking a reasonable interest in the qualifications, value-systems and responsibilities of people being appointed judges as well as in how they are selected. On the other hand, a growing role of courts in the society is also causing a more actual issue of accountability of courts and judges. Today Lithuanian judges are facing all these problems. They are facing new processes forcing them to change their work methods and forming utterly new principles of their work.

A role of judges in the society, especially in a transition society such as Lithuania, is a wide issue. It is hard to consider this question in all its aspects so today I am going to name just some of them that are the most relevant in Lithuania at the moment. These are the role of a judge in interpreting law, the changes of this role through the history, the issue of the

* Ph.D. student, Vilnius University, Faculty of Law; rkazanaviciute@gmail.com.

discretion of judges, their place and functions during the proceedings as well as interrelations between courts and the society and problems related.

The role of a judge in interpreting and applying law

The situation after the Restoration of Lithuanian Independence

It is not a novelty that Lithuania was under the oppression of socialist regime of the Soviet Union for 50 years. The policy of the regime provided for formation of particular mentality in the society. The main traits of such mentality were obeying, conformity to the policy and rules established by the Communist Party and those ones in power. Juridical consciousness of Lithuanian people formed under the conditions of the occupation and totalitarianism regime was adapted to resist nonlegal laws of occupational regime, ignore and get round them. Legal nihilism set in forcing greater mistrust of the general public: citizens mistrusted the state and its commitments, in the meantime the state mistrusted its citizens to obey their law on a voluntary basis. Under such conditions in order to keep the peace the state was forced to control everything, supervise and punish. That is why the extent of nationalization of public life, bureaucratic apparatus and its competence had to be expanded. It is natural that such a situation influenced the conception of law. It was accepted that the will of the state is the only source of law.

After the Restoration of Lithuanian Independence the after-effect of former regime could not simply fade. During the first stage of the reform after purifying Soviet law from communistic ideology normativism and legal etatism, the methodological foundation of Soviet law, still persisted. Law was considered to be the rules of common behaviour established and approved by the state and, therefore indispensable for everyone. The will of the state was still the only source of law, law was identified with the statute in essence, and the case law wasn't legalized. The supremacy of the statute determined the preponderance of the legality against the justice and the impossibility of court's precedent. While courts didn't have the right of *ad hoc* legislation, there was no independent judiciary, and finally there was no real separation of powers, stability of statutes, because the legislature, which cannot foresee all cases of the life, cannot regulate them by norms of statutes, was compelled continually to amend statutes.

It is natural that such conception of law influenced the role of a judge in interpreting and applying law. In fact, the judge became a passive applier of the law without any autonomous rights to decide on justice. The emphasis on the supremacy on the letter of the law not only reinforced formalistic tendencies when administering justice but also diminished the role and accountability of the judge. The whole responsibility for the quality of admin-

istering justice was given to legislators and the work of the judge was demoralized. The judge was not responsible for the quality of administering justice and indifferent to the content of justice administered by him. Any deviation of the adjudication from the letter of the statute was commented unfavourably as a deviation from law as well as self-will in regard to human rights.

Changes

Described situation could not persist any longer. Enormous changes in economics, politics and social life have caused changes in thinking. In the last 10–15 years in Lithuania the search for the new conception of law has started. The change of the conception of law assigns new tasks to any society.

Soon it has been accepted that law means not only legal rules. Juridical principles are becoming the most important element of juridical matter. Famous Lithuanian lawyers are encouraging to evaluate each rule of law in terms of justice, rationality and fairness and not to apply the rule which conflicts them. These encouragements of theorists are reasoned because judges are often called the greatest formalists so it is essential to force them to feel themselves not mechanical appliers of the rules of law but creative settlers of litigations. It is being concerned with the increase in activeness of judges when interpreting law.

It can be stated that tendencies of stagnation have been overcome. When interpreting legal text Lithuanian courts deviate from the legal text and apply a thoughtful disquisition of the legal text in order to determine the meaning of the rule of law relating it to the social background of its functioning: legal principles, legal ideas, protection of human rights etc. Courts are being oriented from the passive application of the letter of statute towards the logical meaning and the common principles of law. In Lithuania where the tradition of absoluteness of legal rules is still prevailing, many judges feel uncomfortable about the thought that besides the normative act there are other sources of law and the judge doesn't apply the letter of law mechanically but improvises appealing to his juridical sense and his own understanding of law. Still the idea, that the decision of the court is not only the act of formal application of statute but also an interpretation of law, is establishing in Lithuanian courts bit by bit.

Presumptions of two groups have caused the formation of the judges' ability to create law:

1. Theoretical (conceptual) presumptions. Non-positive conception of law and its principled implication that law is a more fundamental value than the statute and law doesn't always consist with the statute have to be mentioned first. The supremacy of law flowing from this conception

commits the courts not to apply the statute but law. Art. 39 Section 3 of the Constitution of the Republic of Lithuania has been interpreted more widely indicating that its principle "judges shall only obey the statute" should not be conceived in a narrow sense but it means a duty to obey the Constitution, common principles of law, statutes and other law acts.

2. Normative presumptions. Possibility of judges to create law is also legalized by some new Lithuanian statutes, for instance those ones enabling courts to apply common principles of law in case of gaps of legal regulation and to follow the principles of justice, rationality and fairness when applying and interpreting statutes. Principles of justice, rationality and fairness are supposed to be a guarantee of judge's discretion (as it doesn't admit applying wrong rules) and the bounds of that discretion (as principles force to make decisions coinciding with those principles).

These changes in the conception of law can be illustrated with an example how constitutional law is conceived. Previously constitutional law was treated as one of law branches containing a clear subject of regulation, usually determined by naming its elements: state order, elective system, human rights and freedoms, fundamentals of national economical system, fundamentals of budget order etc. The Constitution was conceived as one of the sources of constitutional law even if the main one.

In the meanwhile the new conception of constitutional law differs from the previous one in three aspects:

1. Elevation of acts of the Constitutional Court of the Republic of Lithuania to the level of sources of constitutional law;
2. Elimination of other acts and statutes from the system of constitutional law except the Constitution itself and acts of the Constitutional Court;
3. An official establishment of the idea of the "living" Constitution.

This new conception of constitutional law must be related to the jurisprudence of the Constitutional Court of the Republic of Lithuania. Constitutional jurisprudence or constitutional doctrine in particular as the result of interpreting the Constitution became a concurrent element of the constitutional content as it develops Constitutional rules and principles, values and the real sense of constitutional regulation. Usually the Constitution is interpreted by the Constitutional Court so that the meaning of the content interpreted is wider than the meaning of constitutional text. Therefore the decisions of the Constitutional Court are not always considered unambiguous blaming the court to have exceeded its functions.

New problems caused by the changes

The problem of court activeness may be defined in terms of the level of court activeness in legal proceedings, how should it act and interpret law as

well as whether it may create law or not and to what level. It has to be noted that not long ago the approach of Lithuanian law was focused on the fostering of court activeness and the development of freedom in interpretation of law. That was presented as the only possibility to aim for the supremacy of law but not of the statute. However, nowadays a new tendency is coming up – more and more often a question is being raised if unrestricted freedom in interpretation of law doesn't become risky and independency and following not only legal text but also social background of functioning of the statute can't change into judge's impunity and unaccountability.

In Lithuania the prevailing tendency to expand the limits of judge's freedom in interpretation of legal text and the occurring risks of legal subjectivism are noticeable. Practitioners have already faced the problem that their efforts to forecast the completion of a case are ridiculous and worthless. At first sight this situation might be caused by too expanded judge's freedom in interpretation when determining the content of juridical principles and interpreting legal rules. Therefore the prevailing tendency to expand the limits of judge's freedom in interpretation of legal text may bring the risks of legal subjectivism.

However, a suggestion for courts to be more active and create law conflicts with the doctrine of separation of powers. The doctrine of separation of powers should be treated as an ethical ideology determining functioning principles of authorities. According to this principle courts can't create law as far as possible. The definition "as far as possible" should refer to the efforts of all authorities, especially courts and law community affecting them, to localize the function of creating law in the democratically elected legislative institution.

Creating the law court is usually excused by such circumstances as indetermination of the legalese, changes in public relations, inner conflicts of legal system, imperfection of the lawmaking process and the like. However, these problems, usually applied to the law created by legislators, are actually typical of law created by courts as well.

A threat to human rights having previously been caused by the legislator now may be caused by the court interpreting statutes in its own way. This kind of threat will really exist unless theories of interpreting rules of law are developed. Courts should define their position on the conception of law they are going to follow when interpreting normative text. These fears have been founded by the impeachment against the President when the Constitutional Court of the Republic of Lithuania found the President in severe violation of the Constitution and his presidential oath and hereafter the former President was justified by the Supreme Court of Lithuania.

Speaking about interpretation of law by courts, there is another problem – that in some cases interpretations of legal text are objective and "right" just because they are final, inappellable and indispensable for everyone. Logical authority of interpretation and obligation are replaced by departmental authority of an interpreter and obligation of his decisions. So during training courses judges often discuss how to recognize not law but the opinion of the judge of the high court influencing the validity of decisions made by the inferior court.

Another problem is that there are no settled clear standards of argumentation of legal text in Lithuania, what encumbers the effect of the principle of legitimate expectations and the principle of legal certainty. A lawyer aiming to forecast the completion of the litigation feels confused because systems of courts of common competence and administrative courts form their work according to different principles. This difference is easily explained by the fact that those different court systems are tied neither by the efforts to unify their practice nor by organizational structures, and court decisions are not founded by the postulates of law doctrine.

Therefore the main task at the moment is to educate a lawyer who is able to act like a judge characterized by inner independence and strong theoretical attitudes allowing to evaluate the meaning of the principles of justice, rightful expectations and others. A judge has to master basic rules of legal argumentation, importance of legal principles and establishment of their correlation. That causes the importance of law doctrine as the source of law. Fostering it as well as detailed and all-round studies may allow overcoming the existing conflict between theory and practice and functioning of the principle of legitimate expectations.

The question is what a judge has to appeal to when interpreting legal text and what statistical limits of interpreting the rules of law are so that the negotiation of one extremity wouldn't be replaced by another extremity. That means the replacement of a passive application of textual meaning by a too wide interpretation of normative text.

Judge's discretion when dealing with a case

Discretion is a central and inevitable part of legal order, because the translation of rules into action requires both interpretation and choice. In general, discretion, which may be both formally granted and assumed, is regarded as the space between legal rules in which legal actors may exercise choice. In more narrow sense discretion appears as an interpretation of existing legal rules. Common legal approach to discretion interprets this phenomenon as space within the limits of legal roles in which subjects of law

can exercise their option, in which the decision made results from freedom to make a decision at own option.

The meaning of discretion, when applying law, is that it allows individualizing decisions and provides the decision maker with flexibility to administer justice. That is so because discretion allows considering all significant specific circumstances. Discretion provides decision makers with the possibility to observe what their decisions result in and consider that in future. Finally, discretion helps to realize real goals of law what is impossible with the help of the rules of law alone.

The use of discretion is related with some risks as discretion as a unilateral power tends to contortion. The opinion is that discretion makes the law too flexible, subjective and unpredictable. That's precisely why effective legal regulation needs an optimal proportion of discretion and rules fencing it in.

Although each judge implements his own discretion by being influenced by subjective factors, law is not unpredictable. Socially that is so because all judges of any society live in the same environment which influences each person almost in the same way. Judges' decisions may be predicted on the ground of common social and psychological patterns. Therefore discretion is limited by social context more than by rules.

There is no absolute discretion of the court in a democratic state as judge's discretion is restricted. Such restrictions can be both procedural and substantial.

1. Procedural restrictions.

First of all, the use of court discretion must be right. The rightness contains some components. It can mean impartiality, i.e. both parties of the case must be treated equally. The court when making a decision has to appeal to proper evidence. Public's trust in the court doesn't necessarily mean acceptance of the court decision but it means public's belief that discretion of the court is used in a right, impartial and neutral way, treating both parties equally when there is not a single hint of a personal profit at the end of the process. That means trust in high moral standards of judge's work.

One of the most important requirements of justice is objectivity. A judge has to look at himself from a different point of view – from a perspective of law community, so that he could understand the values he has to assess and reconcile. Subjective values of a judge are matched against objectivity. A judge must have his own traits of character in his mind and not use discretion appealing to these subjective traits throughout. Of course, a judge is an offspring of his period; he lives in a certain society at a certain time. However, the aim of the objectivity is not to separate him from his environ-

ment but, on the contrary, to allow him to form the main principles of that period properly. Equally, to strive that the main values of law system would be reflected in the court work as much as possible. A judge has to be self-critical and not arrogant so that he could avoid self-identification with what he supposes to be good and kind.

2. Substantial restrictions.

The main restrictions of judiciary discretion are substantial ones. Discretion has to be rational, coherent and reasonable. A very important restriction of judiciary discretion is determined by the only fact that there is an officially established system of rules. The existing legal system creates a reality influencing the nature of judge's choices both possible and impossible. Furthermore, the character of judiciary government as an institution has influence on the extent of judiciary discretion in legal system. A judge acts as a part of judiciary government so his decisions have to correspond with the main definitions of relations between the judiciary government and the state as well as judiciary community. These main definitions arise from the public attitude towards democracy and separation of powers. Judiciary discretion is used in the frame of the system and has to correspond with it. Furthermore, legal system itself in which context a court decision is made, is not a frozen body. It is active, and judiciary discretion is one of the factors giving life to the cells of this body. Judiciary discretion has to ensure natural and organic growth and development so it has to be used coherently. Only then the use of judiciary discretion will accommodate to the legal system as a unit and become its part. A judge is not provided with the right to use judiciary discretion in one case in one way and in other case in another way if those cases are similar.

Values play a very important role in forming common law and interpreting legal text. History, social, political, economic and religious roots as well as basic documents of law system such as the Constitution, "life experience" are sources where a judge learns about the main values mentioned. When a judge makes a decision the main and underlying values have to be his guidelines. Court decisions can't be based on the results of a public opinion poll or populism attracting populace. When the public is not faithful to their main values, a judge can't submit to winds of the time. He should express the deep values and the underlying vision of the public.

The role of a judge in the procedure

Throughout history changing public, political, economic relations, the role of state government, the extent of the interference in economic processes, have caused changes in the understanding of the role of courts dealing with litigations.

Discussing the role of a judge in the proceedings, when dealing with civil litigations in particular, it is advisable to discuss two models of civil procedure – a liberal and a social one. Following one of them determines the role of a court in the procedure, the structure of the procedure, the understanding of the tasks of the procedure as well as the understanding of the power proportion of the court and related parties during the procedure. Furthermore, a soviet model of the procedure can be mentioned which doesn't belong to any of the models mentioned above. Next I would like to introduce those models.

Since Lithuania became a part of the USSR in 1940 the law acts of the USSR and its court system came into force. The socialist content of the civil procedure first of all found an expression in the principle of the party control. The conventional right of disposal became in practice illusory because all the procedural acts of the parties fell under the control of the court (and the prosecutor). Court was absolute leader and controller of the civil action taking over every initiative from the parties and their representatives. The socialist statutes introduced a procedure in which the judge was essentially in the centre and the private autonomy of the parties was pushed into the background. Personal and financial legal disputes of citizens took place, in accordance with the paternalist-etatist concept of the period, under the "care" of the court and "the watchful eyes" of the public prosecutor's office. Soviet civil procedure gave unlimited possibility for the state to meddle into any case investigation. In soviet procedure state interest was absolute devaluing autonomy of the parties, privacy of voidable relations, competitiveness and dispositivism.

The transition period lasted for approximately ten years after Lithuania regained its independence. In this period right after renouncing the soviet inquisitional judicial procedure, Lithuania switched to the other extremity. Suddenly, absolute passivity and neutrality was expected of the judge. The prevailing opinion was that only the litigating parties managed the course of the proceedings, while the judge was only an observer of the process. So in Lithuania a liberal model of the civil code was implemented.

According to the classic liberal model of the civil procedure, the aims of the procedure are to provide litigation parties with the method of dealing with their litigation and not to interfere in the content, duration and limits of the procedure. In this case the impartiality of the judge is usually identified with his passivity.

The role of the court includes control and supervision of the procedure so that the ongoing procedure would coincide with formal requirements of the statute and the procedural form. In this situation the party being right but not having proved the legitimacy of its requirement or having a worse

counsel is going to lose the case. However, the decision of the case will be considered formally right.

Due to the changing economic situation and growing market economy the disadvantages of this procedural model have shown up. Disregarding actual inequality of parties highlighted the disadvantages of the formal decision, as court decision based on the evidence presented by the parties are usually the illusion of justice and legitimacy and the duration of the process is no concern only of the parties. Economic and social conditions of a contemporary society's life do not require only a passive, totally uninteresting and unconcerned court.

It was realized that countries with old democratic traditions acknowledged the judge as the master and manager of the proceedings and that it was not considered as an ignorance of the rights of the litigating parties, nor a violation of the principle of the impartiality of a judge. Certainly, it is solely up to the parties to decide, what to make of their rights in the proceedings, it depends on them, whether they choose to defend their rights or not, but the litigation is not only a private business of the parties. The parties are granted with the right to defend their rights at fair trial and at the same time, a mechanism for doing so, as well as the conditions for exercising it, is fixed. The litigation process is not and cannot be considered as "a game without rules". When the case is taken to the court, namely the court has the obligation to ensure the right to a fair trial and a fair use of legal instruments, laid down in the laws of procedure.

Therefore the model of social procedure was developed. A more active role of the court, responsibility for the course of the procedure is divided between the litigation parties and the court; it also establishes principles of procedural economy and co-operation as well as restricts unrestricted power of the parties acknowledging that there is also public interest in the result of the procedure. It has been recognized that there is both public and state interest in a quicker normalization of public relations. Due to the reasons mentioned a judge cannot be only a passive observer and estimator of presented evidence. He should have all rights and measures required providing him with the possibility to investigate the case as soon as possible and to make the right decision based on the conviction that the decision of the litigation coincides with the actual circumstances. It was recognized that judicial activism should replace the principle of judicial neutrality – which was often wrongly interpreted as judicial passivity. Such activism on the part of the judge should give rise to a very clear allocation of responsibilities as between the parties and the judge – in the sense that the dispute belongs to the parties, whilst the trial belongs to the judge. The new code lays down the principle of cooperation, the obligation of the court for an

explanation, requires the judges to be active and provide help (support) to the litigants, when they carry out their rights. One of the most complicated tasks for the judge will remain finding the right balance between the impartiality and the active role of the judge.

So, the attitude towards the role of the judge has been changing radically. The judge is no longer required to implicitly implement law; there have been stronger nations that a judge should perform the role of a "healer of the society" (which should be regarded with caution), an interpreter of law, a creator. Naturally, any kind of a re-evaluation of virtues must have an adequate legal basis, for example, granting the judge with certain leverage, which, under certain circumstances, would allow the leader of the proceedings to have sufficient discretionary powers.

It is possible to forecast that the judge, who plays an active role in the proceedings, will encounter certain difficulties. In some cases, when the judge offers help to the weaker party, he will face accusations of violating the principle of impartiality. Certain points, which are natural in some countries, might cause astonishment, suspiciousness and even anger. It has to be realized, that no reforms pass unnoticed and all novelties make their way step by step.

Courts and society

In the soviet state relations between the society and courts were highly ideologized. It was officially stated that those relations were harmonious and implied the will of society. In terms of ideology that had been settled in a very successful way – courts were called folk courts; judges were elected and called folk judges. Cases were investigated by a judge and two assessors, whose professional rights were equated the rights of a judge. The procedure also allowed the institutes of public prosecutors and public defenders. However, besides official relations between public and court institution established by the state there was alternative public sense taking economic relations and regulating rules as well as courts differently.

When restoring Lithuanian statehood, forming new economic relations and establishing democratic principles, an ideological screen of relations between the public and court institution was removed. After regaining independence there was no deeper analysis of the model of court system and its functioning, so organization of courts was involved in flux and conducted chaotically because of the influence of interest-groups and lack of coherent and systematic attitude towards the issue. Beginning reorganization of economics and agriculture was based on populist decisions trying to ingratiate with the elective majority as opposed to the most favourable economic effect. Privatisation of national property started and the market mecha-

nism was set into action without having budgeted financial reserves and juridical measures for eventual abuse and reforming crisis. Statutes were not brought into line so applying them caused a lot of disagreements. Unsuccessful reforms of agriculture, economics and privatisation as well as underhand methods of private banks led thousands of people to courts. Courts worked following old statutes and due to lack of juridical practice of new branches were not able to solve those problems. Public discontent with courts was growing and prestige of courts was sinking.

In summary, many issues related with the role of courts in public may be divided into two blocks:

1) Aspects of forming the council of judges;
2) Aspects of court work.

Aspects of forming the council of judges: up to now higher stability of the issue of forming the council of judges has not been reached, i.e. the validity of common criteria for candidates for judges has not been secured. In Lithuania a mixed bureaucratic-professional system of selecting judges where a so called bureaucratic principle of selecting judges of parish courts is prevailing has been introduced. There is insufficient transparency of forming the council of judges as well as its activity: there are no common stable principles what is to be expected of candidates for judges; there is no objective mechanism of implementing these principles; revise of the reputation of a candidate for a judge is ineffective; there is no system of an overall assessment of candidate's knowledge; there is no rational system of judge's responsibility.

Aspects of court work.

One of the problems is a faulty understanding of the principle of court independency. Court independency is usually analysed in two aspects:

1. the external one (independency of the court from other governmental branches);
2. the internal one (independency of the judge from the parties, from the influence of other judges etc.). In the internal aspect, independency essentially means impartiality of the court i.e. the requirement that the court should investigate cases in accordance with law as it is conceived and following the facts established by the court without any external influence. In Lithuania independency of courts is sometimes understood as an absolute immunity of judges from any critics and responsibility as any attempts to speak about judges' mistakes receive feedback: quasi criticising the work of courts and responsibility of judges means an attempt on independency of courts. Such understanding of "independency" of courts means that the judge becomes independent even from law. An inappropriate understanding of independency of the judge has

been partly determined by the fact that there had been no code of judges' behaviour adapted for judges' work which would have laid down specific requirements for judge's behaviour both in the procedure and outside it.

Another big problem is non-confidence of the public in courts in Lithuania. Although the complication of interrelation between the judiciary and the members of general public is to the certain extent determined by the mere nature of the judicial activities, namely the public confidence in the judiciary is a criterion directly determining the level of positive communication between the members of the society and courts. Recent surveys of public opinion in Lithuania still reflect dissatisfactory results concerning the public confidence in judiciary which enables to declare that there is a problem of miscommunication between them. The results of public opinion polls show that only 20–25 percent of people place confidence in courts and 30 percent don't. According to the results of surveys people mistrust courts as courts are said to be corrupt, they are criticised due to the high pays of judges.

Taking into account the results of the last investigations in the mentioned field, three important groups of factors influencing the public confidence in the judiciary may be distinguished:

- publicity of judicial activities;
- duration of court proceedings;
- behaviour of a judge during the trial (judicial ethics).

Although none of the mentioned factors may be given a *prima facie* meaning, only the first one – publicity of judicial activities, directly influences all the members of general public, whether involved in court proceedings or not. Although the Lithuanian judiciary evidently fulfils the task of protection of human rights and freedoms, public opinion remains unambiguous – judicial system lacks publicity.

Other reasons for public's mistrust in courts may be:

- Imperfect statutes, new fields of life lacking for judicial regulation. Frequent changes of statutes, arisen from unstable economic situation, have caused the public's mistrust and sceptical attitude towards statutes and institutions applying them.
- The reform of courts: the reform of the court system is a big challenge to a transitional post-communist society facing difficulties in restoring confidence in the state in general and particularly in courts with regard to the soviet heritage when courts and their representatives were considered ministers of ideology. This reform essentially secures higher guarantees of an objective decision. However, at the initial stage those who had access to the high-quality legal assistance had more possibilities to

win the trial due to the longer legal procedure, higher legal costs as well as the principle of competitiveness. This has increased public's mistrust in courts.

- Disrespect to courts: lacking respect to courts that is obvious from the statements of politicians and reporters is one of the reasons of the public's low confidence in courts.

The interrelation between the judiciary and the members of general publics are very complicated and changeable. Unlike other authorities, the judiciary is a passive observer of public feel and has limited possibilities to apply to the public when declaring or making comments on something. Representatives of the judiciary do not make any comments on justice administered by them, and the media pay great attention to the court and therewith form public opinion informing about its activities.

Since Lithuania regained its independence the mass media have been the only means of communication between the general public and courts. Assessing interrelation between courts and the media in Lithuania two main problems are to distinguish:

1) Objectivity of information presented by the media;
2) Publicity of judicial activities.

The culture of the media is just developing in Lithuania. Reporters, even working in the field of justice and law, often have no basic knowledge of law so they cannot assess the court decision in terms of law and in the context of common public life. Press and television are not always able to interpret judicial material properly. Furthermore, it is a business, so in order to get reader and viewer's attention to the information about trials, information is oftentimes presented overstated or highlighting only a negative aspect of judiciary activity. Recently a tendency of escalating public discontent and mistrust in courts has been noticed. It often happens that the question of guiltiness or innocence of the defendant is discussed in the newspapers although the proceeding has not finished yet. Sometimes it is determined how the civil litigation should be settled. If the court makes another decision as it was supposed by the press, the judge is usually accused of unfairness or corruption without any attempts to go deep into the validity of the decision. According to the public surveys, the majority of respondents have confidence in the press, the greater part of the public trust in the objectivity of information presented by the press and paying no regard to the laws of the market and sectional interests.

The concept of "publicity of judicial activities" contains different meanings. For the practicing lawyer, judge, prosecutor or law student publicity of judicial activities first of all means publicity of the court hearing and material of the case (publicity in a narrow sense), whereas for the other

members of society (mostly politicians, sociologists, journalists, etc.) the concept "publicity of judicial activities" is foremost connected to the activities of courts as public institutions: their openness, transparency and accountability (publicity in a broad sense).

So, publicity of judicial activities is supposed to be the availability of information of judicial activities available to the public. Publicity of the court as an institution influences the public in a broad sense that is all members of the public: both having experience in litigations and not. Public opinion polls in Lithuania show that the information in the press about courts has great influence on their opinion, and only a small part of the respondents having negative attitude towards judicial activities has ever contended with courts.

At the moment interrelations between courts and journalists are strained, based on mutual distrust or even hostility. Journalists usually accuse judges of conservatism, confidentiality, refusal to give information. Therefore judges might be treasonably accused of the wrong understanding of independency of courts identifying it with reticence. As living conditions of the public have substantially changed judges can hardly resign their mind that all information about the legal proceedings should be available for the public. Judges oftentimes complain about the abuse of professional ethics of journalists, an obvious distortion of facts, preconceived investigation of the case herewith putting the impartiality of the proceedings in danger. There are cases when the representatives of the media conceive certain restrictions as an inappropriate dissociation of the court, refusal to give information under cover of independency although such behaviour of the court is pointed at the protection of the participants and the main principles of the proceedings.

Reticence and avoidance of courts to explain adopted decisions and certain circumstances that influenced decisions that are not present in laconic court documents to the media and the public does not protect authority of the courts. The requirements to state absolutely all influential circumstances in the decision are often not fully realized and the motives that predetermined a certain decision remain unmentioned. Therefore the conciseness and laconicism in decisions and oftentimes dilettantism of the media create conditions for doubts and distrust in the work of a court to thrive. Courts should be interested in informing the society about decisions, especially in resonant cases. This would lead to avoidance and misleading information spread by the media.

Taking into account the recent demands of democratic society, it may be concluded that the attitude towards the publicity of judicial activities in a narrow sense is no longer sufficient. Although unconditioned publicity of

judicial activities is impossible due to the necessity to follow the general principles of judicial procedure (e.g. protection of private life, independence of the judiciary, etc.), it is desirable to expand this concept to the submission of accessible information on the functioning of courts to the members of the general public. At the moment the existing problems are being solved by strengthening public relations of courts: establishing a position of the public relations officer in courts, designing websites presenting information on the functioning of courts.

Conclusions

While developing law-governed state, it is important to understand what concept of law exists in Lithuania because it determines the content of "the rule of law". Also it is a very important factor that influences the role of the judiciary in the society.

As courts were a part of the system, historical events had great influence on the role of the judiciary in the society. Today this role can be described as "searching for its place between two alternatives". In the first years of Lithuanian independence, law was strictly identified with the statute. In present Lithuania, looking at the perception of law in a broader perspective, law neither is identified with the system of judicial normative acts, nor directly dependent on the wish of a law maker. The perception of law is changing and the role of the judge is changing together with it.

Not long ago the efforts to define law as decisions made by judges seemed to be ridiculous to Lithuanian lawyers, educated under the spirit of exaltation of statutory law. In the meantime it is advisable to discuss a new problem in Lithuania: if law is not changing into overpowering unrestricted and unreasoned decisions of officials (judges) applying law? If the absoluteness of the right for judge's discretion doesn't distort the independency of the judge and doesn't turn it into judge's impunity and unaccountability?

Speaking about judge's role in the proceedings, it should be noticed that one of the aims in procedure law is to find an optional balance between adversary and inquisitive principles. Efforts have been made in order to increase the activity of the judge in the process and to expand the freedom of interpretation of law.

All in all, in theory countries at least four models of judge's role in the society have been discussed: a judge as a blind executor of the will of a law maker, a judge as a delegate, a judge as a protector, and as a politician. However in Lithuania this important issue, which is actually a basis for everything related to the organization of courts and their activities, is still *terra incognita*.

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*Miklós Könczöl**

From Law to Literature and Back (Then Again)

Introduction

It is commonly accepted nowadays that legal cases do not end with the decision of the court, but keep on moving their own ways.[1] One often has the impression that cases are not finished at all, but sometimes cease to be discussed while sometimes they do not. It also depends on how far they are found interesting by their posterity. On several occasions, however, it is not only the case itself that is of interest, but also the ways it moved after the adjudication. In the following, we are going to take a look at some of the ways – or we might say: traditions – of a most celebrated case from Roman legal history: those of the *causa Curiana*. In doing so, our main concern will be the crossing of the borders between law and literature – if they do in fact exist.

From Law to Literature...

As it often occurs when dealing with topics of the classical antiquity, we do not have any immediate information on the *causa Curiana*, as the recording of the courts' decisions started much later in Roman law (contrary to the writing of statutes). Looking for literary sources, one sees that the earliest accounts stem from Cicero, who mentions the case and its participants in

* Faculty of Law, Pázmány Péter Catholic University, Szentkirályi utca 26–30, H–1088 Budapest (Hungary). An earlier and shorter version of this paper was published as a part of my article 'Law, Fact and Narratives in Ancient Rhetoric: The Case of the *causa Curiana*' *International Journal for the Semiotics of Law* 21 (2008) 21ff, at 28ff; konczolmiklos@gmail.com.

[1] Mark van Hoecke, *Law as Communication* (Hart: Oxford 2002) 176f.

several of his works. Although Cicero himself could not be present at the trial, it seems to have been – or at least so he presents it – a famous lawsuit often talked about in the years of his young age, and of course, he must have heard of it from his teacher of rhetoric, L. Licinius Crassus, who acted in and actually won the case on behalf of Manius Curius, one of the parties. We first deal with those passages of Cicero's theoretical works where the *causa Curiana* is mentioned, and then we turn to a speech, the *pro Caecina*, where he also made use of its example.

(a) De inventione Reading the works of the *corpus Ciceronianum* dealing with rhetoric, one first finds something resembling the facts of the *causa Curiana* (as they are reconstructed on the basis of further passages, mainly from Cicero), albeit without mentioning either the case or its participants by name, in the *De inventione*, a treatise later referred to by Cicero himself as 'the unfinished and crude essays, which slipped out of the notebooks of my boyhood, or rather of my youth' (*De or.* 1.2.5).[2] Here, Cicero gives a summary of the system of classical school rhetoric, and the case appears as an example in his account of the so-called 'legal issues' (*status legales*, called here *controversiae quae in scripto versantur* by the author).[3] Discussing the sub-class of 'controversy over the letter and the intent' (*controversia ex scripto et sententia*), a debate where 'one party follows the exact words that are written, and the other directs his whole pleading to what he says the writer meant,' he gives the following sketch:

> A head of a family, having a wife but no children, drew his will as follows: "If one or more sons are born to me, he or they are to inherit my estate." Then follow the usual phrases. Then comes, "If my son dies before coming of age, then So-and-So is to be my heir." No son was born. The agnates dispute with the man who was to be the reversionary heir in case the son died before coming of age. (*de inv.* 2.42.122)

In such a case, Cicero claims, the person who entered the heritage has to show, against the wording, that the only possible intention of the testator could be that he shall inherit the estate, even if no son is born. What we see here is a school example, a mere outline of a case, intended for showing the students of rhetoric only what is relevant from the perspective of the *controversia ex scripto et sententia*. As for the case, it may or may not be a real one: it is of no interest for school doctrines. The main thing is that it is *possible*, just like in the case of human behaviour regulated by legal rules.

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[2] English translations are those published in the volumes of *The Loeb Classical Library*.

[3] On the doctrine of issues, see e.g. Dieter Matthes, 'Hermagoras von Temnos 1904–1955' *Lustrum* 3 (1958) 158ff, and Lucia Calboli Montefusco, *La dottrina degli "status" nella retorica greca e romana* (Olms: Hildesheim 1986).

It is, then, the same kind of story as the ones used by 'law in books,' it is rhetorical doctrine in a book.

(b) De oratore Some thirty years after the writing of the *De inventione*, the *causa Curiana* appears in the *De oratore*, a fictitious dialogue on the disciplinary status and the different types of eloquence addressed to Cicero's brother Quintus. The dialogue itself is embedded into a narrative framework. Cicero refers to his brother the story of a friendly talk, mainly between M. Antonius and L. Licinius Crassus, he was thoroughly informed about by Caius Cotta, one of the younger persons present. The case is first mentioned by Crassus as an instance in his argument for the importance of legal knowledge:

> [R]emember the conduct of the famous case of Manius Curius against Marcus Coponius, not long ago before the Hundred Commissioners – the crowd that collected, the anticipations aroused! There was Quintus Scaevola, [...] among lawyers the best orator, among orators the best lawyer: he was arguing the rights of the case on the literal terms of the will, and contending that the person who had been nominated heir in the second grade, as substitute for a posthumous son, who should be born and die, could never inherit, unless such posthumous son had in fact been born and died before becoming his own master: on the other side I was affirming the true intention of the testator to have been that Manius Curius should be heir in the event of no son coming of age. In these proceedings were we not both of us unceasingly occupied with decisions, with precedents, with forms of wills, with questions, in fact, of common law all around us? (*De or.* 1.39.180)

Here, both parties are named, and the claims of the advocates are given as well, but the facts appear only implicitly. What is essential, however, for Crassus' argument in the dialogue is that it was a famous case which provoked much interest, and that two of the most excellent orators and jurists pleaded before the court. His basic statement is that orators have to be able to deal with legal problems, and the more important the case was and the more qualified the advocates were, the more convincing his example is.

The *causa Curiana* is next mentioned in the subsequent reply of Antonius. He challenges Crassus' opinion on the legal character of the arguments used, and argues that it was more by 'wit and charm and highly refined pleasantries' that helped Crassus to win the case:

> [Y]ou were mocking at that over-subtlety of Scaevola's, and marvelling at his cleverness in having thought out the proposition that a man must be born before he can die; and while, amusingly and with a sense of humour, as well as shrewdly, you were adducing numerous examples,

> gathered from statutes and senatorial ordinances, and also from everyday life and conversation, in which our pursuit of the letter instead of the spirit would lead to no result. And so the Court was filled with gaiety and delight [...] (*De or.* 1.57.243)

What Antonius actually does is bringing up further details of the same story, in order to give Crassus' example a somewhat different colour. By emphasizing the role of wit, he points out that legal examples were but few among the many brought up by the orator in the case. If read this way, the story of the *causa Curiana* is not one about the legally educated advocate, but one about the sharp-witted orator, who is able to profit the most from the arguments at hand, be they related to the questions of law or to common sense.

In Book II, the case is referred to again by Crassus, in his exchange with Catulus and Caesar about the necessity of *otium*. Evoking his own words, he says that

> [...] in those observations I addressed to Scaevola, in the course of my defence of Curius, I said no more than I thought, when I declared, "Well, Scaevola, if no will is to be duly made, unless it be your drafting, all we citizens will come to you with our tablets, and you alone shall draw the wills of us all, but in that event," I went on, "when will you conduct affairs of State? when those of your friends? when your own? when, in one word, will you do nothing?" And I added also the proposition, "For to my mind he is no free man, who is not sometimes doing nothing." (*De or.* 2.6.24)

Interestingly, these words confirm the argument of Antonius about the skills necessary for the orator rather than that of Crassus himself – or at least they do not add anything to the credibility of the latter on that question. As for the readers' knowledge of the narrative *of* the case, the quotation does not give much new information, only a very small detail, which may be linked to Antonius' statement as an example on the level of the story *about* the case.

In the more technical discussion of Book II, Antonius also mentions the case (*de or.* 2.32.140f), giving no new details to the passages previously seen. Here, the case only serves as the symbol of Crassus' oratorial success, which is – so Antonius claims – not due to the knowledge of the circumstances of the concrete case, but the grasping of an abstract question, which is characteristic of a number of individual cases and which makes it possible for the orator to handle these. Thus, '[t]he identity of Coponius or of Curius had nothing to do with the wealth of argument or with the essential character of the case.' (*ibid.*) This passage resembles that of the *De*

inventione, and is indeed part of the same line of thought, namely, that the individual and the general must not be separated in rhetoric, but the former has to be subordinated to the latter, allowing for a philosophically based methodical approach to any question.[4]

The last occurrence of the *causa Curiana* in the *De oratore* can be found within the discussion of wit, where it is used as an example by Caesar. He tries to show that Crassus

is outstanding in both kinds of humour, the one displayed all through a continuous discourse, the other in instantaneous bons-mots. For that continuous speech, on behalf of Curius, and in reply to Scaevola, overflowed throughout with unmistakable mirth and jocularity; of those sudden shafts it contained none. For the speaker was sparing his opponent's reputation and in so doing was maintaining his own [...] (*De or.* 2.54.220f)

> Once again, these words do not contribute to our knowledge of the case itself, but to the reconstruction of the process. On the other hand, Caesar's evoking of that story is part of his praise of Crassus, while Crassus appears in Cicero's work as the orator *par excellence*, his authority being the seal of credibility on the doctrines presented through the dialogue.

(c) Brutus In the *Brutus*, Cicero gives an account of the tradition of Roman rhetoric. In his overview, the figure of Crassus is given particular attention, as the most outstanding orator of Rome. The *causa Curiana* is mentioned twice, being part of the characterization of Crassus as compared Q. Scaevola in both cases. The first passage is a rather brief one (*Brut.* 39.144f): Cicero states that Crassus argued *contra scriptum pro aequo et bono*, and defeated his opponent. Then a phrase familiar from the *De oratore* follows, albeit in a slightly different form:

> [T]he handling of the case by these two pleaders of like age and like consular rank, each upholding the law from opposite points of view was such that Crassus was allowed to be the ablest jurist in the ranks of orators, Scaevola the best orator in the ranks of jurists. (*Brut.* 39.145)

The difference seems to be due to Cicero's rhetorical striving for variation: in the *De oratore* (1.39.180), he referred to Scaevola as *iuris peritorum eloquentissimus, eloquentium iuris peritissimus*, adding that 'as I always say,' while here the two epithets are distributed among the two excellent advocates: *eloquentium iuris peritissimus Crassus, iuris peritorum eloquentissimus Scaevola*. Yet this *varietas* has led to an interesting opposi-

[4] On Cicero's project of 'thetical rhetoric', see Tobias Reinhardt, *Cicero's* Topica (Oxford University Press: Oxford, New York 2003) 3ff.

tion of the two figures in later commentaries and modern scholarship.[5] To come back to Cicero's account, the second passage (*Brut.* 52.194–53.199) is more pertinent to the case itself, as it reconstructs the main line of arguments of both parties, and also gives an example of Crassus' wit. As for Scaevola, his arguments were the following:

> [...] testamentary law [...] ancient formulas [...] the manner in which the will should have been drawn, if Curius were to be recognized as heir even if no son were born; what a snare was set for plain people if the exact wording of the will were ignored, and if intentions were to be determined by guess-work, and if the written words of simple-minded people were to be perverted by the interpretation of clever lawyers [...] the authority of his father, who had always upheld the doctrine of strict interpretation [...] observance of the civil law as handed down [...] (*Brut.* 52.195ff)

Thus, Scaevola presented narratives about both the drafting of the will and the role of the Court: these may be summarized as either Curius wrote exactly what he intended to, and in this case, his will is to be observed, or he did not write what he wanted, but even then, an eventual decision against the letter would lead to ill consequences for those who do write what they want, and this would be rather unfavourable for 'upholding the civil law.'

Crassus, in turn, did not challenge the arguments of his opponent at once, but had rather begun his speech with some mocking remark on the main point of Scaevola's interpretation:

> Crassus, however, in rebuttal began with a story of a boy's caprice, who while walking along the shore found a thole-pin, and from that chance became infatuated with the idea of building himself a boat to it. He urged that Scaevola in the like manner, seizing upon no more than a thole-pin of fact and captious reason, had upon it made out of a case of inheritance imposing enough to come before the centumviral court [...] Thereupon he urged that the will, the real intention of the testator, was this: that in the event of no son of his surviving to the age of legal competence – no matter whether such a son was never born, or should die before that time – Curius was to be his heir; that most people wrote their wills in this way and that it was valid procedure and always had been valid. [...] He then passed over to general right and equity; defended observance to the manifest will and intention of the testator; pointed out what snares lay in words, not only in wills but elsewhere, if obvious

[5] See J.W. Tellegen and Olga E. Tellegen-Couperus, 'Law and Rhetoric in the causa Curiana' *Orbis Iuris Romani* 6 (2000) 171ff, at 173ff, and 189ff in particular.

> intentions were ignored; what tyrannical power Scaevola was arrogating to himself if no one hereafter should venture to make a will unless in accordance with his idea. (*Brut.* 53. 197ff)

As we may see, Crassus made use of even more narratives to support his case: first, the story of the silly boy, which he presented as a parallel to his story of Scaevola's way of argumentation. Then, turning to the story of the drafting, he claimed that there was not even a contradiction between the words and the intention, since what Coponius included in the testament was exactly what normal people with the same intention would have written: here, his version of the testament was shown as a parallel to the usual practice of making wills – as described by him. Thirdly, he argued that too much adherence to the letters would be another danger for civil law, since it would make people quarrel about words just as Scaevola depicted it for the case of preferring the intention against the letter. Here again, he brought his opponent's person into the narrative, by prophesying that everyone is going to ask for his opinion (or even to ask him to draft their wills): this is what Cicero puts in the mouth of Crassus in the *De oratore* (2.6.24).

(d) Topica The last rhetorical work of the *corpus Ciceronianum*, the Topica, is a brief practical guide addressed to a lawyer, Trebatius, and is intended to make the readers aware of the necessity of a methodically and philosophically founded rhetoric. Also here, the causa Curiana appears as an example, within the discussion of the topic of similarity, on which examples are based:

> [...] Crassus in his defence of Curius cited many cases of men who, having been named as heirs in the event that a son was born within ten months and died before attaining his majority, would have taken the inheritance. Such a citation of parallel cases carried the day, and you jurists make frequent use of it in your responses. (*Top.* 1.44)

What is puzzling in this reference is that it does not tell anything about the main issue of the dispute, nor about the fact that in that particular case no son was born. Therefore it is hard to see how Crassus could use his examples – unless one reads it in the light of *Brut.* 52.197. Yet it might not be important for Cicero: he only wanted to mention the *causa Curiana* as a well-known case, and Crassus as a well-known advocate, in order to convince the jurist Trebatius.

On the basis of the above sources, one can gain some insight as to the working of stories both *in* and *of* the case – to use the terminology of Bernard Jackson.[6] The stories *in* the case are those told by the advocates be-

[6] See e.g. Bernard Jackson, *Law, Fact and Narrative Coherence* (Roby, Merseyside: Deborah Charles 1988) 35.

fore the court. Here, these were essentially about Coponius' intention and the drafting of his will: the parties wanted to persuade the *centumviri* to accept one of these narratives. Yet, as Jackson states, what happens in the courtroom is also perceived by the participants of the process within a narrative framework: this is the story *of* the trial. What is interesting in these passages of Cicero is that they also give some impression about how the orators tried to influence the judges' perception of the trial process through stories told in the courtroom: on the one hand, they both offered a narrative about the upholding of civil law – and through that, about the role of the *centumviri* as a body that ought to bring a decision which is suitable for this aim. On the other hand, we are informed by which stories Crassus oriented the court's and the audience's perception of the argumentation of Scaevola.

We then witnessed how law became literature through Cicero's literary activity: it is due to his writing that information on the *causa Curiana* has come to us. What we read in his works I would call stories *about* the trial, and as we have seen, they may serve various purposes. What comes next is the returning of stories about a case to the court: this is what happens in the speech *Pro Caecina*.

...and Back...

In the *Pro Caecina*, Cicero tries to persuade the court in favour of Aulius Caecina, who inherited an estate from his wife, Caesennia, but was unable to take possession of it, since Sextus Aebutius, to whom some small share of the estate was left by Caesennia, challenged his right to inherit. In such a case, one of the parties has to formally 'lead off' the other from the land. Caecina, however, could not even get there, as Aebutius and his company of armed men did not let him enter. Caecina then asked for an *interdictum de vi armata* from the praetor, who named a panel of *recuperatores* to decide the case.[7] Aebutius' advocate apparently argued that on the one hand, Caecina was not driven away by force; therefore his claim cannot be valid, while on the other hand, he did not enter the estate, and thus he cannot plead for its possession, either.[8]

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[7] See Bruce W. Frier, *The Rise of the Roman Jurists: Studies in Cicero's pro Caecina* (Princeton, NJ: Princeton University Press 1985) 20ff.

[8] See *Pro Caec.* 23. 66. These are only the points important for us here. For a complete comparison of arguments and counter-arguments, see the introductory notes of H. Grose Hodge, in *Cicero, the Speeches: Pro lege Manilia, Pro Caecina, Pro Cluentio, Pro Rabirio perduellionis* (Cambridge, Mass: Harvard University Press, London: William Heinemann 1927, repr. 1952) 87f.

The point where the *causa Curiana* comes to the picture is where Cicero discusses the possible content of the word *deiectio*, claiming that Caecina could not possibly be 'driven out' without force, and therefore the conditions for applying the *interdictum de vi armata* obtain:

> And now I suppose I must produce examples of all these points; as though indeed every one of you cannot think of some example, whether in one connexion or another, to support my plea that Right does not depend on words, but that words are subservient to the purpose and the intentions of men. This opinion was supported by the great orator, Lucius Crassus, in an elegant and ample speech before the centumviral court shortly before I was called to the bar; and although the learned Quintus Mucius was against him he proved to everyone, and with ease, that Manius Curius, who was to succeed to an estate "in the event of the death of a posthumous son," was entitled to succeed although the son was not dead – never, in fact, having been born! Well, did the wording of the will provide adequately for this situation? Far from it. Then what was the deciding consideration? Intention; for if our intention could be made clear without our speaking, we should not use words at all; but because it cannot, words have been invented, not to conceal but to reveal intention. (*Pro Caec.* 18.52f)

Here again, the *causa Curiana* appears as an example: the interpretation advocated by Crassus and accepted by the *centumviri* is intended to serve as a parallel to the case at hand: the rule about applying the *interdictum de vi armata* is not to be interpreted by the words only but by the underlying intention and *aequitas*. On the other hand, it can also be understood as an *argumentum a maiore ad minus*: Caecina's case is a much more obvious one than that of Curius, and if even there, Crassus could easily (*facile*) convince every member of the court, then it cannot be a question any more what decision the *recuperatores* ought to bring.

The second and third passages are parts of a reply to some remark concerning Scaevola's defeat in the speech delivered by the other party in the case:

> And in that connexion you remarked that Scaevola lost his case in the centumviral court; but I have already reminded the court that when he took the same line as you (though he had some reason for doing so and you have none) he failed to commend his arguments to anybody because it appeared that he was using the letter to assail the spirit of the law. (*Pro Caec.* 24.67)

> Why, Crassus himself did not take the line he did in pleading before the centumviral court, in order to disparage the authorities, but to convince

> the court that the point which Scaevola was maintaining was not law; and in addition to the arguments he adduced to support his contention he went so far as to quote the authority of many learned men, including that of his father-in-law, Quintus Mucius. (*Pro Caec.* 24. 69)

Previously, Cicero already quoted the words of his opponent: 'Then there is that statement of yours [...] that we ought not to defer to legal authorities.' (*Pro Caec.* 23.65) In sum, while he advocates the spirit of the law against its letter, he also declares his willingness to follow legal authorities. Both statements, to be sure, are rather vague: what decides is what one thinks the spirit of law dictates and what authorities ought to be followed (and in what respect). Why it is important for Cicero, however, to make these declarations, can be found at the level of the story *of* the trial. His aim is to appear before the eyes of the jury as someone who is standing on the right side, as it were: as someone with whom one can agree if one is devoted to upholding the best traditions of civil law. Thus, the story of the *causa Curiana* is told in another case, in order to influence the jury's perception of what is going on in the trial.

...then Again

Thirdly, we turn to the *Nachleben* of the *causa Curiana* in 20th-century philology and legal history. Although we cannot endeavour to review and comment on all the scholarly literature devoted to that case – we are not even going to take side in the debates presented–, the presentation of some basic narratives (and meta-narratives) may illustrate in how manifold forms the story returned to literature.

It was the German philologist Johannes Stroux, who in a 1926 essay presented several provocative ideas on the development of Roman legal thought.[9] His main point was that the idea of *aequitas* as opposed to the *strictum ius* appeared in Roman law through the door opened by Greek rhetorical education, namely by the doctrine of issues. The legal issue of *scriptum et voluntas*,[10] which was decided here in favour of the latter, Stroux argued, made Roman jurists' minds more willing to accept arguments based on *aequitas*, and it was in the *causa Curiana* that this breakthrough first became manifest. His arguments provoked considerable efforts from the part of classical scholars and historians of Roman law in particular, aimed

[9] Johannes Stroux, '*Summum ius summa iniuria*: Ein Kapitel aus der Geschichte der *interpretatio iuris*' repr. in his *Römische Rechtswissenschaft und Rhetorik* (Ed. Stichnote: Potsdam 1949) 7ff.

[10] Or *scriptum et sententia*, see above at p. 1f.

at either refuting or confirming his theses concerning the *causa Curiana* on the one hand and the development of Roman law on the other.[11]

In order to classify the different views, it seems necessary to identify the main narratives that can be found in Stroux' essay. First, he tells a story about the case itself: here, the two oppositions of *scriptum/voluntas* and *strictum ius/aequitas* are linked to each other, and consequently, the prevailing of *voluntas* is presented as indicating the victory of *aequitas* in a broader perspective.[12] Then, this story is connected to another, namely that of the influence of Greek rhetoric on Roman legal thought. Now we see the main points where one can agree or disagree with Stroux, and if one takes a look at different contributions to the subsequent debate, one sees that all these points were discussed in various ways. Generally speaking, for Romanists the most important questions were the influence of the doctrine of issues (and whether it can be shown in sources of Roman law),[13] and that of the acceptance of *aequitas*.[14] Classical philologists in turn concentrated on the rhetoric of the case,[15] and the ways Greek rhetoric could exert its influence on the thinking of Roman lawyers.[16]

In the course of the debates about the *causa Curiana*, another question emerged, where different narratives collide, namely, the question of jurists and orators. An opposition of the two groups may have its roots in Cicero's stories about the lawsuit. Cicero, as we have seen, sometimes speaks of Crassus and Scaevola as 'the ablest jurist in the ranks of orators' and 'the best orator in the ranks of jurists'. (*Brut.*39.145) This opposition can also be connected to the disciplinary division between law and rhetoric. Now, the question is whether these two fields could be cultivated by the same

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[11] Two overviews may be mentioned here: Manfred Fuhrmann 'Philologische bemerkungen zur Sentenz "Summum ius summa iniuria"' in Studi in onore di Edoardo Volterra (Milano: 1971) vol. 2, 53ff, Tellegen and Tellegen-Couperus (n. 5 above).

[12] John W. Vaughn, 'Law and Rhetoric in the causa Curiana' *Classical Antiquity* 4 (1985) 208ff.

[13] Just to mention a few examples: Arthur Steinwenter 'Rhetorik und römischer Zivilprozeß' *Zeitschrift der Savigny-Stiftung, Römische Abteilung* 65 (1947) 69ff, Ernst Meyer 'Die Questionen der Rhetorik und die Anfänge juristischer Methodenlehre' *Zeitschrift der Savigny-Stiftung, Römische Abteilung* 68 (1951) 30ff, Uwe Wesel, *Rhetorische Statuslehre und Gesetzesauslegung der römischen Juristen* (Köln etc.: Carl Heymanns 1967) – it is interesting to note that Wesel divides his bibliography to publications before and after Stroux.

[14] E.g. Fuhrmann (n. 11 above).

[15] See Vaughn (n. 12 above) 221f.

[16] See Michael Winterbottom, 'Schoolroom and Courtroom' in Brian Vickers (ed.), *Rhetoric Revalued* (Binghamton, NY: CMERS 1982) 59ff.

persons or not. Any answer to that, be it a positive or a negative one, may influence our understanding of the story of the *causa Curiana* as well as our views concerning the history of Roman legal thought and the professionalization of Roman law. As for the case itself, we will have three oppositions: Crassus/Scaevola, rhetoric/law, orator/jurist. These may or may not correspond to each other, but our point here is that narratives about the *causa Curiana* are structured by them. This certainly is the case in scholarly literature, and arguably in Cicero's account (we do not have direct information on the story *of* the lawsuit, i.e. whether the participants perceived the process along these lines).

Finally, we should take a look at a meta-narrative, that is, a story about scholarship dealing with the *causa Curiana*. In a highly provocative article, Jan Willem Tellegen and Olga Tellegen-Couperus present their views on the case,[17] but their discussion of the actual evidence is preceded by a critical overview of previous literature on the topic. Identifying the points where most interpretations agree,[18] they claim that Romanists fail to take account of the sources, and that this is due to their adherence to 'a strict division between law and rhetoric,' which 'dates from the time of the interpolation-hunt.' Given all that, they argue that their misinterpretation of the case was due to both anachronism and falsification. These statements are embedded into narratives about the story of the study of Roman law. As for anachronism, they offer an account of the methods of the Historical School, adding that these methods are by now outdated. In their narrative, however, Romanists kept on applying them (anachronism), and what is more, they did so more or less intentionally (falsification). In order to prove that latter, they sketch another narrative about the changes of Romanists' position in legal education. Our final observation may be, then, one related to that accusation: the meta-narrative drawn by Tellegen and Tellegen-Couperus brings the story of the *causa Curiana* from literature to the field of law broadly understood.

Conclusion

The present paper was intended to examine the role narratives play not only in the adjudication of legal debates but also in later interpretations. In order to do so, we revisited the evidence Cicero's work offers about the

[17] Tellegen and Tellegen-Couperus (n. 5 above).

[18] They primarily discuss the opinions of Fritz Schulz, Franz Wieacker and Ulrich Manthe, and (not in the narrow context of the causa Curiana, an article by Bruno Schmidlin (see their footnotes 5, 12, 20 and 38 for the references).

causa Curiana, and identified the narratives described by and being active in these passages, that is, what narratives Cicero accounts of and what he makes use of. Using the terminology of Bernard Jackson, we distinguished between stories *in* the trial and stories *of* the trial, and suggested a third type of stories, the stories *about* the trial. These categories, however, proved to be rather flexible, as we have seen how many ways they can move after the actual decision of the legal debate concerned. Stories of the trial can be retold as stories about the trial, while stories about the trial can return to the court as stories in the trial. These movements can also be described as between the fields of law and literature, while the fact that the borders are so easily crossed suggests that they are – to say the least – not particularly rigid ones. Finally, we have shown how strongly narratives are active in scholarly literature: as stories *in*, *of* and *about* scholarship, sometimes all the three in the same time.

*Sophia A. Leahy Stone**

Justice and Friendship: An Analysis of Aristotle's Virtues Exhibited by the Judicial Reasoning in *Brown v. Board of Education*

Introduction – Preliminary questions

When we read the landmark decision, *Brown v. Board of Education*, 347 U.S. 483 (1954), the arguments presented seem redundant to the values we hold today. This is because we take as a matter of fact that all citizens, regardless of race,[1] need a good education in order to be able to participate fully in the democratic process of government. Yet what is remarkable about reading *Brown* today is that the case formed and re-shaped American law so that now, when we think of equal education for all, we think of it as a matter of fact – we don't even question it.[2]

* Lecturer in Ethics, University of San Francisco; sstone@gmail.com.

[1] 'Race' is a figment of man's mind, there is no race distinction as such according to biology. That we look different should not, in itself, be a determination of one group over another group. I hold that race is a categorical distinction that comes empty, in order to be used for profit, gain, delineation or prestige. In other words, race is meant to create unequal distinctions between groups where, in nature, they are equal. *See* S. Keita, et al., *Conceptualizing human variation*, [in:] *Nature Genetics* 36, S17–S20, (2004) http://www.nature.com/ng/journal/v36/n11s/full/ng1455.html.

[2] I do not want to give the impression that all is rosy for black Americans in education. There are many schools which predominately have a minority population that do not get the funding to keep up basic needs such as computers for classrooms, new text-books and working bathrooms, to name a few issues. A legitimate argument still can be made that American education is inherently unequal among classes.

We would not have come to this understanding and belief in education if it weren't for *Brown*, and the case, I will argue, goes beyond judicial activism, it extends a kind of virtue that rarely belongs in legal case decisions. That virtue is friendship, *philia*, as described in Aristotle's *Nichomachean Ethics*, Books VIII and IX.[3] While the decision itself is just, I will argue the reasoning that brings the Warren Court to their final decision is not based on justice, *dike*, but on friendship.

Immediately one who is familiar with Aristotle will object to the application of virtuous friendship, because the love in friendship, according to Aristotle, must be reciprocal, *antiphilçsis.* (NE 1157b30-1) Virtuous friendship requires equality, and given the unequal status of black American citizens at the time of *Brown*, it would seem that this equality requirement precludes any application of virtuous friendship in the decision. Another objection one could have is applying Aristotle's philosophy to the Brown decision at all, since Aristotle wrote his treatise on the *Nicomachean Ethics* more than two thousand years ago and supported slave and discriminatory economies. Yet this is precisely why we need to look at the *Brown* decision from an Aristotelian viewpoint. Aristotle's ethics and politics represent the classical conservative viewpoint of ruler and ruled, state and citizen, husband and wife, master and slave relations from which the *polis* depends for stability and strength. As Aristotle writes in his *Politics*, "[f]or that some should rule and others be ruled is a thing not only necessary, but expedient; from the hour of their birth, some are marked out for subjection, others for rule."[4] From an Aristotelian view point, we can analyze the *Brown* decision to see how the Warren Court changed traditional law which upheld segregation to create new law that forbade segregation. By using Aristotle's ethics we may come to a better understanding of the reasoning behind the landmark case, *Brown v. Board of Education.*

For this paper, I will argue that the reasoning that overturns the *separate but equal* argument in *Plessy v. Ferguson,* 163 U.S. 537 (1896), exhibits Aristotle's virtue of friendship and oversteps the boundaries of justice in order to render a just decision. I will address the problems to my argument as well as answer them. I hope to show that in particularly divisive issues among people, an effective remedy is thinking about the issue not merely in terms of justice, but also in terms of Aristotle's virtue of friendship. By this, we create a more just community, one that is based on *philia*, friendship.

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[3] Aristotle, *Nicomachean Ethics*. Tr. by Christopher Rowe and commentary by Sarah Broadie, Oxford: Oxford U. Press, 2002.

[4] *See* Aristotle's, *Politics*, Book I, 1254a20, tr. Benjamin Jowett in *The Complete Works of Aristotle*, Vol. two, ed. by Jonathan Barnes, Princeton: Princeton U. Press, 1995, p. 1990.

Plessy v. Ferguson, 1896

Justice Brown delivered the opinion of the court, which affirmed a Louisiana state law requiring separate riding cars for people of color and for white people when they rode the intra-state railroad. When addressing the constitutionality of the statute, the court denied that the Thirteenth Amendment, which abolished slavery, had any bearing on the case at bar. Quoting Justice Bradley in the *Civil Rights Cases*, 109 U.S. 3, 24, 'It would be running the slavery question into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business.' (163 U.S. 543) Justice Brown then concluded, "[a] statute which implies merely a legal distinction between the white and colored races-a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color-has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude." (Ibid.) With this interpretation of law, Justice Brown obviated the need to further discuss the Thirteenth Amendment within the context of the case.

The Fourteenth Amendment, which states that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws," garnered more discussion and consideration from the Court. While the Court agreed that the Fourteenth Amendment was meant to enforce the absolute equality of the two races before the law, the Court denied that law had any power or influence in abolishing distinctions based on the prejudice of color. The Court went further and said that such distinctions do not necessarily imply the inferiority of either race to the other (163 U.S. 537, 544) and would later conclude that feeling inferior is "solely because the colored race chooses to put that construction upon it," and is not due to law (163 U.S. 537, 551). The Court denied that social prejudices could be overcome by legislation, and claimed that "if the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals." (Ibid) What is missing in the majority opinion in *Plessy* is the acknowledgment that America, since its formation, has had a long history excluding black Americans. As Hannah Arendt says, "…[America's] attitude to its Negro population is rooted in American tradition and nothing else. The color question was created by the

one great crime [slavery] in America's history…"[5] America's founders did not intend to include people from African descent to be under the protection of rights guaranteed to American citizens by the constitution. The most egregious example of this is in the 1856 decision, *Dred Scott v. Sanford* (60 U.S. 393), where the court ruled that people of African descent could never become citizens in America. Justice Harlan, who dissented in *Plessy,* did mention our shameful past, and rightly concluded that "the judgment [in *Plessy*] rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case." [163 U.S. 537, 559] Yet for the majority opinion, as long as the laws of segregation were equally and reasonably applied to both races, the Court concluded that there could be no violation of the Fourteenth Amendment.

While we may disagree with Justice Brown's reasoning and conclusions of law, in one respect, the Court was absolutely correct in saying that in order for social prejudices to be overcome, it must be brought about by 'mutual appreciation of each other's merits,' and 'a voluntary consent of individuals' – which also, by the way, are two requirements necessary for a virtuous friendship.

Aristotle's *Justice*

It is clear today that the *Plessy* decision was unjust. When the law affirms distinctions based on race that is due in part to racial prejudice, the law affirms and perpetuates such prejudices. While unequal treatment to people who are inferior is not unjust *per se* according to Aristotle, (such as having laws applied one way to adults and in another way to minors) unequal treatment to people who have equal legal status in citizenship, such as the American black community at the time of *Plessy*, is unjust. The problem though, is what kind of reasoning would it take to overcome the unjust decision in *Plessy*?

Generally speaking, for Aristotle, justice is a disposition in character that makes people do just things and wish for just outcomes. (*NE* 1129a5-10*)*.[6] The person with just character tends to be a law-abiding citizen and acts according to what is fair. (*NE* 1129a34) What is just, Aristotle concludes, is whatever is lawful and equal. (Ibid) According to this general account of what is just so far, the decision in *Plessy* does not seem to be contrary to justice because by definition, whatever is lawful is just. The *Plessy* decision was simply upholding the law with its interpretation that the

[5] Hannah Arendt, *Reflections on Little Rock*, reprinted in: *Responsibility and Judgment*, New York: Schocken Books, a division of Random House, 2003, p. 198.

[6] Aristotle, p. 158.

'separate but equal' distinction in the Louisiana state statute did not violate the Equal Protection clause in the Fourteenth Amendment of the constitution. We need to look at Aristotle's account of particular justice to see what sort of reasoning would show that the decision rendered in *Plessy* was indeed unjust and necessarily needed to be overturned.

In Book V of the *Nicomachean Ethics*, Aristotle distinguishes among two types of particular justice, distributive and rectificatory, and includes a third type though it does not fall under the particular category, equitable justice. Distributive justice pertains to goods and honor bestowed upon people, where a person is deserving of recognition for valor in battle, or likewise, a person deserves a cut in military pay due to cowardice in battle. Distributive justice seeks to equalize status among people where it is unequal. This is shown by the valorous soldier and the cowardly soldier – both have unequal status comparatively, yet the distribution of pay and honor (or lack thereof) serves to bring them back to a more or less equal status among soldiers. While it is true that the American black citizens deserve equal education, there is nothing that we have yet to support the conclusion that equal education must necessarily entail desegregated education.[7]

Rectificatory justice has to do with particular goods and services among people or parties. Before a transaction the involved parties are on equal terms and agree upon an exchange of work or goods for a certain value. When the work is finished and if the service is rendered or the goods that are exchanged are valued less than what was agreed upon, an imbalance is created, either on behalf of the worker or on behalf of the payer. When there is such an imbalance among the exchange of goods and services, rectificatory justice seeks to right this imbalance, by way of a penalty owed to the one who had suffered the harm. The argument to overturn *Plessy* will need to address the imbalance and the inherent unequal facilities in schools designated for black Americans and will appeal to some rectificatory justification for needing to equalize the schools, but in and of itself will not be

[7] During class discussion, A.J. Fiorella, a student of mine, argued that the overturning of *Plessy* exhibited Aristotle's distributive justice, for it returned the equal status to the African American, from the time *before* the slaves were brought from Africa to America. While this is an interesting thesis and deserves mention, I think it is a stretch to extend Aristotle's distributive justice from before slavery began to equalize the status of the African American. First, the slaves themselves were betrayed by their own leaders (so the inequality could not be solely the fault of the American slave traders), and second, it is not clear to me that Aristotle's justice was meant to apply equality among peoples who belonged to different countries.

sufficient for overturning segregation laws. There will need to be an appeal to a larger and more encompassing reason for overturning segregation laws – the reasoning must show that segregated education has a detrimental effect on the personal self-worth of black Americans and therefore is in direct violation of the equal protection clause in the Fourteenth Amendment – for the ruling to have the sanction of law and the support of the American people.

Equitable justice seeks to right an application of law, where it is just in its universal application, the law is unjust in a particular application. Equitable justice rights the unjust particular aspects of a law. It is equitable justice that is the most obvious application to the overturning of *Plessy*, yet it too does not quite meet the mark necessary to accomplish this task. At *NE* 1137b15-25 Aristotle writes,

> So whenever the law makes a universal pronouncement, but things turn out in a particular case contrary to the 'universal' rule, on these occasions it is correct, where there is an omission by the lawgiver, and he has gone wrong by having made an unqualified pronouncement, to rectify the deficiency by reference to what the lawgiver himself would have said if he had been there and, if he had known about the case, would have laid down in law.[8]

Immediately from what Aristotle writes we can see why equitable justice would not be appropriate to use in the overturning of *Plessy* because the law itself is unjust – there is nothing to 'fix' the separate but equal distinction affirmed in the Louisiana statute, the distinction itself must be overturned. One could argue that by overturning the separate but equal clause in the Louisiana statute *is* fixing the unjust law. Where before, the Court had ruled that separate but equal qualification wasn't in violation of the Fourteenth Amendment, the correction of law states that now the clause is in violation of the Constitution. This is a plausible counter consideration, but I reject it based on the fact that the discourse surrounding the overturning was not centered on a misinterpretation of law, or even, a reinterpretation of fact. There was no 'fixing' this unjust law, but rather, there were new considerations brought in, that did not rely upon interpretation of law. Of course one could respond, and say that these new considerations did fix an unjust law. But these new considerations didn't merely 'fix' an unjust law, these new considerations were used in order to change the way we think about segregation in the public realm.

While there will be elements of just reasoning, justice, though necessary, would not be a sufficient condition for the overturning of *Plessy v. Ferguson*. It would take America another half century or so living with the

[8] Ibid, p. 174.

laws of segregation before its highest court would consider once and for all the constitutionality of those laws. And, it would take a certain man with an excellent character to render the just decision that segregation in public schools and therefore in all public facilities was inherently unequal in the application of law and was in violation of the rights and privileges guaranteed by the constitution. That man was Justice Earl Warren.

Brown v. Board of Education, 1954

The clarity and brevity with which Justice Warren writes in the landmark case *Brown v. Board of Education*, 347 U.S. 483, bespeaks of a determination of mind, reason and will that can be best described as *just*:

> …justice alone of the excellences is thought to be someone else's good – because the just person does what is of advantage to someone else, whether someone in power or an associate. …the best sort is not the one whose excellence extends to his treatment of himself, but to his treatment of another; for it is this that is a difficult task. (*NE* 11030a4-1130a9)

We can read from this passage in Aristotle that Justice Warren's reasoning goes beyond what Aristotle describes as just, for his argument is not for the sake of 'someone in power' or 'an associate', but the entire black American community, who for so long has had an inferior place in every aspect of American society.

What is also remarkable about the case is the absence of any robust discussion of law. While the Warren Court determined that segregated education violated the Fourteenth Amendment, there is actually little argument and little justification for the finding.[9] The Court discusses briefly the nonexistent education of black Americans at the time that the Fourteenth Amendment was drafted, even mentioning that in some states, particularly the south, it was against the law to educate them. (347 U.S. 483, 490) At best, the Court had found the history and the intent of the Fourteenth Amendment inconclusive to the case at bar. Rather, the Court focused on recent cases which discussed the effects of segregated education on black Americans, particularly the rulings on cases about admissions to law and graduate

[9] Eugene Garver claims that had there been more reasoning in *Brown*, the decision would have been less persuasive. Professor Garver argues the reason for this is that the Warren Court needed to show responsibility for the judgment. I argue, however, that the Warren Court could not rely on legal precedent and law because there would not have been the justification needed from prior law to support the conclusion the Warren Court made in *Brown*. *See* Garver's, *For the Sake of Argument; practical reasoning, character, and the ethics of belief*, Chicago: University of Chicago Press, 2004, p. 76–86.

schools, where black applicants were denied admission not based on qualifications, but on race. The Court cites and quotes *McLaurin v. Oklahoma State Regents*, supra, requiring a black American admitted to a white school that he be treated like all the other students, "…his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession," and the Warren Court concluded that these considerations *apply with added force* to children in grade and high schools. (347 U.S. 483, 494) Contrary to the findings in *Plessy*, the Warren Court determined that "to separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." (Ibid) This conclusion of law extends the Court's reasoning based on logic to one of concern and care. The Court quoted another finding in a Kansas case, even though that particular court ruled against the black plaintiffs:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system. (Ibid)

The Warren Court, in one sentence, declared that any language in *Plessy v. Ferguson* contrary to this finding was rejected. The absence of discussion or extended argument was meant to show the Court thought that racially segregated schools, though equal in every aspect, had a detrimental effect on the personal self-worth of black children and that this point of fact was incontrovertible. The Court concluded that segregated schools deprived the black community equal protection of the laws guaranteed by the Fourteenth Amendment, and stated that this disposition made unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment. (347 U.S. 483, 495) With such little discussion of law, how was the Warren Court justified in making its decision, where other courts, with similar findings, had rejected the conclusion that segregated schools violated the Fourteenth Amendment?

Justice Warren relied on basic democratic values, that to participate fully in the democratic process, every citizen needs a good education, as education was the foundation of democracy. At the same time, the Court focused on the self-worth of the individual and the effect that self-worth had on the

ability to learn in school. By enforcing segregation in schools with the sanction of law, America was perpetuating the norms and beliefs that black Americans were inferior to white Americans, violating the equal protection clause in the Fourteenth Amendment. For fifty years after the ruling in *Plessy*, segregation had the sanction of law. While these issues were brought to bar in courts across America, only the Warren Court had the wisdom and resolve to declare the segregation practices in education unconstitutional. What is different in the Warren Court's decision is the recognition of black citizens, not as 'other', but as positive, productive, contributing members of American society. In the beginning of *Brown*, the Court acknowledged the achievements by members of the black community: "Today… many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world." (347 US 483) Such recognition was absent in other cases, perhaps because the focus was on law and norms alone, or perhaps courts thought that such recognition was not integral to the issue at bar. Yet in *Brown*, the Warren Court found it necessary to focus on the value of educational development of the black community, as an end and a good in itself. The legal practices of segregation had precluded the black American community from participating in public policy and higher ranks of government, in effect, barring black voices from public discourse. By ending segregation in education, the Warren Court had successfully opened opportunities for all people to engage in every aspect of Democratic discourse and activity, regardless of skin color. The considerations and argument for black Americans in *Brown v. Board of Education*, as a concern for the good of another, marks Aristotle's virtue of friendship.

Aristotle's *Friendship*

In Book V, Aristotle reminds us that, "the things that tend to produce excellence as a whole are those legal provisions that have been enacted in relation to education with a view to the common interest." (*NE* 1130b25) This, of course, occurs in the section on Justice, and, some would argue, epitomizes the decision of *Brown v. Board of Education*. So far as Justice is concerned with the good for the whole society, I would agree that the outcome of *Brown* was a just decision.

Yet, in order to achieve the just decision, the Warren Court had to focus on black American students and the importance of the personal and educational development. In other words, the decision had to make the consideration for the good of black Americans the most important, and then see how the law was to follow such reasoning. Any attempts prior which focused on the rule of law for black individuals had failed because of long standing prejudices in American law and society against the black race.

Justice was a necessary but not a sufficient requirement for concluding that segregated education was in violation of the Fourteenth Amendment, an appeal to a higher virtue, friendship, was needed.

Aristotle writes that there is no need for rules of justice between friends, and that of what is just, the most just is thought to be what belongs to friendship. (*NE* 1155a25-30).[10] Part of the reason that friendship is more just than justice is that friendship involves good will between reciprocating parties (*NE* 1155b35). In justice, where law coerces people to be good and respect one another, in friendship this good will is voluntary. There are three criteria that Aristotle gives for friendship, and that is wanting good things for another, an awareness of the other's doing so, and that this good will is reciprocal. At 1156a1-5:

> If there is to be friendship, the parties must have good will towards each other, i.e. wish good things for each other, and be aware of the other's doing so…[11]

By definition then, there is a problem with applying friendship to the *Brown* decision, for how can the Court's good will towards black citizens be reciprocated? By ending segregation, and allowing black and white Americans the space to interact freely, the *Brown* decision opens up the possibility of reciprocal good will between the races. While the reciprocating requirement is not immediately met, it has the potentiality and increases the probability of being met in the near future. By making the *Brown* decision unanimous by a 9 to 0 vote, there could be no question of the intent that the rule of law made by the justices in the highest court in the land requires the good for black Americans. By ending segregation, it now opens the possibility for this good will to be reciprocated by black Americans.

I see no need to discuss the objects of love in the three different kinds of friendship Aristotle delineates in Book VIII, though I will mention them here only to conclude that the friendship we are most concerned with is the virtuous kind. The three kinds of friendship are distinguished by the end and the sake of which we love the friend. Utility friendship is based on how useful the friend is to us.[12] An example of this kind of friendship would be

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[10] Aristotle, p. 209.

[11] Ibid, p. 210.

[12] Danielle Allen argues that Aristotle's notion of civic friendship mostly applies to the friendship of utility. While I am in agreement with Allen, I still hold that the reasoning in Justice Warren's decision is not based on arguments of utility, what is useful to America. Neither is Justice Warren basing his reasoning on self-interest. I stand on my original claim that the reasoning is based on virtuous friendship. *See* D. Allen, *Talking to Strangers*, Chicago: University of Chicago Press, 2006, p. 119–139.

to make friends with someone who works at the cinema so that one can go to the movies for free. Pleasure friendship is based on a pleasure we get from our friend, such as a friendship based on purely sexual intimacy. Both of these kinds of friendship value another person not for their own sake, but for what one can get from the other person. Virtuous friendship, then, is different from the useful and the pleasure friendship because the good that one seeks is for the good of another for his or her own sake, and not only for what one benefits from the other person:

> And those who wish good things for their friends, for their friends' sake, are friends most of all; for they do so because of the friends themselves, and not incidentally. So friendship between these lasts so long as they are good, and excellence is something lasting. (*NE* 1156b5-b12)[13]

There can be no doubt that the Warren Court's decision in *Brown* exhibits good will, and that this good will is the consideration of the good for black Americans, for their own sake, as equal members of American society. The problem is that even though the decision comes from the standpoint that all citizens are equal before the law, regardless of race, color, or gender, at the time of the writing of the decision, black Americans were nonetheless not treated as equal to white citizens. It would take the whole Civil Rights movement, with demonstrations, protests and, in some cases, violence, for black Americans to be treated and considered equally, with the same opportunities and privileges as white Americans. And, while there has been much progress, America still suffers from racial prejudice. But all this aside, one would ask, how could the decision in *Brown* be thought of as a decision based on friendship when at the time of writing, the black and white races, though they ought to be of equal worth, were not treated as such and therefore could not be of equal worth? Is it possible, on Aristotle's account, for virtuous friendship to occur between unequal parties?

When there is a great distance among friends, in terms of excellence, badness, resources, or whatever it may be, Aristotle says, "…then people are no longer friends, and do not even expect to be." (*NE* 1158b33-35) This is the case for gods and kings, at *NE* 1158b36-1159a4:

> This is most evident in the case of the gods; for the gods are to the highest degree superior to us in all good things. But it is clear in the case of kings too; for those who are much needier do not even expect to be friends with them and neither do those without any merit expect to be friends with them, and neither do those without any merit expect to be friends with the best or most intellectually accomplished.[14]

[13] Aristotle, p. 211.
[14] Ibid, p. 216.

Aristotle admits, though, that there is no precise way of determining up to what point people can be friends, for just like goods and qualities, people change, but what lasts, if people are friends, is friendship. When the gulf is too wide among people, such as gods and kings, or when a person changes too much (for example, when one becomes bitter and unfriendly due to a loss and cannot recover), friendship is impossible. "If then," Aristotle writes, "it was right to say that a friend wishes good things for his friend for the other's sake, the other should remain whatever sort he is; his friend, then, will wish the greatest goods for him as a human being. (*NE* 1159a10-14) Given what was said before, that friendship needs to be reciprocal among equals, it appears that the decision in *Brown* could not be based on friendship.

Though the Warren Court adjudicates by being the highest court in America from a standpoint of authority and superiority, the reasoning in *Brown* itself does not. The kind of reasoning in *Brown* exhibits an extension of care to black Americans, acknowledging the injustice of segregated education and wishing to redress the injustice. The care to which Justice Warren goes to right the wrongs of the past does not mention or expect any kind of return, other than the implied hope that the black Americans will no longer be subject to an indoctrination of inferiority generated by legal segregation. The reasoning exhibits loving more than being loved, as when a mother loves her child:

> …sometimes they give their own children to be brought up by others, and they love them, knowing who they are, without seeking to be loved in return, if they cannot have both things; it seems enough to them to see them doing well, and they themselves love their children even if the children give back none of the things a mother ought to expect, because they do not know who their mothers are.[15] (*NE* 1159a30-a34.)

On Aristotle's account, friendship is much wider than our understanding of the term. Friendship encompasses most relationships (excluding enemy relations, of course) for Aristotle. We would not necessarily think that a teacher-student relationship is one of friendship: friendship to us would be further qualification on such a relation that is not a given simply by a student sitting in on a teacher's lecture. For Aristotle, such a relation is friendship. Yet where most relationships fall into the category of useful or pleasurable, the friendship a mother extends to her child is a friendship of care, one that excludes the friendship that is for the sake of being useful or pleasurable (though these could be secondary attributes). A mother's love

[15] Ibid, p. 217.

for her child is for the sake of that child, wishing for the good for the child. Aristotle claims in 1159a35 that *the excellence that belongs to friends seems to consist in loving*, and later concludes, '[t]his is the way, most of all, that even unequal parties will be friends; for in this way they will be brought into equality with each other. 'Equality and similarity make amity,' and most of all the similarity of those similar in excellence…"[16] The Warren Court's position of superiority and hence an unequal position to that of black Americans, I argue, is analogous to the mother's superior position to her child. Both have a responsibility of care. And if the requirements of virtuous friendship are not immediately met, they have the promise of being met.

One might immediately object to my claim, calling it 'patronizing' and argue that the relationship is not like a mother towards her child, but rather, from one brother to another.[17] From an Aristotelian viewpoint, however, it is status and virtue that cannot be unequal for friendship. I argue that brotherhood is exempted in the *Brown* case because the status of the Warren Court and Black Americans was unequal. Aristotle's view of brotherhood implies equal status among friends and a sharing of everything in common (1159b32-33). In brotherhood, it is the sharing of everything in common that could be most like the Warren Court's decision, yet this 'sharing of everything in common' also includes the care a mother extends to her child.

One may also object to the conclusion that the Warren Court has a responsibility to black Americans, and say that rather, it has a responsibility to interpret the law and maintain just relations among equals. I would agree that the Supreme Court's primary responsibility is to interpret the constitution and maintain just relations among equals (where all citizens are equal before the law) but the problem the Court faced was the justice that had been rendered from prior interpretations of the law, for fifty years after *Plessy,* was inherently unjust. The Court had to approach the reading of the constitution with new eyes when it came to adjudicating on the laws of segregation. The Court had to exclude any gap of ambiguity in interpreting the constitution as being against segregation, and this reasoning had to go beyond any discourse of justice, because what had been rendered before as just was actually unjust. I think that what had to go above and beyond justice was a level of care that was not unlike the care that a mother extends to her child. The Warren Court's decision took the focus off of what was just according to the law and focused rather on the development of the

[16] Ibid.

[17] This, in fact, was an objection raised by University of San Francisco's professor on the philosophy of race, Ron Sundstrum.

personal self-worth of black Americans, and the detrimental effects of segregated education. There was little appeal to precedent and prior law, because such discourse had been fundamentally prejudiced and against the black people of America. Justice Earl Warren, so the story goes, would not adjourn the Court, until the decision was unanimous, that the laws of segregation in education were a violation of the Fourteenth Amendment and therefore were rendered unambiguously unjust.

The landmark decision in *Brown v. Board of Education* led the way to other decisions that soon began chipping away at the unjust laws based on racial prejudice that had plagued America for so long.[18] *Loving v. Virginia* (388 U.S. 1, 1967) was such a case that came after *Brown*, declaring the laws which had forbidden marriage between different races unjust. It was the Warren Court's decision in *Brown* that paved the way to the possibility of equal friendships between the black and white races. Before *Brown*, racial prejudice precluded true friendships from forming between the races. After *Brown*, virtuous friendship was now a possibility, because with equal education comes equal opportunity, thereby developing and nurturing citizens on equal grounds. Such nurture and development then paved the way for lasting friendships:

> But given that friendship lies more in loving, and that we praise those who love their friends, the excellence that belongs to friends seems to consist in loving; so that it will be those between whom this occurs according to worth that will be lasting friends, and whose friendship will last. This is the way, most of all, that even unequal parties will be friends; for in this way they will be brought into equality with each other. (*NE* 1159a33-1159b2)

America, still, has a long way to go to eradicate prejudice from law. There are still populations in America that remain marginalized. Even though there is a growing population who chose to be with the same sex for their pursuit of happiness, the laws of most states forbid the institution of marriage from sanctioning such unions. In time, such laws will most certainly be declared unjust. Yet the decisions overturning such laws will not be able to rely on justice alone, for like enforced segregation, our laws and judicial history enforce the prohibition of gay marriage and limit the friendship possibilities of gay communities. Such a decision will need to appeal to principles of friendship, as care for the other for the sake of the other's good.

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[18] *See* Garver, *The Creativity of Brown*, [in:] *For the Sake of Argument*, p. 85–86.

*Marcin Pieniążek**

How Does it Differ? A Trial of Application of Nicolai Hartmann's Axiological Square Toward Differentiation of Legal, Medical and Business Ethics

Introduction

"Unity and diversity…" The central theme of the IVR Congress in Kraków provokes, among other, to ask the question whether in a diversified, in every sense, 'postmodern' world in which it is inappropriate to talk neither about one proper idea for life nor about a universal model of law or a pattern of practising science, it is feasible to sustain the faith in the existence of any, common for all humans, hence – objective – world of values. This classic question is based in this essay on philosophy of law and, at the same time, it is referred to the sphere in which pluralism, or even axiological conflict, is easy to grasp, namely to the sphere of professional ethics. (The initial question was obviously the subject of thorough research carried out on the grounds of anthropology, sociology of law etc. It should be stressed out at the outset that the attempt to answer the latter has been undertaken in this essay in the sphere of "theory of legal ethics", using phenomenological ethics of values[1]). Due to practical reasons, on account of clarification of

* PhD, LL.M. (EALT), senior lecturer at the Andrzej Frycz Modrzewski Krakow University, Poland; pieniazekm@poczta. onet.pl.

[1] The concept of legal ethics as phenomenological ethics of values, which makes a reference to the output of M. Scheler, N. Hartmann and J. Tischner, has been described in details in my doctoral thesis.

the problem and its depth, the analysis that is going to follow is limited mainly to the relations occurring among three ethics, that is legal ethics, medical ethics and business ethics.

1. Let us start with an example which will, at the first glance, confirm the standpoint of the supporters of axiological pluralism in the sphere of professional ethics. Let us imagine that a young lawyer who provides legal services for an enterprise trading in medicine is given an order from his superior, let us say the member of the board of directors, to carry out an illegal transaction which can rescue bad financial situation of the enterprise. The transaction consists in a "silent" purchase of a batch of medicine which is produced with the use of an ingredient taken off from the market due to a proven harmful effect on pregnant women. The lawyer finalizes the transaction which turns out to be an entrapment. Whilst being chased by the police, dead scared lawyer reaches for a gun and takes a number of dangerous shots. After being warned few times and asked to drop the gun, he is shot and is taken to hospital where his life is rescued owing to immediate help of the team of experienced surgeons.

The abovementioned description could be, at best, the basis of a script of a poor detective film. However, it allows to point at the differences which exist between the axiology of legal, business and medical ethics.

Without going deeper into details, let us say that one of the basic ethical-professional duties in legal professions is avoiding any situations which would give even a slight possibility of infringing law. The latter is caused by the fact that a constitutive value for the ethics of a judge, prosecutor, barrister or solicitor is justice in itself. On the other hand, a constitutive value for business ethics is always gaining profit which has often little to do with justice and abiding by law. Furthermore, nobody has to be persuaded that irrespective of whether we talk about nurses' ethics, doctors' ethics or physiotherapists' ethics, what can be found in the centre of their ethics are such values as life, health or patient's dignity. The employee of health service has ethical-professional duty of helping everyone, including a criminal. It can be said that medical services have, as the base of their ethics, unconditional mercy directed at every ill person. Therefore, hospitals provide help both to an injured criminal and to an innocent victim of the accident caused by the former, irrespective of a severe punishment which this criminal deserves.

A mutual conflict between such values as profit, justice and, let us say, mercy can be very difficult to settle. In our example, the lawyer, whilst being in the conflict among constitutive values for legal and business ethics, opted for the latter. Doctors, on the other hand, have carried out their

ethical-professional duties to perfection by rescuing criminal's life, which was threatened as a result of using weapon, according to the rules and professional ethics, by those who guard law and public security. What can be more realistic, and not fictitious, example presenting mutual conflict of constitutive values for legal, medical and business ethics is ethical classification of illegal organ trading, which can be differently seen in a particular situation from the perspective of each of these ethics. Legal ethics can, then, be in a seemingly irremovable conflict with business and medical ethics, which confirms a general rule according to which different professional groups, like other social groups, place potentially contradictory values in the centre of their axiologies. The abovementioned observations constitute natural basis of justifying a popular thesis on ethical and axiological pluralism, or even relativism, of modern societies of western civilizations.

The aim of the essay is, among others, to show that there exists such ethical theory, particularly useful for the theory of legal ethics, which allows, firstly, to precisely grasp and describe the source of a conflict between the three abovementioned professional ethics and to defend a difficult thesis, in the light of the aforementioned observations, about objectively existing, and therefore common for different professions and, what is of utmost importance – for their representatives, *universum* of values. Phenomenological philosophy or, more precisely, phenomenological ethics of values in the version proposed by N. Hartmann can, in my opinion, provide many arguments in favour of the standpoint which can be succinctly summarized as "unity above diversity".

2. The term "phenomenology" (Greek *phainomenon* – something which appears, reveals itself, a phenomenon + *logos* – a word, science, theory) is ambiguous and in history of philosophy it appears in several meanings. It was introduced in philosophy probably in 1764 by J. H. Lambert in order to denote "science about phenomena" (*Theorie der Erscheinung*). Notions with similar meaning appear later in the theory of science of Johann G. Fichte, like "science about phenomena" – *Erscheinungslehre*. Kant, referring to Fichte, contradicts the knowledge about "things in themselves" with science of phenomena.[2] Let us add that in Hegel, phenomenology of spirit (*Phanomenologie des Geistes*) is understood as a science about stages of the development of consciousness. The most crucial meaning of the term "phenomenology" is connected with philosophical trend created by Edmund

[2] R. Ingarden writes that the word "phenomenology" appeared for the first time in one of Kant's letters. Compare: R. Ingarden, *Introduction to Husserl's Phenomenology*, PWN, Warszawa 1974, p. 7.

Husserl (1859–1938). Husserl uses this notion, what will be discussed below, to describe philosophical "primary science" and research method closely connected with the latter.

J. Tischner writes that a general profile of the trend, initiated by Edmund Husserl, is "fundamentally antipositivist". As the former author points out, Husserl set as his aim to revive traditional idea of philosophy as science, separate from particular sciences, using its own methods.[3] This science should fulfil two goals, namely instead of being preoccupied with notions, it should refer to reality and replace many philosophical trends with one universal philosophy. Hence Husserls's saying – "back to things as they are!", that is back to phenomena.[4]

The description of the nature of phenomena given to us in direct intuition of their essence has become the method of phenomenology.[5] Polish phenomenologist, Husserl's disciple – Ingarden, points at three basic principles (tendencies) which laid the grounds for phenomenological philosophy as a method. First of all, it is "the rule of all rules", expressed in the abovementioned motto – "back to things as they are!" (*Zuruck zu den Sachen selbst!*) – that is to "primary, direct experience". The second principle concerns the realization of direct cognition in the sphere of the so-called ideal objects and, therefore, the realization of direct apriori cognition, which leads to considering ontological issues by Husserl's phenomenology. The third principle requires the realization of "immanent" cognition and introducing transcendental reduction.[6]

J. Galarowicz writes that the ultimate goal of phenomenology as a fundamental science was to be certain knowledge. Therefore, one of such crucial postulates of phenomenology was the lack of any assumptions, leading to the rejection of all hypotheses, prejudices or superstitions and being open to what is intuitively obvious, namely given in undistorted cognition. Phenomenology, in such understanding, was to research not only particularly shaped phenomena but rather their nature.[7] In this way, the aim of the latter was to grasp what was basic in phenomena themselves.[8] As a consequence, "purely appearing" and, in this sense, ideal objects were considered to be

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[3] J. Tischner, *At the Source of Modernity*, *Thinking according to the Values*, Znak, Kraków 2000, p. 39.

[4] J. Galarowicz, *Phenomenological Ethics of Values*, Publishing House of Papal Theological Academy in Kraków, 1997, p. 19.

[5] J. Tischner, *At the Source of Modernity*, p. 40.

[6] R. Ingarden, *Introduction to Husserl's Phenomenology*, PWN, Waszawa 1974, p. 57.

[7] W. Tatarkiewicz, *History of Philosophy*, vol. III, PWN, Warszawa 1958, p. 302.

[8] J. Tischner, *At the Source of Modernity*, p. 41.

real and existing independently from awareness. Similarly, the objects of some general notions, that is "ideas" were considered as existing independently from awareness, though not real and they were referred to as "ideal objects".[9] The aforementioned outline of Husserl's philosophy is referred to as transcendental idealism.[10]

According to Husserl, a primary source cognition of the object is a specifically understood perception of the latter, its "source presenting clearness", at the same time there is a close relation between the kind of object and the way in which it is presented to awareness.[11] "Primary presenting" awareness is the perception, the so-called act in which the object of cognition is present here and now as itself. (Such acts are of intentional character, which means that awareness is always understood as awareness of a particular object, namely it is an awareness constituting sense of objects.)[12] All that is not empirical, what is general and stable, that is the essence (*eidos*) of a particular phenomenon is presented in what is given in cognition, besides that what is of empirical, changeable and individual character. The essence as well as essential states of things and aprioric laws are available for cognition in a peculiar variant of obviousness – in eidetic intuition. Intuitive grasping of the sense of phenomena is based on eidetic reduction. Therefore neither deduction nor induction is needed or useful in the process of determining what is directly given and obvious because these are methods of reasoning, of indirect manner of aiming at the truth and of indirect approach to the latter. Intuition is perceived here as a primary and irreplaceable source of cognition; all kinds of reasoning are impossible if intuition fails to provide their premises. For Husserl it was, as he claimed, "the principle of all principles".[13]

Let us say that phenomenologists differentiated among various kinds of intuitions, depending on the kind of direct data so one can talk about rational intuition, characteristic for logic and irrational one, typical for emotional acts. The differentiation which must be made first of all is between the intuition which presents the phenomenon in its particularity and the intuition which presents the essence of phenomenon itself, which allows to

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[9] W. Tatarkiewicz, *History of Philosophy*, vol. III, PWN, Warszawa 1958, p. 303.

[10] J. Galarowicz, *Phenomenological Ethics of Values*, Publishing House of Papal Theological Academy in Kraków, 1997, p. 23.

[11] Ibidem, p. 21.

[12] J. Tischner, *In the Circle of Husserl's Thought*, [in:] *Thinking according to the Values*, Znak, Kraków 2000, p. 13.

[13] W. Tatarkiewicz, *History of Philosophy*, vol. III, PWN, Warszawa 1958, p. 303.

formulate a priori assumptions.[14] Due to its aprioric character, phenomenology was to be equally scientific as mathematics and it aimed to realize the postulate of philosophy as a science.[15]

Husserl's later works focused on transcendental phenomenology which was a science about pure awareness and transcendental I.[16] As Tischner points out, Husserl discovered that every phenomenon is a phenomenon for a particular I who is getting to know it and that without this I no object of cognition is possible. He concentrated his research and descriptions on the essence of "pure awareness", "transcendental" awareness, perceived as a condition of a possibility of any "objectivity" in the world and of the world and in this sense being something "beyond the world".[17]

At this stage of Husserl's thought, transcendental reduction was crystallized as a method. The latter was to be used, generally speaking, to reveal unknown insight into the relation between awareness and reality. According to Husserl, transcendental reduction consists in "leaving aside" everything which is not granted by the process of cognition itself. Tatarkiewicz writes that it was in fact the same method as Descartesian method of doubting and rejecting everything which is questionable.[18]

3. This short description of the assumptions of Husserl's phenomenology has moved us closer to phenomenological ethics of values, which derives from the latter and which gives us a chance to formulate a positive answer to the question posed in the introduction. Max Scheler is considered to be its author and he presents his views in the work *Der Formalismus in der Ethik und die materiale Werthetik*[19] (*Formalism in Ethics and Non-Formal Ethics of Values*). The first part of Scheler's most important work from the first stage of the development of his ethical thought was published in 1913 in the first volume which included, among others, Husserl's *Ideen zu einer Reinen Phanomenologischen Philosophie*.[20]

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[14] W. Tatarkiewicz, *History of Philosophy*, vol. III, PWN, Warszawa 1958, p. 304.
[15] Ibidem, p. 306.
[16] J. Galarowicz, *Phenomenological Ethics of Values*, Publishing House of Papal Theological Academy in Kraków, 1997, p. 22.
[17] J. Tischner, *In the Circle of Husserl's Thought*, [in:] *Thinking according to the Values*, Znak, Kraków 2000, p. 41.
[18] W. Tatarkiewicz, *History of Philosophy*, vol. III, PWN, Warszawa 1958, p. 302.
[19] This work was published in the years 1914–1916.
[20] Compare: K. Wojtyła, *Max Scheler y la etica cristiana*, Biblioteca de autores cristianos, Madrid 1982, p. 5.

A. Węgrzecki writes that what is characteristic for Scheler's phenomenological philosophy is "connecting empirical with aprioric approach". Phenomenological experience is characterised by him as "the insight into the essence" (*Wesenschau*). Cognition of what is important, however, has aprioric value and refers to everything what has a given essence. As Węgrzecki points out, aprioric moments are then "extracted from the experience".[21] Scheler writes about those matters in this fragment: "first of all, it concerns new facts which exist before all and every logical determination and, secondly, it is about clearly seen operation (*Schauverfahren*) [...] about an attitude basically different from observation. What is experienced and seen is "given" only in an experiencing and clearly seen act, in its fulfilment, it appears in it and only in it."[22]

Phenomenology is then a specific way of perceiving reality. In his work *On the Essence of Philosophy*, Scheler writes as follows: "…the first and most basic property which philosophy based on phenomenology must possess is the most lively, the most intense and most direct communication with experience (*Erlebnisverkehr*), with the world itself, that is with objects at issue. These things are directly presented (*sich geben*) in experience, they are present in experience and only in it. It should be stated already at this point that what was placed in the centre of Scheler's interests was the issue of using the latter method to get to know objectively and "physically" existing world of values. Scheler writes also that: "…reasonable view [of a philosopher – phenomenologist] occurs [...] at the meeting of experience and object – the world – irrespective of the fact whether it concerns something physical or mental, numbers, figures, God or anything else. The spark of reflection should aim only at the latter, providing it is "present" in this closest, the most lively contact."[23] Cognition reached in this way is of aprioric and emotional character, unlike cognition in Husserl's theory, for whom intuition was of basically intellectual character.

At this moment we pass to such element of the abovementioned theory which allows to take a look from a brand new perspective at a contradictory nature of axiological basis of different professional ethics. What Scheler postulates in his theory is the ethics based on objectively existing and "physi-

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[21] A. Węgrzecki, *Scheler*, Wiedza Powszechna, Warszawa 1975, p. 24.

[22] M. Scheler, *Phanomenologie und Erkenntnistheorie*, *Phenomenological Attitude*, GW, vol. 10: *Schiften aus dem Nachlass*, second edition, Berlin 1957, p. 380 and next [in:] A. Węgrzecki, *Scheler*, "Wiedza Powszechna", Warszawa 1975, pp. 131–132. Translation: A. Węgrzecki.

[23] Ibidem.

cal" world of values.[24] Values are given directly in intentional feeling, just as colours are present in seeing or sounds are present in hearing.[25]

Aprioric character of feeling of values is independent from the objects that it refers to. The content of values and their ordered sequence have priority in "giving themselves" in the order of experience because feeling of values is, according to Scheler, primary to presentation of objects. However, in real order values and objects create insoluble interconnection (*Zusammenhang*). M.S. Frings notices that in Scheler's conception values are independent from the existence.[26] Independence of values is obvious for Scheler on account of the fact that such values as "pleasant", "beloved", "charming" are available for us without referring or connecting them to objects. The latter is also true about colours which present themselves to us without the need to perceive them as "the layer on the surface". Frings writes after Scheler that: "An ordered sequence of different colours does not undergo any change whilst the objects that represent them do change. Similarly, values do not change with the change of objects which represent them."

We have now reached such aspect of Scheler's ethical theory which is directly connected with the question whether a common world of values can exist irrespective of more relative axiology of different professional ethics. What Scheler postulates is that all kinds of values create an absolute order and they are unchangeable. He stresses, however, that the cognition of the truth about their hierarchical order takes place anew every time – in intentional feeling. In this way, the position of each value undergoes the act of grasping in acts of preference, moving closer and feeling. Even before introducing the elements of N. Hartmann's theory, we will notice that "intentional feeling" and acts of value preference, connected with the latter (as Scheler writes – "moving them closer" and "moving them away") can have different outcome in case of representatives of different professions. Those results will be conditioned by a specific character of each profession and independent from the existence of their unchangeable hierarchy. It should be added that in an ordered "realm of values" there exist aprioric formal laws which govern the latter. Values are divided into two groups, namely

[24] W. Tatarkiewicz, *History of Philosophy*, vol. III, PWN, Warszawa 1958, p. 306.

[25] S. Frings Manfred, *Max Scheler – A Concise Introduction into the World of Great Thinker*, Duquesne University Press, Pittsbourgh, Pa., Editions E. Nauwelaerts, Louvain 1965, p. 111.

[26] Ibidem, p. 112.

positive and negative values.[27] The most crucial aprioric relations between values consist, as I have mentioned, in their hierarchical order and sequence between all values. Values are divided, to simplify, into three classes, namely starting from the lowest respectively – sensual, vital and spiritual ones. This sequence shapes aprioric intuition of values and intuitive insight into the laws of their preference.[28] Let us emphasise it once more that the order of sequences of values is absolute, namely it is independent from all historical changes, goods or norms, in this way it also does not depend on particularities of axiological professional ethics. Such order is, then, an absolute system of ethical reference which has as its background all historically relative moral judgements and norms (the changes of ethos and morality – also in the sphere of professional ethics).[29]

4. German phenomenologist Nicolai Hartmann referred to Scheler's thought, for example in his work *Ethik*. What can be traced in ethical theory suggested by this author are additional elements which move us closer to a paradox of simultaneous coexistence of contradictory recommendations of professional ethics and aprioric, unchangeable and universal world of values.

Hartmann, at many points, developed and specified M. Scheler's deliberations. In contrast to the latter author, Hartmann does not claim, for instance, that cognition is reduced to purely emotional dimension. Hartmann derives his theory of values from ontology and, what remains in close relation with the latter, he postulates ontology of dual character, namely be-

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[27] Let us add that the existence of positive values is a positive value itself; inexistence of positive value is a negative value; existence of negative value is a negative value in itself; inexistence of negative value is positive value in itself. Moreover, one value cannot be simultaneously positive and negative. Citation from S. Frings Manfred, *Max Scheler...*, ibidem, p. 113.

[28] Scheler writes about this notion in the following words: "Among all aprioric connections the most important and the most basic ones exist, in the sense of a certain hierarchical order, between the systems of qualities of physical values which are referred to as modalities of values. The latter create physical apriori for our insight into values and insight into their superiority. […]" M. Compare Scheler, *Aprioric Connections of Superiority Character between Modalities of Values*, [in:] *Der Formalismus in der Ethik und die materiale Wertethik*, GW, vol. 2, fifth edition, Bern–Monachium 1966, pp. 122–126.

[29] S. Frings Manfred, 'Max Scheler...' *Max Scheler – A Concise Introduction into the World of Great Thinker*, Duquesne University Press, Pittsbourgh, Pa., Editions E. Nauwelaerts, Louvain 1965, p. 113.

sides a real existence, Hartmann assumes the existence of ideal being. He includes to the latter, among others, objects of mathematics, logical structures and values.[30] The way in which values exist, as Hartmann writes, "turns out to be real, though ideal being in itself. Values are something which exists independently from the possibility of grasping or acknowledging them, something which is independent and this independence is clearly confirmed in sheer feeling of values."[31]

In reference to an ideal being, Hartmann assumed the existence of three kinds of perfection, namely free one (*freie Idealitat*), bound one (*anhangende Idealitat*) and "suspended" one ("*schwebende*"). The latter kind of perfection was used in the characteristic of how ethical values exist.[32] Let us explain that these values are ideal objects, somehow suspended (*rei schwebende*) above the space of real interpersonal events, transmitting particular moral orders to intuitive "receiving unit" in a human.[33] In his work *Ethik* Hartmann writes that as everything that is ideal, values are and remain transcendent in relation to the awareness of a subject who, in this way, gets to know them.[34] At the same time, the author attributes a peculiar "aggressiveness" to ethical values. As he claims, they appeal to a human by means of emotional intuition for adequate reaction, so they are not passive like physical objects.[35] Hartmann also talks about "ontological unsatisfied feeling of ethical values" which are not satisfied with pure, unbound perfection but which demand to be connected to the sphere of real practice.[36] Let us pay attention to the fact that such "unsatisfied feeling" and "an appeal" are very often visible in the sphere of professional ethics. Values, however, do not bind a human mechanically. A human being is free from their appeal; he can but he does not have to follow it. As Z. Zwoliński writes, axiological intuition is not free from the voice of values and it has to perceive them in such way in which an eye sees an object which is presented to it. What is free is only human free will, which cannot be directly

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[30] B. Trochimska-Kubacka, *Axiological Absolutism. Reconstruction based on Ricket's, Scheler's and Hartmann's Axiology*, Publishing House of the University of Wrocław, Wrocław 1999, p. 49.

[31] N. Hartmann, *Philosophical Thought and its History. Systematic Self-Presentation*, Comer, Toruń 1994, p. 118.

[32] Z. Zwoliński, *Being and Value in Nicolai Hartmann*, PWN, 1974, p. 24.

[33] Ibidem, p. 25.

[34] N. Hartmann, *Specificity of Intuitive Cognition of Values*, [in:] *Extracts from Ethics*, The Publishing House of UMK, Toruń 1999, pp. 89–101.

[35] Z. Zwoliński, *Being and Value in Nicolai Hartmann*, PWN, 1974, p. 283.

[36] Ibidem, p. 286.

forced by the values to follow intuitively perceived duty. Thanks to freedom a man is a mediator (*Vermitter*) between the world of ideal duties or obligations and moral practice and without his involvement many ethical values will not become principles of social reality. Hartmann talks here about "helplessness of values" (*Ohnmacht der Werte*) in determining human behaviour. He also uses the notion of "powerless order" (*machtlose Gebot*).[37] In this way, one can also say that ethical-professional values appeal to a barrister's, doctor's or businessman's ethical intuition, demanding to be realized in ethical-professional ethics. Reacting to such an appeal is every time a question of personal choice.

An important point of Hartmann's theory is his conception of the world of values. Basically speaking, Hartmann, following in this sense Scheler, considered a determination of an objective hierarchy of values to be an ideal. According to Hartmann, "the results of researches" do not entitle, however, to present such commonly important hierarchy. Despite some doubts, Hartmann in his analyses differentiated six groups of values, namely the values of goods (which are always goods for somebody), hedonic values, vitality values, moral values, aesthetic values and cognitive values. Hartman introduced, what will be discussed below, the notion of weight and height of values and, at the same time, he distanced himself from a linear approach to the hierarchy of values, as worked out by Scheler. Unlike the latter, Hartmann claimed that the higher the value is the more it is dependent on the previous values, that is more basic ones. In this way, moral values are, according to Hartmann, based on the realization of fundamental values, that is biological, economic, social etc; they themselves, on the other hand, condition the realization of aesthetic assumptions. Without going into details, it should be stated that besides Scheler's output, Hartmann tried in his conception to take into account the hierarchy postulated by Aristotle who opposed the sequence of moral predicatives to the sequence of negative predicatives.[38]

What complemented in many issues the polemics with Scheler was Hartmann's view about "multidimensional character of the world of values". As Z. Zwoliński writes, the concept of differentiating the weight of ethical values from their height was one of Hartmann's most innovative

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[37] Ibidem, p. 336.

[38] Aristotle suggested the following sequence: not bad, deserving a praise, beautiful, worth of respect, worth of love, worth of awe, worth of admiration. The sequence of negative predicatives was presented in the following way: transgressed, ugly, reprehensible, shameful, hateful. Compare: Z. Zwoliński, *Being and Value in Nicolai Hartmann*, PWN, 1974, p. 356.

ideas. According to this view, two moments decide about the position of values in hierarchical system, namely height (*Werthohe*) of a value and its power (*Wertstarke*) and not, as Scheler claimed, only its height.[39] Having the latter in mind, Hartmann formulated the law, according to which "the power of a value is inversely proportional to its height" so the lowest values are equipped with the greatest power whilst the highest values possess the smallest power. On the account of the latter, values can be ordered in a hierarchical sequence in a twofold way, either taking into consideration their height or from the perspective of their power, whilst both these possibilities do not overlap. The height of a value is manifested in a positive emotional answer to its realization, that is in approval, appraisal, respect, awe; the power of a value, on the other hand, is manifested most of all in a negative emotional reaction which is caused by acting against the value itself, namely in disapproval, condemnation, contempt.[40] As Hartmann writes, greater credit of realizing a higher, that is positive, value corresponds in case of disrespecting or infringing it, to a smaller offence. On the other hand, greater fault which one is burdened with whilst infringing lower but stronger, that is positive, value, corresponds, in case of its realization, to a lower credit. In other words, the higher the place of a particular value in the hierarchy, the smaller the order of its realization and, vice versa, the more fundamental and lower the value is, the stronger the demand of its realization and the ban on infringing it.[41] In Hartmann's understanding, the higher the value, the smaller the duty of putting it into practice but, at the same time, the bigger a moral credit in case of its realization. On the other hand, the more fundamental the value (for instance indispensable for life, health, abiding by legal order etc.), the smaller the credit for realizing it and the bigger the condemnation for infringing it.[42]

We have now arrived to such point in the discussed theory which allows us to give a positive answer to the abovementioned question. The consequence of differentiating the power and the height of ethical values is the possibility of creating different ethos, based on those values, including those of professional character. Irrespective of aprioric, transcendental and universal values, there can also exist quite distinct professional ethics which favour different, basic and strong ("heavy") values such as justice, in case of legal professions, health, in case of medical professions, or profit – from the perspective of business ethics.

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[39] J. Galarowicz, *Phenomenological Ethics of Values*, Publishing House of Papal Theological Academy in Kraków, 1997, p. 215.

[40] Ibidem, p. 158.

[41] Z. Zwoliński, *Being and Value in Nicolai Hartmann*", PWN, 1974, p. 369.

[42] Ibidem, p. 370.

It merits adding that according to Hartmann, experiencing something what is more and less valuable, what is higher and lower, is possible due to the so-called axiological awareness. The latter is a peculiar kind of human sense which, like sight in case of colours or hearing in case of sounds, enables the perception in the world of values. However, due to the restriction of our awareness of values, similar to a restricted character of any other sense, we always grasp only limited fragments of their hierarchy, concentrating basically on the heaviest value which is placed in the centre of attention of our sense of values. Hartmann refers to the latter phenomenon as the law of narrow-mindedness of our axiological awareness. Irrespective of the latter, in case of different people this sense can be better or worse developed. For example, "obvious" values for judges are such as justice, judicial independence or neutrality, for businessmen – profit, for soldiers – honour and for doctors – human life etc.

Having in mind Hartmann's abovementioned view, we can point at theoretical justification of the existence of professional ethics which are different, contradictory in respect to principles or even particular recommendations. It cannot be denied that the heaviest values are for example legal order, justice, human life and health or profit. Let us repeat that Hartmann, unlike Scheler, does not finally settle which of the latter are placed higher in the hierarchy. Some professions, on account of performing social tasks, refer to the heaviest values as a consequence of being invariably connected with a particular fragment of social reality. The representatives of such professions have, by nature, a restricted axiological awareness. Those professions work out professional ethics which are inevitably concentrated on a fragment of a world of values. The law of axiological narrow-mindedness leads to the act of driving beyond its scope such values which cannot be combined with constitutive values for a particular profession. Such regularity, obviously, proves correct also in case of business, legal and medical ethics from the perspective of "everyman", creating an illusion of intransgressible axiological diversification of society. At the same time, Hartmann's theory enables us to perceive the fact that heavy, differentiated ethical-professional values make up a considerably greater world of values, perceived in its fragment by means of a doctor's or company's president's axiological awareness. The theory of professional ethics, based on Hartmann's phenomenological ethics of values allows to restore confidence in the possibilities of "unity above diversity".

According to Hartmann's theory, due to a limitation of axiological awareness, which grasps only a fragment of the world of values, and because of spot character of ethical intuition, we are forced, practically in every situation, to decide without the possibility of referring to any authority or a code

of norms. We have to be guided by our own current and true feeling of values.[43] Ethical cognition is then always something personal and it takes place by means of direct participation in solving real moral problems.[44] It cannot be denied that the necessity of properly directing axiological awareness of the members of doctors', lawyers' or entrepreneurs' associations, has influenced the creation of the phenomenon of codification, or in other words compilation of the rules of professional ethics. In my opinion, such normative acts should not be in any case placed in the same category as codes in legal meaning because they are primarily a particular kind of lodestar for a lawyer's, doctor's or businessman's axiological awareness which is professionally bent. The abovementioned remarks point at basically individualised character of professional ethics which invariably refers to personal feeling of ethical-professional values by the representative of a given profession.

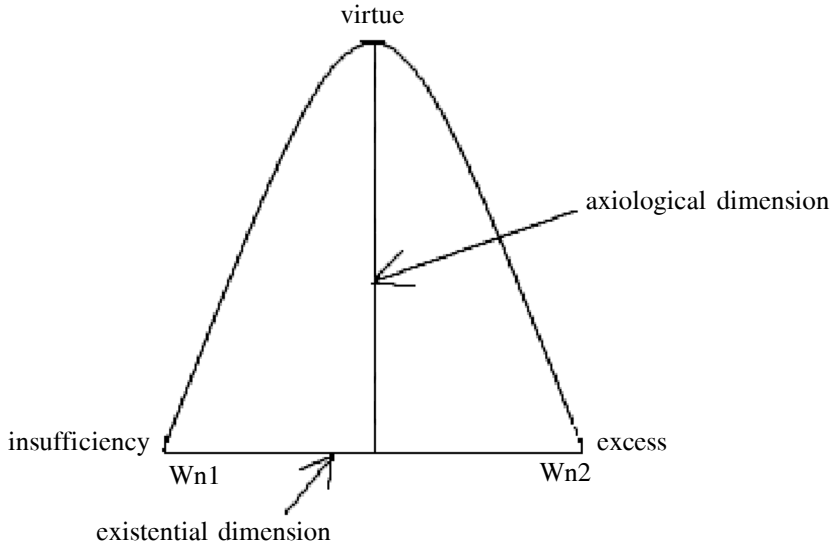
5. Let us now look closer to the phenomenon of contradictory recommendations of professional ethics highly valued by society. Let us notice that even in a "film" example, presented in the introduction of our essay, the representatives of one profession have undertaken activities in accordance with the rules of the profession which potentially threatened the life of the main character whilst the representatives of another profession rescued his life. Irrespective of earlier comments, Hartmann's ethical theory suggests a further multifaceted explanation of a mutual, socially accepted conflictual nature of recommendations of different professional ethics. Hartmann differentiated the notions of conflict and antinomy of ethical values. Antinomy between values means their "*ex definitione* impossibility of mutual execution", connected with the opposition of material character. According to Hartmann, conflicts between values constitute the core of moral life; what is more, they are always empirically conditioned, that is they depend on the context of particular situation. Antinomy, namely the opposition like just – unjust, merciful – merciless etc., means fundamental unfeasibility; a conflict, on the other hand, means empirical, that is situational impossibility of mutual execution. On account of the latter, we experience the conflict of values when we have to choose, in particular case, between, let us say, mercy and justice. As Hartmann believed, we must count basically on ourselves in conflictual situation; we have to use our feeling of values. It is obviously a mistake to think that in such situation we lack any lodestar because we take a decision on account of our "primary axiological choice",

[43] Z. Zwoliński, *Being and Value in Nicolai Hartmann*, PWN, 1974, p. 360.
[44] Ibidem, p. 367.

as Hartmann refers to it. Let us notice that specialised professional ethics determine such choice from the perspective of their content, pointing at the expected direction of a settlement of a conflict of values by a doctor, businessman or a judge which is situationally different in case of each of these people. In this way, a conflict between mercy, namely, as it has been already mentioned, a constitutional value for medical ethics, and justice – from the perspective of judge's or prosecutor's ethics, will be obviously settled in favour of justice. This settlement will be different in case of a doctor or a nurse. A tension, or a conflict, between positive values of justice and mercy constitutes the basis for diversification of medical and legal professional ethics on the grounds of the concept of axiological square, presented below.

The concept of axiological square is sometimes considered the most crucial achievement in N. Hartmann's philosophical output. It enables a better theoretical justification of legitimacy of creating separate professional ethics, grounded on the basis of heavy, that is "strong" values.

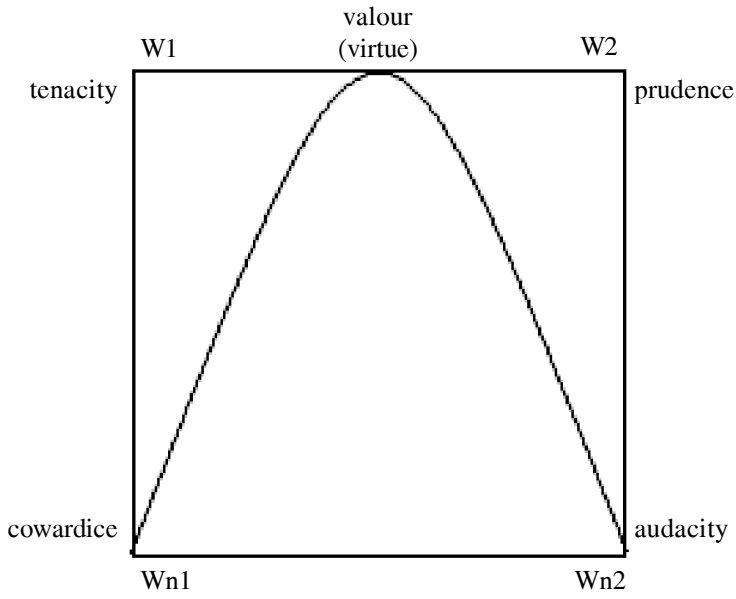
In his reasoning of axiological square, Hartmann referred, to a large extent, to Aristotle's concept of virtue.[45] Hartmann has interpreted Aristotle's view on virtue in the following way: it is placed in the middle, between two contradictory negative values but only in existential dimension; in axiological dimension virtue is something most crucial. In order to present his view, Hartmann used the following drawing:



[45] T. Czatnik, *Axiological Square of Nicolai Hartmann*, "Philosophical Studies" 1987, No. 4 (257), pp. 105–109. Drawings based on the article by T. Czatnik.

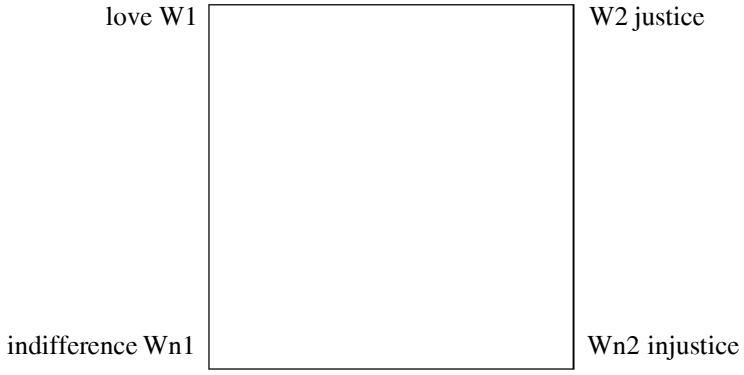
As T. Czatnik writes, thanks to such perspective it can be seen that virtue can be reached gradually. If it was otherwise, a man would either always lead a virtuous life or in case of even slight offence he would be devoid of virtue. In fact, it can be seen from life experience that we reach the state of virtue by means of improvement, reaching greater ethical value of our behaviour. I would like to express my belief that if, as Hartmann writes, one can reach the state of virtue gradually, it is possible to ethically improve the acts undertaken in the situations of conflict of ethical-professional legal values, namely ethical improvement of an attorney, judge or prosecutor in the context of their profession.

Hartmann, like Scheler, claims that there is a particular positive value opposite each negative value. Virtue is then in the middle, between two positive values and, in consequence, the scheme is enlarged by two positive values and it has the form of a square.



In the abovementioned approach, virtue is treated as a synthesis of two positive values. At this point, we come to the core of the problem signalled at the beginning of this essay. Hartmann, in accordance with his thesis about a conflictual character of morality, gives an example of positive values which cannot be connected at current level of human feeling; the latter are: love and justice. It is the case because "…justice must be objective, it must refer acts to norms or laws irrespective of the offender. Love, on the other hand, always refers acts to a person, treating him or her as the highest value; it is

rather oriented to human inherent good features than to evil ones. [...] Love has positive emotional attitude. Justice, on the other hand, cannot be guided by emotions; a judge must "stand next to it" [...]. Hartmann also writes that every positive moral value, if it influences the feeling of value in exaggerated way or if it claims the right to completeness, is burdened with a peculiar "negative axiological character", which Hartmann refers to as "a barb" (*Widerhaken*). When a value aims at a fuller overwhelming of human personality, when it becomes absolute and total, its negative moment is revealed. For example, as T. Czatnik points out whilst commenting on Hartmann, fanaticism of justice leads to exaggerated execution of norms and this, in turn, leads to insensitivity. When the latter is the case, positive values which occur in particular situations diminish. It is also true about love because its plenitude eliminates justice. On account of the latter, Hartmann suggests the following scheme:



In the abovementioned case, the synthesis of two negative values, namely injustice and indifference is, as Czatnik writes, "possible and often encountered".[46] Hartmann gives a positive answer to a question, which immediately comes to one's mind, whether it is possible to similarly connect two positive values, that is love and justice. However, he adds that such level of value sensitivity has not been reached by a human yet.

As we remember, the conflict of values, including positive ones, is treated by Hartmann as the core of ethics in general. If positive values, even those, to use Hartmann's register, which are the heaviest, can – as it is seen from

[46] T. Czatnik, *Axiological Square of Nicolai Hartmann*, "Philosophical Studies" 1987, No. 4 (257), pp. 105–109.

axiological square – collide with one another, the suggested concept gives a crucial information about a potential conflict of professional ethics. The abovementioned example of contradiction between love and justice makes it possible, in my opinion, to reveal the nature of the tension between medical and legal ethics in which, to simplify, love (mercy) for another human and justice respectively take central positions. When analysing the conclusions that can be drawn from the concept of axiological square, we can perceive theoretical justification of a clear antinomy between the demand to rescue human health and life – which is directed to a doctor and, for example, professional demand of respecting legal order which is present in different types of legal ethics, for instance the prosecutor must "guard" respect for law. The norms of medical professions, which are drawn from the central values, can remain in opposition with the norms of the ethics of legal professions, therefore, in practice there are many cases when dangerous criminals are rescued in hospitals, their life is treated equally to other patients' lives. Similarly, it is easier to understand the functioning of military ethics which takes into account the necessity of killing other people, next to medical, business or judges' ethics. The abovementioned scheme needs to be supplemented with some remarks connected with the notion of the field of axiological awareness. As we remember, this awareness has a limited range and, therefore, some categories of values "do not fit" into the latter and are supplanted by those more current, clearer for the subject. (Excessive "extension" of axiological awareness must lead to dulled feeling of grasped values.) On account of the latter, lawyer's axiological awareness, filled with a set of professionally relevant ethical values, cannot accept particular values, typical for medical ethics, due to the aforementioned antinomy between these ethics. These ethics are, to put it in these words, driven away even more, on the basis of a contradiction presented in Hartmann's axiological square.

What has been stated above gives a theoretical justification of the fact that there exist separate professional ethics, concentrated around clear and vivid values as well as the fact, often observed in practice, that the attitudes of representatives of different associations (like medical or legal ones) frequently collide. The situation in which a doctor's axiological awareness is preoccupied with values common for business activity, like the drive for profit, is unacceptable, morally reprehensible in common understanding. It is also the case with a judge who cannot properly pursue his profession if he is driven by mercy or by the need of becoming wealthy. The latter does not stand for relativism or full axiological pluralism of professional ethics. An inherent element of the theory presented in this essay is the existence of internally ordered, vast world of values. Axiological awareness of the rep-

resentatives of different professions, often due to purely pragmatic reasons, like efficient functioning of broadly understood social community, must have narrow character. It is obvious that every man is also a human being after work but on account of the importance of ethical-professional situations and the time devoted to pursue the profession, its "ethical style" connected with a particular profession is also visible in non-professional behaviour. Everybody has only one axiological awareness. After taking into consideration the intensity and the amount of work in legal or medical corporations or, similarly, in big enterprises, we start to understand how important place in the awareness of their members is taken by the values with ethical-professional connotations. All of this has to contribute to preserve the belief about axiological diversification of society and to erroneous incorporation of the specificity of lawyer's, doctor's or businessman's axiological awareness into the world of values in general.

I do hope that in this way, whilst analysing the phenomenon of legal ethics, with an active participation of medical and business ethics, I have presented the view on the solution of the conflict between "diversity" and "unity". This solution is contradictory to post-modern vision of social values which create undefined, relative amalgamation.

Conclusion

The reasoning presented in this essay resembles, as I meant it, "a chest in chest". In other words, it has been simultaneously carried out on three levels of generalization. The first one, the lowest, was the level of a detailed analysis of the problem of coexistence of contradictory recommendations of professional ethics. I have based my argumentation on the example of legal ethics and I have also taken the example of medical and business ethics – on account of their practical significance and due to vivid "border problems" between those three types of ethics. The fist level was also the layer of "practical" implementation of a reasoning model as a part of axiological square and the concept of a limited field of axiological awareness, that is the problem of clarifying the phenomenon of socially accepted coexistence of contradictory recommendations of professional ethics.

The second level ("the middle one") was the layer of a more general presentation of a satisfactory theory of professional ethics which is based on the output of phenomenological ethics of values, being the source of the theories of axiological square and the field of axiological awareness. This presentation used a frame of E. Husserl's phenomenological philosophy as well as M. Scheler's and N. Hartmann's phenomenological ethics, which supplemented the latter.

The third level, the most general one, was connected with the attempt of an arbitrary settlement of existential dilemma between "diversity" and "unity", referred to the sphere of axiologies of contemporary western societies. The theory of phenomenological ethics, presented at this level, particularly in the fragment which concerns the manner of existence of the world of values, both aprioric and transcendental ones, irrespective of their relative "feeling" by a limited human sense of values, often professionally twisted, constituted the defence of the thesis about "unity above diversity". In turn, the observations made on the first level, concerning particular professional ethics, made it possible, from the perspective of the third level, to diagnose the source of misunderstanding, which often takes place in practice, leading to a common conviction about a relative character of values in post-modern society.

*Andrés Santacoloma Santacoloma**

Legal Material: Defeasibility and System

Introduction

This paper analyses the issue of defeasibility in law and the probability of making a system with defeasible norms. It gives a logical characterization of the interrelation between law, defeasibility and legal system. In the first part, defeasibility has been distinguished as a phenomenon that plays a role in legal reasoning conditionals: when the corresponding argument is logically undeniable but not deductively valid. The connection of support between premises and conclusion in the normative conditional is a hesitant one, potentially defeated by additional information. The second part develops a review of the "strengthening the antecedent", given in logic terms $p \rightarrow r$; $p\&q \rightarrow r$; and it projects this analysis to the legal field (Ox/p; Ox/p&q; Ox/p&¬p); $p > Ox = fp \Rightarrow Ox$. The defeasible conditional, according to the last words, is presented here in the form $p > q$. And here, also shows the definition of the defeasible conditional, given in terms of operator *f* which have a revision function $fp \rightarrow p$; $(p \rightarrow p)$; $fp \Rightarrow q = p > q$. The third part, gives a discussion between the concept of Applicability and Legal Gaps as consequences of defeasibility. This paper ends by showing how the logic for defeasible reasoning provides tools to characterize some aspects of law.

I

According to the Stanford Encyclopedia of Philosophy, reasoning is defeasible when the corresponding argument is logically undeniable but not de-

* Pre-graduate Law Student, Universidad Catolica de Colombia, Bogotá D.C., Colombia; andres_santacoloma@hotmail.com.

ductively valid. The connection of support between premises and conclusion in the normative conditional is weak, potentially defeated by additional information.[1] Reasoning proceeds by constructing arguments for conclusions; the individual inferences making up the arguments are licensed by what we might call *reason schemes*.[2] It is usual to think of arguments as linear sequences of propositions, with each member of the sequence being either a premise or the conclusion of an inference (in accordance with some reason-schema) from earlier propositions in the sequence. As we know, this philosophical tool was introduced by H.L.A. Hart to the legal field in 1948.[3]

Legal norms (regardless of the authority that issues them), can be promulgated with the specific purpose of regulating and ordering specific conduct. Most of them have a conditional structure: they subordinate a legal effect to a legal condition.[4] At the time of stating the normative precept, the normative authority has a deontological purpose. However, when the authority is not able to foresee situations that present themselves after the norm and that are not regulated as such in itself, what reasons can norms offer to cases for which they haven't been originally formulated? What is the scope of a norm? All these questions leave room to question norms, their existence, relevance, scope, applicability, defeasibility and systematization.

Every legal norm (LN) has its premises which must be followed so that they can be applicable. The applicability is determined by the reach of the LN, and at the same time, deduced from the logical consequences that follow this norm, and as established by other authors whose opinions in this matter are agreeable upon, it is crucial to set the task of systematizing the set of cases that a specific normative order regulates, build the legal system this way. With this systematization, it is possible to identify the derived norms from the ones that are promulgated by the normative authority.

All legal norms correlate generic states with normative solutions; these are normative qualifications of an element of the Universe of Action.[5]

The relationships which exist between the state of things and the normative solutions depend on the type of norms that create this relationship. It is important to note that derivative norms are not the same as norms that are intentionally formulated. Derivative norms are more "dependent" compared

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[1] *Stanford Encyclopedia of Philosophy*, 2005.
[2] Pollock 1987:3.
[3] Hart 1948–1949.
[4] Pollock 1987:3.
[5] Navarro 2005:106.

to others, due to the following reasons: (a) The linkage with the system is contingent, while the existence of norms expressly formulated by authorities is conceptually linked to the notion of the legal system. (b) Intentionally formulated norms can be independent or dependent based on the legal system; however derived norms are always dependent on the legal system.[6]

Regardless of the type of norm, derivative or intentionally formulated, it always contains the form of a conditional $p \rightarrow q$. This conditional form is complemented by the Deontic Logic expressed by $p \rightarrow Oq$, $p \rightarrow Pq$, $p \rightarrow Fq$.[7] In order to make logical and admissible application of q, it is necessary that all of the elements of p are concurrent.[8] When those elements concur and the norms fit that are perfectly applicable to the particular cases, in a similar way as it happens with an arithmetic operation, it deals with a system of norms that are consistent.

In the legal system, not all cases are provided with simple normative solutions, it is necessary to distinguish between easy and hard cases as denominated by Dworkin.[9] An easy case exists if there is no normative abnormality. Only those cases that present any relevant characteristic will limit the acquisition of a solution contemplated in the general norm that has been taken as a start point. It is understandable that its presence or absence determines its ability to become a differential normative solution. An easy case can be established if no exception is presented to the solutions established by the LN.

In this paper I will address and focus on the hard cases. The problem lies on the normative solution that must be given to a case not foreseen by the LN, in other words, given by a hard case. Basically, it can be established that the difference between easy and hard cases lies in the repercussion of the norm, while in the easy cases the scope is defined by the conventional meanings of words, the hard cases are supported by the election within a group of open alternatives, that is, a group of pragmatic and semantic contingencies.

Hard cases can be presented in three ways following Navarro:[10] (1) Semantically Hard Cases. When a gap emerges in this type of case, due to an

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[6] Navarro 2005:18–19.

[7] Where O is obligatory, P is permitted and F is forbidden.

[8] When the antecedent of the norm has occurred as a fact, we can talk about the existence of some kind of 'perfect norm.' We call *perfect conditional norms* those norms connecting a legal effect to a sufficient condition, that we call *total antecedent*". Sartor 1993:281–316.

[9] Rodríguez 1997, Dworkin 1977.

[10] Navarro 2005:74–75.

error in communication; doubt is formulated concerning the meaning of a normative formulation. (2) Regulative Hard Cases. Here the gap exists within the system that has not been promulgated in a conditional normative and can rule the case. (3) Evaluationally Hard Cases. When the norm (even if applicable to the case) produces results that are absurd or manifestly abject.

In Law, it is important to review the theory presented by Neil MacCormick[11] in order to solve the hard and easy cases. MacCormick considers that a decision during an easy case, need a deduction from the general norms and its own facts. Schematically:

P1) $p \rightarrow Oq$
P2) p
P3) Oq

It can be established from the general norm above that in all cases where p occurs q will be mandatory ($p \rightarrow Oq$). If the case in question is comprised in the nucleus of the clear meaning of the norm, it is possible to deductively justify the conclusion that in it, q is mandatory.[12]

The hard case is invalidly deducible, since the premise of the syllogism is not complete before the condition that determines the consecutive:

$p \rightarrow q$	P1
p&r	P2
p&r…s…t…u	P3

When semantic problems of open texture exist on the antecedent, the *modus ponens* application is not applicable. When that is the case, how can a normative solution be deducible? The open texture of legal norms constitutes a problem relative to the inclusion of an individual case in a generic one. This case becomes problematic, if the particular case being considered is or not an instance of the generic case that the norm correlates with a specific solution. It also happens due to the limited epistemic capabilities, not knowing what the future holds; lack of determination of purpose and the imprecision of our language causing the law to be open and of difficult application. Just as it is shown in the formalization of the legal language, it is not about the "inclusion" of a factual circumstance in another, but, rather the concurrence of the united factors by a conjunction, which represents the obligation of the concurrence from both to be able to obtain a logical conclusion.

Based on the applicability of the LN, the absolute existence and applicability cannot be stated. The applicability of a norm can be stated when it

[11] This MacCormick's solution is cited in: Rodríguez, Sucar 2003.
[12] Rodríguez, Sucar 2003.

considers a group of pre-established cases that regulates in it as such, and when the LN that regulates such case, can produce consequences that the social group observes, assumes and recognizes. When this happens, we are based on the internal and external applicability, being the first one; an intrinsic or conceptual relationship between the norm and the cases and the second one, and extrinsic relationship between the norm and its institutional strength (justification).

Norms are susceptible to modifications, due to the changing conditions which can arise over time, given that for every LN there is a universe of cases (UC). It can also be seen as expanded, since in the UC are the exceptions or variations that norms could encounter, and are not considered.

LN have been introduced for the people to direct their conduct. What can one do in cases where there is not a norm? How to regulate the conducts non-expressly normed? Would the application of another norm become extendable by systems of interpretation or integration? It can be possible to think of an affirmative answer for such a query leaving aside the legal security that the principle of legality of a state of law provides, and that makes a norm applicable. A norm that couldn't be considered by the agent for not regulating expressly the case – since it is not an integral part of the UC – it would become arbitrary, since eventually it could provide the criterion of external applicability because of its institutional strength, it is certain that it does not provide the criterion of internal applicability.

A concern then arises for the necessity to have a normative system that could satisfy social necessities. One that allows the configuration of institutionality is able to provide stability, security and order and also that it is formally perfect and coherent. Is it then possible to still create this system with defeasible norms?

To begin, we will review the concept developed by Cristina Redondo[13] of the defeasibility of norms. It is necessary to be able to obtain a result that is only satisfactory, at least serious and close to the objective. When we talk about the defeasibility of norms we must differentiate between two types of defeasibility: a logical defeasibility (LD) and a substantial defeasibility (SD).

LD refers to proving a fact in all the possible conditions within the "absolute" norm, where the law of reinforcement of the antecedent is not acceptable to fill the voids or exceptions not contained in the precept. LD can take place, as long as norms in which *the set of circumstances described in the antecedent of defeasable conditionals destined to represent those norms, do not represent enough conditions of conclusive duties*,[14] meaning, irre-

[13] Redondo 1998.

[14] Quote translated to English from Spanish edition. Caracciolo 2005:92.

futable obligations cannot be inferred from the norms, given the absence of absolute character, derived from the lack of determination of the exceptions of the precept, for which they can only be given for or against, not as a conclusive duty.

It can be argued that norms being defeasable are then pseudo norms,[15] and cannot be applied, due to the content they have for exceptional cases, but that simultaneously cannot stop being applied since this would cause gaps in the legal order.

On the other hand, the SD, is the derivation of consecutives, based on the equilibrium of reason, for which the SD norm wouldn't have a reason to be, because the duty wouldn't stem from its precept, but from a group of arguments external to it. The SD then argues that norms are not defeasable as long as they do not offer enough reasons for attaining a final duty (it does not per se qualify the resolution of practical matters).

For the LD, it is necessary to take the operation of reinforcement of the antecedent, which consists of fixing reasons for a conditional, this is, if p then q; if p and r then q. This group of elements are not useful to obtain reasons in the application of substantial norms, and precisely this impediment is one of the basic motives of the defeasibility of the conditionals, and consequently of the legal norms.

To illustrate this situation, we can use as a reference the Columbian procedural norms that sentence the parts to pay the legal fees. In the norm that sentences to pay the legal fees for the unfavorable resolution stated by the judge in the verdict, it doesn't consecrate that the parties must also pay fees for the unfavorable resolution of interlocutory orders or of procedures within the process. However, interposing incidental resources within the process, opens the possibility that the jurisdiction applies this type of measures; if the procedural subject loses in the resolution of the verdict (p), then it has to pay the legal fees (q)) ($p \rightarrow q$); if the procedural subject loses in the resolution of the verdict (p) or in the pronouncement concerning an interlocutory order (r), then it has to pay legal fees (q) ($p\&r \rightarrow q$). For this particular case, the subject being a procedural party, could argue that it did not pay the obligation in which the judge must adhere to the dominion of the Y law, the penalty that it is delivered is not derived from an attribution or faculty conferred by a legal precept.

Taking into account the above element, it wouldn't then be legally justifiable, for an application of a general norm that is susceptible to be logically defeated, in a particular case, since the derived duty of that applica-

[15] Caracciolo 2005:95.

tion would be exterior to the normative precept that supports it. It is affirmed that even if duties that are derived from the application of the norm are vitiated, there isn't a casual nexus that would be argued to take away any sense from the general norms.

The same fact that allows the derived duty of the norm to be defeated implies that the general norm is defeasible.[16]

If the partition of defeasibility is observed in LD and SD, both situations offer the same argument in the end[17] and it consists of the conditionals that are used to outline the normative precept, and don't offer enough reasons for the derivations of conclusive duties.

To think of indefeasible general norms (absolute character), is to assert that in the concrete case, it is not necessary to take into account a circumstantial relationship for the presentation of arguments, meaning, the decisive relevance is left simply relegated to a precept that doesn't analyze the circumstances of the action of the subject. To consider the detachment of the decision, the application of the norm to the issue as such, implies lack of knowledge of the coherence criterion, and there would arise a conceptual legal abnormality.[18]

II

A conditional in the Law, would then become defeasable, when it doesn't accept strengthening the antecedent, since the propositional form of this is constituted in an open way, when it is subject to exceptions – additions – not taxatively numbered. In simple words it means that if p in itself implies q then the conjunction of the antecedent *(<<p>>) with any proposition different from it, also implies q and to go from <<if p then q>> (p → q) a <<if p&r then q>> (p&r → q) is what is denominated by the operation of "strengthening the antecedent*.[19]

The formula p → r is seen strengthened when circumstances arise that can change that antecedent of the conditional like: p&q → r, but it becomes defeasable when the exceptions – additions – that can arise, haven't been and can't be determined by the normative subject and it would arise as: p → q, r, s…z → r. This conditional is then a mutilated expression that can be represented as p > q – the strengthening from p > q infer p & r > q.

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[16] Caracciolo 2005:97.

[17] As certainly Caracciolo says: *the dichotomy between LD and SD, in fact, does not exist.* Caracciolo 2005:98.

[18] Peczenik 2000:68.

[19] Quote translated to English from Spanish edition. Navarro 2005:112.

The conceptual content of p > q hides circumstances implied in its antecedent of the conditional. Those circumstances not considered are denominated as an expansion of p (p1, p2, p3, p4…, pn). p > q It can then be defined as p & (q, s, t, u…, zn) → r. The derivation of a conclusion with these premises is valid but it can't be accepted in logic of norms (if asserting the existence of itself is allowed).

As it has been discussed, the problem of such a proposition lies in the impossibility that it would have to provide conclusive reasons to establish normative patterns of conduct – Obligatory, Permitted and Forbidden. This can be translated in the legal field (in Deontic Logic) as p > Ox, p > Fx, p > Px. In deontic logic the reinforcement of the antecedent could be defined as Ox/p; Ox/p&q; Ox/p&¬p (Concerning the mandatory and it would be the same for the optional and forbidden actions).

Alchourron and Bulygin provided an apparent solution to the open texture of the norms in the following way: "If the presence or absence of q doesn't modify the status of an action in a specific system, then q is irrelevant in that system and that specific universe of actions determines the solution of a case".[20] When precept like $p \rightarrow Oq$ is present in the Normative System and transforms into a $p\&r \rightarrow Oq$ after an appearance from a modifier, a factual situation within the Universe of Actions (UA) appears as a result of r being relevant for the internal applicability of the LN.

These two authors also state that a "property is relevant in a system when the presence of this property is assigned a deontic state different from its complimentary property, for example ¬q".[21] If this is so, the norms couldn't be closed, because just like a circumstance can arise to reinforce the antecedent can have the same Deontic character of the antecedent. In addition, there is a problem with semantic contingency, resulting in the indetermination of the normative character of the precept. That indetermination can be seen as per Jorge Luís Rodríguez,[22] the following:

1) Thesis of Partial Indetermination. All norms have within themselves a "nucleus of meaning", this is the group of cases that abide the norm. The nucleus is evident in the group of easy cases. The law would then be only partially determined, since the norms wouldn't be prepared to control hard cases. It happens because:
   a) The elements of the case are not present in the nucleus of the norm or,
   b) The system is inconsistent, meaning, there is a gap derived from a contradiction.

[20] Quote translated to English from Spanish edition. Alchourron, Bulygin 2006:153.
[21] Quote translated to English from Spanish edition. Alchourron, Bulygin 2006:153.
[22] Rodríguez 2002:68–69.

2) Thesis of Radical Indetermination. There, the norms lack the capacity to regulate conduct; due to the problem of language ambiguity (open texture) which all norms are constructed from.

$p \rightarrow Or$	P1
$p \,\&\, q \rightarrow Or$	P2
$p \,\&\, (q,s,t,r\ldots zn) \rightarrow Or$	P3
$p \,\&\, (q,s,t,r\ldots zn) \rightarrow Or = p > Or$	P4
$p > Or$	P5

In the case were $p > Or$, Alchourron y Bulygin would sustain the argument of the Universes of Cases that could be summarized as "If a normative system S solves the cases of a Universe of Cases UCi, then S solves in such a way the cases of all Universes of Cases UCj far finer than UCi, that the properties of that characterize a UCj are irrelevant to the solution of an action X as long as S is coherent within UCJ".[23] The problem using this argument is not the relevance of finer cases instead, the relevance of assuming different facts, circumstances that become complementary but not disjunctive. According to the above mentioned argument, it is not viable to apply the modus ponens for $p > q$.

Continuing with the same problem, Pablo Navarro deduced that the qualification attributed to an Action X in the case p, is not modified because a property is added to the antecedent of the case X:

$p \rightarrow Or$
$p\&q \rightarrow Or$
$p\&\text{–}q \rightarrow Or$

This case is not about giving modifications of the normative qualification already attributed to an action X in the p case, rather action X is no longer enough to establish a normative qualification because the action is no longer required to form the conditional to obtain the conclusion.

Additionally, Navarro[24] sustains that the system completeness of less fine cases is not always maintained as formulated by $(p, \neg p)$. The generic case of solution is linked with a disjunction of solutions, for example, with the disjunction Ox v Fx (obligatory; forbidden). A disjunction of maximal solutions is not a maximal solution, as a result, p lacks (partially) of a solution.[25] With the reinforcement of the antecedent these new conditions of the proposition become necessary so the precept of the form $p\&q \rightarrow Or$ o, $p\&\neg q \rightarrow Or$ or is able to provide a maximal solution to the case. The maxi-

[23] Quote translated to English from Spanish edition. Alchourron, Bulygin 2006:151.
[24] Navarro 2005:111.
[25] Navarro 2005:113.

mal solutions are using P for permissions, F for the facultative character of the action, O for the obligation and Ph for the forbidding.

Pp & P¬p (Fp): Internal Negation of p.

Pp & ¬P¬p (Op): External and Internal Negation of p.

¬Pp & P¬p (Php): An external negation of P and a second negation but now internal of p.[26]

Absolute norms presuppose the acceptance of a Universal Quantifier to certify the action: "such norms should be expressed in the syntax $\forall x1 \ldots \forall xm$ $(E \rightarrow A1 \ \&\ldots\&\ An)$ where $x1,\ldots, xm$ are the free variables in E, $A1,\ldots, An$, where E is the legal effect and $A1, \ldots, An$ are the elements of the total antecedent and $\forall$ is the universal quantifier "for every"".[27] How to construct indefeasible norms? Perhaps it is viable to speak of universal principles, since they consolidate themselves as models of open case subject to implied exceptions[28] and it could not be affirmed that such a thing of a norm regulates a general but concrete case.

Since such a norm isn't viable in a social system, many authors have tried to build legal systems with defeasable norms. In his last papers, Alchourron focused on the problem of defeasibility and tried to allow a place for it in the system without affecting it. The result developed the operator of revision to treat the problem of reinforcement of the antecedent and the expansion of p (A1, A2,..., An).

The operator of revision allows normative precepts to be created, and to understand that they are not absolute within the system. The norms due to their function and origin, cannot be absolute, they always depend on the social system, autopoiesic but variable by its own conditions. This operator works basically in the following terms p >Ox = fp $\Rightarrow$ Ox. Allowing us to understand that the p *factum* is conditioned to the existence of contingencies, in the same way the derived obligations derived from it. The form fp $\Rightarrow$ Ox[29] would be the definition of p >Ox. fp $\Rightarrow$ Ox doesn't mean anything but the obligation to realize the action X in all the cases that the circumstance p. (p >Ox) = (fp $\Rightarrow$ Ox) arises where f used as an operator of revision supposing that they exist associated to p the premises A1...An, fp would represent the combined assertion of p with all the A.[30]

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[26] These notations are taken from Jorge Luís Rodríguez. Rodríguez 2002:65.

[27] Sartor 1993:283.

[28] Atienza, Manero 1991:101–120.

[29] According to Rodríguez, Alchourron was the first to use the strict conditional to do the universal quantification of a normative conditional in the fact of the different circumstances. Rodríguez 2003:84.

[30] Rodríguez 2003:87.

p >Ox	P1
p (p1, p2, p3, p4…, pn) → Ox	P2
*f*p ⇒ Ox	P3

The expression *f*p ⇒ Ox shows that an action X can be obligatory when it happens in the p circumstance and evaluating the possible annexed or contributive circumstances (exceptions we have already called additions). Contributory properties are weight factors assigned to properties that play a role in the determination of the meaning of a concept.[31] The properties of the strict implication operator ⇒ and of the *f* operator determine a conditional logic for a system. However, authors like Pablo Navarro,[32] consider that the strategy of revision of the antecedent solves the problem of the incoherence in the universe of finer cases, but a price, which introduces a partial gap in the universe of less fine cases. This problem of introduction of gaps will be addressed later on.

The defeasible conditional appears as such, whether it is a situation that configures itself as true and which doesn't have along any other action or condition so that a true conclusion can be achieved; (p & ¬(r v s v t…)) ⇒ q. And so, in this form the antecedent is not reason enough so that the truth of the consequent is given as such, but the circumstances of the antecedent of the normative conditional are only contributors.

The mutilated expression p >Ox refers to the last instance, were p is, along with another group of premises united to it, reason enough for achieving the consequent. However p has to be accepted as a weakened antecedent in the expression.

III

As discussed before there are situations in the normative system that aren't given normative solutions that stem from legal norms and were not initially relevant. However, it became relevant in a specific moment for the normative subject. These non-regulated normative cases have been denominated legal gaps in philosophy of law. A legal gap results from the problem that judges face when considering law as a deductive system of norms, and they have to find normative solutions derived from a set of (legal) premises.

Every legal system looks for a way to consolidate itself as complete and coherent in order to offer a legal organization to society.

The concept of legal gap is very ambiguous, for which it is necessary to define limits in its meaning. When talking about a legal gap we can at least

[31] Sartor 1993.

[32] Navarro 2005:117.

refer to four types of gaps, as presented by Bulygin in the prologue of Jorge Luis Rodriguez:[33]

1) Normative Gaps. They arise when there is an absence of an agreeable norm for a generic case. Jorge Luís Rodríguez defines them as: a case C of a universe of cases UC is a gap in the normative system related to a universe of solutions if, and only if it doesn't correlate with any solution of this universe of solutions.[34]
2) Knowledge Gaps. Difficulty to include an individual case in a generic case due to the lack of information on the facts.
3) Recognition Gaps. Difficulty to include an individual case in a generic case due to the vagueness of the terms that characterize the generic case.
4) Axiological Gaps. When there is a solution to a generic case, but according to some values it is inadequate or unfair. Axiological gap arises when there is a discrepancy between the thesis of relevance of the system (depending on the universe of relevant properties and it depends on the norms that solve a determined universe of actions) and the hypothesis of relevance of the system (series of properties that should be relevant as per a determined by a worthy position). The universe of identified cases, with the hypothesis of relevance becomes finer than the universe of identified cases by the thesis of relevance.[35]

The gaps which the litigators refer to the most, are the normative ones. The normative gaps can be defined as non-correlated cases without any maximal solution of the system. When there is a p action which is the only one that composes the universe of cases, there are three maximal and three minimal solutions (using P for permissions, F for the facultative character of the action, O for mandatory and Ph for forbidding):[36] Here the maximal solutions always imply the deontic qualification AND of the realization and abstaining of p, and the minimal ones imply the deontic qualification OR the abstaining of p.[37] Maximal: Pp & P¬p (Fp); Pp & ¬P¬p (Op) y ¬Pp & P¬p (Php) and Minimal: Pp v P¬p (Fp); Pp v ¬P¬p (Op) y ¬Pp v P¬p (Php).

To be able to determine the gaps in the system, regardless of its kind, a process pf logical analysis of law must be developed. A purely deductive process implies determining the logical consequences which we are able to observe:[38]

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[33] Bulygin 2002. Prologue.
[34] Rodríguez 2002:65.
[35] Navarro 2005:119.
[36] Rodríguez 2002:65.
[37] Rodríguez 2002:65.
[38] Rodríguez 2002:62–63.

1) If the system is complete, norms have all the required solutions or on the contrary, there are normative gaps.
2) If the normative system is coherent, the norms do not correlate differentiated normative or contradictory solutions.
3) Norms can be independent among them or on the contrary, there can be rules that demand the same conduct being redundant.

The defeasibility of a norm is the element that creates breaches in the system, and the legal gaps can be some of its consequences; so much that, when the defeasibility of the norm is stated, a gap, a case not previously discussed, is created and because of it, it would be striped from a normative solution.

Perhaps, there is a casual nexus with the norm's, as previously discussed, the criterion of internal and external applicability of a norm, argues that the first one of them, considers an intrinsic or conceptual relationship between the norm and the cases to which it is applied. The second shows that there is an extrinsic or normative relationship between the norm and its institutional strength. According to these concepts, norms are applicable as such, and they must meet both criterions.

When a normative gap arises, it assumes the non-existence of an internally applicable norm, meaning, there is not any norm that has in its nucleus the *factum* and the normative solution for itself, but not because of it we could assure that when there is a gap, there is a non-existent norm externally applicable. Pablo Navarro, for example, states that a gap allows norms to be externally applicable, to justify the institutional decision in a judiciary case.[39] It is not too clear what happens if the norm isn't regulating the particular case. Does another norm have the ability of abrogating the internal applicability, adapting the situation, without being expressly considered? Navarro draws three ideas to reach a grand conclusion that does not appear to correspond to the possibility of supplying gaps without the internal applicability of the norms:

a) There must be a clear distinction between the internal and external applicability of a norm.
b) The internal applicability of a norm depends on the meaning of the words used by a legislator when formulating the norms.
c) The factual proclamation of a norm is a necessary condition and enough for its internal applicability.

As we can see, the concept of applicability is constituted by internal and external applicability, and both are necessary to talk about the applicability of a normative conditional.[40]

[39] Navarro 2005:79.
[40] Navarro 2005:45.

According to Navarro,[41] it is impossible to fill a gap without modifying the system. These modifications can be accomplished by judges using discreet but never arbitrary normative powers (argumentation and interpretation), restricted and directed. The judge can be an operator of norms, but not the normative subject of the State.[42] The only way to solve this flaw, if there is a gap in a specific case before a certain action, is by modifying the normative system. If an action lacks normative regulation in a specific case, the only way to deontically qualify this action is by adding a new norm.[43]

A gap may be seen as a hard case (both being a product of the defeasibility), semantically hard (the gap arises in these type of cases from miscommunication, doubt arises concerning the meaning of a normative formulation) regulatively hard (the gap is in the system, and the normative conditional hasn't been promulgated that is able to lead the case) or evaluationaly hard (the application of the norm, even if applicable to the case, produces absurd results). The judge should use personal discretion through stages as follows:[44]

a) Examine the judiciary tools that law sources.
b) Prove that the case is in fact difficult, that is, there is a gap in the normative system.
c) And finally, execute normative powers and use discretionary elements (i.e. analogy, which can help in reaching a decision).

Until now, it is clear that norms are defeasable and they can't have absolute character derived from it. The problems of legal gaps exist as a consequence of defeasibility, closely related to the applicability of norms and the criterion of applicability.

IV

At first glance, the defeasibility of the norms, the applicability (both criterion) and legal gaps, seem to indicate that it is necessary to think on either of the two alternatives to reconstruct the system: (1) An addition of elements externally to the logic, because those elements can provide sufficient reasons so that the system is conclusive of duties of conduct or, (2) To think of the implementation of para-consistent logic, which allows the coexistence of non-trivial contradictions, where there can be relationships of possibility and necessity carrying out sensible manipulations of information, and with it, attempting the reconstruction of a new legal system.

[41] Navarro 2005:81.
[42] Navarro 2005:81.
[43] Navarro 2005:81.
[44] Navarro 2005:74.

Because of the difficulty that logical analysis of law poses, it is not possible that the formal logic becomes irrelevant. Nowadays, it is unacceptable that philosophers and logicians of law reject the application of the elements of logic to itself, given that structural problems are evident. On the contrary, the task of logic itself is determined and purifies the expressions or elements that it brings before its revision.

Thanks to logic itself and to the deep reflections done from its laws and tools (i.e. defeasibility) the incoherence and inconsistencies of the system can be determined, and attempted to be corrected. It is not about discarding the idea of a logical analysis of law, because it shows us mistakes within itself.

The real problem of contradictions in the Law does not reside in logic, it resides in the impossibility of determining the institutions and forms in which the legislators will express themselves. The impossibility of anticipating the way in which the normative subject is going to promulgate the precept, is an evaluation of human and temporary behavior.

In order to achieve a consistent legal system, it is necessary to set the task to establish parameters for the creation of conduct regulation. The way that norms make up the system are stated, which, if they could be logically established and in doing so, avoiding the relationships of contradiction between norms. The need to search for more useful tool of communication of the precepts so that the jurist in charge of norming knows them and doesn't counterpoise them can be a more viable path to grow in the positive construction of a legal system.

Legal norms are defeasible. They don't have an absolute character in any way or form. It is possible to think about correcting the system trying to regulate situations that are relevant to society. Defeasibility presents itself as a useful tool for the purification of law legislation, if not, we will be facing normative contradictions, atypical situations and legal gaps making impossible the applicability of legal norms that faces a violation of the citizens own rights.

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*Szilárd Tattay**

Medieval Antecedents of Thomas Hobbes's Natural Rights Theory

According to a quite common view – the perhaps most prominent representatives of which are Leo Strauss and Crawford Brough MacPherson[1] – the idea of natural rights is a distinctively modern phenomenon that appeared in the seventeenth century, in the works of Thomas Hobbes and John Locke (sometimes Hugo Grotius is mentioned as well), as a political-legal consequence of the rise of modern science and market economy and the philosophical individualism of the age. In the book of Norberto Bobbio on Hobbes and the natural law tradition, to take an illustrative example of this modernist standpoint, we can read that "the theory of natural rights is born with Hobbes."[2] However, Michael Oakeshott warns us in his brilliant *Introduction to Leviathan* that

> Hobbes was born into the world, not only of modern science, but also of medieval thought. The scepticism and the individualism, which are the foundations of his civil philosophy, were the gifts of late scholastic nominalism; the displacement of Reason in favour of will and imagination and the emancipation of passion were slowly mediated changes in European thought that had gone far before Hobbes wrote… the greatness of Hobbes is not that he began a new tradition in this respect but that he constructed a political philosophy that reflected the changes in the Euro-

* Pázmány Péter Catholic University – Budapest; tattaysz@yahoo.com.

[1] Cf. L. Strauss, *Natural Right and History*, Chicago: University of Chicago Press, 1953; C. B. MacPherson, *The Political Theory of Possessive Individualism: Hobbes to Locke*, Oxford: Clarendon Press, 1962.

[2] N. Bobbio, *Thomas Hobbes and the Natural Law Tradition*, trans. D. Gobetti, Chicago: University of Chicago Press, 1993, p. 154.

> pean intellectual consciousness which had been pioneered chiefly by the theologians of the fifteenth and sixteenth centuries. …Individualism… as a reasoned theory of society… has its roots in the so-called nominalism of late medieval scholasticism… Hobbes inherited this tradition of nominalism, and more than any other writer passed it on to the modern world.[3]

Accepting this wise warning, I will examine Hobbes's natural rights theory in this paper not in itself but from the point of view of the past, i.e. from the perspective of medieval and early modern scholastic rights theories.[4] Consequently, I will be less interested in Hobbes's own views than in the possible sources of his thought, with special regard to the question whether and to what extent his legal philosophy was influenced by late medieval nominalism.

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Curiously enough, Professor Oakeshott omits to mention the fourteenth-century theologians, whereas one of the key figures of late medieval nominalism and the first nominalist rights theorist was the fourteenth-century English theologian and philosopher William of Ockham. Michel Villey and Georges de Lagarde, who both published (more or less independently from each other) a series of extensive studies on Ockham's legal and political philosophy, presented him as the "father" of the concept of natural rights. They argued that the *venerabilis inceptor* had been the first to give a clear and complete definition of subjective right and to develop a legal and political theory on its basis. They also claimed – and this is a crucial but highly contested point in their argumentation – that the direct source of Ockham's theory of subjective rights was his nominalist philosophy.[5]

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[3] M. Oakeshott, *Introduction to Leviathan*, [in:] *Rationalism in Politics and Other Essays*, Indianapolis: Liberty Press, 1991, p. 278.

[4] A similar but much more comprehensive "scholastic" analysis of John Locke's natural rights theory was undertaken by S. G. Swanson, *The Medieval Foundations of John Locke's Theory of Natural Rights: Rights of Subsistence and the Principle of Extreme Necessity*, "History of Political Thought" (18) 1997, p. 399–459. In Locke's case it is more legitimate to speak of 'foundations' than in that of Hobbes, for many times when Hobbes departed from the medieval tradition of natural rights and natural law, Locke did not.

[5] Cf. M. Villey, *La genèse du droit subjectif chez Guillaume d'Occam*, "Archives de philosophie du droit" 9 (1964), p. 97–127; idem, *La formation de la pensée juridique*

Recent researches have proved that the semantic origins of the concept of subjective rights can be traced back long before Ockham, namely to the twelfth century. Brian Tierney, for instance, has demonstrated in numerous articles that the subjective meaning of *ius* had already appeared in the twelfth-century canonistic texts.[6] Richard Tuck has also argued in his historical survey of natural rights theories for the twelfth-century origins.[7] As a consequence, Ockham is no longer regarded as the "father of subjective rights".

Ockham defined *ius* in the subjective sense as a *potestas*, more precisely as a *potestas licita* (licit power).[8] Villey has seen the juncture of the concepts of *ius* and *potestas* as a striking innovation, or as he put it: a "semantic revolution… at the Copernican moment of the history of legal science".[9]

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moderne: Cours d'histoire de la philosophie du droit, Paris: Montchrestien, 1975; idem, *Les origines de la notion du droit subjectif*, [in:] *Lecons d'histoire de la philosophie du droit*, Paris: Dalloz, 1962, p. 221–249; G. de Lagarde, *La naissance de l'esprit laïque au déclin du moyen âge*, Paris: Béatrice, 1934–46, vol. V: *Ockham: Bases de départ* (1946), vol. VI: *Ockham: La morale et le droit* (1946); idem, *La naissance de l'esprit laïque au déclin du moyen âge*, 2nd, rev. ed., Louvain – Paris: Nauwelaerts – Béatrice-Nauwelaerts, 1956–70, vol. IV: *Guillaume d'Ockham: Défense de l'empire* (1962), vol. V: *Guillaume d'Ockham: Critique des structures ecclésiales* (1963).

[6] Cf. B. Tierney, *Villey, Ockham and the Origin of Natural Rights*, [in:] J. Witte, Jr. and F. S. Alexander (eds.), *The Weightier Matters of the Law: Essays on Law and Religion*, Atlanta: Scholars Press, 1988, p. 1–31; idem, *Origins of Natural Rights Language: Texts and Contexts, 1150–1250*, "History of Political Thought" 10 (1989), p. 615–646; idem, *Tuck on Rights: Some Medieval Problems*, "History of Political Thought" 4 (1983), p. 429–441.

[7] Cf. R. Tuck, *Natural Rights Theories: Their Origin and Development*, Cambridge: University Press, 1979, ch. 1. See also H. J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, Cambridge, Mass.: Harvard University Press, 1983.

[8] *Opus nonaginta dierum* (henceforth *OND*), c. 2, c. 11, c. 14, c. 61, c. 65; *Breviloquium de principatu tyrannico* 3.7–11 and 4.10. Perhaps the best – and surely the most often quoted – example is Ockham's definition of *ius utendi* in Chapter 2 of the *Opus nonaginta dierum*: "a right of using is a licit power of using an external thing of which one ought not to be deprived against one's will, without one's own fault and without reasonable cause, and if one has been deprived, one can call the depriver into court" [ius utendi est potestas licita utendi re aliqua extrinseca, qua quis sine culpa sua et absque causa rationabili privari non debet invitus; et si privatus fuerit, privantem poterit in iudicio convenire].

[9] M. Villey, *La formation de la pensée juridique moderne*, 261. "Arrivons aux définitions juridiques du *dominium*, de l'usufruit, du *ius utendi*. Elles offrent cette particularité… que la notion de droit s'y trouve résolument virer au sens de pouvoir. … Le droit, au

Tierney again has shown, however, that the association of *ius* and *potestas* had not been Ockham's own invention. In fact, this association was already present in the twelfth-century canonistic discourse and appeared later in the Franciscan literature on evangelical poverty, too. So the understanding of a right as a power was common in juristic thought before Ockham.[10]

Although Ockham was not innovative in associating *ius* with *potestas*, his usage of *ius* still contained novel elements. On the one hand, Ockham was the first to distinguish carefully between *ius naturale* and *ius positivum* – above all between the natural and positive right of using things.[11] On the other hand, Ockham was original, as Annabel Brett pointed out, in not assimilating *ius*, contrary to the earlier Franciscan discourse, either to liberty or to *dominium* (property) and in using the Aristotelian notion of potency to base the concept of right as licit power.[12]

But if Ockham's concept of subjective right does not prove to be "revolutionary" in the semantic sense, can he still be considered as a central figure of scholastic natural rights theories? I would answer the question in the affirmative. First of all, because Ockham has the enormous merit of transposing the concept of subjective rights from technical juristic discourse to the heart of philosophical-theological debates. The importance of this transplantation, I think, cannot be overemphasized.[13] Secondly, because Ockham founded his political philosophy to a large extent on natural rights, which hence can be regarded as an essentially rights-based political theory and his *Breviloquium de principatu tyrannico* (Short Discourse on Tyrannical Government) as the first rights-based treatise of the history of political

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sens technique du mot, cesse donc de désigner le bien qui vous revient selon la justice (*id quod justum est*), il signifie cette notion beaucoup plus étroite: le pouvoir qu'on a sur un bien." – M. Villey, *La genèse du droit subjectif chez Guillaume d'Occam*, 117.

[10] Cf. B. Tierney, *Villey, Ockham and the Origin of Natural Rights*; idem, *Origins of Natural Rights Language*.

[11] OND, c. 65.

[12] A. Brett, *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought*, Cambridge: University Press, 1997, p. 62–63.

[13] Brian Tierney's observation is very apropos here: "The old texts also acquired a new significance from the fact that Ockham was addressing an audience different from that of the Decretists, not just a narrow circle of professional canonists but the whole intellectual world of the Christian West. The language of rights continued to be used in the works of late medieval jurists but, after Ockham, it increasingly inhabited the realms of philosophy and political theory." – B. Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law, 1150–1625*, Atlanta: Scholars Press, 1997, p. 202.

thought. In his polemical works imbued with concern for rights, Ockham conceptualized for the first time in Western political thought the right to institute government in the context of natural law and natural rights.[14] He was also the first to conceive of natural rights as limits to temporal and spiritual power and to raise the problem of the alienability of natural rights, which later acquired great importance during the seventeenth century.[15] It is interesting to note (particularly from the perspective of Hobbes's political philosophy) that he found only one inalienable natural right, the right to sustain life – through the natural right of using.[16]

Another crucial but at the same time highly complicated and debated question concerns the relation of Ockham's legal and political theory to his general philosophy: namely whether his rights theory was influenced – and if yes to what extent – by his nominalist and voluntarist philosophical doctrines. In this question I find the most acceptable the view of Arthur S. McGrade who points out, without asserting a relationship of interdependence or strict logical entailment, broad areas of congruence between Ockham's philosophy and political thought. On the one hand, he doubts that "a global interpretation of nominalism provides a good basis for a global interpretation of Ockham's political thought", but, on the other hand, he emphasizes that "we may still look to specific aspects of Ockham's metaphysics, epistemology or ... his logic for at least a partial explanation of various points in his polemical works".[17] For my part, I am convinced that the fact itself that Ockham is so strongly preoccupied with natural rights and personal liberty is a reflection of his nominalist ontology and logical individualism.

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[14] Ibid., p. 185, 193–194.

[15] A parallel between Ockham and Locke was suggested by Alan Gewirth. – A. Gewirth, *Marsilius of Padua: The Defender of Peace*, vol. I: *Marsilius of Padua and Medieval Political Philosophy*, New York: Columbia University Press, 1951, p. 258. This parallel does not seem to be artificial, particularly as John Dunn has pointed out strong religious and theological motives in Locke's political philosophy. Cf. J. Dunn, *The Political Thought of John Locke: A Historical Account of the Argument of the 'Two Treatises of Government'*, Cambridge: University Press, 1969.

[16] OND, c. 65.

[17] A. S. McGrade, *Ockham and the Birth of Individual Rights*, [in:] B. Tierney and P. Linehan (eds.), *Authority and Power. Studies on Medieval Law and Government Presented to Walter Ullmann on His Seventieth Birthday*, Cambridge: University Press, 1980, p. 150, 156–162.

After Ockham, the most eminent natural rights theorists were the fifteenth-century French conciliarist Jean Gerson and the sixteenth-century Ockhamists John Mair, Jacques Almain and Conrad Summenhart. In the period immediately preceding Hobbes's *oeuvre*, scholastic natural rights tradition was continued by the Spanish theologians of the Second Scholastics: Francisco de Vitoria, Francisco Suarez and Bartolomé de Las Casas. However, unlike their predecessors, they were very far from being nominalists; on the contrary, they were devoted Thomists. And Aquinas, their master, though certainly knew the subjective definition of *ius*, seems deliberately to have avoided it.[18] To be more precise, at times he used *ius* in a subjective sense in the *Summa theologiae*,[19] but this usage was sporadic and marginal, and doing so he was only unreflectively following the common juristic terminology of his age, very far from thinking of developing a theory of natural rights.[20] As Annabel Brett pointed out, "the scattered usage of the subjective construction of *ius* with the gerund does not affect the theoretical elucidation of *ius* as objective, which is indeed the sense that *ius* normally bears in Aquinas' text; nor does it necessarily imply a concept of subjective right as liberty."[21]

As a consequence, Dominican theorists in the sixteenth century were still quite moderate in the use of the subjective notion of *ius*.[22] In his *Com-*

[18] Saint Thomas was well acquainted with law, and by the time he wrote the *Summa theologiae*, the subjective meaning of *ius* had widely spread both in canon and urban law. Louis Lachance attempted to give the possible "raisons de l'absence du 'droit subjectif' chez saint Thomas" in a separate chapter of his *Le droit et les droits de l'homme*, Paris: Presses Universitaires de France, 1959, p. 164–170.

[19] Discussing restitution, for example, he mentioned property right (*ius dominii*). – *Summa theologiae* (henceforth *ST*), II–II q. 62 a. 1 ad 2: "Ad secundum dicendum quod nomen restitutionis, inquantum importat iterationem quandam, supponit rei identitatem. Et ideo secundum primam impositionem nominis, restitutio videtur locum habere praecipue in rebus exterioribus, quae manentes eaedem et secundum substantiam et secundum ius dominii, ab uno possunt ad alium devenire." For further examples, see J.-M. Aubert, *Le droit romain dans l'oeuvre de saint Thomas*, Paris: Vrin, 1955, p. 91 n. 2.

[20] B. Tierney, *The Idea of Natural Rights*, 23.

[21] A. Brett, *Liberty, Right and Nature*, 91 n. 12.

[22] Their moderation in this respect misled even such distinguished historians of ideas as Quentin Skinner and Richard Tuck. Skinner claimed that the Dominicans were "highly suspicious" of the subjective understanding of *ius*. – Q. Skinner, *The Foundations of Modern Political Thought*, Cambridge: University Press, 1978, vol. II: *The Age of Reformation*, 176. And Tuck suggested that "in place of a Gersonian active rights

mentary on the Secunda Secundae, Vitoria first defines *ius* in a traditional Thomist way as *obiectum iustitiae*, the object of justice.[23] But later on in the same work he interprets Aquinas' dictum that law is "aliqualis ratio iuris" to mean that *ius* is "quod lege licet" (what is licit by law),[24] and associates this definition with Conrad Summenhart's subjective understanding of *ius* as "a power or faculty pertaining to someone according to the laws".[25]

This moderation disappears from later Jesuit literature. Suarez distinguishes between two etymological explanations of the word *ius* in the *De legibus*. The first derives the term from the verb *iubere* (to command), the second from *iustitia*. According to the first etymology, *ius* is the same as *lex*, the second equates it with *iustum et aequum*.[26] Until now this is very close to what Saint Thomas have said on the subject. But from the second, Aristotelian-Thomist meaning, Suarez deduces a third, subjective sense of *ius*:

> According to the latter and strict acceptation of *ius*, this name is properly wont to be bestowed upon a certain moral faculty which every man has, either over his own property or with respect to that which is due to him. For it is thus that the owner of a thing is said to have a right in that thing, and the labourer is said to have that right to his wages by reason of which he is declared to worthy of his hire.[27]

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theory, the Spanish Dominicans in general put the objective sense of *ius* at the center of their concern." – R. Tuck, *Natural Rights Theories*, 47. For a corrective to Skinner's interpretation, see A. Brett, *Scholastic Political Thought and the Modern Concept of the State*, [in:] A. Brett, J. Tully and H. Hamilton-Bleakley (eds.), *Rethinking the Foundations of Modern Political Thought*, Cambridge: University Press, 2006, p. 144–146. For a criticism of Tuck's view, see: D. Deckers, *Gerechtigkeit und Recht: Eine historisch-kritische Untersuchung der Gerechtigkeitslehre des Francisco de Vitoria (1483–1546)*, Freiburg: Universitätsverlag, 1991, p. 160 n. 294, 163.

[23] *De justitia*, II–II q. 57 a. 1, 6.

[24] *De justitia*, II–II q. 62 a. 1, 5: "Jus ergo, ut ex superioribus constat, nihil aliud est nisi illud quod licet, vel quod lege licet, id est jus est quod est licitum por leges. Patet hoc ex sancto Thoma supra, q. 57, a. 1 ad secundum, ubi dicit qud lex non est proprie jus, sed est ratio juris, id est, est illud ratione cujus aliquid est licitum."

[25] Ibid.: "Conradus, qui fecit tractaum illum nobilem *De contractibus*, …dicit ergo quod jus est potestas vel faultas conveniens alicui secundum leges".

[26] *De legibus ac Deo legislatore*, 1.2.1–2, 1.2.4.

[27] *De legibus ac Deo legislatore*, 1.2.5: "Et iuxta posteriorem et strictam iuris significationem solet proprie ius vocari facultas quaedam moralis, quam unusquisque habet vel circa rem suam vel ad rem sibi debitam; sic enim dominus rei dicitur habere ius in re et operarius dicitur habere ius ad stipendium ratione cuius dicitur dignus mercede sua."

He even adds that this subjective notion of *ius* "appears to be the true object of justice."[28] It is very remarkable that both Vitoria and Suarez claimed to derive their subjective understanding of *ius* as a moral faculty from the *doctor angelicus*' objective conception of *ius* as the just. Their common underlying presupposition – legitimizing this difficult philosophical manoeuvre – could have been, as John Finnis pertinently observes, that "if you like, it is Aquinas's primary meaning of '*ius*', but transformed by *relating it exclusively to the beneficiary* of the just relationship".[29] It should be noted that Aquinas' concept of *dominium sui* (self-mastery) helped them a lot in this manoeuvre.[30]

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Finally we arrive to Hobbes. It is obvious, I believe, that in his general philosophy, Hobbes owes quite much to late medieval nominalism in general and Ockham in particular.[31] As concerns his natural law theory, it is difficult to see if by the 'laws of nature' he means merely 'conclusions' or

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[28] Ibid.: "Illa ergo actio seu moralis facultas, quam unusquisque habet ad rem suam vel ad rem ad se aliquo modo pertinentem vocatur ius, et illud proprie videtur esse obiectum istitiae."

[29] J. Finnis, *Natural Law and Natural Rights*, Oxford: Clarendon Press, 1980, p. 207.

[30] Aquinas understood *dominium* primarily as self-mastery, i.e. the rule of reason over man's other capacities. For him, it is this self-dominion that renders man capable and worthy to have *natural dominium* over animals and things: "according as he is master of what is within himself, in the same way he can have mastership over other things" [secundum modum quo dominatur his quae in seipso sunt, secundum hunc modum competit ei dominari aliis]. – *ST*, I q. 96 a. 2 co. Janet Coleman argues, I think correctly, that the scholastic conception of self-mastery or self-dominion must clearly be distinguished from the modern idea of self-ownership, as represented by Locke and Hobbes, seeing that medieval and modern writers had a very different understanding of the self. – J. Coleman, *Are There Any Individual Rights or Only Duties? On the Limits of Obedience in the Avoidance of Sin according to Late Medieval and Early Modern Scholars*, [in:] V. Mäkinen and P. Korkman (eds.), *Transformations in Medieval and Early-Modern Rights Discourse*, New York: Springer, 2006, p. 24–30.

[31] In recent Hobbes literature, this fact is especially stressed by Yves Charles Zarka, who sees the nominalism of Hobbes as a radicalization of Ockham's nominalism. – Y. C. Zarka, *La décision métaphysique de Hobbes: Conditions de la politique*, Paris: Vrin, 1987, p. 21–22. For the influence of medieval theories of divine omnipotence on Hobbes's philosophy, see: L. Foisneau, *Hobbes et la toute-puissance de Dieu*, Paris: Presses Universitaires de France, 2000.

'theorems' specifying an optimum set of actions designed to bring about peace, or the commands of an omnipotent God acting with his absolutely free will, for Hobbes's statements in this matter are by no means unequivocal. The key passage is perhaps the last paragraph of the Chapter 15 of *Leviathan*,[32] where Hobbes seems to assimilate the laws of nature to divine law.[33] If this hypothesis is true, then Hobbes's view is not very remote at all from Ockham's conception of natural law: though the norms of natural law are discerned by reason, ultimately it is nothing but a particular manifestation of the unrestricted free will of God, not bound by the laws of the moral order created by Himself.[34]

From now on I will examine Hobbes's rights theory. One of the most characteristic elements of this doctrine is the sharp distinction and opposition between right and law. In a famous passage of *Leviathan*, Hobbes complains that

> they that speak of this subject, use to confound *Jus*, and *Lex*, *Right* and *Law*; yet they ought to be distinguished; because RIGHT, consisteth in liberty to do, or to forbeare; Whereas LAW, determineth, and bindeth to one of them: so that Law, and Right, differ as much, as Obligation, and Liberty; which in one and the same manner are inconsistent.[35]

To be sure, medieval rights theorists very often did not carefully distinguish between the objective and subjective meanings of *ius* and hence often shifted from one sense to another (*nota bene* this is true of Ockham, too). But there are important and numerous exceptions to this rule. For example, a consistent formal distinction between *ius* as objective law and

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[32] *Leviathan*, ch. 15: "These dictates of Reason, men use to call by the name of Lawes, but improperly: for they are but Conclusions, or Theoremes concerning what conduceth to the conservation and defence of themselves; whereas Law, properly is the word of him, that by right hath command over others. But yet if we consider the same Theoremes, as delivered in the word of God, that by right commandeth all things; then are they properly called Lawes."

[33] Whether Hobbes's assimilation of the laws of nature to divine law (and more generally his Christianity) is *sincere* or not is one of the oldest and most debated questions of Hobbes scholarship, and is beyond the scope of this study. For the present state of the debate, see: G. Forster, *Divine Law and Human Law in Hobbes's* Leviathan, "History of Political Thought" (24) 2003, p. 189–217. For a moderate theistic reading of Hobbes's natural law theory, see T. Sorell, *Le Dieu de la Philosophie et le Dieu de la Religion chez Hobbes*, [in:] L. Foisneau (ed.), *Politique, droit et théologie chez Bodin, Grotius et Hobbes*, Paris: Kimé, 1997, p. 244–247.

[34] Cf. A. S. McGrade, *Natural Law and Moral Omnipotence*, [in:] P. V. Spade (ed.), *The Cambridge Companion to Ockham*, Cambridge: University Press, 1999, p. 273–301.

[35] *Leviathan*, ch. 14.

ius as subjective right can be found already in the *Defensor pacis* of Ockham's contemporary, Marsilius of Padua,[36] and later in the works of Summenhart.[37] By the seventeenth century, the differentiation between the meanings of *ius* (1) as the just, (2) as a right and (3) as law became quite common. We find this tripartite understanding of *ius* indirectly, through a nominally twofold distinction in Suarez (as we have seen), and in a clear form in Grotius.[38] Moreover, Jean Gerson in the fifteenth century defined *ius* exclusively in the subjective sense as a moral faculty or power and distuinguished it explicitly from the term *lex* meaning a rational rule of human acts: "right is an immediate faculty or power pertaining to someone according to the dictate of primal justice", whereas "law is a rule having conformity to the dictate of right reason".[39] Thus Hobbes's strict dichotomy

[36] *Defensor pacis*, 2.12.6, 2.12.10: "In one signification, therefore, 'right' is the same as law, divine or human … In a second way, 'right' is predicated of every human act, power, or acquired disposition… in conformity with right so-called in its first signification." [Sic igitur secundum unam significacionem *ius* idem est quod lex divina vel humana… Dicitur autem *ius* secundo modo de omni humano actu, potestate, vel habitu acquisito, imperato, interiori vel exteriori, tam immanente quam transeunte in rem aliquam aut in rei aliquid… conformiter *iuri* dicto secundum primam significacionem.]

[37] *Opus septipartitum*, 1.1.1: "Right is taken in two ways. In one sense it is the same as law … In another way right is taken to be the same as a power, as we take it when we say that a father has a right over his son, or a king over his subjects, and that men have a right in their things and possessions" [Ius capitur dupliciter. Uno modo idem est quod lex… Alio modo accipitur ius ut idem est quod potestas, quo modo accipitur cum dicitur patrem habere ius in filium, regem in subditos, et homines habere ius in rebus et possessionibus suis].

[38] Grotius elucidates the three meanings of *ius* as follows: "For, in this place, right signifies nothing more than what is just… There is another signification of the word **right**, different from this, but yet arising from it, which relates directly to the person. In which sense, **right** is a moral quality annexed to the person, justly entitling him to possess some particular privilege, or to perform some particular act. … There is also a third signification of the word Right, which has the same meaning as Law, taken in its most extensive sense, to denote a rule of moral action, obliging us to do what is proper." [Nam ius hic nihil aliud quam quod iustum est significat… Ab hac iuris significatione diversa est altera, sed ab hac ipsa veniens, quae ad personam refertur; quo sensu ius est qualitas moralis personae competens ad aliquid iuste habendum vel agendum. … Est et tertia iuris significatio quae idem valet quod lex, quoties vox legis largissime sumitur, ut sit regula actuum moralium obligans ad id quod rectum est.] – *De jure belli ac pacis*, 1.1.3, 1.1.4, 1.1.9.

[39] *De potestate ecclesiastica*, 242: "ius est facultas seu potestas propinqua conveniens alicui secundum dictamen primae iustitiae … lex est regula conformitatem habens ad dictamen rectae rationis".

of right and law is by no means without antecedents in medieval legal thinking.

In the very beginning of Chapter 14 of *Leviathan*, Hobbes defines 'right of nature' and 'liberty' as follows:

> **The Right of nature**, which Writers commonly call *Jus Naturale*, is the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing, which in his own Judgement, and Reason, hee shall conceive to be the aptest means thereunto.
>
> **By Liberty**, is understood, according to the proper signification of the word, the absence of externall Impediments: which Impediments, may oft take away part of a mans power to do what hee would; but cannot hinder him from using the power left him, according as his judgement, and reason shall dictate to him.[40]

Although Hobbes is in no way consistent in his use of the term 'liberty',[41] there is a common element that unites the different senses of 'liberty' he uses: the idea of negative liberty. The core of this idea can already be found in Ockmam's works. As McGrade has sown, Ockham regards freedom – in contrast with medieval Aristotelians – not as a participation in a supra-individual corporate whole, but as an individual freedom of action (which is obviously a "political repercussion" of nominalist philosophy). For him, a person is free *from*, and not in the government.[42] Moreover, since he conceives of political liberty as an absence of interference from government, he assesses secular government instrumentally, as a means to the social coexistence of free individuals (not as the basis or end of community), and hence confers basically only negative, peacekeeping functions to temporal power, regarding the promotion of virtue as an essentially spiritual function, thus belonging exclusively to the spiritual, and not to the secular power.[43]

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[40] *Leviathan*, ch. 14. In the parallel passage of *The Elements of Law*, we can find a similar definition: "that which is not against reason, men call **Right**, or *ius*, or blameless liberty of using our own natural power and ability. It is therefore a *right of nature*: that every man may preserve his own life and limbs, with all the power he hath."

[41] See the classic study of J. Roland Pennock, *Hobbes's Confusing 'Clarity' – The Case of 'Liberty'*, [in:] K. C. Brown (ed.), *Hobbes Studies*, Oxford: Blackwell, 1965, p. 101–116.

[42] A. S. McGrade, *The Political Thought of William of Ockham: Personal and Institutional Principles*, Cambridge: University Press, 1974, p. 119–122, esp. 119 n. 115; idem, *Ockham and the Birth of Individual Rights*, p. 158 n. 12.

[43] *Dialogus* 3.2.1.1.

Another important aspect of this definition is Hobbes's insistence on self-preservation as the basis of right of nature. According to Richard Tuck, the main source of Hobbes's emphasis on self-preservation is the scepticism of Montaigne and Lipsius.[44] But here too, Hobbes could take inspiration from medieval thinkers as well. I have already mentioned that Ockham justified the inalienable right of self-preservation through the natural right of using. We find a similar argumentation in Gerson and Almain. The latter affirmed that God had given every man a natural right of acquiring the necessities of life and of resisting aggression, and that by natural law everyone was obliged to preserve his own being.[45] Thus self-preservation was for him, just like for Hobbes, an inalienable natural right and a duty in the same time. Vitoria even acknowledged that in the state of nature each person was owner of all things, so that he could use (or consume) anything according to his pleasure, as long as he did not harm other people or himself.[46] Moreover, he (and later Suarez) laid a great emphasis on the individual and collective natural right of self-defence, and conceived of it as an inalienable right which could be asserted also against the Sovereign. In his *relectio* on civil power, for example, Vitoria states that "every man has the power and right of self-defence by natural law", and adds a bit later that "if a man cannot give up his right and ability of self-defence and of using his own body for his own convenience because this power belongs to him by natural and divine law, by the same token the commonwealth also cannot by any means be deprived of its right and power to guard and administer its affairs against violent attack from its enemies, either from within or from without."[47]

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[44] Cf. R. Tuck, *Hobbes*, Oxford: University Press, 1989.

[45] *Tractatus de auctoritate ecclesiae et conciliorum generalium*, col. 977; *Quaestio resumptiva*, col. 961.

[46] *De justitia*, II–II q. 62 a. 1, 16: "Non solum universitas et communitas humana habet dominium super omnia, sed etiam quilibet homo in statu naturae integrae, id est, stando in solo jure naturali, erat dominus omnium rerum creatarum et poterat uti et abuti omnibus illis … pro libito suo, dummodo non noceret aliis hominibus vel sibi."

[47] *De potestate civili* 7, 10: "quilibet homo iure naturali habeat potestatem et ius defendendi se… Si enim homo cedere non potest iuri et facultati se defendendi, propriisque membris ex commodo suo utendi, ergo nec etiam potestati, cum hoc illi naturali et divino iure competat. Itidem etiam respublica nullo modo potest privari huiusmodi potestate tuendi se et administrandi adversus iniuriam et suorum et exteriorum".

All this is not to suggest that Thomas Hobbes was a faithful heir of scholastic thought. He excluded the idea of moral rightness from his definition of right of nature, he ascribed natural rights to the isolated, unsocial, selfish individuals of the state of nature, he regarded reason as an instrumental, morally neutral means of human passions – to mention only some of his ideas that no medieval thinker could have easily cherished. Nevertheless, I hope that the examples and parallels I have enumerated in this paper suffice to show that although Hobbes was a creative innovator who deviated in many respects from the medieval tradition of natural rights and natural law and initiated a new language of political thought, in other important respects he can be considered as a follower of this tradition.

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*René Thalmair**

Some (Philosophical) Aspects of the Image of Man of the European Citizen (Homo Europaeus)

Introduction – Preliminary questions

First we have to talk about the peculiarity of the speech about the image of man. Can we speak confidently about the image of man in Europe? And where can we find it? Why is it so important to reflect philosophically about this homely topic?

The legal system and its rights and duties show human basic traits, which – according to the legal system – are suggested to be inherent to human nature itself.[1] The image of man contends these fundamental human basic traits. From a legal philosophical perspective one can speak confidently about an image of man in Europe. Philosophical reflections are required in order to deduce the image of man from a constitutional text, in which the image itself is not explicitly mentioned. The implications of these connotations are considered as basic values for a peaceful co-existence. Human dignity, fundamental rights, separation of power, the right to resist, citizenship of the union, family, democracy, solidarity, subsidiarity, pluralism all cast a revealing light on the unapparent image of the Homo europaeus.

We also have to discuss the basic texts in relation to our theses. Is there a basic European social contract, which constitutes a legal system for a peaceful co-existence?

* Mag. phil. fac. theol. Rene Thalmair writes his doctoral thesis at the kath. theol. Fakultät der Universität Innsbruck and attends the MA "European Politics and Society"; csad3735@uibk.ac.at; Rene.Thalmair@student.uibk.ac.at.

[1] See J. M. Bergmann, *Das Menschenbild der Europäischen Menschenrechtskonvention*, Baden-Baden, 1995, p. 15–20, who talks about Radbruch.

Fundamental implications of the Homo europaeus are represented above all in the Treaty establishing a constitution for Europe. The Treaty is the essence of constitutional agreements and sums up all other actual Treaties (like the Treaty of Maastricht, the Treaty of Amsterdam, the Treaty of Nice) and is now a single constitutional document ("IV-437f. Repeal of earlier Treaties: This Treaty establishing a Constitution for Europe shall repeal the Treaty establishing the European Community, the Treaty on European Union..."). [2]

As a result I will present some aspects of the image of man of the Homo europaeus/European man/civic in the Treaty establishing a constitution for Europe from a philosophical perspective.

From my point of view there are two images (the ideological EU-image of man and the actual EU-citizen's notion of their image of man). The two contrasting images are responsible for the present crises and for some bygone crises like the ratification of the EU constitution. Congruence between these two contrasting images is necessary to get over the present abyss and to support the further development of the peace project EU and in general to assist a peaceful co-existence by peaceful means. So let us start with aspect number one.

1. Aspect: Is human dignity a value or merely a commonplace?

First of all I want to begin with some philosophical concerns. The central aspect of the image of man is human dignity. [3]

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are

[2] Actually today we do not discuss the constitutional treaty any longer. Instead we talk about the Treaty of Lisbon (reform treaty). A significant number of experts from various disciplines confirm a consensus that there is no substantial difference to the Treaty establishing a constitution for Europe. This fact makes our investigation up to date and relevant for ongoing discussions.

This text cites the Treaty establishing a constitution for Europe only as Treaty or only with part-article, e.g. I-9. The preamble of the Treaty will be short the preamble, whereas the preamble of the charter of fundamental rights of the European Union will be mentioned as the preamble of the charter. We refer to all Treaties according to the official versions published on the official sites of the European Union. See http://europa.eu/abc/treaties/index_en.htm (last accessed 02.06.2009). Especially the Lisbon Treaty is cited according to the consolidated version.

[3] The term human dignity is missing in the preamble, but mentioned in I-2 ("values...") and in the preamble of the charter.

common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail (I-2[4]).

Human dignity is inviolable. It must be respected and protected (II-61) says the Treaty.

The individualistic human rights conception of the European Union is normatively based on this human dignity.

The dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights.[5]

Human dignity is interpreted as an end of itself status and presupposes a transcendental subject. But what is a transcendental subject?

For example, when we listen to music, we do not hear disconnected jangles of sound; instead we hear coherent sequences of melody that comprise an aesthetic musical whole. Thus, Kant reasoned that something exists inside us that unifies our discrete sense impressions. An enduring and coherent "self" is a necessary precondition for the types of experiences that we do in fact have everyday. Kant called this unifying self the Transcendental Subject. But Kant simultaneously stressed that we still can never know the Transcendental Subject directly. Its inherent nature (the so-called "thing-in-itself") is always beyond the reach of our empirical capacity to know.[6]

Kant tells us something about the end in itself status. Kant says in his Groundwork on the Metaphysics of Morals:

Autonomy then is the basis of the dignity of human and of every rational nature.[7]

...but that which constitutes the condition under which alone anything can be an end in itself, this has not merely a relative worth, that means a price, but an intrinsic worth, that is dignity.[8]

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[4] See Lisbon Treaty art. 1a.

[5] See http://www.consilium.europa.eu/uedocs/cms_data/docs/2004/4/29/Explanation%20relating%20to%20the%20complete%20text%20of%20the%20charter.pdf (last accessed 02.06.2009).

Explanations relating to the complete text of the charter of fundamental rights (originally prepared under the authority of the Praesidium of the Convention which drafted the Charter of fundamental rights).

[6] Adam Crabtree, *Reflections on Kant, Myers, Schopenhauer and Whitehead*, www.esalenctr.org/display/confpage.cfm?confid=17&pageid=127&pgtype=1 (last accessed 02.06.2009).

[7] Immanuel Kant, *Groundwork on the metaphysics of morals* 89, 436.

[8] Kant 87,435.

So what says the European Court of Justice about human dignity:

> In its judgment of 9 October 2001in Case C-377/98 [...] the Court of Justice confirmed that a fundamental right to human dignity is part of Union law. It results that none of the rights laid down in this Charter may be used to harm the dignity of another person, and that the dignity of the human person is part of the substance of the rights laid down in this Charter. It must therefore be respected, even where a right is restricted.[9]

This is a very important remark and we will refer to this again at the end of the chapter.

You can not apply basic rights barriers to human dignity, but it is not clear whether or not these basic rights barriers are subject to basic rights, because basic rights put in concrete terms what is concretely meant by human dignity. According to the Treaty these concrete terms of basic rights are for example the right to the integrity of the person (II-63), the right to life (II-62), the prohibition of torture and inhuman or degrading treatment or punishment (II-64) or the prohibition of slavery and forced labour. Nevertheless the European Union develops its basic rights functionally and merely accepts them in this shape. Basic rights serve as functions for the purpose of reaching European Union objectives.[10] So we have to conclude, that the functional introduction of basic rights has an influence on the interpretation of basic rights. And we mentioned it before: basic rights put in concrete terms what is concretely meant by human dignity. And this has an influence on the judgements of the European Court of Justice. There is a evident relevance between the image of man (above all his metaphysical foundation) and the concrete form of basic rights ("It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice"[11]).

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[9] Explanations relating to the charter of fundamental rights, http://eur-lex.europa.eu/en/treaties/dat/32007X1214/htm/C2007303EN.01001701.htm (last accessed 02.06.2009).

[10] "The Union therefore recognises the rights, freedoms and principles set out hereafter as the Preamble of the Charter of fundamental rights says. The Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II (I-9(1)).

The Union shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance (The Union´s objectives I-3(3))".

[11] Preamble of the charter.

Until now the European Court of Justice has based its decisions on the principle, that the guarantee of basic rights has to fit in well with the structure and the aims of the EU. Nevertheless the EU judges supported the development of basic rights. They made them legally relevant and legally binding. Although the European Court of Justice gives precedence to push the rules of the single European market through, but he does not give precedence to the basic rights of individuals. There is no effective legal protection for these basic rights.[12] We have to consider, that the European Court of Justice gives priority to maintain acts of law concerning the single European market. Finally we must deduce a performative contradiction (performative: I act differently from what I say; for example the statement: I lie) between the procedure of the European Court of Justice and the confessions made in the Treaty establishing a constitution for Europe.

The Preamble of the Charter says: "It [the union] places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice".

The unrestricted guarantee of human dignity is based on the premise that man is a precondition for community. Therefore the legal system has no competence in the making of man, it has no authority to do so. In the narrower sense the EU cannot give rights to its citizens. In the contrary in the western tradition and according to the western human rights conception (see next chapter) citizens have rights and that is the presupposition for community. As far as that goes it is incomprehensible why the Treaty vests men with rights, which the EU allows beforehand.

Nowadays men are considered to be mental and moral beings (the primacy of the mind is widely acknowledged). Human dignity is generally seen as an intrinsic factor. It is inside us. One can derive the ability to arrange both one's life and one's personality development independent from human dignity. In that way the written right corresponds with a claim to freedom. Freedom is the transcendental principle of acting as a human and therefore freedom is the presupposition for acting morally (that means a condition for a mental and moral development of man). Subjective rights imply the acknowledgement of the subject-transcendental rights sphere. But the Treaty says that the union itself is in the centre of the EU, because the union guarantees the compliance of their rights. So the Treaty does not say that freedom is in the centre of the EU. According to the Treaty freedom and liberty are only granted by written rights.[13]

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[12] See Waldemar Hummer, *Der Status der "EU-Grundrechtecharta"*. Politische Erklärung oder Kern einer europäischen Verfassung? 2002, p. 102ff.

[13] "The Union therefore recognises the rights, freedoms and principles set out hereafter (says the Preamble of the Charter of fundamental rights). The Union shall recognise

The Treaty does not take the man with his metaphysical/transcendental determination into consideration. The foundation of the universal value of human dignity is not explicitly mentioned in the Treaty. Man is set free contrary to his "higher" determination. Citizens have freedom of choice between different pluralistic contents without obligatory odds or orientation[14] (e.g. job and private life can have conflicting moral standards). According to the Treaty freedom appears to be a subjective right for self-determination. In more philosophical terms: the universal aspect (obligatory odds) is not equated with the individual aspect. Humans are covered by rights, freedoms, and liberties so to speak from the outside (the union). This image of man originated without any regard to the foundation of his rights. From a philosophical point of view the transcendental subject founds every conception of human rights since the enlightenment. Man's normative sense is based on human dignity (and presupposes freedom, which means autonomy of will). Therefore we can conclude that the foundation of human rights is effectively the end of itself.

To sum up we have to mention a contradiction. Citizens' rights in the EU are founded in the human dignity (and their foundation: freedom), which is granted by the union itself. Synchronously the union says that man is central to its establishment. In this EU-model it seems as if the EU makes its citizens a gift of human dignity. The EU makes itself an authority, which pretends to be able to give human dignity. From a philosophical point of view we have to demand an explicit confession to the metaphysical foundation of human dignity. If we pay regard to these conclusions we can refer to the Polish constitution that says in the Preamble:

> We, the Polish Nation – all citizens of the Republic, both those who believe in God as the source of truth, justice, good and beauty, as well as those not sharing such faith but respecting those universal values as arising from other sources, equal in rights and obligations towards the common good – Poland.[15]

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the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II (I-9)".

[14] See Ernst-Wolfgang Böckenförde, *Das Bild vom Menschen in der Perspektive der heutigen Rechtsordnung*, [in:] *Der Mensch in den modernen Wissenschaften: Castelgandolfo – Gespräche 1983*, Krysztof Michalski (Hg.), 1985, p. 91–99, here 93.

[15] www.eicee.org/e_doc_poland.html (last accessed 02.06.2009).

2. Aspect: The illusion about indivisible basic rights[16]

If we understand basic rights as a protection against state authority (according to the liberal interpretation of defence rights), this evaluation shows distrust opposite to the humanity of political decision makers. It seems to be necessary that law subjected citizens have to be protected against the state (particularly against political decision makers). Above all, negative freedom rights are granted to the Homo europaeus, although the EU thinks little of basic social rights at all. Therefore we can conclude that the EU-citizen has the ability of autonomic self determination. As an autonomic subject he is able to take all actions, which are granted by basic rights. Consequently men are considered as potential personalities determined to fulfill their human capabilities. So you can look at the human person with a potential perspective, like the Treaty does.[17] That is a tradition, which binds human dignity not to certain abilities or behaviour. It binds dignity to humaneness itself (as a determination of being). The human rights express the acknowledgement of men as bearer of fundamental rights. These rights are innate, inviolable, inalienable and absolutely necessary for his human realization. What right has the EU to divide indivisible human rights into classic-liberal and social with different procedural guarantees and varying possibilities of enforcement?[18] The splitting of liberal and social rights contradicts the inviolable nature of human rights, because these non-enforceable (non-codified) social rights are a presupposition for using liberal rights. Homo europaeus seems torn and without an adequate socio-economic ground.[19] This artificial and unjustified separation classifies the right to property as liberal and the right to labour as a social human right (and that means as a non-enforceable right). But do these two rights have no structural conditional connection? Do we have the freedom of owning property but not the freedom of labour?

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[16] Preamble of the charter: "Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice".

[17] See Gerd Forcher, *Bedingungen der Personalität*. Daniel C. Dennett und sein naturalistischer Personbegriff. Diplomarbeit, 2004 and Eva Baumann, Die Vereinnahmung des Individuums im Universalismus, 2001 and BVerfGE 5, 85 (204).

[18] See Karl Heinz Auer, *Verfassung und Strafrecht im Kontext rechtsphilosophischer Ethik*, 2000, p. 36.

[19] See Nora Pichler, *Die europäische Grundrechtscharta im Vergleich zur österreichischen Grundrechtsordnung*, 2001, p. 15.

Another example is that if you have not the social right of security of tenure (Kündigungsschutz) or that of establishing a works council, than you cannot exercise your liberal right of freedom of speech.

Therefore we can conclude, that this image of man presupposes a self-supporting, economically independent human being, who is not in need of help and capable to look after himself. The image of man of the Homo europaeus is similar to that of the Homo oeconomicus and this image of man ignores

- the social relations surrounding each human being from his very beginning;
- the Homo oeconomicus fails to appreciate a close connection of ethically acting people and essential values;
- the Homo oeconomicus decides in rational ways, but this model reduces the varieties of different ways of life;
- in general the Homo oeconomicus overrates the rationality of man.

The division of indivisible basic rights to classic-liberal and social ones with different procedural guarantees and varying possibilities of enforcement show that the Homo europaeus suffers from a kind of constitutional right schizophrenia. The Preamble of the Treaty insinuates that the claim[20] to establish the union on indivisible and universal values has practically failed. All States of the World Human Rights Conference in Vienna 1993 confirmed the indivisibility of human rights[21] (and that means the unity of liberal and social rights). So we must assess the speech on indivisible basic rights as an illusion or better as a legitimacy discourse for elitist supremacy.

3. Aspect: Is the principle of separation of powers the organizational backbone of the human rights idea?

Thoughts of Montesquieu clearly underlie modern separation of powers. Montesquieu provides a realistic image of man holding political office. The extension of these thoughts to other social areas (like economy) assumes a sceptical view of man, because this tradition suspects an imminent abuse of power not only from office-bearers but also from man as such.[22] Any liberal constitution needs both trust and distrust in the citizens as Montesquieu says. The central pillar of the constitutionalism is the principle of

[20] See Auer p. 36ff.

[21] The term human rights is not gender neutral in french. They prefer the term basic rights in the Treaty. See www.eukonvent.at/cv_850_kom.html (last accessed 02.06. 2009).

[22] See Häberle, p. 41f.

separation of powers.[23] Separation of powers is an imperative condition for real validity of human rights. The Treaty shows a performative contradiction concerning the commitment to human rights and the non-compliance of the principle of separation of powers.[24] Hummer notices a fusion of power, because the Council, the executive authority, also has legislative competences. Kirchhof speaks about the human right origin of separation of powers[25] (art. 16 of the Declaration of human and civic rights of 26 Aug. 1789: "any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution"[26]).

Separation of powers serves as a guarantee for the basic right beneficiary opposite to the state power.[27] Köchler says that if the legitimacy of a democratic order consists of the subjection of the citizens under control by precise control mechanisms, then the whole system depends on a consequent executed separation of powers.

To sum up we can state that there is a fundamental decision made by the European Court of Justice 1970 (legal case Köster) about the existence of a so called balance of powers in the EU. This surrogate of a missing principle of separation of powers is named institutional balance. It shows an ad hoc existing and changeable institutional structure by means of member states. In the contrary the principle of separation of powers is dogmatic and in the long run designed for separation of different powers relating to constitutional law.[28] Therefore you cannot conclude the EU has a separation of

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[23] See Ulrich Haltern, *Verfassungsgerichtsbarkeit, Demokratie und Misstrauen: das Bundesverfassungsgericht in einer Verfassungstheorie zwischen Populismus und Progressivismus*, 1998, p. 352.

[24] See Waldemar Hummer, *Paradigmenwechsel im internationalen Organisationsrecht. Von der "Supranationalität" zur "strukturellen Kongruenz und Homogenität" der Verbandsgewalt*, [in:] *Paradigmenwechsel im Völkerrecht zur Jahrtausendwende*, Hummer (Hg.), 2002, p. 145–203, here 155.

[25] See Paul Kirchhof, *Kompetenzaufteilung zwischen den Mitgliedsstaaten und der EU*, [in:] *Die künftige Verfassungsordnung der EU*, hg. von der Vertretung der Europäischen Kommission in der BRD. Europäische Gespräche 2/94, p. 57–67.

[26] http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/cst2.pdf (last accessed 02.06.2009).

[27] See Hans Köchler, *Neue Wege der Demokratie: Demokratie im globalen Spannungsfeld von Machtpolitik und Rechtstaatlichkeit*, 1998, p. 26.

[28] See Waldemar Hummer, *Legitimations- und Demokratiedefizit in der EU? Rolle und Funktion des Europäischen Parlaments im "institutionellen Gleichgewicht"*, [in:] *Etappen auf dem Weg zur Europäischen Verfassung*, Busek/Hummer (Hg.), Wien 2004, p. 471–504, here 497ff.

powers.[29] The EU has balanced powers (an institutional balance or a fusion of powers) to realise union objectives. Pragmatically we can speak about a party-oligarchy that undermines the system by occupying powers/offices with party officials who have to come up by a previous negative selection of each party. So not the best, but the most loyal candidate will get the job. This imperfection is prolonged by the Treaty. Separation of powers requires independent justice, but in fact sensitivities to basic rights (like Schengen and Europol[30]) are not under control of the European Court of Justice.[31] From my point of view you cannot acknowledge independent judges in the EU, because they are appointed by the heads of governments and states for six years with a chance of reappointment.[32]

In the Union the Homo europaeus is not vested with an effective individual right to complain. The lack of opportunities for a direct basic right complaint[33] is constitutionally questionable, because of restrictive admissions.[34] The main weakness of the European Court of Justice is the inadequate access for individuals to the controlling system of courts[35] whereas the European Court of Human Rights grants individual complaint authority. In the Union the principle of separation of powers is dissolved into a balance of powers, which is structured party-oligarchically. Separation of powers can be seen as the organizational backbone of the human rights idea. The European Charter for fundamental rights is a kind of compensation for this weakness, although the Charter is only solemnly proclaimed

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[29] See I-19ff.

[30] See Lisbon Treaty Protocol (No 19) on the Schengen *Acquis* integrated into the framework of the European Union; See Lisbon Treaty art. 276f.

[31] See Andrej Busch, *Die Bedeutung der Europäischen Menschenrechtskonvention für den Grundrechtsschutz in der Europäischen Union*, 2003, p. 180.

[32] I-29 Abs. 2: "They shall be appointed by common accord of the governments of the Member States for six years. Retiring Judges and Advocates-General may be reappointed". See also Lisbon Treaty art. 253.

[33] See Jürgen Schwarze, *Der Verfassungsentwurf des Europäischen Konvents – Struktur, Kernelement, Verwirklichungschancen*, [in:] *Der Verfassungsentwurf des Europäischen Konvents*, Schwarze (Hg.), Baden-Baden 2004, p. 481–563, here 509.

[34] See Stefan Barriga, *Die Entstehung der Charta der Grundrechte der Europäischen Union*, 2003, p. 58.

[35] III-365 Abs. 4: "Any natural or legal person may, under the conditions laid down in paragraphs 1 and 2, institute proceedings against an act addressed to that person or which is of direct and individual concern to him or her, and against a regulatory act which is of direct concern to him or her and does not entail implementing measures"; see also Lisbon Treaty art. 263.

and not legally binding.[36] By the way one can see a difference between two meanings of the term separation of powers (Gewaltentrennung, -teilung). The first meaning requires independent powers, whilst the second means a system of checks and balances without strict independency.

4. Aspect: Why has Homo europaeus no right to resist?

The absence of a right to resist embodied in the Treaty[37] is remarkable and describes the Homo europaeus as a rule-subjected (and not resistance-authorized) human being. Why is he not competent enough to accomplish resistance legitimately? Maybe he is not able to acknowledge the right? A human right to resist needs two conditions for legitimacy:

- In a society based on human dignity and freedom, a state prevents social progress by means of his monopoly on using force.
- All public authorities or bearer of governmental executive power underlie arrogance or corruption and act against rights of sovereign persons.[38]

Regarding a social contract, a right to resist is legitimate if there were previous violations of the contract. According to Auer a democratic order cannot concede the right to take no notice of a law only with reference to conscience. This would endanger the security and freedom of everyone. Whoever achieves civil disobedience in a constitutional state puts at risk the highest and most vulnerable cultural achievement: legal peace (Rechtsfriede).[39] Auer doesn't make a clear difference between civil disobedience and a codified right to resist, but from my point of view legal peace needs a possibility of correction at human conscience. Finally the legal peace acts as a purpose to peaceful co-existence for entities. A legal peace, which incapacitates the individual, perverts its content.

The right to resist fits in well in an European legal order, because many member states have absorbed this right in their constitutional traditions.[40]

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[36] See Lisbon Treaty art. 6.

[37] And in the Lisbon Treaty as well.

[38] See Karl-Heinz Schöneburg, *Vom Recht des Menschen auf Widerstand*, [in:] Schöneburg V. (Hg.), *Philosophie des Rechts und das Recht der Philosophie*, 1992, p. 55–66, here 55f., who quotes verbatim Rousseau (contrat social 1762): "[...] wenn eine staatliche Macht die volontée generale nicht befolgt, sie verletzt, sie beschränkt, ihr entgegenwirkt, dann hat das Volk ein Recht auf Widerstand gegen diese unrechtmäßige Gewaltanwendung".

[39] See Auer, p. 66.

[40] I-9 Abs. 3: "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".

It is time to embody the right to resist in a law. The absence of legitimate resistance against unjust laws says something about the image of man in the EU. The image of man in the EU does not suggest a responsible being, which is competent enough to resist. It suggests a rule-subjected human being without a legitimate right to resist against laws of injustice. Autonomy, self-determination, and independent life-style presuppose the possibility to say no and this possibility requires a right to resist as its organisational and practical consequence. Hence the image of man of the Homo europaeus is not the one of a responsible citizen. This is a performative contradiction to the Homo europaeus seen as an autonomic and self-determined human being appealed for an independent life-style.

5. Aspect: Citizenship of the Union needs previous support of European identity and solidarity

Homo europaeus lives in a pluralistic democracy which allows him individualistic self-determination, but without effective protection of basic rights through his status as a citizen of the EU.[41]

The citizen has a comprehensive protection because of his nationality. Every second European says that he feels close to his national identity instead of his European identity. And 49% agrees with the statement: there is no single cultural identity of all Europeans.[42] Therefore we can conclude that there is a strong connection between the citizenship of the Union and

[41] I-10: "1. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it".

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Constitution. They shall have: (a) the right to move and reside freely within the territory of the Member States; (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State; (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State; (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Constitution's languages and to obtain a reply in the same language. These rights shall be exercised in accordance with the conditions and limits defined by the Constitution and by the measures adopted thereunder + II-99 to II-106 + Preamble of the Charter: It places the individual at the heart of its activities, by establishing the citizenship of the union..."

[42] See *Wie die Europäer sich selbst sehen*, hg. Vom Amt für amtliche Veröffentlichungen der Europäischen Gemeinschaften, Luxemburg 2000, p. 11.

the question of European identity. We can distinguish two different categories of community: demos (as a political community) and ethnos (as a community of descent) as subject of European democracy. Citizenship in the first sense grows through political nationalisation and acculturalization and is open minded for all human beings who commit themselves to certain political and cultural basic values. The analytical separation of demos and ethnos makes it easy to relate with a pluralistic community, an open society and the basic idea of democracy (seen as an individualistic self-determination). But the identification of demos and ethnos is not easy to relate with.[43] Demos refer to political responsible people and ethnos refer to a community of origin. According to Habermas and Weiler the European ethnos are an expression of variety and heterogeneity, but European demos shows the beginning of development. It seems that the so-called no-demos-thesis is confirmed by the failure of the Treaty. It seems that there is no constitution given subject. So we can assume that the necessary foundations of a political community are a single language, a single tradition, and a single history. Habermas rejects this thesis. He says that the actual civil solidarity is getting weaker and weaker. Tax burdens replace the former duty of risking ones life defending the community. The self-assertion of the collective doesn't become the focus of attention, but rather preservation of the liberal order in the interior. The identification with a national state must change into the orientation towards the constitution, so that universalistic constitutional principles take precedence over nationalistic imaginations. Constitutional patriotism should according to Habermas replace a nationalistic cut-off. The unquestioningly accepted precedence of EU laws (I-6) indicates this development. A political community has a silently accepted and collective preferred life-style, that distinguishes the community against others. These political ethnos are achieved in democratic processes and run along communications. The national arenas must be open for common political opinion forming.[44] Citizenship is a new shape of modern state (at the end of 18th century, beginning of 19th century).[45] It is an achievement of nation state, that citizenship causes a new abstract solidarity by means of the law. Habermas calls the stabilizing process between national consciousness and democratic citizenship a circular process. Mass communication, national pride, and public discourse of political parties have produced a national

[43] See Anne Peters, *Elemente einer Theorie der Verfassung Europas*, 2001, p. 654.

[44] See Jürgen Habermas, *Der gespaltene Westen*, 2004, p. 76–81.

[45] See Ernst-Wolfgang Böckenförde, *Staatsbürgerschaft und Nationalitätskonzept*, [in:] *Staat, Nation, Europa: Studien zur Staatslehre, Verfassungstheorie und Rechtsphilosophie*, Böckenförde (Hg.), 1999, p. 59–67, here 59f.

consciousness during the 19th century. This identity springs from a local dynastic loyalty to citizenship. It is extensible, if we recognise the necessity of a European civil society, a European political public, and in general a political culture.[46] Nowadays 70% of national laws are made in Brussels without a public political discourse in national arenas. According to Habermas it is a lack of logic if we talk about a European constitution without a support of European solidarity. A citizenship of the Union without demos lacks its foundation. This criticism is directed to the architects of Europe and they will have to find a good answer.

6. Aspect: Is there a European value called: family?

Homo europaeus is no typically family member. It only seems important to harmonize professional life and family.[47] The European study on values says that 91% of all Europeans think highly of family life as a value and as the most important area of life.[48] According to art. II-93 only harmony of professional life and family is guaranteed, but beyond this no further social impact is recognized. These rights are subjective rights, which mean the bearers are individuals. Family under an individualistic perspective is a sum of individuals with individual rights and duties. Family as a pre-social form of community, as a refuge for education, development, nationalisation, value obtaining, freedom and common interests obtaining, is not institutionally protected.[49] Family is legally seen as an individualistic relation of rights and duties.[50] Basically individualism shows negative effects to the understanding for family and marriage, which are no longer binding values. Nowadays classical values like family and marriage loose their significance for the benefit of a pluralistic view: marriages become homosexual ones or partnerships which are legally on the same social level like heterosexual marriages; and families become patchwork families or a crowd of lone parents. On the one side there are strong wishes of orientation, support and the commitment to the most important value of life named family, but on the other side we're able to take a variety of possible ways of life. The Treaty

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[46] See Jürgen Habermas, *Zeit der Übergänge*, 2001, 117f.

[47] "II-67: Respect for private and family life, II-69: right to marry and right to found a family".

[48] See Michaela Watzinger, *Säulen der Ordnung – Werte, Normen und Institutionen*, [in:] *Die europäische Seele*, Denz (Hg.), 2002, p. 65–94, here72.

[49] See Thomas Sören Hoffmann, *Europa vor der Rechtsidee*, [in:] *The post-Nice process: towards a European constitution?* Zervakis (Hg.), 2002, p. 173–193, here 191.

[50] See Böckenförde, *Das Bild vom Menschen*, p. 92.

codifies individualistic basic freedoms at an exposed position.[51] Here we can deduce an image of man from these basic freedoms, who is flexible, prepared to get away on business, mobile, trained and qualified, skilled in language and without a family. The Treaty insinuates a citizen, who needs no governmental support to maintain his position in the economy. In spite of the importance of the value given by Europeans themselves, there is no corresponding realization in the Treaty. The architects of Europe delegate the protection of this most important value to national level.

7. Aspect: Democracy[52] serves the realization of individual self-determination

Not the commitment to the principle of participatory democracy[53] but the principle of representation rules in the community of the Homo europaeus.

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[51] "Article I-4 Fundamental freedoms and non-discrimination

1. The free movement of persons, services, goods and capital, and freedom of establishment shall be guaranteed within and by the Union, in accordance with the Constitution.

2. Within the scope of the Constitution, and without prejudice to any of its specific provisions, any discrimination on grounds of nationality shall be prohibited".

[52] "Preamble of the Treaty: Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law + I-2 the union´s values: The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities + the democratic life of the union I-45 to I-52 + Preamble of the charter of fundamental rights of the union: it [the union] is based on the principles of democracy and the rule of law".

[53] "Article I-47 The principle of participatory democracy

1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.

2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.

3. The Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.

4. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Constitution. European laws shall determine the provisions for the procedures and conditions required for such a citizens' initiative, including the minimum number of Member States from which such citizens must come".

The performative contradiction lies in the principle of self-determination in favour of self-realisation and in the lack of direct democratic elements. In a representative democracy citizens' will is reduced to the vote of a representative, who is free from any binding content. Representatives decide freely and independent. By the way, it is not possible to delegate a will (according to Rousseau). Each democratic system has to take care of inalienability of the will, if it should be legitimated by human rights. Such a system must take measures so that decisions can be made under free, equal and direct participation of the citizens.[54] Only this way corresponds with the image of man of human rights. A representative democracy imposes restrictions on individual wills. The autonomic subject allows representatives fundamental decisions concerning vital interests of his life. He essentially hands over decisions and gives away his influencing control. So he gets into dependence on representatives except for voting somebody out of office after a certain period of time.

Kelsen says representation should create the illusion that parliamentarianism shows the idea of democratic freedom. The parliament seems to be the representative of the people, because people can only express their wills through the parliament. Although the parliamentary principle has in all member states the specific tradition that representatives must not accept binding instructions from their voters. Therefore the parliament is functionally and legally independent from the people. According to Kelsen parliamentary representation is the most important element of restriction for freedom and democracy in the political history of Europe.[55] Until now I would call the creation of rights in the EU oligarchic, because representation means incapacitation for the citizens. They think they can decide for themselves, but that is a myth: The EU doesn't take citizens and their individuality serious as long as citizens cannot participate in fundamental decisions. At present citizens have to accept fundamental decisions made by representatives.[56] In fact lobbies and representatives rule whereas democracy indicates a direct rule by the people. Representatives have a free and independent mandate.[57] Representatives execute their mandate independently and cannot be

[54] See Hans Köchler, *Neue Wege der Demokratie*, p. 11ff. and Hans Köchler, *Philosophie, Recht, Politik: Abhandlungen zur politischen Philosophie und zur Rechtsphilosophie*, 1985, p. 42.

[55] See Köchler, *Philosophie, Recht, Politik*, p. 33, 39f, 43ff, 51f, 58, 73.

[56] L. c.

[57] See www.europarl.eu.int (last accessed 02.06.2009): "Die Abgeordneten nehmen ihr Mandat unabhängig wahr und können weder durch Anweisungen gebunden werden noch ein Pflichtmandat übernehmen".

bound by instructions. In reality there is a mechanism called party-discipline or club obligation. And there is a financial and power-political dependence from lobbies. At the European level we have a non-transparency, so that a citizen cannot say who stands for what and who has what interests. In a representative democracy the will of citizens refers only to the decision who will have a seat in the parliament. The representation of specific contents considering the will of citizens is a myth. Whatever action those representatives are going to take, it is independent of the voters. I want to exaggerate a little bit: they can do whatever they want. I know that voters look for a foundation of trust, but that is non-binding. Participatory elements allowing the people to make fundamental decisions by their own are an alternative to these restrictions of freedom and will. Direct democratic elements are for example binding referenda. But citizens are permitted to vote their representatives personally. Nevertheless the will and the freedom of citizens are restricted as long as there is no obligation for the representatives to execute the will of the people. Citizens subject themselves to rules of elected representatives. These representatives decide about general setups, which constitute areas of life. After that, citizens have the chance and the freedom for self-realisation inside these general setups. But why should citizens want to live dependent on other people who make these decisions for them? Main arguments include a technical impossibility of cross-Europe referenda respectively due to the costs (the monthly travel of the EU from Brussels to Strasbourg there and back costs almost 200 million Euro;[58] and the fact that each European country has already established the vote shows the technical possibility) and that it would expect too much of citizens to decide for themselves. They do not have enough knowledge and/or they do not have time to acquire this knowledge (are most people really too stupid for referenda?). As a result of the commitment to representative democracy, Homo europaeus refuses the possibility of influence regarding general setups (certain value preferences), which are the limits of his self-realization. It is my conviction that fundamental decisions should be made

[58] During the 27th Bundesdelegiertenkonferenz (23.–25. November 2007 CongressCenter Nürnberg) delegates demand, that sessions of the European Parliament should only take place in Brussels. "Neben den Kosten von über 200 Millionen Euro summieren sich nicht zuletzt die unnötigen CO2 Emissionen, die durch den monatlichen Umzug nach Straßburg ausgestoßen werden. Der Betrieb eines Gebäudes, welches 9/10 des Jahres leer steht und der CO2 Ausstoß der über 3.000 Pendler/innen im Monat belaufen sich insgesamt auf ca. 20.000 Tonnen CO2 im Jahr", http://www.nouripour.de/fileadmin/pdfs/bdken/bdk1107_V-24__sitzungen_des_europaeischen_parlaments_i.pdf (last accessed 02.06.2009).

by the citizens themselves (concerning for example genetically modified foods, war efforts like Iraq, cloning, military armament, making families and children worse off then they were before for the benefit of neo-liberalism and privatisation, and so on...). So I plead for real direct democratic processes.

There are people saying democracy leads to the realization of self-determination.[59] Direct democratic elements are a thin façade in the EU.[60] How the Commission reacts is not legally established and lies in the direct democratic ambiguity. Beyond that it is a misunderstanding to assess a non-binding right to an initiative as a direct democratic element. Direct democracy means a binding commitment, but that is denied by Art.47 Abs. 4. Also I-47 Abs. 2: "the institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society"[61] is not corresponding to a direct democratic reading.

Paradigmatically the Treaty puts citizens on an equal level with representative associations.[62]

From a philosophical view we can note a categorical mistake. Direct democratic procedure refers significantly to citizens and not to a dialog with representative associations. Do we prefer a lobby represented society? This would contradict every participative democratic attitude. It is significant that the article "Principle of participatory Democracy" contains representative elements. The constitution should bring the Union closer to its citizens. To this end direct democratic elements should be part of success. Our analysis show performative contradictions with the claims of the Union, but they never made the claims true. The lack of direct democratic and the over-emphasis of representative elements increasingly remove the citizens from the EU. This fact secures the influence of powerful lobbies on the decision-making process in Brussels. The architects of Europe can merely understand democracy as representative democracy. Representation means an ideology of exercising power (and his legitimacy) and not of restricting

[59] See Peters, p. 658.

[60] I-47 Abs. 4: "Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Constitution". See also Lisbon Treaty art. 10.

[61] See Lisbon Treaty art. 11.

[62] I-47 Abs. 1: "The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action". See also Lisbon Treaty art. 11.

power. Democracy in the reading of actual European Treaties serves as the realization of individual self-determination in so far as citizens say: it is enough to elect representatives, we do not want to influence their decisions over us and we believe that there is nothing more relevant to do for our political self-determination than voting representatives. Representative democracy means dependence upon representatives and self-realization inside general set-ups, which are given without any influence of the citizens. Philosophically we have to conclude a restriction of freedom and a partial binding of the free will. The autonomic individual requires direct democratic fundamental decisions. That leads us to the question: is Homo europaeus even in fundamental decisions (value preferences, resolution of political general set-ups, etc.) autonomic?

8. Aspect: Men need solidarity and subsidiarity to be able to perform their human destiny[63]

Two principles are necessary for the self-realization of the Homo europaeus. First: the principle of subsidiarity[64] emphasizes individuals.[65] The community is orientated towards the well-being of each single individual. The Union is aligned with this principle. So we can conclude Homo europaeus is seen as self-responsible and free. According to the Treaty it is up to the EU to decide what kind of cases remain on regional or national level and what kind of cases have to be solved on EU-level. Therefore subsidiarity depends on the good-will of the EU. The principle of subsidiarity originates from the catholic social theory. This social theory moves the human being into centre of all social orders. According to the catholic reading subsidiarity means precedence of the private sphere for the sake of the community. 1931 pope Pius XI stresses this statement and pope John Paul II extends it to wider social areas. Transferred to the Union smaller units in their varieties have fundamental precedence upon central responsibility of

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[63] See Emerich Coreth, *Was ist der Mensch?* 4. Aufl. 1986, p. 36ff.

[64] "I-11: The use of Union competences is governed by the principles of subsidiarity and proportionality. Paragraph 3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level + II-111: + 2. protocol of the application of the principles of subsidiarity and proportionality".

[65] See Preamble of the Charter: "It places the individual at the heart of its activities by establishing the citizenship of the union and by creating an area of freedom, security and justice".

the EU. Giscard d'Estaing said that a stronger subsidiarity puts the EU from head to foot and is an answer to governmental centralism. Beyond doubt it is the Christian heritage in the Treaty that citizens can complain subsidiarity at the European Court of Justice. It is also the practical realization of the Christian image of man in the Treaty.[66] Subsidiarity in the catholic sense moves human beings radical into centre. To begin, humans are responsible for their life-style. If there are spheres with unsolvable problems for individuals then the state should support his citizens. But it is important that people can act independently. The term subsidium means a support to individual self-helps or a support for smaller communities.[67] According to the principle of subsidiarity each community is bound to the well-being of individuals. Help and support are necessary as soon as a subordinated group is unable to solve a specific problem. The limits of support are reached if individual rights and freedoms are restricted or violated.

Second: Medias connect European solidarity with financial support. People are saying that the main motivation for membership in the EU for the states of Eastern Europe is not peace-keeping, but expected economic assistance on regional and national level as a form of European solidarity.[68] But the principle of solidarity[69] is necessary to be able to perform human destiny. Solidarity means that the individual is bound to his community in order to perfect his moral and mental realization. You cannot deduce a duty for solidarity out of codified rights because if that would be possible then it would also be possible that this duty could not exist. A codified right depends on national commitments. So the principle of solidarity has declamatory character, it precedes international law.[70] It is more than a ius cogens, that means more than a standard accepted by the community of states. It is

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[66] See Heinrich Hoffschulte, *Christliches Menschenbild und Gottesbezug in der Verfassung der Europäischen Union*, 2004, p. 37, 41, 75.

[67] See Frank Ronge, *Die Charta der Grundrechte*, [in:] *In welcher Verfassung ist Europa – welche Verfassung für Europa?* Ronge F. (Hg.), 2001, p. 333–343, here 341.

[68] See Hoffschulte p. 67.

[69] "Preamble: ...and to strive for peace, justice and solidarity throughout the world + I-2: These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail + I-3: It shall promote economic, social and territorial cohesion, and solidarity among Member States.+ I-43 Solidarity clause + Preamble of the Charter of fundamental rights: the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity + Solidarity II-87 to II-98".

[70] See Christoph Dorau, *Bedarf und Inhalt einer Verfassung für die EU*, [in:] *In welcher Verfassung ist Europa – Welche Verfassung für Europa?* Ronge F. (Hg.), 2001, p. 155–196, here 182.

taken away from national actions and has to be thought of identically with the existence of the international community of states.[71] Philosophically it is clear that humans are related to community (zoon politicon) for the purpose of mental and moral realization and to perform their human destinies.

Kirchhof assesses that questions around basic rights are too much for the EU. There is a performative contradiction between the guarantee of property as an economic foundation of individual freedom and as expression of management responsibility and investment funds. It is characteristic that investors take no ethical responsibility for their investments. Essential for them is the rate of return (profit).[72] III-177ff "economic and monetary policy" confirms the assessment of Kirchhof. The principles of economic policy obey solely the law of free market economy with free competition. The monetary policy of the European Central Bank emphasizes price stability[73] and a low inflation rate instead of economic growth and employment. A policy emphasizing growth and employment would require legal change by the EU. According to economic theory full employment is a euphemism. An unemployment rate of 4–5% is referred to as full employment. It is cynical to claim social cuts as a way to full employment like neoliberal theories suggest.[74] The unrestrained freedom of capital (III-156ff "capital and payments") leads to growing poverty and the sovereignty of the nation state concerning economic and monetary policy are shrinking. Citizens no longer have influence on transnational corporations. The EU law has precedence opposite to national law.[75] The freedom of capital makes it impossible for nation states to influence the plant location of transnational corporations. Beyond that investors and shareholders no one is ready to declare their solidarity with the community. In the way the corporation sees itself, they are no more part of the community.

To sum up the principle of subsidiarity moves human beings into centre. They are responsible to manage their lifes. Subsidiarity means that the com-

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[71] See Heribert Franz Köck, *Von der Neutralität zur internationalen Solidarität*, [in:] *Paradigmenwechsel im Völkerrecht zur Jahrtausendwende*, Hummer (Hg.), 2002, p. 85–120, here: 87f.

[72] See Paul Kirchhof, *Der Unionsvertrag als Grundlage europaoffenen und weltweiten Wirtschaftens*, [in:] *Zukunftsprobleme der europäischen Wirtschaftsverfassung*, Schäfer W. (Hg.), 2004, p. 9–31, here 30.

[73] III-185 Abs. 1: "the primary objective of the European System of Central Banks shall be to maintain price stability".

[74] See Andreas Wehr, Europa ohne Demokratie? 2004, p. 122–125.

[75] I-6: "The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States".

munity is bound to the well-being of individuals. Therefore it corresponds to a free and independent image of man. Subsidiarity and solidarity are complementary principles and get away from the antagonism of individualism and collectivism. Both principles must be realized in order to perform human destiny. Solidarity means that humans are related to community for the purpose of moral and mental realization and to perform human destiny. It is a reality in the EU that investors and shareholders are not part of the community and have therefore no duty for solidarity. This contradicts the commitment to solidarity as an indivisible and universal value.

9. Aspect: Do citizens have to recognize the fact of pluralism as a premise of peaceful co-existence?

Pluralism[76] is a structural element of the social order of Homo europaeus and he has to recognize pluralism as such a fact. The pluralism has presuppositions, which identify Homo europaeus. As such, he has the ability to make a distinction between good and right (a value based decision), he must make the commitment to recognizing the pluralistic framework, and to realize his life style in this framework (a fact that excludes certain concepts of life). Pluralism commits Homo europaeus to various basic values (human dignity, equality, freedom, solidarity, ...). According to the Treaty it seems not important whether Homo europaeus has or has not a metaphysical/transcendental determination. He is set free without regard to his higher determination. He has freedom of choice between different pluralistic contents without any orientation or instruction. According to the Treaty freedom seems to be subjective freedom for self-determination. The general sphere does not equate to the individual sphere.[77] So to speak the Union guarantees rights and freedoms from the outside. This pluralism has presuppositions with effects on the image of man. The commitment to this pluralism excludes certain life styles and certain images of man; as should the individual's ability to distinguish between good and right. This difference is not neutral, it is a value based decision. Beyond that the individual has to accept the pluralistic framework and he has to realize his life style inside this framework. By recognizing the framework the individual recognizes also the fact of pluralism as an unquestionable premise for peaceful

[76] I-2: "these values are common to the Member states in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail + I-8: the motto of the union shall be: United in diversity +II-82, I-3, I-52".

[77] See Böckenförde, *Das Bild vom Menschen*, p. 93.

co-existence. Beyond doubt this pluralism is ideologically bound, because this pluralism presupposes a certain framework with certain premises. So that value based decisions cannot be ideologically neutral. But this pluralism commits us to a variety of basic values, which we have to join. A pluralistic approach adheres to an immanent founding for the validity of pluralistic values. Pluralism cannot be founded without transcendent elements. The pluralistic legal system has moral presuppositions, which cannot be achieved by the legal system itself. Individuals are committed to values for moral and mental realization, which cannot be founded imminently. So you can recognize human dignity immanently, but you cannot found human dignity in that way. A pluralistic approach says that you are able to recognize laws, but you cannot realize laws in a sort of knowledge. But citizens will recognize laws if they can satisfy their fundamental needs in a legal system. So we can conclude that the foundation of a pluralistic community is satisfying essential needs like peace, safety, freedom and minimal means of subsistence (to be able to use freedom).[78] Considering pluralism it is very hard to find the foundation of law. Values can show abstractly a consensus, but cannot found the consensus.[79] Values of an immanent system are relativistic and without a claim of universal validity. It is my conviction that the value discourse in the EU shows the attempt to compensate the lack of foundation (the secular state claims to find his foundation immanent). And the EU tries to find the foundation of community in common values. (Böckenförde stresses that) Values can show a common consensus, but they cannot found the consensus. The Treaty tries to codify common values. But it is significant that the pluralism offers no valid interpretation of these values. Pluralism means that no single interpretation has precedence. That said, pluralism has a framework binding each member to specific values. On one hand there is no unity of overriding importance, and on the other hand pluralism needs a minimal consensus.[80] The central theses of liberalism are the splitting of law and morals (connected with the splitting of politics and morals) and the theses of precedence of right to good. Therefore principles of justice can be neutral opposed to conflicting moral and religious convictions.[81] It is a liberal knowledge that individual self-determination is the

[78] See Köck, p. 91ff.

[79] See Ernst-Wolfgang Böckenförde, *Die verfassungsgebende Gewalt des Volkes – ein Grenzbegriff des Verfassungsrechts*, [in:] *Zum Begriff der Verfassung: die Ordnung des Politischen*, Preuß (Hg.), 1994, p. 58–80, here 76.

[80] See Joachim Rabanus, *Europa in der Sicht Johannes Paul II: eine Herausforderung für die Kirche und die europäische Gesellschaft*, 2004, p. 219ff.

[81] See Peters p. 655.

foundation of democracy. A presupposition of democracy is pluralism and tolerance. So we have to respect the framework and commit to realizing our life style inside the framework. But is pluralism a descriptive (you live in an actual pluralism) or a normative term (tolerance upon people with different attitudes)? Constitutional thinking shows the tendency to found the state out of the law. This thinking underestimates that the state is a bearer of creating law and that the state guarantees normality. It is impossible that a state is only constituted out of granting constitutional freedom. He needs a unifying connection, a homogeneous-making power, which is previous to that freedom and which makes the state a politically united entity.[82] This unifying connection (guarantee and support of peace) gets lost in the actual EU. Nowadays there is no question that we live in peace (and at present peace is often identical to security/safety). Present constitutional debates lack adequate philosophical discourse about the consensus of basic values which can constitute a pluralistic worth of living.

10. Aspect: Can we deduce positive/constructive consequences from the theses?

We saw that human dignity seems to be more commonplace than a value. Human dignity has no foundation in the Treaty and beyond that the Treaty does not even describe the dignity exactly. Therefore we require a constructive and clearer commitment to the fundamental value basis.

It is not adequate to the Homo europaeus if the EU merely recognizes rights and freedoms. But the Treaty does not mention their real source and beyond that the Treaty suggests that the source would lie immanently in the union itself. I think it is one of the most important challenges of the future to put liberal rights in the same category as social rights (to abrogate the structural division) so that every citizen has a socio-economic foundation. And this is a presupposition for using his liberal rights. Indivisible and universal basic rights are necessary for actual self-realization. For the realization of complete basic rights protection the Union has to make progress concerning the development of EU-law through the European Court of Justice (above all in basic rights sensible areas like Schengen and Europol, where we can assume that violations of basic rights will take place). The EU has to limit the influence of lobbies in benefit of a real separation of powers without the undermining effect of party-oligarchy. From my point of view we

[82] See Ernst-Wolfgang Böckenförde, *Entstehung und Wandel des Rechtsstaatsbegriffes*, [in:] *Recht, Staat, Freiheit: Studien zur Rechtsphilosophie, Staatstheorie und Verfassungsgeschichte*, Böckenförde (Hg.), 1991, p. 143–170, here 169.

must require an extension of the sphere of responsibility of the European Court of Justice (considering all violations of basic rights) and a better development of separation of powers: e.g. an independent justice and a non-party dominated appointment of the executives in the EU. The lack of a codified right to resist is a significant sign for responsible citizens. Citizenship of the Union also requires a more comprehensive strategy (with previous support of European identity and solidarity). Altogether we have to require direct democratic elements (like referenda for fundamental decisions) and acts of solidarity (common solidarity between shareholders and employees or citizens). Finally the constitutional debate should become more and more a discourse about the unifying process to make and keep peace and to support social peace in the wider sense. Such a Treaty must be the framework for a peaceful coexistence of the European citizens (Homines europaei).[83]

We assessed in a first approach that the image of man of the European citizen (Homo europaeus) constituted by the officials (bearer of power) has some critical points to solve, some inconsistences. In a next step we have to go deeper in possible solutions concerning harmonizing the two images of man (one of the citizens and the other of the officials) to bridge the gap ("distant Brussel", intransparency, democratic deficit, disenchantment with politics of the EU-citizens). The solution I suggest is a kind of citizen commitment (Bürgerbekenntnis), which names the values, that constitutes a minimal consensus for a peaceful coexistence and for the salvation of the European way of life (manifest in the peace project and in the value-based EU that will make the world better than today).

[83] See for the whole inquiry Thalmair Rene, *Das Menschenbild des Homo europeaus. Menschenbildaspekte im Vertrag über eine Verfassung für Europa*, 2007.

*Li Yan Ping**

The Basic Laws of Hong Kong and Macao and the Development of Chinese Constitutionalism

Inroduction

After the return to the homeland, the Basic Laws of Hong Kong and Macao (hereinafter the Basic Law) has been enforced in Hong Kong and Macao S.A.R. The practice of the Basic Law shows that it effectively maintains the relatively independent development of Hong Kong and Macao and supports the stabilization and prosperity of the two places. But the development of Hong Kong and Macao is closely connected with Chinese Mainland's improvement. How to expand the Basic Law and to improve and optimize Chinese constitutionalism is an issue of great significance. This paper discusses the functions and issues in the basic law in relation to Chinese constitutionalism, based on the forms and practices of the basic law. As a constitutional document, the basic law shows some constitutional spirit, protecting the market economics of Hong Kong and Macao, and in some extent draws a tentative area of Chinese democratic constitutionalism. However, local constitutionalism is to a large extent tied to the mainland development. Chinese constitutionalism should be bound to view the experience of Hong Kong and Macao S.A. R. there are no precedent to be followed and only trust and learning each other should put a way for Chinese constitutionalism.

Some concepts: liberty, democracy and constitutionalism

It is necessary to define some concepts. Here the goal is not to study all usages of these words but to simply introduce their general use and rela-

* Assistant professor, Law School of Macao University of Science and Technology; ypli@must.edu.mo.

tionship for a latter research. It is known that all of the concepts come in large part from the western cultures. Market economics and the rule of law among different countries have common characteristics. These theories affect Chinese society and the practice and forms of the basic law based on "one country, two systems".

What is liberty? Generally, it is an ability to control oneself.[1] Mr. Acton, J. said liberty is a self-confidence that every person should be protected when he does his business and be free of the pressure of authority, majority, customs and public opinion.[2] Hayek said liberty is independence and the assuring of being forced to do something.[3] But liberty also depends on rules. According to the protective degree, there are two kinds of liberty: actual liberty and institutional liberty. The former is a liberty in any society possessed by any person but subject to be infringed by the political power at any time. This liberty exists because the political repression is not exercised not because it cannot infringe the liberty. So the actual liberty offers few protections. But institutional liberty provides rights protected by law and restricts political power. Liberties are divided into economic liberty and political liberty. Economic liberty is the foundation of the market economic and embodies the property rights, contract liberty, social welfare and right to education etc. Political liberty includes religion liberty, liberty of speech, incorporate liberty and so on. In many countries, the most important right is considered political liberty, especial liberty of speech.[4]

Democracy means that all powers belong to all people which implies their power is unlimited. China has not rejected democracy. The Chinese constitution is designed to set up a "wealthy, democracy and civilization" country. But democracy is not naturally harmonized with liberty. Extreme democracy brings majoritarian autarchy. Considering the experiences and lessons of democracy, the democracy must imply liberty. Liberty democracy means the person's rights and liberties are the critical things under the rule of elected government. The people have suffrage like the ancient people and have the right to be free of oppression like the modern people.[5] The

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[1] Zhang qianfan, *Introduction of Constitution*, Published by Law Press, 2004, p. 462.

[2] Acton J., *Essays in the History of Liberty*, Published by Liberty Classics, Indianapolis, 1985.

[3] Friedrich A.Von Hayek, *The Constitution of Liberty*, Published the University of Chicago, 1960.

[4] Gong xiangrui, *The Compared Constitution and Administrative Law*, Published by Law Press, 2003, p. 89.

[5] Liu junning, *Why democracy must be liberty?* http://www.gongfa.com/ziyoudminzh.htm (2007-6-7).

constitution protects the person's rights and controls government power. There are two kinds of non-liberty "democracy". One is totalitarian "democracy" in which there is no opposition and people's purpose is more important than their liberties. The other is collective "democracy" that all of the people's rights are strictly restricted by the government though there has been public election. Liberty democracy just companies with the market economic system. Although the market economy country may not have liberty democracy, it will be no political liberty if there is no economic liberty.

Constitutionalism is limited government and has a set of effective techniques to control government action and political action. Its aim is to prevent the government infringing personal liberty. There are two relationships in constitutionalism. One is the relation between government and citizen, that is the relation between power and right. The other is the power distribution among different parts of government. Constitutionalism subtly balances the powers and rights and has different forms for the different countries.[6] The basic system arrangement of modern constitutionalism includes act of rights, check and balance, rule of law, freedom of news etc.

In sum, if liberty is a cherished value, democracy and constitutionalism protect it from different aspects. Democracy politics should protect the liberty, but the tension between democracy and liberty can't eliminate for democracy included the liberty. If one cannot control the elected government, autarchy may emerge again and personal liberty will be infringed. So democracy can't protect liberty by itself; liberty should be protected by constitutionalism in modern society. Under a constitutional system even the elected government can't make anti-liberty laws which restrict the democracy. As to protecting personal liberty, constitutionalism may be more important than democracy. Constitution democracy orients the democracy to protect liberty. All of these theories have importance to the relationship between the basic law and Chinese constitutionalism.

Relationship of the basic law to Chinese constitutionalism

After clarifying the concepts and their relationships, now we should talk about the basic law and the development of Chinese constitutionalism. The market becomes the main distribution form of social resources with the reforming and opening. The economy impels the change of social structure and constitutionalism entering into the view. How to construct Chinese constitutionalism under the existing condition is a vital topic of Chinese academe. Although it is still a working progress, Chinese people have cre-

[6] Liu zhiqiang, *On the Liberal Constitutionalism*, Xueshhujie, 2007, p. 6.

atively set up the idea of "one country, two systems" for handling the Hong Kong and Macao problem. The basic law offers more room for exploring Chinese constitutionalism. The relationships of the basic law to Chinese constitutionalism at least have three aspects.

Firstly, the aim of the basic law is to protect the developed liberty of Hong Kong and Macao. All of the systems in the basic law must serve as to support the pre-existing societies and their liberties. The idea of "unchanged systems" in the concept of "one country, two systems", does not mean the systems never change. The goal is to protect the personal liberties through system continuity.[7] Moreover, the law-making process of the basic law full of democracy and every interest representative positively participate in the lawmaking.[8] The most important is that the basic law compromises Chinese political powers by contract and system and shows the characteristic being practical and realistic of Chinese constitution. The systematic compromises rely on the argumentation and reasoning not just compared the power or bargaining, operating according to some rules and proceeding. This is an important improvement of Chinese constitutionalism.

Secondly, there are many articles of the basic law relating to liberty and democracy. The central-local relations are specially stipulated in the basic law and one different from the Chinese mainland's central-local relation. According to the basic law the central government power is highest but limited and the local autonomy is very abroad but subject to the central restriction. It is a meaningful development for the Chinese central-local relation that the basic law as a constitutional document that definitely regulates the central power scope. There are many kinds of local autonomy such as the local democracy autonomy, the ethical region autonomy and the special administrative region autonomy in China. The national single structure has added diversification. As to the local government structure, the basic law shapes the administration role, balancing with the legislative, different from the three powers separation and the Chinese mainland's people representative conference system. Although the legislative powers are restrained, the administrative system works effectively and helps to poster social and economic development of Hong Kong and Macao. Moreover, the local judiciaries are preserved, to going beyond the judicial powers of colonial age.[9] For example, the final courts of Hong Kong and Macao could

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[7] Xiao weiyun, *On the Basic Law of Hong Kong*, Published by Beijing University Press, 2003, p. 4–5.

[8] Supra, p. 173–179.

[9] Before returning, the courts of Hong Kong and Macao have no final jurisdiction. See Xiao weiyun, *On the basic law of Hong Kong, On the basic law of Macao*, Published by Beijing University Press, 2003.

explain the basic law which is a very important protection for the personal liberties of these areas.

Thirdly, the practices of the basic law maintain the spirit of the rule of law and preserve the economic liberties of Hong Kong and Macao. The societies are steady and the people's lives have been improved. The central and local governments strictly enforce the basic law and trust each other through communicating to discuss the problems that emerge. The national idea of separate government of Hong Kong and Macao appears stronger than ever before and the perceived value of democracy is improved. The basic law frames a suitable system for the development of the Hong Kong and Macao.

Challenge of the basic law to the Chinese constitutionalism

However, the basic law offering constitutional resource for the Hong Kong and Macao does not mean that constitutionalism and democracy can be naturally achieved. Like any constitutional document, the basic law cannot and does not resolve all of questions. The constitutionalism of Hong Kong and Macao still depends on practice. Meanwhile, local constitutionalism can't disengage the whole country's development. There are contradictions and conflicts from different situations between the two systems. But we think these conflicts never differ from opinions in the collaboration rather than opposition. There are some problems as follows.

Firstly, the constitutional principle of the basic law is not sufficient for the constitutionalism of Hong Kong and Macao. For example, the legislative arm is weaker than the executive and can't restrain illegal action of government. The dominant role of the executive may make the government insensitive to the social voice. There is no systematic structure to balance the executive and legislative in the political level. How to develop democracy is not only the main task of Chinese constitutionalism but also of Hong Kong and Macao. It is still a challenge for China to find a concrete democracy system. Moreover, the judiciary is independent from the legislative and administrative but not a restriction on the two departments. As a local jurisdiction, the judicial review of the courts of Hong Kong and Macao is limited by the country system of judicial review.

Secondly, there is no dispute-settlement system between the central and local governments. According to the basic law, the central government has a few powers and most of the management power belongs to the local government. But the basic law has not a clear dispute settlement system. It is usually left to the judiciary to do independent judgment based on other countries' experience. Because there are three final judiciaries under one sovereignty, the system actually has no supreme court and no judicial way

to resolve the dispute. In the Chinese mainland there is also no special dispute settlement system between central and local government. This problem should be settled when constitutionalism comes true in China.[10] The constitutionalism of Hong Kong and Macao contributes experiences to Chinese constitutionalism and helps the central-local relationship.

Lastly, although the basic law has detailed articles to protect personal liberties and rights, there is no specific article to forbid the legislative from infringing the personal liberties. All of the liberties are protected by the judiciary. The ability of the local judiciary is limited by the central government. Some cases have show the localization of courts in the Hong Kong S.A.R.[11] Moreover, because there is more than one legal system especially protecting the human rights under one sovereignty, how to carry out the equal principle is a critical question for the Chinese constitution and to advance human rights protection systems.

Conclusion

Based on the foregoing analysis, we suggest the basic law should become an important system arrangement to achieve Chinese and Hong Kong and Macao constitutionalism together. The thought of "one country, two systems" aims at keeping economic and person liberties of Hong Kong and Macao. But there is not a whole democracy constitutionalism in Hong Kong and Macao. The existing legal systems offer fundamental systems which can't restrict absolute power. The basic law frames the constitutionalism for Hong Kong and Macao and accords with the requirements of development. The political democracy of Hong Kong and Macao is part of Chinese political development. "One country, two systems," as the result of the systematic compromise, actually should go on to help Chinese political reformation. The experience of Hong Kong and Macao constitutionalism would contribute to transform the Chinese traditional political model. How to use the basic law tests the wisdom of Chinese people and offers many opportunities. Meanwhile, Chinese political development should effect the democracy development of Hong Kong and Macao. But the economic reformation is helpful for the constitutionalism development. In some sense, the special administrative region is simply the logic of extending of Chinese reformation. When meeting with the drafting committee of the basic law of Hong Kong, Mr. Deng Xiaoping had said "The policy of Hong Kong, in-

[10] Liu Haibo, *Some Questions of "One Country, Two Systems"*, http://www.gongfa.com/liuhbyiguoliangzhi.htm (2007-6-7).

[11] Zhang qianfan, *On the Constitution*, Published by Law Press, 2004, p. 715–719.

cluding the basic law should not be changed for fifty years since 1997 returning homeland. And I still said they are not necessary to change over the fifty years." We should not be limited to the words of "fifty years", in which more belief and courage is expressed for the system improvement of Chinese and Hong Kong and Macao.

Leading by market economics, all of Chinese people accept more and more the liberties value. How to protect these liberties by systematic arrangement relies on setting up the democracy and constitutionalism system. So we can say it will reach the same goals by different routes for the constitutionalism of Chinese mainland and the special administrative region and there is more scope to learn from each other. The basic law not only is the foundational rules for constitutionalism of Hong Kong and Macao, but also the natural extension of Chinese constitutionalism. It is beneficial to the Chinese system of development as a whole.