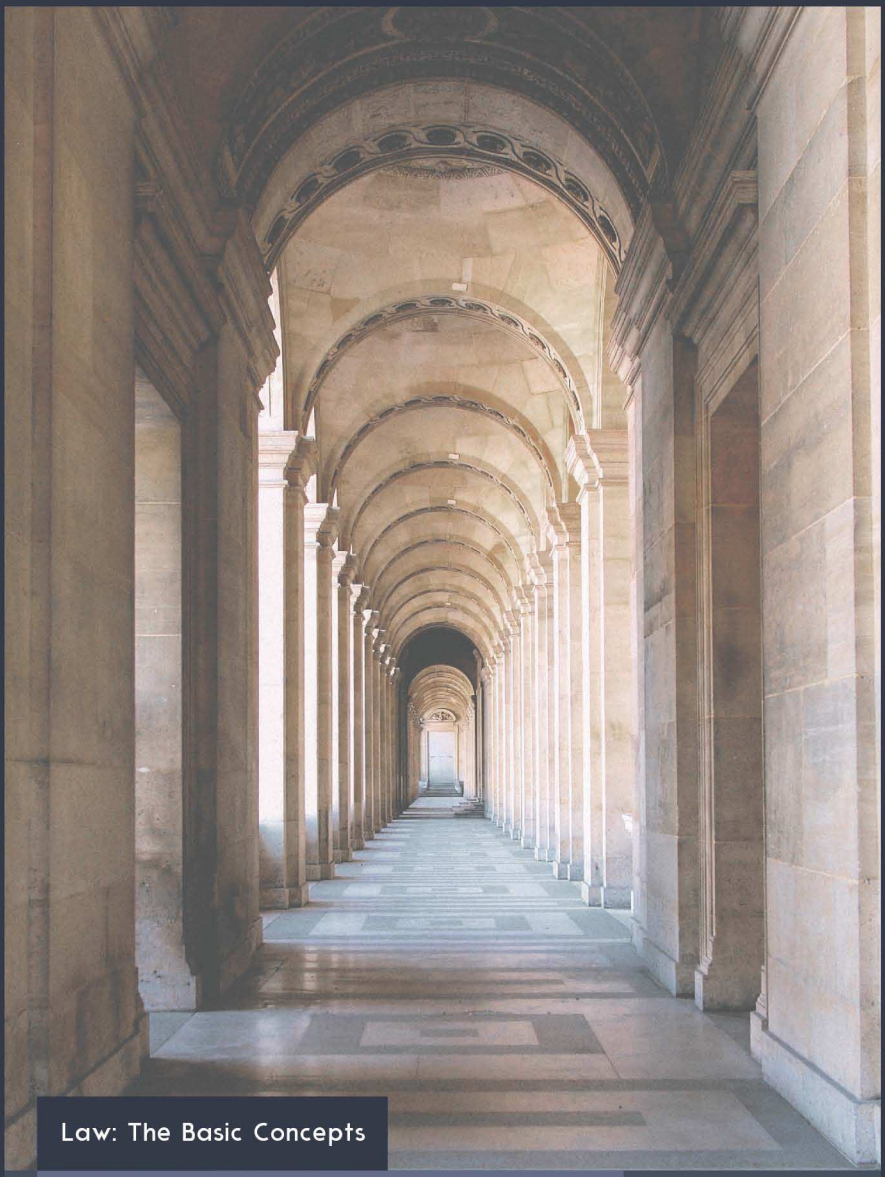

Law: The Basic Concepts

# Philosophy of Law

edited by:
JERZY ZAJADŁO
KAMIL ZEIDLER

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Series Editors

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DAVID MALCOLM

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# From the Editors

University studies mean the critical reading of texts, and also reflection. The latter should be stimulated by lectures and tutorials, and by discussion. In an attempt to meet the needs of students, we offer here a handbook (in English) for the study of the philosophy of law.

An innovative idea underlies this handbook – teaching an aspect of law through questions and answers. It is based on a philosophical approach to the study of law. Teaching the philosophy of law is, indeed, substantially different from that of more standard legal subjects. In the philosophy of law, setting many short questions along with equally brief answers does not seem really possible. Philosophy of law is of a descriptive, normative, and also a discursive nature. This discursive quality affects how the subject can be learned and, thus, taught, and also, in its final phase – if, indeed, with regard to philosophy, it is even possible to talk of a final phase – how students' knowledge can be tested during examinations.

In preparing this handbook, the authors have drawn on English-language models – in the first instance, on the *Routledge Questions & Answers Series: Jurisprudence 2013–2014* by David Brooke (New York 2013). There is no doubt that this book has been a source of inspiration for us, for all that we have deviated from the model it establishes. That book is the work of one author, while our handbook has been written by a eleven-person team of authors. It does not need to be stressed that a text by one individual differs from that written by a group of authors. The former will be distinguished by a greater degree of homogeneity, including that of form, construction, and style, while a collectively written work makes it possible to have a varied, diverse, and multi-perspective view of and approach to the topics that it covers. Thus, it is both a clear advantage, and yet also something of a defect in a book that aims, nonetheless, to be a handbook for teaching its subject.

We have proceeded from a position that the subject of philosophy of law may be dealt with in five sections. These are: (I) methodology; (II) people; (III) approaches; (IV) concepts; and (V) hard cases. The contents of our book reflects this division into parts.

At the outset, however, we must mention some reservations.

First, this handbook considers problems of contemporary philosophy of law, but it is by no means a handbook of the history of philosophy of law.

Second, this handbook has a module-based organization. In the future, it will be possible to change these modules as required. Thus, it is an open-ended offering, which will certainly – and this was part of the project from the start – be subject to further changes, supplements, and modifications in subsequent editions. We are aware that several important questions have not been dealt with in it, and perhaps some have been dealt with too fully. In subsequent editions, we will certainly modify the book – like a house made of building blocks – taking into consideration the latest views and approaches, the responses of our readers, and above all the comments of our students.

Third, the editors have given the authors of particular chapters and subchapters a substantial degree of freedom in relation to the final versions of their texts. Thus, they frequently have a considerably individual character, and each of the authors bears responsibility for the contents of his/her part of the handbook. This individual quality is, however, essential; how could we speak of the philosophy of law in one way, and expect a different approach from our students?

This book was first published in a Polish-language edition by the publishers LexisNexis (*Filozofia prawa w pytaniach i odpowiedziach*, ed. J. Zajadło, K. Zeidler, LexisNexis, Warsaw 2013). However, it differs considerably from that first Polish version. It is, thus, both a continuation of that earlier project, and also a book which has evolved and which will continue to do so in the future.

*Gdańsk, summer 2015*

*Professor Jerzy Zajadło*
*Professor Kamil Zeidler*

# Instead of an Introduction: What Use Is the Philosophy of Law to Lawyers?

Before we proceed to discuss the methodological status of the philosophy of law as an academic subject (part I), outstanding philosophers of law and their work (part II) approaches to the philosophy of law (part III), concepts that are part of philosophical reflections on the law (part IV), and practical philosophical-legal problems (part V), and before we ask concrete questions arising out of those issues, we will attempt to answer the most general of questions: Is philosophy of law at all necessary for lawyers, and if so, why? In this sense, this chapter is in the nature of an introduction to all that follows in this book. However, it is necessary to read it because it will determine the manner in which answers are formulated to concrete questions that arise within the framework of particular problems, along the lines of our title ("philosophy of law in questions and answers").

At the end of May 2008, the Polish media were swept by a wave of quite justified outrage occasioned by the decision of a Moscow court relating to the rehabilitation of the victims of the Katyń massacre and their families. To put it succinctly, the judge Igor Tuleniev questioned the *locus standi* (legal standing) of the families of the victims of the massacre, since, in his view, according to art. 8, para. 1 of the law of the Russian Federation concerning the rehabilitation of the victims of political repression, the right of appeal belongs solely to a citizen whose rights have been directly infringed, *ergo* in this case only to the victims of the crime. If we assume that this provision, indeed, applies and that it was, in fact, properly interpreted, it is difficult not to remark on the absurdity both of the law itself, and the verdict issued on the basis of it. One must conclude that, in the first place, the Russian

legislature is mocking the victims of Katyń, and, in the second place, the Moscow court is following suit.

Ignoring the further fate of this case in the course of proceedings, one can say that the source of our outrage is not only the law and its application, but also, perhaps most importantly, the court's ignoring the historical, moral, political, social etc. context that determines the specific nature of the issue, a context that the court either did not wish to consider for extra-legal reasons, or that it could not take into consideration for legal reasons. If, however, one ignores substantive and justified, although fundamentally emotional, factors, the following question arises: How in a similar – I emphasize, similar in a legal sense – case would the average Polish judge behave? In other words, what would that judge do in a situation in which the regulation relating to *locus standi* numerically limited the circle of authorized agents? Would he/she pay heed to the effects of his/her decision from the point of view of elementary justice or appropriateness? Or would he/she, on the contrary, be guided solely by a literal interpretation of the provision of procedural law? For the purposes of this essay, I assume that the solution of this dilemma requires moving into the field of philosophy. The matter of the decision of the Moscow court is here only an exemplification and point of entry into consideration of the effects that a general deficit of philosophical-legal reflection may have in the process of creating, applying, interpreting, imposing, and observing the law.

To the question asked in the title to this quasi-introduction, most lawyers would probably say: I don't know. After deeper reflection, always assuming that they would be wholly forthright, they would give a more concrete answer: In my everyday work, philosophy of law is of no use to me at all. Indeed, this characteristic reaction applies not only to lawyers and the philosophy of law, but also to the majority of average persons and philosophy in general. For most people, philosophy is associated with something so far off, vague, metaphysical, incomprehensible, and speculative that it has become a synonym for the counter-factual and impractical. In the case of people with higher education, this is augmented by a distant memory – for some more, for some less pleasant – of a required subject at university, which it was nec-

essary to pass principally by cramming (and which was almost immediately forgotten).

In the program of legal studies, irrespective of the history of philosophy that is generally taught in the course of the first year, the theory and philosophy of law further appears as a required or elective course, usually in one of the concluding semesters of a degree course. It is assumed to be a kind of buckle linking into a certain whole an education that begins with the basics of law as part of an introduction to legal studies, and which is filled with concrete legal dogmas. In this sense, it is like the dot over the "i" and a presentation of law not through the prism of administrative, civil, financial, constitutional, criminal, or international law, but through the prism of the conception of law as comprehensive system, and that from a "bird's eye view." The philosophy of law is, thus, a general academic discipline, with a complex descriptive and normative structure, which makes it possible to look at things, above all, from the position of an "external observer," but also one that is also useful from the point of view of the "internal participant" in the phenomenon that is the law.

Unfortunately, in practice, this is only a hypothetical assumption, one that does not at all overlap with the student's imagining of the philosophy of law and its later recollection when he/she begins to work as a lawyer. Even if this synthetic description is accurate and properly reflects the substance of philosophy of law as a specific method (philosophy) applied to a specific phenomenon (law), this does not at all answer the question posed in the title above: "What use is the philosophy of law to lawyers?" Is it only an essential (inessential?) element of legal erudition, one that is sanctified by tradition and rooted in a classical model of education, or does it also possess a certain practical dimension necessary (unnecessary?) in the work of a future judge, public prosecutor, notary, legal advisor, or lawyer? Answering this question with a vision of the enlightened human being, whom philosophy permits to understand the world better, is genuine and true, but also at heart trivial and banal.

However, one must recognize that answers to the question "What use is the philosophy of law for lawyers?" are not made any easier by scholars who pursue this discipline. Even more, the philoso-

phy of law practiced by philosophers substantially differs from that practiced by lawyers. One can see this in controversies relating to the methodological status of this discipline. For some it is a part of general philosophy; for others it is part of legal studies; and for still others it is simultaneously one (as regards methods) and the other (as regards subject).

Recently in Poland and the world, it is possible to observe a renaissance of philosophical-legal concerns in the form of general reflection on the law. More and more frequently, questions arise as to the methodological status of the philosophy of law as a scholarly field and as to its relationship to the theory of law. Other topics arise in this context – the problem of the relation between the philosophy of law and particular systems of legal principle (or, in broader terms, the relation between the philosophy of law and particular disciplines that play a role in the study of law in general).

There is no doubt that philosophy in various ways penetrates and shapes the mental make-up of lawyers. Jan Woleński formulates this in reference to theoreticians in the following way:

> There exist at least four ways in which philosophical ideas enter into the theory of law. First, every theoretician of the law operates with a defined general conceptual system, part of which derives from philosophical texts. […] Second, theoreticians of the law, because they wish to improve their philosophical competence, deliberately reach for books of philosophy or, further, attend lectures and seminars conducted by philosophers. […] Third, the theoretician of the law when considering this or that issue within his/her discipline, comes across what are evidently philosophical problems, or those that are indirectly connected with philosophy. […] And fourth, the theoretician of law may adopt the general perspective of a particular school of philosophy, and model his/her theory of law according to that specific perspective. [Woleński, 1985–1986, p. 287]

For the purposes of this essay, let us assume that the above does not only apply to theoreticians of the law, but also to representatives of legal systems of thought and of historical-legal scholarship, and to practicing lawyers. This is linked to the more general question posed once by Aleksander Peczenik: Can philosophy

help legal scholarship? We could put the question differently: What can the great philosophers offer the practicing lawyer?

One can do philosophy of law in varying ways. As Marek Zirk-Sadowski, for example, proposes, one can work "from philosophy to the law," or "from law to philosophy." For lawyers, not just theoreticians, but also practicing lawyers, it is the second of these models that seems particularly interesting. Reading contemporary writing on this subject allows us to identify four possible conceptual frames.

A topic may be dealt with as it were "from within" a concrete system of legal thought, that is, above all, by highlighting its particular features that result from the specific elements of a given branch of the law (model 1). Thus, one can show what such specific features consist of in relation to the sources of law, the process of its drafting and application, methods of commentary and interpretation, problems of compliance and sanction, social functions, etc. One does this, as appropriate, in relation to administrative law, civil law, finance law, criminal law, constitutional law, etc. In this sense, every one of the systems of legal thought has something like "its own philosophy of law."

The second possibility is based on a perspective "from without" (model 2). In this case, it is a matter of presenting whether and in what manner the adoption of a defined legal dogmatics influences how one sees the system of law as a whole – in other words, whether the substance of the law is seen differently by a criminal lawyer, an administrative one, a civil one, an international one, a constitutional one, etc.

Let us here turn our attention to a certain characteristic and personal relation between the philosophy of law and a particular legal dogmatics one that is apparent in worldwide legal studies. This can be seen particularly clearly in the case of Germany. German philosophy of law that is the domain of lawyers (in distinction to the philosophy of law that is the domain of philosophers) possessed and still possesses a certain specific feature: it was always connected, and still today is connected with a particular legal dogmatics. At German universities, this is a result, above all, of teaching conditions: it is not possible to study/practice philosophy of law itself (something that is incomprehensible in Polish

universities, where the theory of the state and of law still possesses an independent dimension, and where the philosophy of law has only been taught again after a lapse of several years). At German universities, philosophy of law must be linked with one particular body of law, because these are the demands of courses of study and university instruction. In the past, the philosophy of law was most frequently linked to either criminal law or with general study of the state. This was a result of the substance of these fields, because, on one hand, problems of the culprit, the deed, guilt, punishment, etc., and, on the other, those of authority, democracy, sovereignty, etc., were and are philosophical issues *par excellence*.

Thus, there is nothing strange in the fact that in a German environment the philosophy of law was the concern both of criminal-law experts of the stature of C.A. Emge, K. Engisch, and H. Welzel, and of constitutional-law thinkers of the rank of E. Kaufmann, H. Kelsen, H. Heller, and – *last but not least* – C. Schmitt. The matter is still current today. In contemporary German (or more accurately, German-language) legal doctrine, philosophy of law is practiced principally by experts in criminal law (for example, W. Hassemer, G. Jakobs, K. Kühl, W. Naucke, U. Neumann, and K. Seelmann), or those in constitutional law (for example, R. Alexy, H. Dreier, R. Dreier, M. Kriele, G. Roellecke, Ch. Starck). It is true that the principles of criminal and constitutional law still dominate, but, at the same time, the philosophy of law has "spilled over" into other fields, such as labor law (for example, K. Adomeit), and civil and commercial law (for example, in the past, K. Larenz, and, at present, N. Horn, W. Ott). Celebrated German-language experts in international law (such as, to furnish only two examples, A. Verdoss and H. Kelsen, in the later phase of his work) also deal with philosophy of law, but these are exceptions rather than the rule.

That the philosophy of law has been and is still the concern of representatives of specific bodies of law, does not, of course, mean that they attempted to construct a philosophy that only applied to a given branch of the law. Quite the contrary, we encounter most frequently general reflection on law, which does not derive in any particular way from the specific area of the law practiced by the author. The connection of a body of law with the philosophy of law does not, in fact, necessarily lead to the

creation of a philosophy of law that is characteristic for a given branch of the law, or even less to any attempt to construct his own philosophy of law on the part of any given author. At times, it is limited either to employing reflection *more philosophico* in research into a given problem that has arisen in the analysis of legal principle (model 3), or to resorting to philosophy in general and philosophy of law in particular within the framework of the methodology set out by a particular field of legal studies (model 4). In this sense, every lawyer, to put it colloquially, has in his/her rucksack the baton of a philosopher and, indeed, of a philosopher of law.

The connections between philosophy of law and legal principles are not, however, limited at present to the above-mentioned "personal links." Lately, this phenomenon has been transferred onto a level that one could call institutional. An example of this is the emergence of specialist scholarly journals that link a concrete body of law with philosophical issues – for example, within international law, the new internet *Journal of the Philosophy of International Law*, and in criminal law, *Criminal Law and Philosophy*, published from 2007 by the prestigious publisher Springer. In the first number of the latter journal, the editors emphasize that one of the reasons for creating the new periodical linking a particular branch of law with philosophy is that there is an increasing number of lawyers who focus on philosophy, and of philosophers who focus on the law. It is true that in this respect criminal law demonstrates a far-reaching distinctiveness, but one could, in my view, also make this observation, to some degree, to other bodies of law too – to administrative law, civil law, and constitutional law, etc.

It is our view, however, that the controversy concerning the methodological status of philosophy of law has not been settled. For the purposes of this essay, we are also interested in what the philosophy of law is in its essence, what its relationship is to other fields of study *in genere* and to other fields of legal studies *in specie*, and indeed what its functions are. Answers to these questions can be found in the majority of academic textbooks, but they really only animate a small body of specialists. The basic aim is to attempt to demonstrate via concrete examples that the philosophy of law is not just some pretty embellishment to le-

gal erudition, but a necessary, and even a vital, element of a lawyer's practical toolkit. Even more than that, I am convinced that lawyers very frequently refer to reasoning *more philosophico*, although they do not always realize that they are doing so. The principle is the same as that demonstrated by M. Jordan in Moliere's *Le bourgeois gentilhomme*, who did not realize that he had been speaking prose for forty years. To paraphrase Karl Marx, one can say that for lawyers the practical dimension and practical applications of the philosophy of law is, indeed, a necessity, but for the majority of them it is a necessity of which they are unconscious. Thus, I am not concerned here to convince theoreticians and philosophers of law, since they are already convinced. I am rather concerned with lawyers in general, representatives both of legal studies and the world of legal practice. As a result, I am aware that the methodological assumptions set out below have limited value from a point of view, and that they are adapted in advance to the thesis that philosophy of law is, nevertheless, necessary, to a lawyer. However, I share the following view expressed by Richard Dworkin:

> Any practical legal argument, no matter how detailed and limited, assumes the kind of abstract foundation of jurisprudence offers, and when rival foundations compete, a legal argument assumes one and rejects others. So any judge's opinion is itself a piece of legal philosophy, even when the philosophy is hidden and the visible argument is dominated by citation and lists of facts. Jurisprudence is the general part of adjudication, silent prologue to any decision at law. [Dworkin, 1986, p. 90]

The practical role of philosophy is apparent, above all, when we have to deal with what can be called hard cases. This concept, however, needs to be understood considerably more broadly than is the case in contemporary legal studies. In this formulation of hard cases, their solution without a conscious or unconscious application of philosophical-legal tools is, in practice, impossible.

Lawyers, like indeed the majority of people, are inclined to what one can call a fascination with *prima facie* conclusions. This is understandable: where an issue is straightforward, and we are dealing with a so-called easy case, there is no need to complicate

matters, since the solution to the matter is at hand. However, the problem is that often difficult to set the border between hard case and easy case. What at first glance appears simple and uncomplicated, turns out on closer inspection to be considerably more complex. Therefore, the role of the philosophy of law is, above all, to exclude or confirm the existence of what one can call "another side" to a problem – to reject *prima facie* conclusions and to penetrate the matter *more philosophico*.

Let us adopt the understanding of philosophy of law proposed recently in German legal studies by Dietmar von der Pfordten. In this author's view, the point of departure should be the division, established by Kant, of human reason into theoretical and practical reason. If we transfer this classification to legal studies, this means that philosophy of law as general, external, and descriptive-normative reflection on law contains, on one hand, a theory of law (theoretical reason that analyzes, generalizes, and systematizes), and, on the other hand, an ethics of law (practical critical reason). To simplify somewhat, it is possible to say in connection with this that the theory of law, so-conceived, generalizes and systematizes the law as it is. In turn, the ethics of the law criticizes it, referring to the law as it should be from the point of view of a certain ideal of the law.

So what, indeed, is the law in its essence? Is it only a tool that in the trained hands of a "social engineer" solves every hard case, even the most complicated ones? Or is it part of an open, and thus imperfect, humanities condemned to reality *per fas et nefas*? What, indeed, is the final end of law – efficient management of a system, or human good?

Thus, how is it with those so-called hard cases: do hard cases make bad law; or, on the contrary, do they, in the fire of practical discourse, forge a good, wise, and responsible lawyer? And what meaning in a lawyer's practical life should practical reason have, *ergo* philosophy of the law? Where does its role as a bearer of an axiology that is vital to every legal system end? And where does it begin to be a piece of unnecessary, or even dangerous, ballast, which interferes with the process of the application of the law, leading at times to interpretation *contra legem*?

Lech Morawski once asked the question as to what postmodernist thought might offer legal studies. To a degree, this essay refers to this matter, but in a somewhat broader context. At a time of postmodernist undermining of established paradigms, and further a questioning of the assumptions underlying the fiction of the rational legislator, the presence of the philosophy of law as part of a lawyer's toolkit should no longer provoke reactions similar to M. Jourdain's amazement, but it should be seen as a matter of conscious necessity.

I have not invented the question "What use is philosophy of law to lawyers?" It has long been asked, and still is. It is sufficient to point to the problem raised, for example, by Mark Safjan in relation to constitutional controversies: Whom do we need more – a positivist judge or a philosopher? The attempt at an answer in this essay runs as follows: We need in one person both, because positivism does not indicate *a priori* an a-philosophical position, or indeed an anti-philosophical one. Positivism is an absolutely natural, necessary, and indispensible instrument of a lawyer's work, but only at the level of *prima facie* conclusions. Beyond these, stretches a limitless space of hard cases, for the resolution of which the usual lawyer's toolkit is not sufficient – nor, indeed, is Kantian theoretical reason and the theory of law that accords with it. It is necessary to reach for practical reason and the ethics of the law that accords with it.

Here it is worth recollecting the philosophy of Gustav Radbruch. In this author's view, the idea of the law consists of three elements: utility, purposiveness, and legal certainty. A perfect law is one that ensures an ideal harmony among all the components of this triad. Unfortunately, in life there are no ideal situations, and perfect models exist only in theory. As a result, in practice, among justice, utility, and certainty there may emerge conflicts. Sometimes these are antinomies that are easy to resolve on the basis of the above-mentioned *prima facie* reasoning, but sometimes they are of a principle-related and fundamental character, and then we are unable deal with them without a deeper philosophical-legal analysis. Under the influences of his experience of Nazi illegality, after the War Radbruch formulated the concept of statutory lawlessness and of supra-statutory law. From the perspective of the main topic of this essay, this proposition, called in contemporary

literature Radbruch's formula, is particularly interesting, because no philosophical-legal concept has had such a huge influence on judicial decisions. The misleading nature of the alternative "either a positivist judge or a judge who is a philosopher" can be clearly seen in Radbruch's concept.

Let us return to the question asked at the beginning of this essay: How would the average Polish judge conduct him/herself in a case that was similar (in a legal) sense to the one in Moscow? Without any philosophical-legal reflection, most probably just as the judge Igor Tuleniev did, and not as the judge did in the case of *Riggs v. Palmer*. This does not, of course, mean that philosophy of law constitutes a panacea for all the pains and inadequacies of the law in all its five dimensions. However, it is worthwhile, in this context, mentioning the words of Aaron Barak, President of the Supreme Court of Israel.

> A philosophy of life and a philosophy of law help the judge in understanding his role and in executing that role. It is important that the judge have an understanding of the philosophical discourse. Through it, he can participate in the search for truth, while understanding the limitations of the human mind and the complexity of humankind. With the help of a good philosophy, he will better understand the role of the law in a society and the task of the judge within the law. One cannot accomplish much with a good philosophy alone, yet one cannot accomplish anything without it. [Barak, 2006, p. 116]

**Works cited**


Barak, Aaron. 2006. *The Judge in a Democracy*. Princeton: Princeton University Press.

Dworkin, Richard. 1986, *Law's Empire*. Cambridge (Mass.)–London: The Belknap of Harvard University Press.

Woleński, Jan. 1985–1986. "Szkoła lwowsko-warszawska a polska teoria prawa," *Studia Prawnicze*. No. 3–4.

## Part I

# METHODOLOGY

If we have persuaded readers that philosophy of law is necessary for lawyers, and even, in fact, vital for them, then before we pose concrete questions relating to important philosophers of the law (part II), to the trends in legal philosophy that they represent (part III), to the ideas analyzed within those trends (part IV), and to problems that arise in the practical sphere (part V), we must present the place of the philosophy of law within legal studies, and its relation to other particular fields of study, particularly to other fields of study that engage in general reflection on the phenomenon of the law.

Chapter 1

# The Methodological Status of Legal Studies

**[?] What is the place of philosophy of law within legal studies?**

Let us assume for the purposes of this discussion that the philosophy of law is rather a part of legal studies than a part of philosophy in general, although we fully realize that this is a position that deviates from the paradigm that is universally accepted in the general methodology of scholarship/science. A consequence of this position is, however, that we attempt to distance ourselves in general terms from the traditional concerns of philosophy, and that we do not present to our students detailed analyses of the law, for example, from the point of view of theories of being (ontology) or theories of cognition (epistemology). This position is also an attempt on the part of lawyers to defend the autonomy of the philosophy of law as part of legal studies against their marginalization within general philosophy. We will employ here a characteristic example: although for many years German philosophy of law has had a leading position in Europe, in a recently published book on the development of German philosophy after 1945, there is not a single word about philosophy of law. So if we are to link the philosophy of law with legal studies, three matters require clarification: first, the position of philosophy of law within the system of legal studies; second, the methodological status of jurisprudence as a discipline; and third, the relationship of the philosophy of law to other particular fields within legal studies.

The first matter is quite simple and does not provide any particular controversy among scholars who deal with the methodology of jurisprudence studies. Legal studies can be divided into four basic groups, and the philosophy of law, as general reflection on the phenomenon of the law, can be placed in the first of these groups. The groups are:

1) theoretical-legal studies (theory of law, philosophy of law, and sociology of law);
2) historical-legal studies (general history of law, the history of Polish law, the history of political-legal doctrines, and Roman Law);
3) studies of particular legal dogmatics (administrative law, civil law, European law, financial law, commercial law, criminal law, constitutional law, international law, etc.);
4) auxiliary studies (legal logic, legal computer studies, forensics, criminology, forensic medicine, forensic psychiatry).

**[?] What are the four basic positions relating to the scholarly/scientific status of jurisprudence?**

The second issue is much more complicated – that is, the methodological status of legal studies as part of scholarship/science. Jerzy Stelmach and Bartosz Brożek precede their analysis of basic legal methods (logic, analysis, argumentation, hermeneutics) with a survey of various positions. In their view, both in the past and at present, it is possible to distinguish three basic positions in relation to the matter of the existence or non-existence of particular legal methods, and of their nature. It is true that the authors relate their considerations, above all, to types of legal reasoning, but their observations can equally well be related to questions of the methodological status of legal studies in general.

First, one can completely reject the scholarly/scientific status of jurisprudence. In this sense it is not a science (or an art, as in Ulpian's famous formulation – *ius est ars boni et aequi*), but rather something like a "craft." The classic example is the position of the German lawyer Joachim von Kirchmann, who in 1847 entitled, in a very characteristic manner, a lecture critical of the historical school: *Die Wertlosigkeit der Jurisprudenz als Wissenschaft* (The Worthlessness of Jurisprudence as Science). History has also recorded the following symbolic view, which questions the value of discussions of legal principles: three words from the legislator and whole libraries end up as scrap paper. In the view of Jerzy Stelmach and Bartosz Brożek, the representatives of *Critical Legal Studies* in much the same fashion deny the existence of specific legal methods.

Second, it is true that jurisprudence is not without scholarly/scientific value, but it is difficult to point to any characteristic methods of legal research that it has developed. In this sense, the methodology of jurisprudence is of a heteronomic nature, for it only borrows its instruments from other fields of knowledge, for example, from linguistics, psychology, sociology, biology, and economics. Thus, it does not possess its own methodology, but rather a methodology specific for a given field of knowledge that has been adapted for the purposes of jurisprudence. In this sense, the scholarly/scientific nature of jurisprudence is only the reflected light of the scholarly/scientific status of methods appropriated from without. Particular philosophical-legal approaches, constructed on the basis of such a methodological model, have as a result been one-sided and one-dimensional, because they have drawn only from one field of knowledge. This is the case with, for example, analytic legal philosophy, legal realism, sociological jurisprudence, and psychologism.

Third, jurisprudence is not just scholarship/science, but also simultaneously, to some degree, an autonomous scholarship/science, which does not have to (although it may) borrow legal research methods from external sources. For jurisprudence is specific to such a degree that its methodology cannot be compared either with the methods of the exact sciences or the natural sciences or, indeed, the other social sciences. This myth of the methodological autonomy of jurisprudence was developed by Roman jurisprudence, and then maintained, on one hand, by the historical school, and, on the other, by legal positivism.

The legal methods analyzed by Jerzy Stelmach and Bartosz Brożek (logic, analysis, argumentation, and hermeneutics) point to a fourth possible position, and one that is perhaps most welcome from the point of view of the contemporary paradigm of science. For a very long time, the complexity of the phenomenon of the law has been seen (language, psychological experience, social fact, bearer of values), and, in consequence, the inseparability of various levels of legal research have also been noted (analytical, sociological, psychological, axiological). Thus, it is a matter of constructing a model of jurisprudence as science that would be based on the dynamic exploitation of the achieve-

ments of varied and continually new fields of knowledge, while all the time maintaining its own relative autonomy

An analysis of the third of the issues raised above – the relationship of the philosophy of law to other particular areas of legal studies – is such a broad matter that it goes beyond the limits of this discussion. In this introductory chapter, we have simply sketched out models of the use of reasoning *more philosophico* within studies of legal principles, in an attempt to answer the question as to what use philosophy is to lawyers. In what follows we will focus exclusively on the mutual relations – genetic, formal, and substantive – among three theoretical branches of legal studies: the theory of law, the philosophy of law, and the sociology of law.

Chapter 2

# Philosophy of Law and Theory of Law

**[?] What is the philosophy of law?**

Philosophy of law is one of the general fields of legal studies. Its status, however, is not ultimately clear. According to some, it is part of philosophy; according to others, it is part of legal studies. The eternal question also arises, as to whether the philosophy of law, just like philosophy in general, is scholarship/science, or whether it is something more: that is, a species of reflection on law, one that does not necessary fit into any accepted paradigm of scholarship/science. It is most frequently associated with other forms of general research into the law, such as jurisprudence or the theory of law. In this sense, its status may depend sometimes, on one hand, from the status of the individual that practices it (philosopher, lawyer, political scientist, etc.), and, on the other hand, whether the stress is placed on philosophy or on law. If the latter is the case, then such reflection can proceed "from philosophy toward law" or, contrariwise, "from law toward philosophy." The practice of philosophy of law "from philosophy toward law" is most frequently linked with the specific type of philosophy that is applied in research into law – Existentialism, phenomenology, Hegelian philosophy, hermeneutics, Kantian philosophy, Marxism, or Thomist philosophy, etc. In turn, the practice of the philosophy of law "from law toward philosophy" does not entail an acceptance of the assumptions of a given philosophical school, and tends rather toward a varied conception of the nature of the law, of the conditions and limits of its application, of its relation to other normative systems, of its social functions, etc. (for example, the law of nature, legal positivism, and legal realism).

The border between the philosophy of law and the theory of law is extremely fluid. Despite this, many contemporary studies clearly distinguish in their very titles these two concepts – both in Polish and in world-wide legal studies. However, it is hard to maintain that in such studies any precise or clear border is estab-

lished between these disciplines. On the contrary, the impossibility of making such a division is often emphasized. Distinguishing among philosophy of law, jurisprudence, and the theory of law depends on whether we are moving within Continental European legal culture or common law. In the latter case, the philosophy of law is often juxtaposed to a specifically Anglo-Saxon jurisprudence. It is telling that the internet encyclopedia prepared by the International Association for Legal and Social Philosophy (*Internationale Vereinigung für Rechts- und Sozialphilosophie* – IVR), and thus by the representatives of a variety of legal cultures, contains all these concepts within its very title.

At present, we can see the emergence of a tendency not toward the division, but rather toward the combination of philosophy and theory of law. Such a step, however, requires the adoption of certain specific methodological assumptions. For example, a proposition has recently been made that draws on the Kantian division between theoretical reason and practical reason, which fulfill different cognitive functions. In this sense, the philosophy of law incorporates, on one hand, the theory of law (theoretical reasoning that analyzes, generalizes, and systematizes), and, on the other, the ethics of the law (practical critical reason). To simplify, one can, thus, say that the theory of law in this sense generalizes and systematizes law as it is; in turn, the ethics of the law criticizes the law by referring to the law as it should be from the point of view of a certain ideal of the law. In another formulation, it is proposed that one operates with the concept of the philosophy of the law in the broadest possible meaning as a reflection on the essence of the law, on methods of legal research and interpretation, and on the values bound up with the law. This formulation embraces the philosophy of the law in a narrow sense, along with jurisprudence, and the theory of law.

According to contemporary understandings, if one wishes to construct a definition of the philosophy of law, one must recognize that the *genus proximum* is constituted by philosophy, while the *differentia specifica* is constituted by law. Thus, the philosophy of law, like philosophy in general, refers to ontology, epistemology, and ethics, and takes the form of reflection referring to the law of a normative (critical), analytic (general), and holistic

(systematic) character. In short, it constitutes "deliberation on the nature of law."

Polish philosophy of law has a very rich tradition. One can see, especially, Leon Petrażycki's psychologism as a particular contribution to international legal studies. In Communist-period Poland, however, the philosophy of law was ousted both from philosophy and legal studies, as it was deemed speculative reflection contrary to the principles of the Marxist theory of state and law. However, since 1989, we have observed a powerful renaissance of philosophical issues in studies of the state and of law.

**[?] What is the theory of law?**

The theory of law is one of the general branches of legal studies, and it is generally associated with other forms of general research such as: jurisprudence, general legal studies (in German, *allgemeine Rechtslehre*), and philosophy of law. The border between the philosophy of law and the theory of law is extremely fluid. Despite this, many contemporary studies clearly distinguish in their very titles these two concepts – both in Polish and in worldwide legal studies. However, it is hard to maintain that in such studies any precise or clear border is established between these disciplines. On the contrary, the impossibility of making such a division is often emphasized.

Distinguishing among philosophy of law, jurisprudence, and the theory of law depends on whether we are moving within Continental European legal culture or common law. In the latter case, the philosophy of law is often juxtaposed to a specifically Anglo-Saxon jurisprudence, which only to a certain degree can be recognized as the equivalent of the Continental European theory of law. Paradoxically, one can also encounter positions that recognize jurisprudence as the Anglo-Saxon equivalent of continental philosophy of law. Even more, sometimes within an English-language study that has legal theory in the title, there is concealed something that is fundamentally a discussion of basic tendencies in theory of the law and philosophy of the law, for example, legal positivism, normativism, law of nature, legal realism, critical legal studies, and integral legal philosophy. It is, however, telling that the internet encyclopedia prepared by the Interna-

tional Association for Legal and Social Philosophy (*Internationale Vereinigung für Rechts- und Sozialphilosophie* – IVR), and thus by the representative of a variety of legal cultures, contains all these concepts within its very title.

In a historical sense, the theory of law is a relatively young branch of scholarship, and in any case, much younger than the philosophy of law, understood as general reflection on law. The origins of theory of law are linked to legal positivism, and, thus, to the end of the nineteenth and the beginning of the twentieth century. Its prototype is general legal studies, but only to a degree, since contemporary theory of law, on one hand, employs modern research methods, and, on the other hand, it operates with a modern paradigm of scholarship/science, one that substantially differs from a somewhat mechanical and archaic *allgemeine Rechtslehre*.

One possible, and one of the most popular, formulations of the theory of law entails the recognition that it constitutes an opposition to particular legal doctrines. More precisely, it is, within legal research, a theoretical analysis and synthesis constructed over these doctrines. In this sense, the theory of law is concerned with law in general, and not, for example, with administrative law, civil law, criminal law, constitutional law, or international law. These bodies of law constitute at most exemplifications of theoretical theses in relation to particular issues concerning, for example, the drafting, application, interpretation, validity, and observance of law. In this sense, as opposed to philosophy of law, theory of law has no critical function, but rather an analytic and systematizing function vis-à-vis the law as it is, and not as it should be from the point of view of a posited ideal of the law.

At present, we can see the emergence of a tendency not toward the division, but rather toward the combination of philosophy and theory of law. Such a step, however, requires the adoption of certain specific methodological assumptions. For example, a proposition has recently been made that draws on the Kantian division between theoretical reason and practical reason, which fulfill different cognitive functions. In this sense, the theory of law (theoretical reasoning that analyzes, generalizes, and systematizes) stands alongside the ethics of the law (practical critical reason).

To simplify, one can, thus, say that, in this definition of the theory of law, the *genus proximum* is constituted by theory as an aggregate of ordered guiding principles and the assertions that derive from them; on the other hand, law, as it is generally understood, is the *differentia specifica* of this concept. In the literature, however, attention is drawn to the fact that such an understanding of the scholarly/scientific discipline mat be somewhat misleading, as it suggests the existence of some universal theory of law.

**[?] What is the analytical theory of law?**

The concept of analytical theory of law deserves separate attention within the theory of law. The analytic theory of law is considered a particular variety of contemporary legal positivism, which in the twentieth century became the main approach within philosophy of law, along side the sociological (American legal realism) and the psychological (Scandinavian legal realism). It appears with two different meanings, although these are connected genetically and in terms of substance. In a broad formulation, it identifies itself with Anglo-Saxon analytical jurisprudence, initiated by Jeremy Bentham and his disciple John Austin. On one hand, it differentiates itself from the Continental European version of legal pragmatism; on the other hand, however, it differentiates itself from Continental philosophy of law and from theory of law altogether. However, in a narrower formulation, its geographical or cultural provenance is not so much of importance, as its characteristic method of studying law as a linguistic phenomenon. In this sense, it grows out of analytic philosophy, for example, the work of George E. Moore, Bertrand Russell, and Ludwig Wittgenstein, and as a result is often called analytic legal philosophy.

According to several authors, however, the question remains if it is at all possible to speak of the existence of an analytic theory of law, or whether it is rather necessary to stress the fact of a particular analytic method used in relation to specific issues in jurisprudence. The adjective "analytical" designates study of the law that is far removed from metaphysics, focused on methodology, practical, and of an objective nature. Its main object of study and its purpose are a semantic "analysis" of the terms and

concepts arising within legal language. In this sense, an analytical approach (or more broadly, an analytical theory of law) was present, and is still present today, in the Anglo-Saxon tradition (for example, Herbert L.A. Hart), as well as in the Continental European one (in the Scandinavian tradition – for example, Alf Ross – and in the German tradition – for example, Norbert Hoerster). This approach should be linked with other basic concepts of contemporary theory and philosophy of law, for example, legal argumentation, legal language, and legal logic.

Chapter 3

# Philosophy of Law and Sociology of Law

**[?] What are the relations between philosophy of law and sociology of law?**

It is difficult to draw up a clear methodological classification of the sociology of law within the systematic paradigm of the social sciences. On one hand, this is because its subject (law) brings it close to what is broadly understood as jurisprudence *in specie*; on the other, however, its research methods (sociological methods) place it within sociology *in genere*. To put it in a simplified fashion, one can say that within the definition of sociology of law, sociology is the *genus proximum*; however, the *differentia specifica* is law. For these very reasons, the situation is basically the same as with the philosophy of law: for some, it is part of legal studies; for others, it is philosophy. The methodological dilemma is not solved by the formal criterion of the institutional location of departments of philosophy and sociology of law. Within universities, these are most frequently situated within faculties of law. However, at the same time, there is no lack among "pure" philosophers and sociologists of scholars who are concerned with the philosophical and sociological aspects of the law. The situation of sociology of law between legal studies and sociology may, however, entail certain substantive consequences. In terms of its unclear methodological status, the sociology of law is similar to the philosophy of law. With reference to the latter, it is recognized that it may be practiced in two ways – "from philosophy to law" and "from law to philosophy." But, at the same time, the philosophy of law practiced by lawyers is fundamentally different from the philosophy of law that is practiced by philosophers. The question arises whether this is true of the sociology of law too. In other words, does the sociology of law practiced by lawyers differ in any fundamental way from the sociology of law practiced by sociologists?

Even if we answer this question with a "yes," Arthur Kaufmann's view relating to the philosophy of law loses none of its relevance: the dilemma which of the philosophies of law, that of "pure philosophers" or of "pure lawyers," is a false alternative. Both are equally bad. As a result, the methodological paradigm of the philosophy of law demands the joining of a philosophical perspective with one related to jurisprudence. The lawyer asks the questions; the philosopher answers them. The same seems to be true of the sociology of law: the lawyer should ask the questions, but the sociologist should formulate answers. However, one can go farther and say that within contemporary sociology of law the mutual connection between the sociological perspective and that of jurisprudence is even closer: lawyer and sociologist in one person asks the questions and gives the answers. Thus, for example, Roger Cotterrell analyzes the role of "law in social theory," and also the tasks of "social theory in the study of law." In turn, John Griffiths, for example, indicates the necessity of making methodologically precise the relationship of the sociology of law both to sociology and to law (that is, to jurisprudence, broadly conceived). Of course, this causes a certain, but finally only seeming, terminological chaos: alongside "sociology of law" in studies of the social aspects of the law, there are other concepts such as, for example, "law in the real world," "socio-legal studies," "law and society," the "social dimension of law," the "sociological concept of law," and "empirical studies of law."

Here we can note a further methodological analogy with the philosophy of law. The latter may, on one hand, designate a specific discipline of knowledge (philosophy of law *sensu stricto*); on the other, however, it may designate a certain sort of general reflection on the law that employs the tools of philosophy (philosophy of law *sensu largo*). In the contemporary literature on the subject, writers draw attention to the fact that the situation is basically similar with sociology of law: it, too, can either be a methodologically distinguished and defined branch of knowledge that uses the tools of general sociology to conduct research into law (sociology of law *sensu stricto*), or general reflection on the role of the law in social life, which does not only draw on the tools of general sociology, but also those of anthropology, economics, geography, history, cultural studies, linguistics, political sci-

ence, psychology, statistics, etc. In order to supplement this picture, it is necessary to mention the "sociological jurisprudence" of Roscoe Pound, as a legal-philosophical trend that is a branch of American legal realism, and also to mention Leon Petrażycki's psychological theory of law, which is a source of inspiration for Scandinavian realism.

In the context of these various meanings of the term "sociology of law," the literature points to two types of sociology as sources of possible inspiration for sociological research in law: positivist sociology (treating society as part of the world of nature, and as a result, employing methods that are characteristic of the natural sciences), and "interpretive sociology" (pointing to the differences between the world of nature and the social world, and developing research methods that are characteristic of the social sciences). In fact, sociology of law principally took the second of these paths, but in contemporary jurisprudence there is an increasingly frequent return to the first of these, although with considerably more up-to-date research methods than was the case in the past in organic concepts of a different type.

All this certainly indicates the methodological complexity both of philosophy of law and of sociology of law, but it does not, of course, explain the mutual relations between them. It is, in fact, difficult to reconstruct this relationship solely on the basis of straightforward historical facts. The term "philosophy of law," indeed, appears only at the end of the eighteenth century (according to a widespread belief, it is first used in 1798 by Gustav von Hugo in his study *Lehrbuch des Naturrechts als eine Philosophie des positiven Rechts*), but there is no doubt that the roots of philosophical reflection on the law reach back deep into antiquity. In turn, the term "sociology of law" was used for the first time in 1892 by a scholar dealing with international law, Dionisio Anzilotti, in his *La filosofia del diritto e la sociologia*. But several authors see the roots of sociological-legal reflection in texts from the end of the eighteen and the beginning of the nineteenth century, for example, in those of Bentham, Montesquieu, Rousseau, Savigny, and de Tocqueville. However, the majority view is that its emergence has to be linked with the positivist break-through of Auguste Comte. The sources of all sociological concepts of law are to be looked for, first, in Comte's works, and then in writings

by Karl Marx, Emil Durkheim, Leon Duguit, Max Weber, and Eugen Ehrlich. Later work in this field is to be found in texts by Leon Petrażycki (see above), Roscoe Pound, and also by Petrażyckiego disciples – Georges Gurvitch (Georgij Dawidowicz Gurvič) and Nicolas Timasheff (Nikołaj Sergiejewicz Timaszew).

If one looks at these names, it is difficult to deny that from the point of view of the methodology of the history of political-legal thought, the connection between philosophy and sociology *in genere* and philosophy and sociology of law *in specie* is of a genetic nature: just as sociology grew out philosophy, so the sociology of law grew out of philosophy of law. In both cases, this was a form of protest against the obtaining vision of the world and it meant a change in research methods, a scholarly/scientific revolution, and a complete paradigm shift. In what can be broadly understood as jurisprudence, this meant, above all, an attempt to go beyond the ossified dispute between legal positivism and doctrines of the law of nature. The aim of the attack was both the formalism of conceptual jurisprudence, and also the axiological absolutism of legal naturalism. This new tendency was European in provenance, by it took into consideration not only Continental European legal culture, but also that of common law.

Despite all the differences between these two types of jurisprudence, we can notice a certain terminological similarity: on one hand, the "living law" of the school of free law (Eugen Ehrlich), and, on the other, the "law in action" of sociological jurisprudence (Roscoe Pound). It is striking that both concepts were formulated more or less at the same time: the first edition of Ehrlich's *Grundlegung der Soziologie des Rechts* dates from 1913, and Pound's programmatic article "Law in Books and Law in Action" appeared in the columns of the *Harvard Law Review* in 1910.

The circumstances accompanying the emergence of sociology of law at the turn of the nineteenth century, and, particularly, its opposition toward the formalist theory of law and speculative philosophy of law, might suggest that the paths of these fields considered both as scholarly-scientific disciplines (*sensu stricto*), and as types of general reflection on law (*sensu largo*), would diverge radically in the course of time. At the same time, from the point of view of contemporary jurisprudence, one can say that this as-

sumption would be wholly unjustified. Indeed, quite the opposite took place: the links among the theory, philosophy, and sociology of law, despite all the difficulties connected with with establishing the clear methodological status of each of them, became tighter. It is hard to find an author who would acknowledge that philosophy of law and sociology of law are, in fact, competing fields; their complementary nature is usually pointed out. At present, it is impossible to imagine a sociology of law that is aware of the scientific character of its discipline, and at the same time distances itself from philosophical-legal methodological assumptions and from philosophical-legal reflection on law. And *vice-versa*, no philosopher of the law that is taken seriously in the world of scholarship can omit the sociological dimension of law and the achievements of the sociology of law in his/her research. Any differences are primarily a matter of a different placement of emphasis.

Let us give an example. If we can see as paradigmatic the well-known dispute within German scholarship between Jürgen Habermas and Niklas Luhmann, we can say that Habermas lays stress on philosophy, although it is hard not to see elements of sociology in his arguments. In turn, Luhmann certainly foregrounds sociology, but, at the same time, one can scarcely accuse him of ignoring philosophy. From the point of view of the connections between the sociology of law and philosophy, one can see as symbolic the very title of Habermas's fundamental (one can say, only) philosophical-legal text *Faktizität und Geltung* (Between Facts and Norms). There is, surely, nothing more sociological than the real (facts), and nothing more philosophical than the issue of norms.

However his does not mean that one coherent and unambiguous conception has been developed in contemporary jurisprudence of the relations existing between the philosophy of law and the sociology of law. For the purposes of this essay, let us, therefore, accept the following proposition. First, the theory, philosophy, and sociology of law belong to that part of jurisprudence that is connected with general reflection on law, and in that sense, it is necessary to distinguish them as a group of fields of legal studies that differ both from studies of legal doctrine and historical-legal studies. Each is complementary in relation to the others, inasmuch as it emphasizes another aspect of general reflection

on law: the theory of law emphasizes the analytical aspect; the philosophy of law emphasizes the normative aspect; and the sociology of law emphasizes the empirical aspect. Second, just as it is hard to define the relation between sociology and philosophy of law, so it is equally hard to mark the boundary between philosophy and theory of law.

Thus, let us make a suggestion that draws on the Kantian division into practical reason and theoretical reason. In this formulation, philosophy of law contains within itself, on one hand, the theory of law as it is – as a linguistic phenomenon (analytic theories) or as a psychological, social, or psycho-social fact (realist theories). (Theoretical reason analyzes, generalizes, and systematizes.) On the other hand, philosophy of law also contains the ethics of the law as it should be (practical critical reason). In turn, the sociology of law is concerned with law in its social operations and social conditions. If we make this division, sociology of law may furnish valuable information to theoreticians of the law ("that's the way it is"), but it can also constitute a basis for practical verification of the propositions of the ethics of law ("that's the way it should be"). If we bear in mind the above mentioned general philosophical provenance of sociology of law, we can therefore propose that every general reflection on the law – analytic, normative, empirical – can be recognized as philosophy of law *sensu largissimo*.

Chapter 4

# Theory of Law and Sociology of Law

**[?] What are the relations between sociology of law and theory of law?**

It is even more difficult to establish the relations between theory of law and sociology of law than was the case with the analogical matter of the nature of the connections between sociology of law and philosophy of law. In the latter case, at least we are dealing with a certain connection of a genetic nature: just as sociology grew out of philosophy, so the sociology of law grew out of philosophy of law; in both cases, this took place more or less at the same time, that is at the end of the nineteenth and the beginning of the twentieth century.

In Jerzy Stelmach's and Ryszard Sarkowicz's view, one must ascribe a decisive importance here to Auguste Comte's Positivist breakthrough, inasmuch as one can find the sources of all sociological concepts in his writings. If we accept that the foundations of a theory of law based on the positivist paradigm of jurisprudence were established more or less at the same time, both in their Anglo-Saxon and Continental European versions, one can observe a certain paradox that is one of both terminology and content. Philosophical positivism was a point of departure that made possible the later development of sociology of law in the works of Emil Durkheim, Leon Duguit, Max Weber, and Eugen Ehrlich. In turn, legal positivism, which did not actually share a great deal with philosophical positivism, became the basis for so-called general jurisprudence/legal studies (*Allgemeine Rechtslehre*). Contemporary *Rechtstheorie does*, indeed, employ up-to-date research methods and operates with an up-to-date paradigm of science. This departs from the archaic assumptions of *Allgemeine Rechtslehre*, but, on the other hand, from the point of view of the subject under discussion here, it is hard to ignore the genetic connection between them.

> The term "Rechtstheorie" (Theory of Law) is old, but its use to refer to a special discipline of legal studies is scarcely more than four decades old. And yet the subject of theory of law is not actually that new, for what in the nineteenth century up to the beginning of the twentieth century appeared under the label of "Allgemeine Rechtslehre" [general jurisprudence/legal studies] is not, indeed, quite the same, but it is something very similar to today's "Rechtstheorie." [Kaufmann, 1997, p. 12]

In Arthur Kaufmann's view, the fact that theory of law exists alongside philosophy of law can only be explained historically. However, these words can also be taken to refer to the relation between sociology of law and theory of law; here, too, the differentiation of two different general kinds of legal studies has its historical derivation and its historical justification.

But history only elucidates "what was and why?"; it does not, however, answer the question "what is and why?" The circumstances accompanying the birth of sociology of law at the turn of the nineteenth into the twentieth century, and particularly its opposition to formalist theory of law (that is, *Allgemeine Rechtslehre*), and to speculative philosophy of law, might suggest that the paths of these subjects, considered both as scholarly/scientific disciplines (*sensu stricto*), and as types of general reflection on law (*sensu largo*), would in time drastically diverge. At the same time, from the point of view of contemporary jurisprudence, one can say that such a conclusion would be quite unjustified, and that, in fact, quite the opposite happened: the connections among theory, philosophy, and sociology of law became closer, despite all the difficulties involved in establishing the unambiguous methodological status of each. It is true that the theory of law is not burdened by the peculiar "ambiguity" that is characteristic of philosophy of law (suspended between sociology and jurisprudence), and that it is a field of studies that is legal through and through, but its methodological status is also finally not clear. Further, the matter of the relations between sociology of law and theory of law is accompanied, one could argue, by an even greater conceptual confusion than is the case of the connections between sociology of law and philosophy of law.

Let us give an example. If one can class L.A. Hart's *The Concept of Law* as a basic text for contemporary legal theorists, it is worth looking at three sentences from the Introduction to that text.

> My aim in this book has been to further the understanding of law, coercion, and morality as different but related social phenomena. Though it is primarily designed for the student of jurisprudence, I hope it may also be of use to those whose chief interest are in moral and political philosophy, or in sociology, rather than in law […]. Notwithstanding its concern with analysis the book may also be regarded as an essay in descriptive sociology. [Hart, 1994, p. V]

In contemporary literature on the subject, there is a fairly fundamental controversy about what Hart's words actually mean, especially with regard to the formulation "essay in descriptive sociology," since Hart never concealed his deep aversion to sociology. We cannot resolve this controversy here; so let us adopt the following interpretation for the purposes of this chapter. Hart's text was written at a particular moment and in particular circumstances. On one hand, it was a continuation of the famous Hart-Fuller debate; on the other, however, it was, above all, an attempt to create a more refined version of legal positivism as an antithesis to John Austin's archaic jurisprudence. At the end of the 1950s and the beginning of the 1960s, the typical immediately post-war discussion of natural law was coming to an end. Legal positivism had regained its briefly lost dominant position, and theoreticians of law faced new challenges in terms of defining the methodological paradigm of their discipline. One element of this process was the necessity of going beyond analytic linguistic philosophy, and an opening up of theory of law to new social theories, including sociology of law. In Hart's conception, this culminated in a formulation of the thesis of the social character of law (the social fact thesis), alongside theses concerning the separation of law and morality (the separability thesis) and concerning (the conventionality thesis).

That contemporary theoreticians of the law are not restricted to analytic research into law as a linguistic phenomenon, and can consider the social context of law in all its dimensions (creation, application, interpretation, validity, and observation), does not,

however, explain what the relation is between sociology of law and theory of law. For some they are two distinct scholarly/scientific disciplines. For others, however, we can speak of theory of law *sensu largo* as comprising general research into the law both in its linguistic aspect (analytic theories of law) and its social aspect (realist theories of law). This first formulation might indicate the existence of a sociology of law that is drifting more toward sociology than legal studies. In the second, however, legal theorists acknowledge the sociology of law as a fragment of theory of law" [for example, Wronkowska, Ziembiński, 2001, p. 19], and, in turn, sociologists of law point out two legal-theoretical trends: "realistic theories that treat law as a psychological, social, and psycho-social fact, and analytic theories that understand law in terms of linguistic utterances" [Kojder, 2001, p. 191]. For lawyers, the second formulation may be methodologically attractive, since it makes it possible to integrate all general legal studies. The so-called new legal theories appear to tend toward such an interdisciplinary approach. If we can take academic handbooks as a mark of this phenomenon, we can say that most frequently theory of law and philosophy of law are lined, while sociology of law tends to function on its own. However, it is possible to point to examples of texts that combine all these three general types of legal studies.

In summation, let us adopt the following propositions:

First, theory, philosophy, and sociology of law belong to that part of legal studies that combines with general reflection on law, and in this sense, they must be seen as a group of legal studies that differs both from studies of legal doctrine and historical-legal studies. Each is complementary in relation to the others, because each stresses another aspect of general reflection on law: theory of law lays stress on the analytic aspect; philosophy of law emphasizes the normative aspect; and sociology of law gives weight to the empirical aspect.

Second, just as it is hard to define the relation between sociology and philosophy of law, so it is equally hard to mark the border between philosophy and theory of law. Let us, thus, draw on the Kantian division of practical reason and theoretic reasoning. In this formulation, the philosophy of law comprises, on one hand

the theory of the law as it is as a linguistic phenomenon (analytic theories), or as a psychological, social, or psycho-social fact (realistic theories). On the other hand, it also comprises the ethics of law as it should be (practical critical reason). In turn, sociology of law is concerned with law in its social operations and social conditioning. If this is so, then sociology of law can offer very important information to theoreticians of law ("that's how it is"), but it can also constitute a basis for practical verification of proposals made by legal ethics ("that's how it should be").

Third, considering the general philosophical derivation of sociology of law described above (philosophical positivism) and that of theory of law (analytic philosophy), we can propose that every general reflection on law – analytic, normative, and empirical – can be seen as philosophy of law *sensu largissimo*.

**Works cited**

Hart, Herbert L.A. 1994. *The Concept of Law*. 2nd ed. Oxford–New York: Oxford University Press.

Kaufmann, Arthur. 1997. *Rechtsphilosophie*. München: C.H. Beck.

Kojder, Andrzej. 2001. *Godność i siła prawa*. Warszawa: Oficyna Naukowa.

Wronkowska, Sławomira and Zygmunt Ziembiński. 2001. *Zarys teorii prawa*. Poznań: Ars boni et aequi.

# Part II

# PEOPLE

Chapter 1

# Robert Alexy

**[?] What are the elements of Robert Alexy's philosophical-legal system?**

In contemporary jurisprudence, there is a general conviction that Robert Alexy (born 1945) is one of only a few philosophers of law of whom it can be said that they have created their own philosophical-legal systems. Alexy's system is presented in three basic texts: his PhD dissertation, *Theorie der juristischen Argumentation. Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung* (A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification) from 1978; his post-doctoral dissertation, *Theorie der Grunderechte* (A Theory of Constitutional Rights) from 1985; and the study *Begriff und Geltung des Rechts* (The Concept and Validity of Law) from 1992. Each of these texts, at the moment of its publication, was recognized among theoreticians and philosophers of law as an important scholarly event; each has been widely reviewed, commented on, and argued with.

At present, the texts mentioned above are seen as making up a logical triad of a "philosophy of law as a system," which system can also be analyzed in its particulars. Just in the past few years alone, there have appeared two collections of essays that take as their subject Alexy's philosophy of law. They have very characteristic titles, referring to Alexy's principal texts: *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (2007), and *Institutional Reason: The Jurisprudence of Robert Alexy* (2013).

If we accept *prima* facie that there is a linear development of Alexy's philosophy of law – theory of legal argumentation; theory of basic rights; a non-positivist conception of law – it then might seem on the surface that, in the course of time, an interest in subsequent stages of this evolution should arise. At the same time, among commentators on Alexy's work, we can observe

in the last few years something of a paradox: increasingly frequently these discussions return to the point of departure, that is, to the theory of legal argumentation, and this is seen as the core of Alexy's philosophy of law. One of the volumes mentioned above, *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy*, typifies this tendency. Its authors invert the chronology of Alexy's texts, and begin their discussion from the question of the relationship between law and morality (*Begriff und Geltung des Rechts*), then proceed to fundamental rights (*Theorie der Grundrechte*), and end with the problems of legal argumentation (*Theorie der juristischen Argumentation*).

Paradoxically in contemporary philosophy of law, there is an increase in the number of critics and polemicists in relation to Alexy's theory of fundamental rights and non-positivist conception of law; however, there is also increasing interest in his theory of legal argumentation. Within Polish theory and philosophy of law, there is widespread agreement that Alexy's ideas are, on one hand, part of a tendency that sees law in its argumentative-discursive aspect, and, on the other hand, part of a non-positivist tendency.

It is certain that the popularity of Alexy's texts is a factor not only of their content, but also of the fact that they all have been translated and published by prestigious publishers. This applies particularly to Anglo-Saxon scholarship, but not only. Both the original version and the English translation of Alexy's three basic texts have been the source of passionate scholarly controversies. This is the case, for example, with Eugen Bulygin's response to the theory of legal argumentation; with Jürgen Habermas's views on the theory of fundamental rights; and with Joseph Raz's positions on non-positivist theory. Indeed, Alexy belongs to that type of author who does not only set out new directions of thought and creates new fields of research, but also inspires (or even provokes) discussion (or even polemic).

**[?] What does Alexy himself say about the sources of his inspiration and the evolution of his philosophical-legal views?**

Several years ago, there appeared a very interesting, but also very unusual book in the field of philosophy of law: *Legal Philoso-*

*phy: Five Questions*. Several outstanding contemporary scholars were asked to answer the five following questions:

1) Why did you take up philosophy of law?
2) What that you took from philosophy of law do you best remember, and why?
3) What are the most important issues in the philosophy of law, and why are they, above all, a subject of interest within this field of philosophy, and not within other disciplines?
4) What is the relation between the philosophy of law and the practice of law? Should philosophers of law be interested in increasing the influence of their work on the practice of law?
5) Which philosophical-legal problem should have most attention devoted to it in the future?

We can see it as something typical that among the philosophers of law surveyed there were almost exclusively British and Americans, apart from Robert Alexy. Thus, the question arises: does this mean that Alexy is the only contemporary European philosopher of law that the representatives of Anglo-Saxon scholarship know to any substantial degree? Or is he the only one that they value, because his ideas, despite a different heritage, recall their own? I think it is worth briefly to consider how Alexy responds to the five – at times quite personal – questions given above.

With regard to the sources of his research interests, Alexy points, above all, to two figures from the period of his university studies in Göttingen at the end of the 1960s and the beginning of the 1970s. These are Günther Patzig in the field of philosophical education and Ralf Dreier in the field of legal education. It is the latter, probably, who exerted a decisive influence the non-positivist views in Alexy's legal philosophy. He was also the supervisor of Alexy's doctoral dissertation on the theory of legal argumentation.

If we take a bird's eye view of German philosophy of law from 1945 up to the present, there is no doubt that Ralf Dreier, along with authors such as Arthur Kaufmann and Martin Kriele, set out a new path for this discipline. It was a matter of looking for a so-called third way, going beyond the simplified paradigm of the legal positivism/natural law dispute, and of joining the philosophy

of law to the current of Renaissance practical philosophy. In this sense, on one hand, Alexy always considered Dreier as his intellectual master, but, on the other hand, he went beyond his teacher in originality and innovativeness. There is no way of saying if this is exclusively a result of intellectual power, or perhaps an ability to choose issues, or simply a question of the times. However this may be, it is certainly difficult to exaggerate the influence of Dreier's non-positivist concepts on Alexy's thinking. It is of fundamental importance, even if this opinion is more intuitive than grounded in scholarly documentation. It is not, however, an accident that in the foreword to each of the studies mentioned above, Alexy, above all, thanks Dreier for inspiration.

Alexy's answer to the second of the questions posed only serves to confirm the accuracy of the conclusions drawn by his commentators. The author himself confirms that the development of his philosophy of law runs in a linear fashion from his theory of legal argumentation, via his theory of fundamental rights, through to his system of non-positivist philosophy of law. From this perspective, *Theorie der Grundrechte* is a mediating link in this development: on one hand, it is an application of legal argumentation to research into the structure and function of fundamental rights; on the other hand, however, they proclaim an unambiguous *credo* in relation to a non-positivist philosophy of law. Alexy himself emphasizes the sequence of his evolution and the synthetic nature of his scholarly interests.

> Most of my work has been devoted to three themes: first, legal reasoning or argumentation, second, human and constitutional rights, and, third, the concept and nature of law. The overarching idea is intituionalization of practical reason. If the three themes can be united by means of this idea, the result may well be a system. [Nielsen, 2007, p. 2]

So we can see clearly that Alexy himself sees his three central texts in a holistic manner, since ultimately he is concerned to construct a system. If we let our imaginations run, we can say that *Theorie de Grundrechte* could be entitled *Legal-fundamental Argumentation as a Manifestation of a Non-positivist Philosophy of Law*. In this respect, Alexy follows Jürgen Habermas's theory of discourse (com-

municative action), and like Habermas he combines a theory of argumentation with a theory of human rights. It is not, however, uncritical imitation, quite the reverse. We are dealing here with two completely different approaches. Partly, this results from the fact that Habermas is, however, above all, a philosopher, while Alexy is, above all, a lawyer.

This thesis seems confirmed by the answer that Alexy gave to the third of the questions set out above. In his opinion, "There are three main issues in legal philosophy: first, the concept and the nature of law, second, legal argumentation and interpretation, three, rights and justice." [Nielsen, 2007, p. 8] In this sense, Alexy's theory of law, on one hand, goes beyond the paradigm of traditional German *Rechtsphilosophie*, and clearly comes close to Anglo-Saxon jurisprudence. On the other hand, it remains within the classic model of reasoning *more philosophico*. Thus, for Alexy there exists a close connection between general philosophy and philosophy of law. "Philosophy is the field of general and systematic reflection about what there is, what ought to be done or is good, and how knowledge about both is possible. Legal philosophy raises these questions with respect to the law." [Nielsen, 2007, p. 8] In consequence, legal argumentation and interpretation are a specific type (*Sonderfall*) of philosophical argumentation and interpretation, and questions of law and justice are particular questions about what is and what should be.

The closeness of Alexy's ideas to Anglo-Saxon jurisprudence can be seen even more clearly in his answer to the fourth question – on the relation of philosophy of law with legal practice.

> There are authors who claim that there exists no intrinsic relation between legal philosophy and legal practice. Just the opposite, I think, is the case. All jurists have a more or less clear or more or less coherent idea about what the law is, that is to say, a more or less clear coherent philosophy of law […]. The value of legal philosophy for legal practice consists not only in the elucidation of concepts and the perfection of theories. The enhancement of self-understanding and reflection that may be achieved by philosophical analysis is, I believe, equally important. [Nielsen, 2007, p. 9]

In Alexy's view this does not mean that philosophy of law should be exclusively focused on legal practice. However, if philosophy of law does not wish to be just a purely speculative field, it cannot abstract itself from its practical dimension and its practical usefulness in the on-going work of lawyers.

Finally, Alexy also sketches a vision of his main philosophical-legal interests in the future. "First, conflict of rights, second, relation between and among legal systems, and, third, theories of objectivity." [Nielsen, 2007, p. 10] Thus, one can clearly see that Alexy has no intention of radically changing his above-mentioned "system." For him, it is a matter, on one hand, of refining it (conflicts of laws, theories of objectivity), and, on the other hand, of extending it into new fields of research (the relations between legal systems). Alexy links the issue of the conflict of laws, above al, with the tension between individual and collective goods. In the case of the relations between legal systems, it is a matter of the globalization of law. Finally, theories of objectivity are linked to the necessity of making certain concepts more precise, for example, truth, correctness, justification, intersubjectivity, rationality, the real, and knowledge. However, it must be stressed that the *universum discussionis* of contemporary German philosophy of law is significantly broader, and goes well beyond these three issues that Alexy sketches out.

**[?] What is Alexy's theory of fundamental rights?**

In what follows let us concentrate on *Theorie der Grundrechte*, since it is the only book by Alexy published in Polish (*Teoria praw podstawowych*). It is certainly not an easy book to read, but it is absorbing to those interested in the subject. In fact, Alexy does not write in such a hermetic and complicated language, as, for example, Habermas does. But, even so, several of the syntactically complicated constructions he uses, which are typical of German, and specific phrases and concepts are rather complicated. It must be stressed, however, that the relative difficulty of reading *Theorie der Grindrechte* is not just a result of language. Maybe it is more to do with the fact that an accurate and full understanding of Alexy's ideas demands not just legal preparation (particularly in the field of constitutional legal doctrine), but also a certain and far

from minimal knowledge of formal and practical logic, and also of general philosophy. However that may be, as Ewald noted in his review of *Theorie der Grundrechte*, we are certainly dealing with an ambitious and difficult book, founded and written in a coherent manner. It is not for beginners or the faint-hearted.

In his *Theorie der Grundrechte*, Alexy, on one hand, operates on the basis of the normative character of individual rights set out by the formulations in the German Basic Law; on the other hand, he critically follows Ronald Dworkin's ideas of rules and principles. Indeed, just like Dworkin, he "takes laws seriously," but at the same time, to use a certain degree of periphrasis, "not so seriously as all that." In contemporary literature on the subject, one encounters the justified opinion that Alexy – at least as far as the matter of judicial discretion goes – is situated between two extremes: on one hand, Herbert L.A. Hart's position, and, on the other, that of Dworkin. By virtue of his combining a theory of fundamental rights with a theory of legal argumentation and a non-positivist philosophy of law, he does not, in fact, allow a judge such freedom of decision as Dworkin does his model Hercules. But at the same time, he is not hampered as strongly as Hart is by the positivist paradigm of the law.

Alexy's work is today seen as classic. Someone who is concerned to link constitutional issues with the subject of legal reasoning could scarcely ignore his ideas. However, before proceeding to read *Theorie der Grundrechte*, one must be aware of five problems:

1) the assumptions underlying methodological ideas;
2) the conception Alexy adopts of fundamental rights and the structure of their norms;
3) methods of resolving conflicts between norms of the same or differentiated structure, and of weighing up arguments that argue for accepting one principle and rejecting another contradictory principle of fundamental rights;
4) the scope of the constitutional catalog of fundamental rights;
5) the place of norms of fundamental rights within a legal system.

It is clear that the methodological assumptions of the presented idea constitute its extremely strong suit, because Alexy quite

precisely, logically, and convincingly explains what he wants to achieve, and why, to what end, and under what conditions, by attempting to create what he calls a general legal theory of the fundamental rights of the Basic Law. So, first, we are dealing with a "general" theory, that is, one that is concerned with issues that occur in the case of all fundamental rights or in the case of all fundamental rights of a certain kind, for example, rights to do with liberty, equality, and rights to services. The opposite is a particular theory, which deals with issues specific to particular fundamental rights.

Second, it is a matter of a legal theory that as a theory of positive law defined by a legal order is a theory of doctrine and principle, whereby legal doctrine and principle (*Rechtsdogmatik*) must be understood, on one hand, as a practical discipline, while, on the other hand, it must be identified with legal studies (*Rechtswissenschaft*) or jurisprudence (*Jurisprudenz*).

Third, if the projected conception is really to be a theory of doctrine and principle so conceived, it has to avoid one-sidedness and lack of comprehensiveness. In consequence, it should take into account all three dimensions of legal doctrine: the analytic, empirical, and normative dimensions.

Fourth, Alexy is not concerned with a theory that concentrates on one conceptual aspect of fundamental rights, nor with a simple combination of all or selected conceptual aspects. His goal is an integrational theory.

It appears that from the methodological point of view, taking account of the three above-mentioned dimensions of legal doctrine (the analytic, the empirical, and the normative) is of key importance. In Alexy's opinion, the imperfection of analyses of fundamental rights up to now has mainly been a result of the fact that they limited themselves to a straightforward description of the empirical dimension, with a simultaneous total (or at least substantial) neglect of the analytic and normative dimensions.

However, it is not just important that Alexy tries to combine these three perspectives in one whole, but also how he defines them. Thus, in the analytic dimension, he is concerned with a conceptual-systematic permeation of the law as it stands. The empirical

dimension may have a double importance: first, in the context of an acquaintance with the law as it actually stands; and second, in the context of the application of empirical premises within legal argumentation. Finally, in the normative dimension, analysis goes beyond the customary establishment of what in the empirical dimension can be seen as the law as it actually stands, with the aim of explaining and criticizing legal practice, above all the practice of judicial decision making. For analysis, the constitutive question is what, given the assumption of the law as it actually stands, is a correct decision in a concrete case. To paraphrase Kant, one can therefore say that in *Theorie der Grundrechte* Alexy exploits not only theoretical reason with its analytic-systematizing function, but also practical reason with its evaluative-critical function. This philosophical-legal methodology seems particularly fruitful in relation to fundamental rights, because their constitutional implementation "on one hand, constitutes their validation; on the other hand, it brings to actually existing law their character related to natural law or morality." [Dybowski, 2008, p. 48]

The distinguishing within legal doctrine of fundamental rights, in the above sense of the analytic, empirical, and normative dimensions, runs through Alexy's whole work, and in a substantial way it determines its construction. This particularly applies to analytic topics. In keeping with the above definition of the analytic dimension, before Alexy moves to a detailed discussion of the provisions of fundamental rights within the Basic law and their limits (chapters 6–9), he sketches out the theoretic and philosophical background to the issue, and he explains basic concepts in considerable detail: the concept of norms of fundamental rights (chapter 2), and the structure of the norms of fundamental rights (chapter 3), but also – which only seems on the surface to depart from the main subject – the concept of subjective rights (chapter 4) and Georg Jellinek's theory of status (chapter 5).

The sober reader may find this theoretical-philosophical background somewhat too extensive, and at times even rudimentary, but let us remember that we are dealing with a post-doctoral dissertation, which, as is well known, is governed by specific rules and is subject to a specific methodological regime.

However, one excerpt of this part of *Theorie der Grundrechte* deserves particular attention because it basically determines the substance of the entire concept. This is chapter 3, "The Structure of Fundamental Rights," This is, however, simply a consequence of the methodological assumptions that have been adopted. In one of the points of his structural theory, Alexy follows Dworkin's integral philosophy of law, and he distinguishes rules (*Regeln*) from principles (*Prinzipien*). But at the same time, first, Alexy understands somewhat differently their substance, and, second, he places special emphasis on principles, according them the status of optimalization prescriptions (*Optimierungsgebote*).

The appearance in a legal system of rules and principles as a certain empirical fact was identified long ago and discussed even in Polish legal literature. Nonetheless, it is worth explaining, even briefly, how Alexy understands this issue, since it is of fundamental importance for his theory of fundamental rights. Thus, in Alexy's view, the substance of this division is in character not just related to content, but is rather logical and structural. Rules are the kind of norms that dispositions may fulfill in whole or not at all. As a consequence, a conflict between rules means that either one of them will be recognized as not applicable as a result of a zero-one calculation, or we resolve this conflict by introducing an exception clause. It is different with principles: their normative structure is, to some degree, open. As a consequence, in the event of a collision of two principles, both in fact apply, but the possibility of implementing one of them is limited to the degree that the implementation of the second is required. However, this calculation is not a logical calculation, as it is in the case of rules, but rather a process of balancing, one that rests on rational argumentation that takes account of the principle of proportionality. In Alexy's view, we are dealing with this kind of situation in the case of the application and interpretation of the norms of fundamental rights, because there is always a state of tension here between differing and sometimes competing values – for example, dignity, freedom, equality, solidarity etc.

In connection with this, in contemporary scholarship, there is a fairly general conviction that Alexy's theory of fundamental rights is fundamentally and substantially a theory of the principles of fundamental rights. Indeed, the specific understanding of rules

and principles and the two laws formulated on the basis of this understanding, the law of collision (*Kollisionsgesetz*) and the law of balancing (*Abwägungsgesetz*), constitute the axis of the theory of fundamental rights.

These two last elements deserve particular attention, and that for two reasons. First, if Alexy's theory is really not just a simple generalization of the doctrine of fundamental rights in the German Basic Law, but has a more general meaning and application, this applies, above all, to the law of collision, and especially to the law of balancing. The so formulated proposal could successful be transferred to an interpretation of the Constitution of the Polish Republic and used in judgments of the Polish Constitutional Tribunal. Second, the law of collision and the law of balancing are a sensitive point in Alexy's thinking. In this sense, they are, in world legal scholarship, the most widely discussed, and often strongly criticized, element of his ideas. One must add that even if Alexy never altered the first edition of *Theorie der Grundrechte*, this does not mean that he did not develop the theory in other scholarly publications. These subsequent explanations and modifications referred, above all, to the law of balancing, and the principle of proportionality that is bound up with it. The issue of resolving conflicts between rights is considered by Alexy to be one of the central philosophical-legal problems of the future.

The fourth of the issues pointed to above that deserve attention refers to the objective scope of the theory of fundamental rights from the perspective of a constitutional catalog of the individual's rights and freedoms. The question may, of course, arise whether the concept discussed is, indeed, fundamentally of a universal character, since it is constructed on the basis of the provisions of a concrete constitutional instrument, that is, the German Basic Law of 1949. After all, in practice, one can find constitutional and quasi-constitutional arrangements that set forth a broader or a narrower catalog of individual rights and freedoms than the German constitution and its accompanying legal determinations of a lower order. A separate problem is the extensive development of this catalog, on one hand, on the level of international protection of human rights, and, on the other, on the level of European law. In the view of several authors, we can observe a certain hypertrophy of human rights, which par-

ticular states, international organizations, and the international community cannot deal with in their entirety. From the perspective of the theory of fundamental rights, however, this is not of great importance. The fact that analysis is based, above all, on the catalog of rights and freedoms of the German Basic Law of 1949 does not deprive the concept under discussion of universal value, since the accepted division – rights relating to freedom (*Freiheitsrechte*), those relating to equality (*Gleicheitsrechte*), and rights to services (*Leistungsrechte*) – reflects a paradigm that is quite widely accepted in modern constitutional thinking.

One can, of course, ask if all these groups of rights, which are so different in their normative structure and in their normative functions, can at all be organized within one ideal "general legal theory of fundamental rights," one that embraces the "concept of fundamental rights," and a universal "law of collision" and a universal "law of balancing." *Theorie der Grundrechte* is, however, certainly an attempt to grasp the issue in this way.

The broad scope of fundamental rights embraced by Alexy's theory results not just from the fact that it is based on a specific constitution. It is, further, the result of the general assumptions of this theory – on one hand, reference to the conception of subjective rights, and the distinguishing within fundamental rights of "rights to something" (*Rechte auf etwas*), "freedoms" (*Freiheiten*), and "competences" (*Kompetenzen*); and, on the other, the broad use of Georg Jellinek's theory of status, and its division into passive, negative, positive, and active forms of status.

In this sense, Alexy's theory really is of a structural character, because at its center lies, above all, a normative structure, and only, subsequently, a normative content. So it is not surprising that in chapters 7–9, which are devoted on the surface to the content of the three groups of rights mentioned above, the discussion really concerns something quite different: "the general right to freedom" (*das allgemeine Freiheitsrecht*), "the general right to equality" (*das allgemeine Gleichheitsrecht*), and the division of "rights to the positive action of the state" (*Rechte auf positive Handlungen des Staates*) into "rights to protection" (*Rechte auf Schutz*), "rights to organization and actions" (*Rechte auf Organisation und Verfahren*), and "fundamental social rights" (*soziale Grundrechte*).

Finally, let us consider the last of the five issues noted above. *Theorie der Grundrechte* finishes with chapter 10, which is devoted to the place and role of fundamental rights and their norms in the system of law as a whole. This can be considered as some kind of summing up, for it looks at, on one hand, the so-called radiation (*Ausstrahlung*) of the norms of fundamental rights on the entire legal system, and their so-called horizontal effect (*Drittwirkung*); and, on the other hand, it considers the issue of the substance of argumentation with regard to fundamental rights. This second issue is particularly important. By finishing his study with this very topic, Alexy confirms both the above theses: first, that his theory of fundamental rights is, in essence, a theory of argumentation in relation to fundamental rights, and, second, that it constitutes only a part of the author's philosophical-legal system, inasmuch as it is a mediating link between his theory of legal argumentation and his non-positivist approach to law.

**Works cited**

Dybowski, Maciej. 2008. "Robert Alexy – niepozytywistyczna filozofia prawa." In: Jerzy Zajadło, ed., *Przyszłość dziedzictwa. Robert Alexy, Ralf Dreier, Jürgen Habermas, Otfried Höffe, Arthur Kaufmann, Niklas Luhman, Ota Weinberger – portrety filozofów prawa.* Gdańsk: Wydawnictwo Arche.

Nielsen, Morten E.J. 2007. *Legal Philosophy. 5 Questions.* Automatic Press.

Chapter 2

# John Finnis

**[?] Who is John Finnis and what place does he have in contemporary philosophy of law?**

John Finnis is certainly recognized as one of the best-known and most outstanding contemporary representatives of the neo-Thomist doctrine of natural law. He is most closely associated with the so-called new theory of natural law, which is set out in his standard study *Natural Law and Natural Rights*. Thus, when discussing him and his achievements, one must of necessity focus, above all, on the propositions of his new theory of natural law.

John Mitchell Finnis (born 1940) is an Australian, and a professor of law at University College, Oxford, and the University of Notre Dame (Indiana, U.S.A.). *Inter alia*, he teaches jurisprudence, political philosophy, and constitutional law. He studied at St. Peter's College at the University of Adelaide, and studied for his doctorate at University College in Oxford from 1962 to 1965. He started to teach there in 1966. Since 1989, he has been Professor of Law and the Legal Philosophy. He has also taught at University of California, Berkeley, the University of Adelaide, the University of Malawi, and Boston College. He is also a practicing lawyer, and a member of the Honourable Society of Gray's Inn in London. Finnis is regarded as one of the leading thinkers in contemporary Anglo-Saxon philosophy of law, and as one of the widely-recognized representatives of contemporary Thomist thinking about natural law. His main work, *Natural Law and Natural Rights* (first published in 1980), is recognized as one of the most important texts in the twentieth-century legal philosophy.

**[?] What are the assumptions underlying Finnis's new theory of natural law?**

As opposed to many other theories of natural law, especially those that draw on the classic conception developed by St. Thom-

as Aquinas, Finnis's theory does not proceed from the assumption of the existence of God as the source of law, although it does not exclude that. Furthermore, Finnis deliberately does not adopt as a point of departure for his considerations any ontological assumptions, especially those of a metaphysical kind. Thus, he attempts to avoid the accusation of the so-called naturalistic fallacy, which constitutes the axis of criticism of theories of natural law. This argument was taken up in varying forms by philosophers such as David Hume (the fallacy is also called, after him, Hume's Law), Immanuel Kant, and G.E. Moore. They insist that from being (the *is*) one cannot derive any obligation (the *ought*). Moreover, they ascribe to naturalists this inference, which is erroneous from the perspective of logic. This accusation is also made in respect of Aristotle's and Aquinas's theories of natural law. It is claimed that these philosophers derive laws, according to which society should be organized (the *ought*), from empirical observations of nature (and, thus, of being).

Finnis defends the views of Aquinas, pointing out that it is an abuse to ascribe the naturalist fallacy to classic doctrines of natural law. He considers that the basic principles of natural law, which permit one to recognize the essence of good and bad, are not derived by Aquinas from the nature of things, that is from being, but they are obvious in themselves (*per se nota*), and they cannot be proved or derived from any physical or metaphysical forms. Finnis considers that in moral questions, human intelligence operates in a different mode, and it uses a "different logic" than is the case when it derives conclusions in the scientific, historical, or even metaphysical sense. However, it is impossible to know whether that special moral intelligence operates in a more or less rational way than the "normal" logic of drawing conclusions about facts. Thus, we take our knowledge of natural obligations from practical reasoning, in other words, from a special kind of internal reflection on our own lives, from experience of ourselves, and not from external authority or the objective reality that surrounds us.

**[?] What values make up Finnis's list of basic goods?**

Proceeding from the above principles, Finnis argues that in human life there are seven so-called basic goods. These are self-

evident, and irreducible to other values. They exist without any preceding rationale. In *Natural Law and Natural Rights*, the list of basic goods comprises: life, knowledge, play, esthetic experience, sociability and friendship, practical reasonableness, and "religion." The order in which these values are given does not indicate any hierarchical ordering among them.

In defense of the insistence that these are self-evident values, Finnis declares that to deny this description to anyone of the basic values leads to internal contradiction. Taking the example of the value of knowledge, Finnis points out that a sentence denying the value of knowledge is "operationally self-refuting," because the person uttering the sentence intends to make its content part of general knowledge and aims to affirm the view that knowledge is worthless. The performative function of such an utterance is, thus, at odds with its content. The objective quality of knowledge does not mean, however, that every circumstance or fact are worth cognition in equal measure. Nor is knowledge an instrumental value, and, thus, does not depend on the usefulness of knowledge in attaining specific goals.

Besides knowledge, Finnis mentions the value of life, which he understands in a broad sense, not only as physical security and health, but also as every form of human vitality and freedom from pain.

More interesting basic good in Finnis's catalog is play. However, this is not only a matter of behavior connected with entertainment, but rather of all manifestations of play or even game, which are present in every aspect of human activity, including serious professional relationships.

A further autonomous and irreducible value is esthetic experience. According to Finnis, this can be separated from experience of the beautiful, since people have esthetic experiences even in activities the purpose of which is not to obtain experience of the beautiful. Thus, esthetic experience is not just an element that is present in artistic activity, but may also be experienced in all aspects of life, and therefore it can be seen as basic.

The value of sociability is, on the other hand, the basis for the experience of common good, which is of considerable importance

for every legal system. Finnis considers that this value is best realized in relations of friendship among people.

In turn, "religion" – written in quotation marks by Finnis because he gives this value a broader meaning than is usual – refers to the ability and need on the part of a human being to experience what is transcendental (going beyond the dimension of human life and experience). Since in this context, this value consists of the very ability to ask existential questions, it is also experienced by atheists and agnostics.

Finally, the most characteristic item on Finnis's list of basic goods is practical reasonableness. This is the ability effectively to exploit one's own intelligence in order to make conscious choices relating to the aims and style of one's life and forming one's character. A proper exploitation of this ability makes it possible to establish one's own hierarchy of the remaining basic goods and to achieve peace both in internal terms (that is emotional and spiritual), and also in external terms in the free pursuit of self-realization. However, practical reasonableness also plays a particular role in Finnis's entire new theory of natural law. The ability to use this defines the demands and criteria of practical reasonableness, and also makes it possible to separate good from bad, and to make use of the other basic goods. Among the criteria of practical reasonableness, Finnis includes: the principle that in a human being's life there has to be a plan of rational (coherent) action; a lack of arbitrary preferences with regard to one basic good in relation to the others; a respect for all basic values, also in the actions of other persons; impartiality in the sense of the equal treatment of all people; and the demand that we be directed by the instructions of conscience in the sense of maintaining inner coherence and in that of not entering into conflict with oneself. For Finnis, morality is, as it were, the "product" of meeting these demands.

Finnis considers that all other values are a combination of the above-mentioned ones. But those basic goods are, in turn, specific practical pre-moral principles (and not moral instructions in themselves), available to pre-philosophical reflection. They cannot be reduced to any other basic value. Finnis criticizes those approaches that attempt to do so and to perceive an ultimate value in human life or in pleasure, as did the Hedonists.

**[?] Are there natural entitlements in Finnis's theory?**

A central element in Finnis's theory are so-called natural entitlements, which are the equivalent of human laws. As in many other Western theories, they are universal and absolute. They are the implementation of basic goods in a legal sense, if we assume the instruction to behave in accordance with practical reasonableness. They constitute the entitlements of each human being that are a consequence of equal participation in achieving those values in society. Natural entitlements are, thus, a guarantee of maximum realization by the members of society of basic values and their combination in one's own life. This, however, contributes to the realization of the common good in society. Among absolute human rights consistent with the demands of practical reasonableness, Finnis mentions: the right to life (in the sense of being free from deprivation of life for the sake of implementing other purposes); the right not to be lied to in a situation in which one can expect factually accurate communication (during a transmission in the media, teaching, scientific discourse etc.); the right not to be disparaged and condemned on the basis of false accusations; the right not to be deprived of the ability to procreate; and the right to respect the individual in all decisions taken with regard to the common good.

**[?] According to Finnis, what is the relation of natural law to positive law?**

Finnis's theory of natural law is counted among those tendencies in contemporary philosophy of law that seek an accommodation between the two traditionally opposed tendencies of legal positivism and natural law. As has been discussed above, Finnis lays emphasis only on a certain parallelism of the basic principles of natural law (derived by the use of practical reasonableness) in relation to human inclinations. He rejects, however, the idea of deriving the former from the latter, rejecting the naturalistic fallacy, and at the same time putting to one side a point of controversy between positivists and his version of positive law. However, the most important thing is that Finnis is an advocate of the thesis of the autonomy of positive law. The consequence of this, on one hand, as P. Łabieniec points out, is Finnis's acceptance of at least the following positions that are characteristic for positivism:

1) to establish what law is valid (in a formal sense) empirical criteria are sufficient;
2) law does not draw its force from its moral content;
3) it is necessary to distinguish study of the law as it is from sociological and historical research into the law, and from moral judgments.

However, on the other hand, Finnis does not accept a range of positions, especially of what one might call hard-line positivism. Here we can mention the theses that authority is uninhibited in creating law, that law is a complete system, that legal studies is restricted only to research into legal doctrines, and that the interpretation of the law is a matter only of discovering the intent of the historical legislator. With regard to the basic question of the connection between law and morality, Finnis declares that there is a necessary connection between them – both law and morality form one field from the perspective of the operation of human practical reasonableness.

Finnis also sees the complexity of the issue of the mutual relations between natural law and positive law. This issue appears in the question of the validity of an unjust law. According to Finnis, it is not the case that an unjust positive law, one that does not fulfill the requirements of natural law, should always cease to be valid or also should not be applied. When making such judgments, according to Finnis, one must take into account the good of the entire legal system. If that system is in principle just, it may be necessary to subordinate oneself to some norms that contravene morality in order not to compromise an entire good system. Permission to break an unjust law must, thus, be subject to a profound analysis, and it depends on a range of social, political, and cultural variables.

### [?] What are Finnis's achievements in other areas of philosophy of law?

Although he is mainly known for his *magnum opus*, Finnis has also published extensively on the subject of many other crucial problems of the philosophy of law and contemporary social matters. Suffice it to say that in honor of his achievements, the celebrated publishers Oxford University Press published in 2011

a five-volume collection of his essays, entitled *Collected Essays*. It contains 122 texts, including many previously unpublished ones. For example, in the field of contemporary social subjects, one of the best-known, although controversial, of his positions is his extremely skeptical and critical attitude toward homosexuality and the question of the formalization of the bonds of persons of the same sex, which he expressed in the article "Law, Morality and 'Sexual Orientation'" (1997).

Chapter 3

# Lon L. Fuller

**[?] What are Fuller's major achievements and what place do they hold in the philosophy of law?**

Lon Luvois Fuller, an American philosopher of law, is considered one of the most outstanding and, at the same time, most popular philosophers of law from the USA. Many consider him, indeed, as the greatest philosopher since Plato to have dedicated a substantial part of his reflections to legal ethics. His concept of the inner morality of law is considered one of the most original and ambitious attempts to construct a concept of the rule of law based on specific legal values.

Lon Luvois Fuller comes from the small town of Hereford in Texas. He was born on June 15, 1902. His father was a farmer and, at the same time, worked in a bank. His mother, it should be stressed, was very interested in literature, especially French literature, which at that time was very popular in America. The family moved to southern California, where in the town of Imperial Valley, Fuller's father took a position as director of the small El Centro National Bank.

Fuller was a student at the University of California, Berkeley, between 1919 and 1924, where he completed his studies with distinction. In 1924, he took a Bachelor of Arts degree at the University of Stanford. He received the degree of Doctor of Jurisprudence (Doctor of laws) two years after completing his studies. Despite his father's clearly expressed encouragement, he did not enter legal practice but concentrated on an academic career. He focused on legal writing devoted to classical texts in jurisprudence, mainly in French and German. At this time, American legal studies were adverse to formalism, seeing it as "deduction from axioms." Fuller lectured in turn at the University of Oregon in Eugene, the University of Illinois, and Duke University. He published three articles in the *Illinois Law Review* on the subject of legal fic-

tions, which attracted the attention of American philosophers of law. He allied himself with the movement of American pragmatic instrumentalism, but his ideas were distinguished by their originality. He was recognized in 1935 when he was awarded the Phillips Prize of the American Philosophical Society.

Fuller deepened his understanding of the field of legal theory and comparative law during a six-month stay in Europe in 1938. The next year, he began work at the Harvard Law School, where he continued to work until retirement. When the U.S.A. entered World War II, and Harvard Law School reduced his teaching load, Fuller took up a position in the firm of Ropes & Gray in Boston. The law firm was mainly concerned with settling employment disputes through negotiation and mediation.

In 1940, Fuller was invited to give a series of lectures at Northwestern University in Chicago. The series of "Rosenthal Lectures" was regarded as particularly prestigious. Fuller's lectures were entitled *the Law in Quest of Itself*, and they were quickly published as a separate study in book form. In this work, Fuller opposes legal positivism. He neither accepts nor recognizes legal realism and its various currents. His open and bold position, and also his clear definition of his position in the forum of world legal studies, meant that critical responses were made. Fuller, however, won esteem and the support of many.

In the mid-1950s, he entered into a controversy with two philosophers of law, Ernst Nagel of Columbia University in New York, and Herbert L.A. Harten of the University of Oxford. As R. Tokarczyk puts it:

> With the former he argued principally about the relation of being to obligation. With the latter, however, he exchanged sparkling views on the subject of the fundamental principles of the two main currents in legal philosophy – legal positivism and conceptions of natural law – and their mutual relations. [Tokarczyk, 2004, p. IX]

*The Morality of Law*, his central work (which was translated into Polish and published in Poland first in 1978), also emerged from a series of lectures, which he gave at Yale University in 1963, as part of the *Storrs Lectures*. This work struck a broad echo in the

world of legal studies, drawing both critical and enthusiastic responses.

In the productive 1960s, another important book, *Anatomy of Law*, came out. This was published in Poland in 1993. The text was written at the request of *Encyclopedia Britannica*. In it, Fuller writes of made law and implicit law, making distinctions between them that are considered innovative. It is worth noting that Fuller prepared himself for the writing of this book by a study of scholarly works in sociology, anthropology, and social psychology. His *The Morality of Law* was reissued in 1969, expanded and supplemented by a chapter entitled "Reply to Critics."

The relevant scholarly literature shows that up to 1940, Fuller's views did not fundamentally stand in opposition to the principals of legal positivism. However in 1940, his critical opinions on legal positivism became clear and well known. In his work, he proclaimed views that are an apologia for natural law. Many critics, although polite in relation to Fuller's position, felt that his criticism is too radical and negative. They complain that the term "natural law" lacks precision, and they propose abandoning such terminology. He is also accused of not formulating his views sufficiently clearly.

In a sense, Fuller paid heed to critical voices and took some reservations into consideration. This is clear in subsequent publications. The voices of the polemicists certainly helped him to make his views and position on many matters more precise. In the course of the discussion, a differentiation was made among English positivism, American positivism, and the normativism advanced by Kelsen. He did not dignify Hart's analytical jurisprudence with the name of a special variety of positivism; however, the polemic with this author was especially long-lasting, and, indeed, became a symbol of the controversy between those who argue for natural law and the positivists (see: "Hart v. Fuller"). Especially after 1958, Fuller's texts are full of references to the work of Hart, references that contain polemic positions and comments.

Fuller was professionally active until 1972, when he retired. He dies on April 8, 1972, at the age of 76. Many scholars who write about Fuller's biography emphasize his many-facetted interests, which went beyond law. Robert R. Summers writes that af-

ter Fuller's death it was discovered in his private library that he had made comments and notes on thousands of books, legal and otherwise. According to Summers, Fuller had much greater importance for legal education than any other American legal theoretician, with the exception of Karl Llewellyn. In Summer's estimation, Fuller is the unquestioned leading twentieth-century representative of the doctrine of natural law in the English-speaking world.

**[?] What is law, according to Fuller?**
**How does Fuller perceive morality, and what dependencies does he identify between morality and law?**

In Fuller's view, law is, above all, a purposeful undertaking. It is an undertaking the aim of which is to subject human behavior to some principles.

The central element of Fuller's theory is an opposition to the philosophical proposition that being can be separated from obligation. In this way, he rejects one of the leading positivist axioms, that which divides facts from values.

Fuller's utterances concerning the concept of morality are also exceptionally interesting. Ancient Greek philosophy distinguishes the morality of aspiration and the morality of obligation. The task of a human being, and thus his or her aspiration, is meant to be an aim to attain a perfect life. It is necessary to aim at the development and perfection of the intellect, but it is also not permitted to neglect the physical development of the body. In this matter, the Ancient Greeks perceived the human creature in an integral and wise fashion. They indicated that such should be human aspirations, in other words, aim and dream. It is also a position that is called a moral one. Fuller drew on this tradition. In search of the essence of morality, he differentiated the morality of aspiration and the morality of obligation.

Fuller is also concerned with establishing a dependency between morality and law. He creates three categories: 1) law "in general," 2) positive law, and 3) natural law. He puts exceptionally heavy stress on the purposefulness of law:

> I have insisted that law can be viewed as a purposeful enterprise, dependent for its success on the energy, insight, intelligence, and conscientiousness of those who conduct it, and fated, because of this dependence, to fall always somewhat short of a full attainment of its goals. [Fuller, 1969b, p. 145]

While Hart treats the law as an expression of the sovereign's (authority's) will, aimed at keeping subjects in a state of order, Fuller rejected this view, adapting it to the developing democratic institutions of the United States, for which law was necessary, and even vital, perhaps even more than to the state authorities. That is why Fuller uses the following formulations:

> I mean the word "law" to be construed very broadly. I intend it to include not only the legal systems of states and nations, but also the smaller systems – at least "law-like" in structure and function – to be found in labor unions, professional associations, clubs, churches, and universities. These miniature legal systems are, of course, concerned with the member's duties and entitlements within the association itself. They find their most dramatic expression when the erring member is called up to be tried for offenses that may lead to his being disciplined or expelled. [Fuller, 1969a, p. 1]

Fuller's definition of natural law is based on an affirmation of human reason, which is meant to specify legal institutions. While a substantial number of the representatives of concepts of natural law have understood natural law as law that derives from God and is expressed in the doctrines and principles of faith or is discovered through human reason, Fuller looks for moral values in the very being of law (see the answer to the last question of the current chapter). According to Fuller, the most important thing is the law's internal morality, for that specifies how the system of legal rules is to be constituted and how to apply it. The system is supposed to be effective and the law is that to which one subjects oneself.

**[?] What were Fuller's views on forms of social order?**

Fuller's views on forms of social order are of particular value. He considered that political and economic life has an internal ethical value, and cannot be just means that make it possible to achieve

certain social goals. The social order that people create reciprocally influences them. The establishment of new forms of social order is only superficially spontaneous and unconstrained; fixed norms limit their invention; in them there resides an internal morality, a "natural law of social order." These have to be taken into account, to the extent that social relations are to contain good within them, as well as appropriateness and justice in the ethical and legal sense. Perhaps no one had ever said so clearly what enormous importance these values have, and no one had emphasized that they have to exist in a social reality.

Ronald Dworkin criticizes Fuller by making a somewhat unclear reservation concerning his understanding of morality. He argues that the fact that some positive law is, for example, unclear, contradictory, or too general, does not make that law either moral or immoral. Positive law, Dworkin insists, only takes on moral import dependending on its aims and the means by which it is applied.

Roman Tokarczyk considers that:

> Fuller […] established that purposeful and rational values, above all moral values, are part of the substance of law. He recognized that it is impossible to draw permanent and clear lines of demarcation between morality and law, because their scopes overlap, in matters that are key for individual and collective matters. [Tokarczyk, 2004, p. xx]

Tokarczyk also emphasizes the particular role of Fuller's views in inspiring new theoretical formulations concerning the relations between law and morality, and especially in the search for elements of morality in the law itself. However, he goes on to say that Fuller's doctrine belongs, above all, among contemporary doctrines of natural law, but does not cut its connections with classic doctrines, since it simultaneously contains absolutist and relativist parts.

### [?] What are the requirements of Fuller's conception of the internal morality of law?

Fuller's best-known theoretical formulation is his conception of the internal morality of the law. It is a doctrine of natural law

of a particular kind. It has frequently been described as a theory of procedural natural law. Fuller presents eight requirements relating to the construction and application of a system of norms, the fulfillment of which makes it possible to consider those norms a legal system. These requirements (of the so-called internal morality of law) can be given in brief as follows:

1) the generality of the law;
2) the promulgation of the law;
3) the law cannot be retroactive (it must be prospective, although some exceptions are permissible);
4) the clarity of the law;
5) contradictions must be avoided in law (the principle of lack of contradictions);
6) it must be possible to follow and fulfill the legal norms – they cannot demand the impossible;
7) the constancy of law over time (the stability of the law, the lack of too-frequent changes);
8) the congruence of the actions of public institutions with the law (the rule of law in the establishment and execution of the law).

Fuller presents the importance of observing his postulates of procedural natural law by recounting the history of failed governments, including the legislation of King Rex. In this invented example, Fuller's King Rex disregards all the requirements of the law's internal morality. He makes the following mistakes:

1) he does not formulate legal principles;
2) he does not provide information about the content of applicable law;
3) he frequently introduces retroactive regulations;
4) the law he establishes is not clear and difficult to understand;
5) contradictions emerge among the legal norms that apply to King Rex's subjects, and these cannot be removed;
6) the duties imposed on King Rex's subjects are impossible to fulfill;
7) the law is changed very frequently;
8) state institutions, including the king in his judicial authority, do not apply the relevant law.

As a result, King Rex's subjects begin to conspire against the authorities. No one respects the law. It is mocked and held in contempt. The embittered king, finding no understanding for his unsuccessful acts as a legislator, dies. His successor Rex II, Fuller writes, takes power from the lawyers and puts it in the hands of psychiatrists and specialists in social communication, so that the subjects are happy without a legal code.

When he writes of the requirements of the internal morality of law (the principles of the legality and the morality of law), Fuller, therefore, formulates mutually stressing negative and positive postulates. As Tokarczyk rightly notes, procedural natural law is inseparably connected with every social order that human reason can describe. It consists of a set of minimal requirements – postulates of procedural natural law, absolutely necessary in order to be able to speak not just of the formal correctness of a legal system, but also of the coherence of the legal order with morality.

In Fuller's view, the requirements that he formulates for the internal morality of law do not only decide whether a good law exists, but whether law exists at all. He insists that "A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all." [Fuller, 1969b, p. 39]

In various texts, Fuller emphasizes that much more important than an ontological definition of law is the search for an answer to the question "What is good law?" What does his faithfulness to law consist of, a faithfulness that does not make it possible to accept that in the criminal Nazi system there actually was law, although it was bad, draconian, and criminal law. We can accept that Fuller inserts an equals sign between the existence of law as such and "good" law. The requirements (postulates) of procedural natural law must serve to work out if a given system of law actually exists.

In Fuller's estimation, in a situation in which a legislator rejects any one of the eight postulates of the inner morality of law, we cannot stop at the verdict that we are dealing with a bad legal system, since there is no legal system there at all. Fuller emphasizes that eight roads lead to catastrophe for a legal system.

1) the impossibility of formulating law in general;
2) the lack of promulgation, or at least making it impossible for the addressees of the legal norms to acquaint themselves with their content;
3) abuse of establishing retroactive laws, which, above all, makes trust in the law impossible;
4) formulating law in an incomprehensible manner;
5) establishing laws that contradict each other;
6) establishing laws that cannot possible be followed;
7) changing the law too frequently;
8) applying the law, including in the justice system, in a manner that contradicts relevant law.

> Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted, or was unintelligible, or was contradicted by another rule of the same system, or commanded the impossible for a man to obey a rule that is disregarded by those charged with its administration, but at some point obedience becomes futile – as futile, in fact, as casting a vote that will never be counted. […] A mere respect for constituted authority must not be confused with fidelity to law. Rex's subjects, for example, remained faithful to him as king throughout his long and inept reign. They were not faithful to his law, for he never made any. [Fuller, 1969b, p. 39, 41]

Fuller's internal morality of law does not refer to the substantive content of law. Nor does it make reference to God or the inspirations of other schools of natural law such as human nature or rational experience. Fuller clearly distinguishes internal morality of law (procedural natural law) from external morality of law (material natural law). The procedural conception of natural law (the internal morality of law) simply refers to the values that belong to the legal system itself. In so far as material natural law can serve to indicate the most important aims of the law (which often cannot be implemented or is impractical), then to that extent procedural natural law is much more important for law as such, because its observance makes it possible for a legal system to emerge at all, and for it to be effective.

It is worth adding that a lack of observance of the postulates of the internal morality of law (procedural natural law) does not – in stable legal systems – simply lead to a recognition that we are not dealing at all with a legal system. Here it is difficult to speak of an alternative: legal system – lack of legal system. It seems more appropriate to adopt Fuller's own formulation of the degree of existence of a legal system. The more postulates of procedural natural law are ignored, the closer we are to the possibility of denying that a given system of norms is a legal system, although in this case it is very difficult to fix the borderline. For practical purposes, the requirements of an internal morality of law that Fuller proposes, irrespectively of whether they are valued positively or critically, may constitute an effective tool for evaluating a given legal system.

**Works cited**

Fuller, Lon L. 1969a. "Human Interaction and the Law." *The American Journal of Jurisprudence* 1969, vol. 14.

Fuller, Lon L. 1969b. *The Morality of Law*. Revised edition, New Haven–London: Yale University Press.

Tokarczyk, Roman. 2004. "Wstęp." In: Lon L. Fuller. *Moralność prawa*. Warszawa: Dom Wydawniczy ABC.

Chapter 4

# Herbert L.A. Hart

**[?] Who was Herbert L.A. Hart and what is the place of his thinking in contemporary legal studies?**

Herbert Lionel Adolphus Hart is considered the leading representative of analytical legal theory, a representative of so-called ordinary language philosophy ("Oxford philosophy"). His ideas place him among representatives of legal positivism, which, for the first time, although it is still powerfully rooted in an Anglo-Saxon tradition, has universal features, and does not lose its relevance outside the confines of a common law culture. In a search for answers to the issue of understanding the concept of law, Hart questioned John Austin's theory (formulated in the second half of the nineteenth century) that law is a collection of commands by a sovereign, in which the obligation of a defined behavior is juxtaposed to state coercion in the form of sanctions (norms). Hart also questioned the conception of law formulated by Hans Kelsen, whereby the legal system was represented a pyramid of hierarchically distinguished norms that have their source in the so-called *Grundnorm*. In his most important and best-known book, *The Concept of Law*, Hart proposes a completely new concept of the structure of a legal system, distinguishes in such a system two types of rule. These are primary and secondary rules, and thanks to this distinction one can differentiate law from moral norms or customs, and simultaneously avoid connecting legal norms exclusively with state authority and the sovereign's command. In addition – although, as a positivist, Hart clearly distinguished law from morality – he is the author of the concept of the so-called minimal content of natural law, which becomes a central element of law if it is assumed that law should possess the quality of being long-lasting.

Herbert L.A. Hart was born on July 18, 1907, in Harrogate in Great Britain, and died on December 19, 1992, in Oxford. He was educated at Bradford Grammar School and Cheltenham College,

from where he went on to study philosophy and ancient history. He completed his studies with distinction in 1929. Then for the first time, he was offered a research position at his *alma mater*, but Hart turned down the offer, and began legal studies. He became a barrister in 1932 and practiced successfully for the next several years. During World War II he worked as a civilian with British Intelligence. At this time, as a result of his work with two Oxford philosophers, Gilbert Ryle and Stuart Hampshire, his interest in scholarship was reawakened, and he renewed his contacts with the academic community.

After the War, Hart did not return to legal practice but began to lecture in philosophy at New College, Oxford. He joined the university for good when he took up the Chair of Jurisprudence in 1952. His appointment was somewhat controversial as he had up to then published few academic works, and, indeed, his publications in philosophy of law were insignificant. Articles and books over the next few years, however, made of him one of the principal authorities in that discipline. He held the Chair of Jurisprudence until 1968, and ten years later he retired. He taught at universities abroad, among them Harvard University and the University of California. For his contribution to the development of legal philosophy he received twelve honorary doctorates from universities all over the world. He continued his scholarly work up to his death, leaving behind him numerous books, articles, and essays. These have guaranteed him his status as one of the most outstanding philosophers of law in the twentieth century. His most important publications are: *Positivism and the Separation of Law and Morals* (1957–1958), *Causation in the Law* (1959), *The Concept of Law* (1961, 1993; Polish edition: *Pojęcie prawa*, 1998), *Law, Liberty and Morality* (1963), *Punishment and Responsibility* (1968), and *Essays on Jurisprudence and Philosophy* (1983; Polish edition: *Eseje z filozofii prawa*, 2001).

**[?] What were Hart's methodological assumptions?**

Initially, an analytical approach is dominant in Hart's work. A starting point for his reflections is, above all, ordinary language philosophy, which rejected defining expressions of the language for observing them and describing them. Examination of the ways in

which particular words and phrases function in different contexts was supposed to make it possible to determine further philosophical problems lined with the concept of law, that is its cognitive quality, its applicability, and its axiology.

Hart notices that the meaning of expressions in legal language undergoes changes and modifications depending on the context cannons of "interpretation" in which they appear. Therefore, it would be wrong to omit any of these meanings. There is no rational reason to do so. For these reasons, the methodology he uses to understand the law can be presented as follows.

In the first place, it is necessary to consider the normal context of the linguistic expression under scrutiny. For this, a basic knowledge of society and human behavior is required. The use of concrete words in a specific situation is, after all, a manifestation of social life that must be decoded. Because it is impossible to explain certain formulations exclusively in empirical categories, language is required – vocabulary that makes it possible to express the normative character of the law. At the same time, if we take into consideration how desired patterns of behavior are formulated, the vocabulary expresses a particular human approach to law as a specific obligation. Examination of social existence (being) leads to discovering normative elements (obligations) and reveals the real motives that guide people who employ these given concepts. Only a comparison of the results of such a multi-faceted analysis with a distinctive model example makes it possible to formulate a theory that elucidates the matter under research.

However, it must be clearly stressed that in Hart's view the relation of language to society is not limited to a descriptive (reporting) and normative function. That is, it does not only consist in guiding and designating desired behaviors. Following Ludwig Wittgenstein, Hart sees language in itself as an exceptionally important social event, the proof of which are so-called performative utterances. The use of certain formulae in defined cultural contexts causes changes to occur in society, and new facts and phenomena to "happen." Looking at them will always bring something new to our knowledge of a society. Thus, we have to argue that by looking for the best method of analyzing legal language, Hart takes into consideration an "internal point of view."

In describing the law, he considers basic, widely-known sociological and psychological facts. It is therefore necessary to accept that Hart, at the core, uses a hermeneutical method.

**[?] What does Hart's legal positivism look like?**

Under the influence of ordinary-language philosophy, Hart in his most important text, *The Concept of Law*, presents a new and refined version of legal positivism, which is sometimes called "soft positivism." He departs from the original legal positivism, developed, above all, by John Austin, who saw law as a logically closed system of commands issued by a sovereign. Austin also insisted that there was no necessary connection between law and morality.

It is necessary to point out that Hart rejects Austin's method of analysis of legal language and his method of constructing definitions. This method does not make it possible to recognize the real meaning of a particular expression. Hart names and enumerates the other failings of Austin's methods. These include: an exclusive concentration on a sphere of laws that is linked to obligations (orders and prohibitions), while law is also a matter of rules that grant entitlements; and a failure to explain the phenomenon of the continuation of a legal system in the event of a change of sovereign. On the basis of Austin's conception, it is, in fact, difficult to understand the difference between such basic expressions as "be obligated" and "have an obligation." Hart pictures this in what is known as the gunman paradox. Original positivism gives no guidelines relating to how the obligation of obedience toward the sovereign (or the obligation to observe the law) differs from following the demand of a gunman who is threatening his victim with a weapon, and demanding that the victim give over all his/her money. Hart does not agree either with the assertion that cognition of the law is possible in an immediate manner, without grasping the internal aspect of certain rules. In his view, such an approach to positivism makes it impossible to see the difference between an obligation to observe the law and stimuli deriving from habit, or the realization of other duties, for example, those of customs or manners.

Hart's understanding of legal positivism developed through his linguistic method renders law an object of cognition for the first

time. The key to grasping its essence is an understanding of the concept of the legal norm (rule) in the sense that lawyers give it. To this end, Hart distinguishes two points of view. One can deal with legal norms exclusively as an observer (an external understanding), and this is how positivists have hitherto perceived the law. Or one can deal with them as a member of a group that accepts these norms and follows them (an internal understanding). Hart does not explain what kind of acceptance he has in mind, however, nonetheless, an internal point of view makes it possible to protect the law from understanding it solely as an external stimulus (habit), and it forces a critical-reflexive position. The addressee either accepts a given rule, or formulates concrete postulates in relation to it. From a formal perspective, the internal point of view will not have any influence on making a decision to act or to discourage some conduct. However, in the practical sphere, it will offer arguments that must be weighed up equally with other reasons for a course of action.

### [?] How does Hart discuss the construction of the legal system?

Hart argues that legal positivism as formulated by John Austin is marked by serious inadequacies inasmuch as it is unsuitable for describing the law, and, especially, cannot answer the question of what causes people to be inclined to keep the law, if they are not driven exclusively by fear of some sanction. Hart solves this dilemma with the help of the concept of the rule, distinguishing primary and secondary rules, which appear unified in a basic, model instance of law (municipal/national/domestic law in a developed state).

Rules of the first kind – primary rules – indicate the kinds of behavior that are obligatory, and thus are duty-imposing rules. These norms are the foundation of every society and exist independently of the will of people who are ought to follow them. Hart takes the position that these norms are a result of the nature of the human being and the world. Thus, on one hand, they will be norms that determine the survival of society (later Hart calls them the "minimum content of natural law"). On the other hand, such rules enjoy a certain general acceptance among the mem-

bers of a given community. Because they do not make it possible to distinguish legal rules from moral ones, primary rules do not yet create a legal system. They are imperfect. Above all, they lack criteria for the applicability of these rules, which leads to deadlock if legal norms clash. Nor can such norms be modified, for they do not set out the ways in which they can be changed (there is stasis), and they are ineffective as they do not indicate how a breach of the law can be established. Nor do they specify the agencies that are to do that, and even less do they set forth the consequences resulting from a breach of a primary rule.

These flaws are corrected by meta-norms, so-called secondary rules. They do not contain any model of obligatory behavior in themselves, but they refer in a different manner to the primary rules.

The lack of effectiveness of primary norms is eliminated, in the first instance, by so-called rules of adjudication, which accord the right to enforce the law. On one hand, these norms define the concepts of court, judge, verdict etc. On the other hand, they confer certain appointed subjects competences to settle disputes against the background of adhering to primary rules. They also set out formal frameworks in which that settlement should take place (procedural norms). The second type of secondary rules, rules of change, make it possible to create new primary rules and to achieve all kinds of modifications of the law's content within the existing rules. They define law-making procedure, but they also possess equivalents in further rules of a lower order, by virtue of which individual subjects are able to change their legal situation by undertaking legal actions.

The last of the secondary rules – the rule of recognition – defines those features of a rule that make it possible to recognize it as a legal rule, and provides criteria for evaluating the applicability and validity of the primary rules. In addition, this rule accords authority (ruling power) and establishes the duties of the officials called upon to exercise ruling functions. The interpretation of rules of recognition is based on the analysis of the arguments of those who formulated the primary rules, so they are valid because they are accepted by officials and judges who possess a certain authority in relation to the legal system. The condition of their existence and the ascription of binding authority to

them, is a general consensus as to the necessity of observing and applying the law according to some standard. In consideration of all this, Hart ascribes an ultimate quality to that type of rule, even though Hart's rule of recognition is based on social practice, and to put it more precisely, on an analytic description of real practice. Because of the principle of the reciprocal normative link of primary and secondary norms with the rule of recognition, one can discern a certain similarity with Hans Kelsen's concept of the basic norm, the *Grundnorm*.

Thus, Hart understands the legal system as a system based on dualism. In order to recognize the existence of the law, the addressees must observe those rules of conduct that apply on the basis of the rule of recognition. On the other hand, secondary rules have to be approved from the internal point of view as public, general models of behavior on the part of various subjects, and, particularly, as standards for making correct judicial decisions.

### [?] What is Hart's conception of the "minimum content of natural law"?

Like other positivists, Hart insisted on the distinction of law and morality as separate normative orders that are independent of each other (separation thesis). Thus, he agreed in principle with the thesis that the law may have whatever content the legislator decides.

At the same time, however, Hart sees that between law and ethical values connections of a factual nature there may exist links of content and links of origin. Both the moral order and the legal order have the same aim, which is to ensure the survival of people living in a community. Legal rules always to a certain degree, at least to a minimum extent, reflect moral rules, and they satisfy primary human expectations and needs. Their task must, then, be to ensure protection within the basic conditions of human life, among which Hart mentions human weakness, human approximate equality, limited altruism, a limited number of goods and natural resources, limited will power, and limited understanding. A basic function of the law is also to protect those who of their free will wish to function with others in a defined community, state, or society. A failure to secure against these determinants would lead

to a situation in which individuals would have no interest in creating a community. At the same time, an acceptance of these most primary rules means that they become an element in the canon of moral rules. Hart thinks that, from purely practical considerations, taking stock of human nature and the reality that surrounds it, to ensure the endurance of societies and all that comes with that, including the endurance of the law, every social organization must possess rules of conduct with a defined content, a "minimum content of natural law." However, it must be stressed that although Hart to some degree shared the views of adherents of schools of natural law, he remained to the end a positivist.

Chapter 5

# Oliver W. Holmes

**[?] Who was Oliver Wendell Holmes, and what is his position among twentieth-century philosophers of law?**

Oliver Wendell Holmes Jr. – as *The Journal of Legal Studies* notes – is one of the three most cited, twentieth-century American legal theorists, and, at the same time, one of the most quoted justices of the Supreme Court of the United States. He owes his exceptional position mainly to the succinct, transparent, and expressive style in which he formulated his opinions, to his position on free speech, and to his philosophical views, which he brought to his work as a judge. In connection with this last aspect of his work, Holmes made his mark on the pages of history as a precursor of American legal realism.

Holmes was born in Boston on March 8, 1841. His father Oliver Wendell Holmes Sr. was a well-known writer and a well-regarded doctor. His mother Amelia Lee Jackson, the daughter of a state judge, was an Abolitionist. Probably because of the atmosphere in his home, Holmes as a young man was fascinated by literature, and also supported the movement for the abolition of the death penalty.

Holmes completed his studies at Harvard University in 1861. In his last year at university, the deepening conflict between Northern and Southern states led to the outbreak of the Civil War. Holmes joined the Massachusetts militia, in which he served for three years. For his service in battle, he was promoted to the rank of (honorary) colonel.

In 1866, he returned to Harvard, where he graduated with a master's degree in law. In that year he was accepted to the Bar and began work in a law practice in Boston, for which he worked for the next fifteen years. During this period he married Fanny Bowditch Dixwell.

In 1870, Holmes became the editor of the *American Law Review*. Three years later, he edited *Commentaries* on American law. In 1881, he published a series of twelve lectures devoted to issues in common law. These have been widely translated. A year later, while he was a professor in Harvard Law School, he was appointed by the state governor to the position of justice in the Massachusetts Supreme Court. He sat in this court for twenty years, for the last three of which he was Chief Justice.

On December 4, 1902, President Theodore Roosevelt nominated Holmes for the position of justice of the Supreme Court of the United States. He held the post for twenty-nine years. He retired on January 12, 1932, at the age of almost 91. He is still today the oldest Supreme Court Justice. He died on March 6, 1935.

### [?] What are law and legal studies as understood by American realism?

As has been mentioned, Holmes figures in the history of legal thought as the "godfather" of American legal realism. In order to explain the substance of this current in jurisprudence, it is best to listen directly to its creator. In a famous article entitled "The Path of the Law," published in 1897, Holmes asks "What is law?" and answers as follows:

> You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of this mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law. [Holmes, 1897]

According to the above, law cannot be taken from a pure analysis of a legal text itself. What the law is is not decided just by the text and hard-and-fast rules of understanding it, but also by what judges actually do when they apply the law. As Holmes puts it, judges are not logicians or mathematicians, and the legal text is

not a logical or mathematical treatise. In Holmes's view, law – or more broadly, the life of the law, its application – has never at its heart been connected with logic, but rather with experience.

> The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. [Holmes, 1881]

The law – according to Holmes – "embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics." [Holmes, 1881]

A clear attack on the position of legal formalism is, thus, one of the main marks of legal realism. The law cannot be seen as a synonym of law in books; in legal research it is necessary to concentrate on law in action. Only law in action – as applied by judges and officials – deserves to be called real law. However, what handbooks present, is at best a vision offered by scholars or moralists of what the law ought to be.

So to know the law, one must leave the library and discover what influences the judge or the official when he makes a decision about the law. The conduct of persons who apply the law must be rigorously analyzed from a sociological and psychological perspective. Social, political, religious, economic, and business factors have to be considered, indeed all the factors that in reality affect a verdict, and thus the content of a legal norm. A simple consequence of this position is the recognition that law is not a static entity, which from the moment of its creation has been interpreted and will be interpreted in the same way, but its is rather something dynamic on the form of which factors external to it frequently exert a decisive influence.

There is no doubt that to someone educated in a Continental European tradition, the image of the law sketched out above may seem excessively cynical. Law becomes here, to a large extent, a creation of judges or officials. Even worse, the great problems of the law are completely reduced to marginal issues connected

with the judge's or the official's application of the law. Where here is there a place for theory or philosophy? At the same time, one should note that an acceptance of the distinction between legal regulation and legal norm can lead to conclusions close to those formulated by American realists. Indeed, one can ask provocatively whether an acquaintance with legal regulations themselves is equivalent to an acquaintance of the content of valid legal norms. Does, in addition, a knowledge of the rules of interpretation, and also of legal understanding, allow one to foresee the content of a verdict? There is no doubt that it does not, and that is the case, too, in the Continental order.

The jurisdiction of the European Tribunal of Human Rights offers a splendid illustration of the above. Out of regard for the necessity of adapting the decisions of the European Convention on Human Rights to a changing reality, as early as 1978 in the case of Tyrer v. The United Kingdom, the Tribunal noted that the convention was a living instrument that had to be interpreted in the light of circumstances of the present day. Indeed – in its nearly sixty-year history – the Convention has been an effective instrument in the field of human rights protection, and its interpreters "discover" in it regulations that apply to problems of which its creators never dreamed.

**Works cited**

Holmes, Oliver Wendell, Jr. 1881. *The Project Gutenberg EBook of The Common Law*, http://onlinebooks.library.upenn.edu/webbin/gutbook/lookup?num=2449.

Holmes, Oliver Wendell, Jr. 1897. *Project Gutenberg's The Path of the Law*, http://onlinebooks.library.upenn.edu/webbin/gutbook/lookup?num=2373.

Chapter 6

# Hans Kelsen

### [?] Who was Hans Kelsen and what is his greatest scholarly achievement?

Hans Kelsen's name is known to nearly every lawyer. He is generally known as the creator of pure legal studies and as the creator of legal normativism. Kelsen was born on October 11, 1881, in Prague (then part of the Austro-Hungarian Empire) He studied law at the University of Vienna. He defended his doctoral thesis in 1906, and completed his *Habilitation* in 1911. From 1919, he was professor of public and administrative law at the University of Vienna. Kelsen was one of the creators of the Austrian constitution of 1920. He was also a member of the Austrian Constitutional Tribunal. In 1930, because of his sympathies with the Social Democratic movement in Austria, he was removed from his positions. As a result, he moved to Cologne (in Germany), where he was a professor at the university. In 1933, after the Nazis took power in Germany, he moved to Geneva to escape repression. In 1940, he left Europe forever and went to the USA where he took a position as professor in the University of California. He died on April 19, 1973. Kelsen's central works include: *Introduction to the Problems of Legal Theory* (1997. trans. B.L. Paulson and S. Paulson. Oxford: Claredon Press); *Pure Theory of Law* (2005. trans. M. Knight. Berkeley, CA: University of California Press); "Foundations of Democracy" (1955. *Ethics*, Vol. 66, No. 1, Part 2, University Chicago Press, Chicago).

### [?] What were the philosophical bases of Kelsen's ideas?

In the areas of epistemology and methodology, it is generally accepted that Kelsen in creating pure theory of law, with which normativism is linked, was drawing on Immanuel Kant's thinking, who was, in turn, in part drawing on that of David Hume. Kant is considered the creator of transcendental philosophy (Latin *transcendere* – to go beyond), that is a philosophy that

must go beyond the borders of experience in order to learn anything at all about things. Kant insisted that human cognition was directed toward the object of cognition (the sphere of being). However, according to him, the objects of cognition should be adapted to human cognition, for reason only understands what itself creates. In this sense, the Kantian theory of cognition is based on the principle that it is not important what is known, but rather how something is known. It is the form of cognition that is important, not the content. Kant divides reason, through which cognition takes place, into theoretic reason that refers to the sphere of cognition (truth), and practical reason, linked to the autonomous capability of choosing conduct, irrespective of external factors. Drawing on Hume, the great German philosopher insisted on the existence of a division of sentences into descriptive ones and obligatory ones, recognizing, however, that between the distinguished kinds of utterance there is no connection or "logical transition." This is because they refer to different spheres of cognition. There is no doubt that this greatly abbreviated concept of Kant's inclined Kelsen in legal research to distinguish two spheres of cognition, *sein* (the sphere of being) and *sollen* (the sphere of obligation). This distinction is fundamental to Kelsen's ideas.

Further, Kant saw that positive law is created by state organization and operates in an external sphere independent of the human being. Law defines duress as a way of ensuring the co-existence of human freedoms. In keeping with Kant's thinking, positive law should be examined by scholarship, in order to establish what the law is in a specific time and place. This kind of research is to be juxtaposed to that which aims to discover whether what the law sets out is law in terms of the universal criteria of good and evil. Here we see a classic division into "the law as it is" and "the law as it should be." I believe that, in his ideas, Kelsen made use of Kant's thought, when he acknowledged that the subject of legal studies should be law that comes from state organization as a set of external norms in relation to its addressees, but the subject of research should be "the law as it is," scrutinized from the point of view of form.

**[?] What does Kelsen's "pure theory of law" consist of?**

Kelsen himself used the term "pure theory of law." The concept of "pure theory of law" is based on a rigorous differentiation of the sphere of being and the sphere of obligation. When creating pure legal studies, Kelsen, on one hand, criticized the positivism that was contemporary with his work because, in his view, it confused the sphere of being, "the law's factual existence," with the sphere of obligation. On the other hand, he criticized proponents of natural law and sociology for a substantialist understanding of law and for deriving legal obligations directly from being. Kelsen's idea of "purifying legal studies" is that all political, historical, sociological, and psychological issues should be eliminated from legal studies. Kelsen also considered that legal studies should also be "purified" from any research connected with evaluation of the law. The fact that he put the problem thus, does not mean that Kelsen was opposed to the above-mentioned kinds of legal study, as many of his opponents accused him of being. Kelsen thought that a "pure theory of law" is irrelevant in studies that evaluate law or research into the social determinants of law. Further, he argued legal research in the real sphere leads to other results than those that can be attained within a pure theory of law. In keeping with the concept of the creator of normativism, one object of legal research should be legal norms understood as linguistic utterances, which, in fact, make up the basic elements of a legal system. For Kelsen, "pure theory of law" should be an autonomous field, logically independent, of which the subject of research should consist of phenomena from the sphere of obligation, juxtaposed to phenomena from the sphere of being. Kelsen suggested that the fundamental method of legal research should be a formal-dogmatic one, in other words, linguistic study of the law in accordance with the assumptions of the concept.

**[?] Why are Kelsen's ideas called legal normativism?**

Kelsen's ideas are, at heart, a theory of the legal norm as the fundamental structure of the law. As he formulates it, the legal norm is a linguistic utterance of a hypothetical (conditional) kind, which is directed at state institutions, and which instructs those

institutions to impose legal sanctions if a defined person causes by his/her behavior a defined event mentioned in the legal norm (hypothesis). In Kelsen's view, there is no place for norms that provide entitlement or norms that are without legal sanctions, so-called *leges imperfectae*. Kelsen understood the coercion connected with the law in linguistic terms (an announcement of the occurrence of negative effects). In contemporary terminology, we may say that for Kelsen legal norms were exclusively norms of sanction. In his view, a legal norm cannot exist outside a legal system. Law is in essence a collection of norms. A legal norm cannot exist outside a system of law, because that norm's belonging to a system of law determines its validity. Kelsen insists that no elements from social reality can decide the issue of a norm's validity. The legal system, in his view, is constructed on a hierarchical principle, and its structure recalls that of a pyramid. At the base of the legal system there are individual norms, to which Kelsen accords the attribute of legal norms. At the apex of the pyramid is the constitution. The validity of a norm can be defined solely by using the concept of "the legal system," because the basis for the validity of a norm of a lower rank is the norm of a higher rank. In this sense, the legal system is a dynamic one, based on links of hierarchy, form, and competence, a system that is opposed to a static system, based on links of content.

In the context of the above, it is important to note that toward the end of his working life Kelsen spoke in favor of a so-called mixed legal system, that is one combining elements of both the kinds of system discussed above. His argument is that since the basis for the validity of norms of a lower rank is provided by norms of a higher rank, the question arises of the basis for the validity of the act that stands highest in the hierarchy of acts, in other words of the constitution. This is one of the weakest and most frequently criticized elements in Kelsen's ideas. He solves this problem by introducing the concept of the fundamental norm, the *Grundnorm*. He sees the fundamental norm is a transcendental-logic condition for the existence and validity of a legal system. One can see here clear influences of Kant's philosophical system. The basic norm for Kelsen is only the content of an act of thought, or *de facto* a conceptual norm, and not an act of will. This is a somewhat complicated way of explaining the es-

sence of the fundamental norm. It would be relatively simple to explain the essence of the fundamental norm as an act of force or a social consensus that leads to the emergence of a constitution. However, this is the sphere of social reality, which in no way relates to Kelsen's conception of things.

**[?] Where are the good and bad points of Kelsen's thinking?**

Kelsen's thinking is seen as an extreme type of legal positivism. In Kelsen's time, legal positivism was already a very diverse notion. It included ideas of a psycho-sociological coloring (e.g. Georg Jellinek, Rudolf Ihering). The pure theory of law was an attempt to modify and correct positivist ideas by a far-reaching methodological rigor. Such a conception is more coherent and more attractive. In the inter-war period in Poland it had many adherents (including, Czesław Jaworski, Antoni Peretiatkowicz, and Szymon Rundstein). It has also been noted that by clearly indicating the place of a constitution in a legal system, Kelsen effaced the impediments, which had been hitherto present in the thinking of Continental lawyers, to recognizing constitutional norms as the same legal norms as legislative norms. Thus, in a way, he contributed to the development of a constitutional judiciary.

One must, however, recognize as the main defect of normativism its one-sidedness and its ontological and methodological extremism. In this conception, we are not provided with a complete image of the law, because axiological, sociological, and historical questions are omitted. As its dominant principle, this concept requires an acceptance of the differentiation in the sphere of being and the sphere of obligation. This proves difficult since in many other philosophical, sociological, and legal sets of ideas, the mutual penetration or conditioning of these two spheres has been clearly indicated. For example, Marxism insisted that the sphere of being shapes the sphere of obligation (values, norms). On the other hand, Max Weber put it the other way round: the sphere of obligation (norms, values) shapes and influences the sphere of being. The concept of the fundamental norm also arouses much controversy, especially if it is seen as a solely conceptual norm. In the last years of his career, Weber tried to treat the basic norm in a volitional sphere, however somewhat unconvincingly.

The concept may provoke some reservations from the point of view of present law, which shows many divergences from the law that was valid in the second half of the nineteenth century and at the beginning of the twentieth. Contemporary law as a linguistic product – especially if we consider international public law and law that goes beyond just one country (EU law) – contains numerous utterances (e.g. directives, optatives), which in their linguistic shape, substantially diverge from the classic legal norms that Kelsen studied. For that reason, it would be hard to apply it today. Kelsen's ideas were born out of Continental law, and they become completely inadequate with reference to Anglo-Saxon law. But these critical observations do not lessen the importance of "the pure theory of law," which has had a substantial influence on the development of legal studies. The widespread regard in which it is held is actually indicated by the many critical voices.

Part III

# TENDENCIES MOVEMENTS APPROACHES

Chapter 1

# Bio-law

**[?] What is bio-law? What is the fundamental object that is protected by bio-legal norms? What are the connections between bio-law and philosophy?**

At present, bio-law is one of the most controversial, and at the same time one of the most rapidly developing, branches of law. Doubt surrounds its very status. It is not clear if bio-law in substance fulfills or will in the future fulfill the conditions required to call it a branch of law, like, for example, civil or criminal law. It is certain possible to indicate a characteristic object of regulation (issues connected with the development of biology and medicine). One can cite clear practical considerations, as, for example, the necessity of creating complex regulations relating to the above-mentioned object. It is possible and, indeed, it is necessary to construct a coherent axiological system that could be the foundation of bio-law. Finally, one can propose specific methods of interpreting its regulations, placing emphasis, for example, on the anthropology accepted by the legislator in the process of creating bio-law. However, because the norms of bio-law are fragmentary at its present level of development, scattered over different branches of law, employing diverse methods of regulation, and referring to differing historical traditions, one can express some doubt even with regard to the partial autonomy of bio-law.

Similar objections are raised against seeing bio-law as a discipline within legal studies. If there does not exist a characteristic object of regulation, it is hard to talk of the possibility of conducting solid research. If, however, such an object exists, it remains unclear what character the discipline should adopt that investigates it: doctrinal or philosophical? As a result, it is not clear what research methods above all others should be applied within such a discipline. Nonetheless, the need is quite obvious for the description, analysis, and regulation of bio-medicine, because of its importance and also because of the ethical, social, economic,

and even political implications of the development of biology and medicine.

The question marks mentioned above clearly indicate what a fascinating phenomenon we are dealing with here. If, in addition, one turns one's attention to the problems that bio-law attempts to fit within the corset of legal norms, or to describe and analyze, one can see that because of bio-law there has been a return to the most fundamental, one might even say, elementary, philosophical questions. What is a human being? What determines his/her humanity? Do facts from the natural sciences translate – or should they translate – to the sphere of obligations? (For example, should the fact of severe physical handicap translate into the possibility of weakening the protection afforded an individual's life, when, for example, he/she asks for help to shorten it, or in the case of a fetus affected by a genetic defect?) Can one grade values that are universally defined as ungradeable, for example, dignity or equality? Do values have only a conventional character, in other words, dependent on convention, or are they completely independent of any particular way of seeing things?

It is worth emphasizing that these questions – because of huge advances in bio-medicine – have ceased to be purely academic ones. Thus, we have to answer the question whether a human embryo, immersed in liquid nitrogen, in the laboratory of a clinic specializing in medically assisted procreation, created from the gametes of donors who have died in a plane crash, is their heir, or property of the estate. Thus, we have to decide art. 2 of the European Convention on Human Rights, which states that "everyone" right to life shall be protected by law" concludes that there is a "right to die" for people suffering from amyotrophic lateral sclerosis, who are asking for assistance in leaving this world?

**[?] What are the historical roots of bio-law?**

Problems connected with the beginning of human life, its biological continuation, and human death have drawn the attention of legislators practically from the start of work on the first legal regulations. For example, in the Codex of Hammurabi, which is dated to 1800 BCE, we find regulations referring to abortion and the responsibility of a doctor for medical error. Similar regula-

tions are found in the codex of the Hittites, the collection of Assyrian laws, and in the Old Testament. It is from Roman law that we derive the principle, well known in contemporary legal systems, according to which "the unborn is deemed to have been born to the extent that its own benefits are concerned" (*nasciturus pro iam nato habetur, quotiens de commodis eius agitur*). It is interesting here that these legal solutions corresponded to views current at that time or to beliefs on the subject of the unborn and its development, which were given support by the greatest thinkers and doctors, with Aristotle at the head of them.

For example, according to Aristotle, it is possible to distinguish in the course of prenatal development – to simplify greatly – a stage of plant life (in which the embryo and then the fetus only takes nourishment and grows), of animal life (in which it attains the ability of perception, movement, and, in addition, psychological functions such as feeling and impulse appear), and of rational life, from which stage on the fetus becomes a human being able to know being and good, and also to make choices. Aristotle viewed the issue of abortion in keeping with these principles, which he not only permitted but even recommended in certain circumstances (for example, for eugenic or property reasons). In Aristotle's view, it was possible to terminate pregnancy up to the moment when "feeling and life" appeared in the fetus, in other words until the animal soul appeared, because – as he put it directly – what is equitable and what is not will depend on whether the fetus already possesses feeling and life, in other words to formulate the matter most forcefully, whether it feels pain. For hundreds of years, the Aristotelian view on human pre-natal development carried weight in shaping abortion legislation, and even today, to some degree, is reflected in them, including in Polish criminal law.

### [?] What are the legal consequences of the development of bio-medicine in the twentieth century?

The exceptionally intensive development of biology and medicine since the 1950s has meant that the number and scale of the problems that demand legislative intervention have grown vastly. In addition, in the subject literature, and in meetings of in-

ternational organizations and national parliaments, voices point out that the dangers that accompany advance in bio-medicine go beyond the level of a concrete individual with a health problem, and have begun to touch whole populations, and even humanity as such. For this very reason, in 1975, the General Assembly of the United Nations issues a declaration concerning the use of scientific and technological advance in the interests of peace and to the benefit of humanity. Similarly, in the 1970s, the Council of Europe concerned itself with problems of the negative influence of bio-medicine on human rights. The result of the work of the latter organization is the so-called European Convention on Bio-Ethics, and the supplementary protocols to it. Up to now, these are the only fully binding international, legal instruments in bio-medicine.

**[?] What from an individual perspective constitutes protection of the human being?**

The purpose of the above-mentioned instruments is, above all, the protection of the individual from the undesirable consequences of bio-medical development, and, in particular, the objectification of the individual. So the European Convention on Bio-Ethics determines that the interest and good of the human person outweighs the exclusive interest of society or science (art. 2). The price of scientific progress – even if carried out under the cover of "the good of humanity" – can never be the infringement of the basic rights of the individual. As a result, the Convention protects the individual against illegal intervention in his/her body, excludes the commercialization of the human body or its parts, and places limits on genetic tests, scientific research, the production of embryos for experimental purposes etc.

**[?] What from society's perspective constitutes protection of a human being?**

In international legal instruments, alongside the individual's perspective the perspective of society is also considered. Thus, the individual is taken to be an element of society – a community, the means of functioning of which specifies certain ethical principles and legal norms. As a result, the above-mentioned instru-

ments recommend that states initiate and direct appropriate public discussion relating to basic questions connected with the development of biology and medicine, so that any projected actions may meet with the approval of the community.

Besides the protection of the interests of the individual and of society, there appear in international bio-medical acts resolutions relating to the protection of the human species as such. This is because several implications of the development of bio-medicine may carry threats not just for specific individuals, but also for the entire species. For example, the mapping of the human genome, on one hand, contributes to success in diagnosis and therapy; on the other hand, however, the possibility cannot be excluded that particular information about the human genome when linked with the possibilities created by modern technology, may constitute a danger for humanity as such. For example, Jürgen Habermas, the famous German philosopher and sociologist, has warned against the danger of our species's auto-transformation through genetic engineering, taking us in unknown directions.

The above outline of bio-law unambiguously shows the extraordinarily close link it has with philosophy. For example, in the first of the discussed planes of regulation – that relating to the individual – one can ask a typically ontological question: who/what is the object of protection? Is a person the same as a human being, or not? Who/what is a person? Then, returning to classic philosophical disciplines, one can formulate questions that are typically epistemological: how do we know (recognize) a person/human being? What features determine belonging to the species *homo sapiens*? How do we recognize these features? Finally, one can ask an axiological question: is being a representative of the species *homo sapiens* equivalent to being a human being, to whom acts in the field of protection of human rights refer? What value does mere biological existence on its own have? Does biological existence translate into the exceptional legal position of the human being? Should we protect human life under all circumstances?

From a social perspective, questions arise, above all, relating to the criteria used to decide on the appropriateness of particular choices. Does the fact that general approval has been achieved for a specific action entail the positive evaluation of that action?

Does obtaining the agreement of a majority of those entitled to give that agreement that new-born children of a specific gender be put to death within five days of their birth mean that such an act becomes just? Does the obligation to inoculate children with substances that in one case out of 50,000 leads to severe disability, despite passage through the specific legislative procedure accepted in a democratic state, mean that one must evaluate this obligation unambiguously positively? Against the background of all the above questions lie in essence fundamental philosophical disputes: between legal positivism and law of nature, between universalism and relativism, and between communitarianism and individualism.

**[?] Finally, what from the perspective of the species is protection of the human being?**

On the level of species, we return to metaphysical and axiological questions. What is human nature? Is it synonymous with belonging to a species? Is human nature plastic, and can it be modified? If so, within what limits? Does human nature, which is linked to belonging to a species, constitute a value, or can it be a source of values? What is human dignity? Is it a gradable value? Is dignity the semantic equivalent of human nature? Can one bring it down to a matter of specific biological facts, or is that dignity independent of them? If it is independent, is that a total independence, or only a partial independence? If it is, indeed, a total independence, can it exist outside the human? If not, with what biological features is it concretely linked? If these features can be defined, is human dignity something more than these features?

An answer to the above questions certainly suggests that it is important to create a strong theoretical-legal foundation that will make it possible to construct a coherent system of bio-law. How necessary such a system is, is best attested by information relating to the "troublesome" achievements of bio-medicine, which one can come across almost every day in the media.

Chapter 2

# Law and Economics

**[?] What is the postulate behind the economic school of law, and who are the representatives of that school?**

The economic school of law constitutes one of the most recent proposals on the intellectual map of contemporary theory and philosophy of law. Combining the work of the dynamically developing economic sciences with the achievements of jurisprudence/legal studies, it sets itself the pragmatic aim of applying precise, contemporary methodology to solve hard cases. It is a movement that has achieved a much stronger position in American jurisprudence than in Continental European philosophy of law.

The term "economic school of law" or Law and Economics is used most frequently in relation to an academic movement that developed in the 1970s in the U.S.A. Its academic nursery was the University of Chicago. Its representatives took a position that the functioning of the law, especially in terms of its creation, interpretation, application, and observance, can be explained in economic categories through applying methods of cost analysis that belong to the study of economics. This observation has as its thesis that economic efficiency is encoded in law. Law, it is argued, tends to maximize general social wealth, and at the same time to avoid incurring unnecessary costs. The adherents of Law and Economics argue that in a common law system, judges intuitively make decisions on the basis of an economic criterion, tending to make a decision that on a macro level will maximize general social wealth and minimize costs. However, these concepts are not limited to a purely monetary or fiscal meaning; they also embrace non-material resources and values, which are, nonetheless, subject to some sort of economization by a judge in the course of his/her analysis. The ambitions of the economic school of law are not, however, limited exclusively to attempts to explain in economic categories how the law works. Its representatives also offer normative theses, and thus try to answer the question what the

law should be like, and what methods ought to be applied in its creation, interpretation, and application.

The literature indicates that the Chicago School is not the only group to propose a theoretical engagement of economic categories and methods in law. Here, mention is made of, *inter alia*, Roman jurisprudence, Marxist legal theory, American legal realism, several movements of legal hermeneutics and legal argumentation, and also Ronald Dworkin's integral philosophy of law. Nevertheless it is the economic school of law from Chicago that first consistently involved economic methods in its ideas, and that first proposed precise methodological tools. Precursors of the school are seen to be: Ronald Coase, Guido Calabresi, Aaron Director, and Armen Alchian, whose publications in the 1950s and 1960s laid the groundwork for Law and Economics. The best-known representative of the economic school of law from Chicago is the professor of law and federal judge Richard Posner, whose book *Economic Analysis of Law*, first published in 1973, became the most important point of reference for the movement.

**[?] What is the genesis and what is the place of the economic school of law in the theory and philosophy of law?**

The literature indicates that an obvious source of inspiration for the economic school of law is, above all, the classic British utilitarianism of Jeremy Bentham and John Stuart Mill. They thought that human beings aim at maximizing pleasure, and at the same time avoid pain. As a result they are directed by a calculation of utility: those actions are useful that permit one to increase happiness and minimize what is unpleasant. It is in the interest of society that the sum of individual pleasures be more than that of individual pains. This utilitarian rationality is expressed in the maxim "the greatest happiness for the greatest number." The maxim is certainly shared by the economic school of law, although the creators of law and Economics look for a more calculable, "scientific" formula by employing the methodological tools of contemporary economics.

A second source of inspiration for the Chicago School is certainly legal realism and sociological jurisprudence, especially that of Roscoe Pound. Economic analysis of law concentrates closely on

law in action, seen in this case in terms of an empirical economic fact. The task of the school is to construct a system of assumptions that will make it possible to foresee – as a result of applying an economic method of analysis – what decision a court will make in concrete cases. Its proponents argue that economic analysis makes it possible to make the kind of changes in legislation that will ensure an economically effective implementation of its aims, and, in consequence, a better and more rational organization of social life.

**[?] What are the main theses of the economic school of law?**

In his book *Economic Analysis of Law*, Richard Posner puts forward two basic theses: first, legal norms (common law) are effective, and, second, legal norms should be economically effective. Effectiveness for Posner means, above all, a maximization of social well-being/prosperity, and, concretely, a maximization of social disposition to pay the price for a specific good. Thus, in keeping with the first thesis, a law is calculated so that its addressees implement norms of effective conduct, that is those that, on the level of the whole society, maximize social well-being/prosperity. On the other hand, one can maintain on the basis of this thesis that effectiveness so-understood constitutes for the representatives of the economic school of law the criterion for differentiating legal norms from other norms. In turn, the second thesis, concentrating as it does on the normative aspect of the theory proposed by the adherents of Law and Economics, can be treated as a theory of adjudication and legal interpretation that is directed to judges. The institutions that apply the law should in the course of their decisions favor solutions and interpretations that maximize social wealth.

In order to make clearer the criterion of economic effectiveness and the concept of the maximization of social good, it is worth referring to one of Posner's examples. One of the clearest has been provided in *Frontiers of Legal Theory*. The case concerns a stamp collection.

> If *A* sells *B* his stamp collection for $1,000, this implies that the stamp collection is worth less than $1,000 to *A* and more than $1,000 to *B*. Let us suppose it is worth $900 to *A* (that is, he would have

> thought himself better off at any price above that) and $1,200 to *B* (the most he would have paid for it). The transaction is wealth maximizing because before it took place *A* had something worth $900 to him and *B* had $1,000 in cash, while afterward *A* has $1,000 and *B* has something worth $1,200 to him; so aggregate wealth has increased by $300 ($1,000 + $1,200 – $1,000 + $900). [Posner, 2004, p. 98]

At the base of the views of the economic school of law there lies the conviction that the human being is in his/her very nature *homo oeconomicus* – an economically rational being. Above all, this means that he/she is a subject who is egoistically aiming to maximize his/her own good (resources) or happiness, and, further, acts accordingly in every event rationally, in an instrumental sense. In other words, he/she correctly selects the means to realize this aim. This is, of course, a controversial assumption. It is certainly counter-factual, since empirically it has been shaken by the observations and findings of contemporary psychology.

**[?] What criticisms are leveled at the economic school of law?**

Of course, many of the assertions of the economic school of law have met with a variety of criticisms. Among the major arguments leveled against the status of the economic school of law as one of the principal movements in contemporary legal theory, is that Posner and other representatives of the school make no reference to the ontological question: what, according to them, is law? In fact, the economic school of law does not take a clearly defined position with regard to this fundamental question, silently assuming that the issue does not arouse any fundamental doubts. Thus, one cannot with complete conviction assert that the economic school of law answers the question in the same way that realism does – despite a genetic closeness in these two trends – that is, by seeing the law solely as empirical facts, in this case, as economic ones. Further, the school adopts certain assumptions that distance it from realism. An example is the hypothesis that the addressees of legal norms and institutions have full knowledge of the law and of all the possible consequences of action in accordance with the dispositions of particular norms, because only then is it possible to make a full evaluation of the situation from the perspective of the criterion of economic effec-

tiveness. It is worth noting that this tendency frequently makes demands relative to norms or to legal principles that are supposed to be economically effective, which may suggest that, at least in the Chicago understanding of things, Law and Economics takes the shape of a normative theory, assuming that law is made up of norms. Thus, despite everything, it comes nearer to positivism. However, the critical potential of the economic school of law in relation to existing ideas is more than obvious.

In addition, some commentators accuse Law and Economics of "primitive materialism." According to these, the economic school of law oversimplifies human behavior and motivations, bringing it down to a substantially reduced form of instrumental rationality with a purely material motivation. Economics and Law theory leaves no place for anything except egoistic and individualistic reasons for observing and applying the law. It arouses an understandable unease and leads critics to mention other values that law implements or should implement and protect. Among these is, above all, justice, which subjects the law to a certain, at least minimal, necessary moral validation, something that economic theory cannot guarantee.

Finally, especially in the context of recent growing criticism of economic neoliberalism, it is possible to lay against the Chicago School and, more broadly, the entire economic analysis of law, the charge of fetishizing free-market methods and the economic mechanism of self-regulation. Maximizing wealth, whether that is social or individual wealth, cannot be elevated to the status of the main principle and purpose of the functioning of a legal system. According to the logic of Law and Economics, social wealth is the greatest if certain limited or even scarce goods are in the possession of those who have been prepared to pay most for them. This is, essentially, a consequence of accepting the hypothesis of the functioning of unlimited competition, including in the legal system, as a result of which the poorest or worst provided have the least chances in the market, and simultaneously their share in "social wealth" is marginalized. The economic school of law does not envisage sufficient space for basic values and rights, nor does it propose any formulas that would make it possible to maintain a balance between social wealth and its distribution among individuals, that is their individual wealth. In other words,

the economic school of law does not suggest a satisfactory solution to the issue of the social allocation of goods.

### [?] In what branches of law do the methods of the economic school of law find their application?

Despite the growing currency of the ideas of the economic school of law, and more broadly, of methods of economic analysis in law, this methodology continues to enjoy decidedly greater popularity in its country of origin, that is the U.S.A., than in continental Europe and in other civil law legal system jurisdictions. Here it is received with greater caution. Posner and other representatives of Law and Economics assert that their method retains its usefulness when one is analyzing all branches of law, including public law. It is true that economic methods of analysis have been applied in the fields of, for example, criminal, constitutional, and trial law, but it has been claimed that much better results are achieved when they are applied to private law, especially civil law. Civil law relations and business relations can be better described in categories of economic effectiveness, and, in general, this can be done without fear of displacing the demands of justice.

### [?] What might be the importance of the ideas of the economic school of law in practical legal discourse?

Finally, it is worth looking at the proposition put forward by Jerzy Stelmach, Bartosz Brożek, and Wojciech Załuski. They suggest a broad employment of economic arguments within practical legal discourse. Their list is divided into general arguments, valid within the entirety of practical legal discourse, and particular arguments, connected with areas of specialized reflection, for example, arguments that arise in the course of making general rules concrete. The authors count the following among general economic arguments – ones that play a part of a species of axioms in the entire practical discourse of law; ones that are universally valid, ethically intuitive, and common sense rules:

1) the law cannot require what is economically impossible;
2) the law should be economically effective;
3) in practical legal discourse it is necessary to consider previously established economic arrangements;

4) legal discourse should give regard to economic standards;
5) law should be created and interpreted by using economic methods;
6) law should lead to a maximizing of social wealth;
7) the law should make it possible to make a correct allocation of goods;
8) the law should favor a minimalizing of the costs connected with exchange of goods. [Stelmach, Brożek, Załuski, 2007, p. 74–84]

**Works cited**

Posner, Richard. 2004. *Frontiers of Legal Theory*. Cambridge (Mass.)–London: Harvard University Press.

Stelmach, Jerzy, Bartosz Brożek and Wojciech Załuski. 2007. *Dziesięć wykładów o ekonomii prawa*. Warszawa: Wolters Kluwer.

Chapter 3

# Feminism and Law

**[?] Why according to feminists does the legal system discriminate against women?**

Feminist approaches to law or feminist jurisprudence is one of the principal ideas of feminist thinking that began in the late 1960s. Its development is shaped by the conviction that the formal achievement of equality by women within twentieth-century liberal democracies did not (and has not) changed their social position in an appropriate fashion. As a cause of this state of affairs, commentators point to a neglect in reforming actions of the fact that the legislative process and its philosophical underpinnings have been shaped exclusively by men. In law, which is an element of the structure of power, this practice results in the legislative oppressiveness of norms in relation to women. Such circumstances make any existing legal system still unrepresentative, and its declared neutrality invalid and defective. The criticisms formulated thus in relation to contemporary law situate feminist approaches to law (with some exceptions) alongside postmodern schools of law, among which it has become one of the main currents next to the critical school of law.

The hypotheses of a feminist approach to law are influenced by the idea of sexual/gender equality (which is common to all feminist thinking) both in the field of cultural self-determination, and its derivatives, which here means the exercise of power and the legal system. Among the conditions for the success of this project, commentators mention, in the first place, the formulation of a new research perspective by moving from being an object of cognition to being a subject of cognition, and the consideration of a female hierarchy of values and way of seeing things (Carol Gilligan), and, second, the description of women in the first person (Drucilla Cornell).

In this way, a new definition becomes possible of basic conceptual categories and methods. These actions should be conducted

simultaneously with a modification of language, so that language implements social heterogeneity. It is argued that, at present, the assumptions of ontology, ethics, epistemology, and philosophy are marked by sexual/gender inequality. Different principles in relation to these will be applied in a new theory of law created by women and their experiences. The result will be not only the suspension of men's legal dominion, but also a systematic strengthening of legislative projects oriented toward the subjectivity of women.

Such a definition of aims is the fruit of many years of analysis of forms of discrimination against women, and of the roots of that discrimination. They are strongly connected with the legal system, which sanctions many states of exclusion and restriction of freedom. In its continuation of earlier studies, feminism also reacts to new manifestations of inequality (the threats and deficits of liberal democracy), and also to chances to extend the borders of freedom (technological advance in the sphere of procreation).Both categories of events strengthen the arguments of feminist jurisprudence, but they are also a cause of its internal divisions. Their criteria refer to estimates of the substance and scale of sexual/gender difference, and, in consequence, to estimates of the legal solutions that are adequate to them. This is also a result of a varied interpretation of experiences won during actions in support of equality. For such reasons, part of feminist thinking still opts for conventional legal reform, but part chooses radical change, including the introduction of a separatist division of the law.

Liberal feminism (Betty Friedan, Patricia Williams) sees a content in most laws that is common to both sexes/genders, which makes it possible to retain them in the existing legal system. At the same time, however, differences emerge that should be regulated by regulations that respect a dual-sexual/double-gendered reality, and, thus, directly respect the experiences and needs of that reality's subjects. Present norms do not possess such features. The solution to this problem is a systemic revision entailing a modification in the content of many regulations and the introduction of additional ones. The best strategy for this kind of change remains maintaining an evolutionary tempo and an evocation of the universally recognized and accepted principle of emancipation. Introducing it again into social dialog, which itself

is undergoing transformation (communicational ethics, interactive universalism), enhances the effectiveness not just of the legislative process of achieving equality, but also the effectiveness of its informal manifestations. The achievements of feminist legal thinking up to now speak in favor of this approach, as does the possibility of employing existing and functioning political procedures, which increases the chance of achieving support over the whole of society.

A radical feminist tendency (Drucilla Cornell, Mary Joe Frug, Deborah L. Rhode, Carol Smart), which stands in opposition to the liberal one, values this project differently. The radical tendency proceeds from the following thesis: sexes/genders so substantially differ from each other, beginning with features of fundamental rights, that their equal existence is not possible on a common legal basis. The creation of two systems of laws is a necessity. The revolutionary content of new solutions and their consequences, *inter alia*, the elimination of male primacy, mean that this cannot occur by means of gradual reforms. For a part of the representatives of this tendency (cultural feminism – Mary Daly, Marylin French, Adrienne Rich, Ti-Grace Atkinson), the only basis for the development of new law is a woman-centered ontology and an extended catalog of means of cognition (including, for example, irrationalism), along with a deconstruction of language (a dual-sexual/double-gendered – and thus truly neutral – terminology. Self-determination requires its own philosophy, in which women's identity (essentialism) is also defined by difference. It is this that will constitute a condition for sexual/gender and cultural separation, and with it is linked the deconstruction of traditional institutions, including the family and the education system. The separation of the legal system is justified not only by difference, but by the need for effective protection of women's rights and the possibility of realizing women's needs.

### [?] Can the principle of formal equality before the law lead to discrimination?

Formal equality before the law in a liberal-democratic system does not refer to social and political relations. Feminist jurisprudence argues that the legal principles that obtain are not,

contrary to declarations, legitimized by freedom, justice, appropriateness, and equality. All the concepts referred to have been defined and evaluated solely by men. Thus, they do not have the value of universality, and for women they are partly a matter of form and partly a matter of oppression. Because of the neglect that emerges from such practice, and in other cases, too, of a faulty normalization of women's situation, there has developed a double legal standard, one that is invisible on a constitutional level. It is clearly visible by comparing the relationships of the state to the male citizen and the state to the female citizen.

The model for behaviors defined by law remains, above all, situations in which men are involved. These are various and cannot be systematized. However, as a rule, women's experiences are excluded from them, and when they are noted, they are exclusively serving roles (mother) or lacking in autonomy (wife). The masculinization of the law occurs, too, via language, which employs only one gender. Legal studies and legislation, since it remains the domain of men, cannot treat persons other than men completely equally, because such persons will always be "every other" for them. As a result, an improper regulation develops of the real or alleged difference that appears on the part of "others."

In fact, with a view to coherence and effectiveness the legal system cannot offer norms for every difference, but the methods by which this problem is solved at present are not only ineffective, but they also sanction actual discrimination. Several systems of norms introduce an abstract equality where there is substantive difference; others – although they take diversity into consideration – do it in a faulty way. There are also regulations that see difference where there is none. For this reason, a certain group of natural differences between women and men is not protected by the law, and the legal order itself leads to the emergence of additional, conventional inequalities.

Excluded from the process of making law, women experience further unjustifiable exclusions, including in the application of the law. For this reason, they suffer serious social, economic, and political disadvantages. This results from the border between the public and private sphere (a border created by men), which leads not only to faulty regulations relating to difference, but also to

a concentration of them in such important fields as criminal law, labor law, law relating to social insurance, and family law.

The normative regulation of public space takes account of principles of the equality of those who use it and the settlement of conflicts of interest, when the freedom of one citizen runs into the freedom of another. The private sphere is treated differently. Because it is recognized as a space of personal freedom, state intervention in it is substantially limited. At the same time, a person in family or marital relations experiences conflicts that involve issues of freedom and equality much more frequently than in the public sphere. This relates above all to women's experience, since being within this sphere is connected additional duties, and the distribution of these duties often occurs on a discriminatory basis. In this way, the state's respecting of personal freedom has led to ensuring freedom to those who are capable of making use of that freedom, and at the same time denying protection to those who do not have such individual possibilities.

A further aspect of discrimination is the privileging of the family. Regulations have emerged within the system that intervene in the sphere of procreation, as have other solutions that promote women's staying at home, at least for a certain time. Responsibility for violence and other prohibited acts is seen differently if the perpetrator is a family member.

A negative regulation of the functioning of the private sphere has a direct influence on the enjoyment of equality in public space. The legislator avoids the fact that part of the potential users of public space, as a result of the differences that they experience in the private sphere, cannot effectively enforce "neutral" laws. Labor law sanctions one of these bonds. Despite the introduction of regulations that protect mothers, the majority of its norms apply to the possibilities possessed by men (an available wage-earning worker fulfilling his duties outside the home). Thus, a change in a legal system so created and so applied is a necessity – and not only in the context of women's interests, but also as an obligation with regard to standards of human rights. A strengthening of the legality and justice of a modern political, social, and legal system should not just involve a formal equality before the law.

**[?] How should one regulate difference, in order to guarantee the equality of citizens before the law?**

Feminist approaches to law, drawing on an analysis of applicable law, do not only formulate some demands relating to its content, but also the conditions within which change should occur. Alongside an articulation of a different collection of concepts, research methods, and an insistence on their equality with others, equally importance is the broadening of the values promoted by law, and a partial modification in the hierarchy of those values, so that an appropriate place can be found for, *inter alia*, empathy and altruism. It is also necessary to introduce new criteria for evaluating law, criteria that refer to:

1) the influence of a norm on the actual situation of women;
2) the effectiveness of solving a given problem of conflict in the context of gender/sex;
3) the state of consciousness of social reality on the part of participants in the processes of legislation and supervision of the law.

These actions also contribute toward an identification of the normative model of the excluded, operating with the concept of difference. Support for this aim will come from the close cooperation of jurisprudence with other academic disciplines, including sociology, psychology, and economics.

The full and stable participation of women in the legislative process will not only change the quality of the law, making it representative, but will also bring about the participation of women in the exercise of political power. As a result, public space will actually be open to all individuals. Liberal feminism proposes employing traditional institutions to achieve this end, however with a modification of some concepts and methods, including how the law handles difference. Reform should take into account natural gender/sexual equality, which can be articulated by means of definitions that feminism has already developed, which take into consideration new social-political experiences, in the context of the diversity of the human being and its interaction with other subjects.

However critical legal feminism rejects the thesis of the rationality of the contemporary legislator who draws on universal meth-

ods of cognition, and thus also rejects its ability to evaluate behaviors in those categories that are important for the law – good and bad, truth and falsehood. Such critical feminism demands a deconstruction of the current system and the introduction of a new legal order possessing a larger number of solutions that make legal equality real. This includes the sexual rights of each gender/sex, restoring freedom to women, and thus power not just in the field of procreation (radical-libertarian feminism)

The internal disputes within feminist approaches to law concerning the vector and scope of changes to the present legal system, and the doctrinal controversies do not cancel out the common aim, which is to draw attention to the legal situation of the individual and the collective, excluded and limited in their rights because of social difference. This problem does not just apply to women, and its solution, as feminism stresses, will substantially improve the legal protection of all citizens.

Chapter 4

# Hermeneutics and Law

**[?] What is hermeneutics?**

What constitutes the key to understanding the world, particularly that which we know through the human products that are linguistic utterances? Why do some of us imagine the gun rest in the Joycean tower by Sandycove Point as being made of bricks, while others imagine it as made of stone? What constitutes the basis for our understanding reality?

From the point of view of reflection on the law, these questions take on yet another meaning. What is in essence the source of a valid rule of conduct? Is it exclusively the linguistically formulated content of a legal regulation? Finally, how does the method of establishing binding rules of conduct proceed, or how should it do so?

Several authors see the source of the word hermeneutics to lie in the name of the god Hermes – the instigator of language. A more probable derivation of the term is from the Greek word *hermeneutic* – that "bringing to the light of day." The essence of hermeneutics in the past was an aspiration to reach the most precise decoding of the meaning of individual words contained in a text.

At the beginning of the Middle Ages, when hermeneutics became a synonym for the interpretation of the Bible, there were two schools of hermeneutics – that of Alexandria and of Antioch. In the former, the movement to interpret the Bible allegorically developed. This was achieved by examining three meanings: the somatic one (literal), the moral one, and the pneumatic one (spiritual). Literal, moral, and mystical meanings were correlated with these fields. In opposition to this movement, representatives of the school of Antioch emphasized the need to interpret scripture literally. The demand for allegorization was replaced by injunction to practice critical exegesis based, above all, on philosophical reflection. Today it is difficult to decide which of these

schools could constitute the basis for the modern understanding of hermeneutics, if we assume a certain continuity of lines of thought. However it is enough to point out that they had a direct influence on the isolation of the contemporary methodological and philosophical tendency that is hermeneutics.

The first approach, which is also called the historical one, began to seem, as it developed, predestined to become a universal epistemology for the humanities. As a result of the work of Friedrich Schleiermacher, it was defined as a historical-psychological process of understanding, of a relative and indeterminate kind. The research method described by Schleiermacher exploits visualization in the shape of the hermeneutic circle, which is treated as a description of the process of understanding. By convention, the interpreter moves over and within a circle sketched out thus, approaching meaning – along with the cognition of the content of the statement, and with parallel reference of to the reality that lies beyond the interpreted source itself. The historicity of the method is a matter of a more or less conscious evocation of experiences and contexts already experienced by the individual engaging in interpretation. The interpretation's psychological aspect refers to the internal progress of the described process.

This approach was continued by Wilhelm Dilthey, who – assimilating to a degree the work of Schleiermacher – considered that the inner life does not consist of a series of mechanical beginnings and ends, but is woven together into a continuity (*Zusammenhang*) that possesses a structure. By this, Dilthey understands that every part must be viewed through the lense of relations, the internal links with other parts of the whole. He also indicated that the aim of methodology in the humanities is not knowledge of psychological cognitive processes, but an opening to a secondary/repeated experience of reality, in the manner, for example, of the creator of a picture or a literary work. At the same time, a humanist epistemology so understood is objective by virtue of the collective character of experience, a character connected with the embedding of the interpreter in the experience of a defined social group, of which he/she is a member.

Hermeneutics began to be seen as a philosophical current, above all, is connection with Schleiermacher's writings. He was the first

to draw attention to the interpretative situation as one of the basic elements that influence the result of interpretation.

In ontology (existentialism), hermeneutics is also not treated in a unified fashion. A general feature of ontological tendencies is the assumption that hermeneutics is a form of existence, but one which, at the same time, does not cease to be a method. Edmund Husserl is seen as the author of this formulation. According to him, life is an existential form of cognition. Martin Heidegger took up this conception, and put forward the more ambitious thesis that the form of being is understanding itself. As Hans-Georg Gadamer put it, the fundamental feature of being is the processual nature of cognition, which is permanent and uninterrupted, while at the same time being in linguistic form. The ontological, in his view, is expressed, above all, in the determining of the essence of the humanities. They exist exclusively through cognition and in the context of cognition.

**[?] Can the essence/substance of the law be explained by hermeneutics?**

In answer to this question, it is, above all, necessary to indicate that an ontologically oriented legal hermeneutics cannot unambiguously be classed as part of a normative or real tendency. Depending on the emphases that we place on particular elements – of the internal character of the reproduction of rules of conduct with consideration of the cultural context – we can consider law seen through the lens of hermeneutics as a kind of real being, a psychological fact comprising both the individual's experiences and relevance to such experiences within a social group. Or it can be treated as a kind of rule of conduct reconstructed on the basis of a normative utterance expressed in the form of a legal regulation supported by experience, culture, and the knowledge of the interpreter. The interpreter is a member, on one hand, of a social community, and, on the other, of a legal community.

It is necessary to consider the attempts undertaken in this respect by Adolf Reinach. He was convinced that Husserl's phenomenology made it possible to elucidate the essence of the law. His concept of intuition is fundamental for understanding the method of cognition of the law, understood here as a compi-

lation of constantly variable law in positivist terms, on one hand, and of human nature with its emotions, on the other. Indeed, legal intuition is to constitute the focal lens for a positivist conception of law (in this case a linguistic conception) and a natural-law concept of law (reproduced in context).

In an extremely complex manner, the epistemological current in hermeneutics adapted the work of Adolf Kaufmann to the field of thinking about law. Kaufmann proceeded from the thesis that law does not exist (does not apply) at a pre-interpretative stage. It arises in the process of its reproduction – that is, its understanding. Therefore, the whole process of applying law has to be grasped as a creative process. This position was based, *inter alia*, on a rigorous differentiation between law and legislation. A piece of legislation is the expression of the imperious will of the legislator, and is only of a potential nature. Law is seen as the realization of a piece of legislation, in the course of a hermeneutic act of understanding. Developing his conception, Kaufmann indicated three phases of a hermeneutic vision of the application of law. The initial stage is the recreation of general and supra-positivist principles of law. A consideration of these alone makes it possible, at the second stage, to make the "piece of legislation" concrete. The final stage is the reference of the shape of the "law" so obtained to the historical and actual conditions, in which the understanding of the legislation/law is carried out.

### [?] Can hermeneutics constitute a descriptive model of the application of law?

The hermeneutics of law can be seen as a method for describing the application of law. Among others, Gadamer (mentioned above) pointed to the possibility of using hermeneutics as method. Understanding law in the process of reconstructing a legal norm and its application did not constitute for him a particular sub-class in relation to humanist hermeneutics in general. The model of applying the law in his conception is categorically set against a syllogistic model. As I have already noted in my comments on the ontological aspects of hermeneutics, this model belongs among the assumptions of the concept under discussion: that law is created by the very process of cognition of the

law – that is, its reconstruction. The ontological-epistemological dualism of hermeneutics – in which the method, and in principle everything that in the course of the method's implementation is taken into consideration, is the "timber" of the law – is characteristic for all its tendencies. If one were to adopt this general comment relating to legal hermeneutics – a comment that in the face of the insoluble controversy about the essence of the law must be rather an expression of belief than of conviction as to its accuracy – it would be possible to accept the notion of the congruence of this description with the actual course of the application of law. The constituents of such a description must include fundamental elements of the concept such as: the linguistic character of the process; and the comprehension and structure of the hermeneutic circle that describes the course of understanding.

A common feature of hermeneutic tendencies is also their linguistic character. All thinking in the humanities, not to say the humanities themselves and their objects of study, are formulated in language. This also relates to aspects of law. The application of law is also carried out in language. On one hand, it is a matter of recreating a linguistically articulated legal rule of conduct. On the other hand, it is a matter of recognizing, based on empirical data or on other opinions expressed previously, opinions concerning the factual state of matters described in legal norms. Research is permissible into the application of law as a process exclusively from a linguistic perspective. Both a rule of procedure, and also the factual state of matters, according to which it would be possible to apply that rule, can be brought down to a linguistic figure.

Understanding of appropriate conduct is an integral element of the process of applying the law. The phenomenon of understanding is present in all relations of the individual with the world that surrounds him/her. This manifests itself in the whole complexity of these relations: beginning from the acquisition of communicative abilities by children for the purpose of enhanced socialization, through a purposeful use of a fabricated tool to work and shape material, up to the acceleration of elementary particles in a cyclotron – just to give examples of various actions based on the comprehended exploitation of possibilities which have arisen at the border of the individual and reality. To put it differently, understanding is treated as the capability of a defined subject,

who legitimizes him/herself by that understanding, to employ the object of understanding, and to use it, *inter alia*, in other processes of understanding.

Every understanding – or more broadly, cognition – is preceded by pre-understanding, which is the accreted and condensed relation of all earlier understandings. The act of cognition never takes place separate from a cognitive situation and from prior knowledge. Understanding, as formulated in hermeneutic legal methodology, describes the process of applying the law, and, indeed, the reconstruction of the law itself – that is, its interpretation.

Besides those features I have indicated, all hermeneutics espouse the concept of the hermeneutic circle (the hermeneutic spiral). The point of introducing this concept is to describe the cognitive process, above all, as a sequence of uninterrupted understandings, in which each earlier one conditions a subsequent one. In addition, among elements of understanding so described, there takes place a regressive compression, leading, on the part of those elements, to constant self-reference. The application of the law submits, both descriptively and in terms of its postulates, to translation into the hermeneutic circle (the hermeneutic spiral).

Chapter 5

# Critical Legal Studies

**[?] What is the Critical Legal Studies movement?**

The name Critical Legal Studies (CLS) is given to an academic/scholarly movement (not however a coherent "school"), which started in the USA in the mid 1970s. It arose in opposition to the liberal tradition that lies at the basis of American jurisprudence. The CLS movement developed in the atmosphere of experiences drawn from civil rights movements and those against the Vietnam War in the 1960s and 1970s. Opposition to the polices of the United States at that time inspired critical reflection on the (existing and dominant) liberal legal ideology of the West.

CLS is presented as the first left-wing movement in the theory and teaching of law in the USA. The literature analyzes the complex relations of CLS with Marxism, as there is no doubt that elements of Marxist philosophy influenced several representatives of the movement. The fact is that one of the key issues advanced by the adherents of CLS was a criticism of the law and ideology of capitalism.

In the course of time, CLS spread beyond the borders of the USA. Its representatives, drawn mainly (but not exclusively) from an Anglo-Saxon legal culture, were active, or are still active, primarily at US universities, although also at universities in England, Scotland, Australia, New Zealand, and South Africa.

One must add that in recent years the influence of CLS in the American academic environment has waned, although adherents of the movement still produce work. Currently, branches of CLS – Critical Race Theory and Critical Feminist Theory – are provoking interest.

**[?] What are the issues that representatives of CLS focus on?**

Although the work of representatives of CLS does not form a coherent collection of ideas, they do concentrate on several

common issues. To put it in very general terms, adherents of the movement subject to radical criticism conceptions of law that have been current up to now. The aim has always been to achieve changes in the existing legal order. Thus, in writings by the representatives of the movement, we can find a criticism of the understanding up to now of the law, the state, and society. We also find criticisms of the research methods used to analyze these phenomena. As a result of this criticism, there have emerged proposals for a new understanding of these concepts and methods of doing research into them.

The aim of this criticism was supposed to be to establish what views on the law, the state, and society legitimatize the existing legalorder and shape social life. The representatives of CLS believe that it is necessary to change the existing legal consciousness of society, a consciousness that is made up of views legitimatizing the capitalist state, since they are marked by erroneous convictions (for example, that the law serves all citizens – in the view of CLS, the law serves the interests of a small part of society). Demonstrating the false convictions that underlie the existing legal order is intended to bring about a change in society's legal consciousness and to lead to desirable changes in the social structure. These changes ought to free society from the influence of concealed interests and the domination of some social groups over others (the source of which is currently existing legal institutions).

Although the views of the representatives of CLS are not coherent and are diversified, the literature indicates the possibility of distinguishing categories of issues that they take up. These include demonstrating the indeterminacy of legal doctrine, based on the argument that any given set of legal principles can be employed to justify differing or, indeed, contradictory legal findings. (Contrary to the general belief, law and jurisdiction do not completely provide a basis for establishing the result of legal disputes.) Further, they include the use of historical and socioeconomic analyses to examine the special interests of those groups that profit from the status quo – despite the indeterminacy indicated above. Finally, they include demonstrating how legal analyses and legal culture "obscure the image" of the law and legitimatize its results, and advancing the implementation

of new or previously disregarded and disparaged visions of society through legal practice and political action.

### [?] What are the views of Roberto Mangabeira Unger that he expresses in The *Critical Legal Studies Movement*?

Among the writings and statements of the representatives of CLS, the views of Roberto Mangabeira Unger merit particular attention. He is one of the most influential thinkers associated with the movement. In *The Critical Legal Studies Movement* (Harvard University Press, 1986; Polish edition: *Ruch studiów krytycznych nad prawem*, Warszawa 2005), which is more a manifesto than a description of the work of CLS, Unger – proceeding from a critique of the functioning of various aspects of the contemporary capitalist state – proposes a redefinition of its institutions.

As Unger sees it, critical studies of law have as their sources, *inter alia*, the need of critique of "formalism" and "objectivism," concepts that he understands in a particular fashion. He defines formalism not so much as a method of eliciting legal findings by deductive method from a coherent system of rules, but rather as a baseless faith in the possibility of justifying those findings via rational and apolitical legal analysis. The point of departure for his criticism of formalism, so understood, is the idea that argues that legal doctrine must be based on concrete imaginings of the forms of human society, which reflect actual social life. The possibility must exist of rejecting parts of the established interpretations and findings of the law as erroneous by invoking the bases of the normative theory of a given branch of law (for example, a constitutionalist requires a theory of a democratic republic, which describes the relations of the state and society), or by invoking the sphere of social practice that the law regulates.

Unger understands objectivism as a faith that the system of lawmaking acts, court judgments, and valid legal ideas establishes an acceptable scheme of social life, and that law is not a fortuitous result of the concatenation of different interests. In his view, it is otherwise. In particular, standing and valid law does not contain one coherent conception of democracy and the market. Quite the reverse, it contains mixed and undeveloped elements of various conceptions. The many failed attempts to find

a universal legal language of democracy and the market would suggest that such a language does not exist.

In Unger's view, in order to overcome the defects of formalism, a broadening of the scope of operations of legal doctrine is necessary. This expanded doctrine should employ methods of criticism and argumentation that are appropriate for ideological disputes, and, thus, go beyond dogmatic legal analysis. The task of this expanded doctrine is, further, to discover conflicts among the principles of the existing legal system. With this is linked the assertion that in the states of the West, visions of the common life invoke concrete ideals of the state and the community, which visions help to create what are only the appearances of rationality in the legal system. However, the fact that there are conflicts of a legal nature suggests that there exist other schemes of social organization.

Further, the critique of objectivism leads Unger to redefine institutional forms of democracy and the market. The program of reshaping basic institutional structures proceeds from the criticism of existing institutional practices and ideals, in particular democratic ones. Unger's program of reforms refers to the organization of state authority, the organization of the economy, and also the system of entitlements.

Unger argues that a reform of state authority must lead to developing ways of structurally limiting the state without paralyzing its transformational operations. Thus, he proposes a diffusion of state power, making it possible to control this power in relation to any conflicts. The organs of state power should be answerable before citizens and political parties, and the structure and organization of these organs must make it possible swiftly to emerge from any impasses. However, the authorities of the ruling party should possess the real possibility of trying to implement its plans.

With regard to a new organization of the market economy, Unger proposes, *inter alia*, a rotation of capital funds. That is, capital would be available for a limited time to groups of workers under conditions fixed by the government. Here the purpose of reform would be the active role of the state in the economy, and a departure from the principles of the market economy as it is traditionally understood.

Finally, Unger proposes a reshaping of the institutional aspect of individual entitlements. This is meant to tend toward an overthrow of the "tyranny" of consolidated property. Here Unger distinguishes four categories of entitlement: the entitlement to independence (to the guarantee of security in relation to the state and to other subjects); the entitlement to violate the existing state of things (to question existing institutions and forms of social practice); market entitlement (to part of social capital that is the object of division); and the entitlement of solidarity (to life in a community).

Chapter 6

# Legal Positivism

**[?] What is legal positivism?**

By "legal positivism" we mean an approach or actually a group of approaches to reflection on the law and the state that are usually set against approaches based on natural law. They developed in Anglo-Saxon legal culture and in Continental Europe, beginning in the mid-nineteenth century. In its model formulation, positivism is always marked by a rejection of any search for an answer to the question of what the law should be. It rather concentrates on the question of what the law is.

The huge number and variety of positivist ideas, which have developed in the study and theory of law especially in the twentieth century, and which have gone into its programmatic division of matters into the sphere of being (*Sein*) and obligation (*Sollen*), means that these approaches are not easy to classify. Basically, legal positivism developed in two currents: as Anglo-Saxon positivism (Jeremy Bentham, John Austin) and Continental positivism (Karl Bergbohm, Rudolf von Ihering, Georg Jellinek). These are substantially different from its contemporary versions (H.L.A. Hart, Joseph Raz, Neil MacCormick). Hans Kelsen's normativism is a particular variation of it.

Currently, the line of division among positivist approaches runs between so-called soft or inclusive positivism and hard or exclusive positivism.

**[?] What were the beginnings of legal positivism?**

As a new way of perceiving law, positivism was an answer to philosophical-scientific, socio-political, and legal changes that had been taking place since the seventeenth century. The dynamic development of the natural sciences and their development of modern methodology meant that they were seen as offering a universal model for science and scholarship. Knowledge was

detached from metaphysics, and all cognition was to be scientific cognition, reached by applying empirical and experimental methods, or by induction. Philosophical Positivism, initiated by Auguste Comte (1798–1857) and transferred to the social sciences by Herbert Spencer (1820–1903), rejected those statements that could not be reduced to individual empirical knowledge, and restricted the sphere of their interest to existing scientific facts.

The positivist consideration of the law and the state was an expression of the Enlightenment crisis of liberal ideology, which valorized natural-law concepts that proclaimed ideas of human rights and affirmed the idea of the state as the "night watchman" of an order based on tradition and metaphysical ideals governed by a law established by a monarch. The whole range of social differences and inequalities that became apparent after the French Revolution and the Napoleonic Wars, had to result in substantial corrections to the image of the emerging state and its institutions. In the first half of the nineteenth century, a simple return to the *ancien régime* was no longer possible, and at this time positivism offered new solutions, which aimed to stabilize weakened social-economic relations in a dynamically developing Europe. This was especially important because of the formation of new relationships in society, especially with regard to those connected with production and work. Law was ascribed, inter alia, a protective function and the task of mitigation of conflicts. The idea of legal security and the certainty of the law became predominant. The implementation of such ideals became possible through a shift in the importance of the law's legitimacy from the ruler's person (sovereign) to a real legislative act. Conventionally made law was to regulate reality in a complex, coherent, complete, and lasting manner.

At the same time legal studies became apolitical. The study of law parted company with historical reflection, and concentrated on programmatic matters of doctrine. Legal concepts, and also the whole legal system, were to be certain ideals. The main task of jurisprudence became the development of fundamental concepts and the analysis and systematization of the law that is valid in a specific time and place (so-called positive law).

**[?] What were the features of Anglo-Saxon positivism?**

The English lawyer John Austin (1790–1859) is regarded as the father of Anglo-Saxon positivism. His key work is *Lectures on Jurisprudence or the Philosophy of Positive Law* from 1879. In this, he sets out to formulate a general jurisprudence – a discipline that will deal with law as such. However, it is important to mention that it is not Austin, but rather his great teacher Jeremy Bentham (1748–1832), who is seen as formulating the fundamental ideas of the classic, Anglo-Saxon version of positivism, and especially, as the author of the theory of command, which served him to critique common law, a system that employs arbitrary precedents that lack in clarity.

Bentham perceived the irrationality of judge-made law and compared its mechanisms to those of animal training, which is a matter of imposing punishments for behavior that does not fit in with the trainer's wishes, and in the case of judge-made law with the judge's evaluation. He noted that this mechanism has a retroactive and reactionary character. In systems of statutory law, based on rational legislation, norms of a prospective kind are created. Bentham perceived such statutory legal norms as commands proceeding from the will of a sovereign possessed of authority and competence to establish valid law guaranteed by sanction. Bentham greatly valued the many advantages of written (positive) norms, and he wished to codify law, which was also to be separate from morality. The ethical function of law was, in turn, to be determined by the Utilitarian idea of utility. Establishing norms with regard to a felicific calculus was to decide whether a law was rational and good. This was a reaction to the view expressed by William Blackstone, who denied that statute law had binding force, if it contradicted natural law, which proceeded from God. Hereby Bentham was the first to see that the application of the law is a quite different question from that concerning its content and moral judgment. In Austin's work, this led to the elimination of statements of value from legal studies.

Above all, Austin directed his attention to a descriptive analysis and orderly arrangement of the conceptual apparatus in jurisprudence, within which an especially important place was taken up by a search for a definition of the concept of "law," and the

matter of settling its scope. Austin came to the conclusion that law is a collection of legal norms. A legal norm I understood by him as a rule of behavior, which one subject has established for another subject, over whom the former has power (authority). Thus, it takes the shape of a general and abstract command. Further its carrying out was always secured with a sanction, which was understood as a threat to harm the individual who violated the legal order. This command proceeded, of course, from a sovereign possessed of power. This sovereign was defined by Austin as having three features:

1) The habit/custom of obedience on the part of the addresses of legal norms;
2) The lack of the habit/custom of obedience on the part of the sovereign in relation to any other higher authority; and
3) The unconstrained, undivided, and uninterrupted character of the power exercised by the sovereign.

Accepting the concept of law as a union of legal norms proceeding from the state actually meant that considerations relating to axiology and the content of the law were excluded from jurisprudence. But Austin did not consider that the law instituted by a sovereign could be created completely arbitrarily at all. Brought up in a Utilitarian tradition, like Bentham, Austin indicated that in such a matter key importance is possessed by values such as the rationality of the law-maker, public opinion, and the felicific calculus.

It must also be noted that a legal system constructed of legal norms construed as commands did not include international law, which is usually created in the form of agreements between independent subjects, and very rarely employs sanctions. For these reasons, such law was given the name of "positive morality," just as is the case of those norms that are currently ascribed to the field of constitutional law; these define the obligations of the sovereign toward citizens and customary law broadly understood.

However, it is to Austin that we owe, above all, the development of a whole new way of understanding law – that is, analytic jurisprudence. Scrutiny of the law has to be objective and to observe the obedience among subjects/citizens toward the sovereign's

commands. Thus, the lawyers' task was to recreate the contents of the sovereign's acts of will. This meant a *de facto* formal-doctrinal exegesis of the norms of the law, an exegesis based on a linguistic-logical analysis of the words used and of the rules of inference. One should add here that the subject of jurisprudence was exclusively positive law, which meant that this discipline did not concern itself with the content of the above-mentioned "positive morality," or other approaches to law, such as divine law (although the existence of such orders in general was not denied by Austin). An analysis of law without considering its connections with axiological, historical, socio-political, and economic conditioning factors made it possible to create an exceptionally simple model of the legal system, and, at the same time, to eliminate the problem of moral support (or lack of such support) for the law as it is in force. Even today, this constitutes the power of this conception. Unfortunately, far-reaching simplifications expose it to frequently justified criticisms, including those from positivists themselves (for example, H.L.A. Hart).

**[?] What are the features of Continental European positivism?**

Continental positivism developed rather differently. It arose in German-speaking countries in the second half of the nineteenth century and in the twentieth century. Among the leading proponents of this approach are: Karl Bergbohm (1849–1927), Ernst Bierling (1841–1919), Karl Binding (1841–1920), C.F. Geber (1823–1891), Rudolf v. Ihering (1851–1911), Franz v Liszt (1851–1919), Adolf Merkel (1836–1896), Felix Somló (1873–1920), Bernhard Windscheid (1817–1892), and Ernst Zitelmann (1852–1923). It is important that the general theory or science of law was formulated in the course of arguments relating to the field of doctrine with which a given author was concerned. Among many different views, however, at least two versions of positivism are usually spoken about, that is, so-called statutory positivism (*Gesetzpositivismus*) and conceptual jurisprudence (*Begriffsjurisprudenz*).

Positivists initially focused on an analysis of the expressions of legal language. Such an analysis is necessary to make the language of doctrinal legal studies clearer and more precise. The lawyer is compared in his activities to a scientist, a chemist for example,

who extracts "pure" legal concepts out of a mass of legal material, and then goes on to systematize them, and on the basis of them gives verdicts and decisions. This process takes place by means of methods developed by logic, and especially by means of the legal syllogism, in which a general norm is established instead of a major premise, and in the place of a minor premise comes a legal fact. The conclusion is an individual norm, the sovereign's command. Thus, lawyers have to perform a purely technical operation, a straightforward derivation (subsumption), and legal studies is to limit itself exclusively to linguistic and formal matters. By virtue of this approach, it was possible to develop an independent linguistic apparatus, which legal studies uses to this day.

As in the original Anglo-Saxon concepts, law is defined as the sovereign's command supported by compulsion, although not in the form that Austin proposes, because directives of conduct are to be both directed to the citizen and to designate the framework of the functioning of the state, the will of which the law indicates. German positivists came to the conclusion that the source of law is apiece of legislation (statutory law). However the key issue for determining its validity is the fact of the passing of a law. This extreme formalist approach to the certainty of a law meant that in Continental positivism (as in British positivism) there was no place for ethical consideration of the content of the law itself. Legal policy lay outside the lawyer-positivist's scope of interest; for him, as for the "scientist," the fact of the law's validity has to be verified empirically. Bergbohm puts this very clearly when he writes that even the most contemptible piece of legislation (law), if it is correctly passed in a formal sense, is binding and valid. Linguistic conformity demands that the concept of "law" is reserved exclusively for positive law, and hence rigorously differentiated from other types of reflection on the law. It is, however, necessary to recall that the content of the law so formulated does not in any way have to be unchanging, and it may be subject to modification when it ceases to suit the state.

Rudolf von Ihering suggested a somewhat softer version of positivism. As an eminent expert on Roman law, he opposed the reduction of legal studies to a linguistic-logical operation. In his most important works, *Zweck im Recht* (Purpose in Law) and *Kampf ums Recht* (Struggle for Law), he proposed to broaden the

definition of law as a command fortified by compulsion, in terms of the purpose it is to serve. He argues that every legal norm is the expression the interests of citizens, has to serve the security of the conditions in which they live (maintenance of peace and eliminating social conflicts), and changes depending on the social situation. The means of achieving these aims is a struggle with lawlessness, which is fought by the use of compulsion. For these reasons, the analysis of legal concepts must also take into account the social, historical, and even psychological context of the law.

**[?] What is normativism?**

In the twentieth century, the Austrian lawyer and philosopher Hans Kelsen developed a particular version of legal positivism, sometimes called "pure theory of law" (*reine Rechtslehre*). In its premises, this approach emerged from Neo-Kantian thinking, which rejects irrationalism, speculative naturalism, and positivism in a general philosophical sense. Thus, its fundamental methodological premise was an epistemological formalism and dualism, which assumes a clear division of being (*Sein*) and obligation (*Sollen*), something that was mixed in earlier versions of positivism. Normativism was, therefore, free of ideological considerations and evaluations, and it was detached from all other branches of study (sociology, economy, politics). It asked neither about the content of the law, nor about its purpose.

This idea is inimical to the sociological-legal considerations initiated by Ihering. In principle, for Kelsen, the subject of legal studies is "pure" legal norms, and, to put it more precisely, a system of laws composed of general and abstract legal norms. It has a specific structure based on formal connections, but not on content-based ones. It is, accordingly, a dynamic system in which norm n1 is valid only because there exists another relevant norm of a higher rank, n2, which authorizes the establishment of the former. In this way, an autonomous, coherent legal system develops, taking the shape of a pyramid. At the apex, is the fundamental norm (*Grundnorm*), which possesses a purely logical and hypothetical character. It applies only because the premise of its validity is accepted, and, in this sense, its content may vary. Kelsen defined a legal norm in a similar way – as a hypothetical utter-

ance indicating that under the conditions A, it is necessary to do B, whereby these elements are linked by a normative connection. This depends on prescribing a specific sanction in defined circumstances and in relation to defined conduct. This leads to the conclusion that, for Kelsen, legal norms are something in the nature of norms of sanction. It is worth noting that Kelsen sees specific and individual utterances also as legal norms, in which he differs from other representatives of positivism.

**[?] What are the principal theses of contemporary positivism?**

A positivist approach is still of key importance for legal practice and remains part of the lawyer's basic tool-kit, irrespective of what legal culture he/she moves in. Extensive critique, not always merited (as, for example, making positivism responsible for the perversions of the Nazi system of lawlessness), has led to the verification of several of the premises of this approach.

In its contemporary formulations, the substance of positivism resides in legal research based on three fundamental theses:

1) of the separation of law and morality (separability thesis);
2) of law as a social fact (social fact thesis);
3) of the conventionality of the law (conventionality thesis).

Ad 1. Currently, within positivist approaches, a central issue remains the question of the separation of law from other normative systems, especially from morality. This issue is based on the premise that law "is law" irrespective of its moral values. An ethical evaluation of its content only determines whether it is "good" law or "bad" law, and not whether it is or whether it is not "law." This leads to the position that the agreement or lack of agreement of legal norms with moral norms (natural law) remains totally without influence on the matter of the validity or binding force of those legal norms. By the same token, law may violate principles of appropriateness, justice, and utility, and still, despite that, stay valid law, if it has been introduced into the system by the appropriate agencies within the framework of their competence, and if it has not been removed from the system according to established procedures.

The thesis of the separation of law and morality, marking the conventional axis of division into hard (exclusive) and soft (inclusive) positivism, does not mean, however, that currently positivists ex-

clude the existence of any links at all between written law and the doctrines of natural law. The nihilistic position – arguing that there are no connections between these spheres – was basically only presented at the start of the development of the approach. The same is true of the conception suggesting that, indeed, certain links factually exist, although they are not of a required or desirable character (for example, Kelsen and others). Meanwhile, at present those concepts are considerably more widespread in which such connections exist, which although they may not be required, are, nonetheless, preferred (H.L.A. Hart), or which, in fact, are necessary and desirable (Dworkin).

Incidentally, it is necessary to recall that the so-called Radbruch formula had a huge impact on the development of a new paradigm of this traditional problem. The formula was the point of departure for one of the best-known philosophical disputes in the twentieth century, the Hart-Fuller debate. At the same time, this dispute opened legal studies up to the possibility of seeking a third way between positivism and non-positivism. The authors themselves as a result of their discussion in the 1950s, made a substantive revision of their positions. The positivist Hart formulated his conception of the minimum content of natural law within positive law, and Fuller formulated his idea of the inner morality of the law. Another important discussion is seen as a continuation of this debate, that is, the argument between Hart and Dworkin.

Ad 2. The thesis that treats the law as a social fact correlates with the above issue. It is somewhat more important in relation to exclusive positivism and is more clearly set forth in inclusive positivism.

This issue refers directly to Austin's conception of sovereignty. The authority and independence of the legislator is decisive for the substance of the law, and not the source of the legislator's mandate (for example, from God or from other supernatural sources). The social fact is, thus, the existence of a strong and superior power, capable of imposing on the addressees of the legal norms the obligation of obeying them, the habit of observing the law. Such precedence of the law over other normative systems directly influences the certainty of the law and legal security, since every question may in principle be subject to

legal regulation. The procedural criterion of the source of derivation is decisive in evaluating the validity of the law, and not any content of the law.

It must be noted that in inclusive positivism this issue was substantially modified, and, for example, in Hart's concept takes the shape of a rule of recognition. Hereby, there is a shift in the center of balance in the substance of the law from the sovereign's command to the law's social acceptance. This still does not mean that there is a switch to the position of natural law, and the connection of the law with moral norms is still not seen as a criterion of the evaluation of the validity of legal norms, but it does have some influence on its actual validity and observance. This results in making the law more flexible, and in opening the system up to other normative systems that function in society, including to the moral norms that obtain in a given collectivity.

Ad 3. The third thesis of contemporary positivism provokes the greatest controversy – that is, the thesis of the conventionality of the law. It posits that the law in itself is something conventional, since its binding force is determined by rules contained within the law itself. In this sense, law is, accordingly, a creation of human beings and not of a differently understood nature. It must be pointed out that citizens' recognition of certain models of behavior as valid is a matter of a certain convention formed within that society, and it may be based on a purely formal criterion (the test of derivation). But practice may be different; it may appeal to this or that provider of norms, a specified type of concrete and individual findings or customs, and it may be dependent on many historical, political, social, or cultural factors that shape various legal orders. In this formulation, whether and to what degree moral standards are taken as criteria for "legal" findings, is an element of convention, on which the practice of the functioning of a legal order is based. Hart solves this matter in an interesting way, for he bases the legal system on rules that he divides into primary and secondary.

Chapter 7

# Law and Literature

**[?] What is the source of the law and literature approach, and what connections does it see between law and literature?**

Contemporary theory and philosophy of law often draw on interdisciplinary research, for example, the sociology of law or the economic analysis of law. The approach designated "law and literature" also employs interdisciplinary methods to look for connections between the law and literature.

The name law and literature – previously, the literary school of law – is given to research that mainly concentrates on the analysis of works of literature that have legal contents in the broadest sense. This research is based on the premise that there exist many connections between law and literature. This approach, thus, concentrates on the thinking about the legal and juridical content of literary works (external frame of reference), but also looks at the literary value of normative acts, and more broadly at other acts of applied law. These last may be in written form, such as texts giving the grounds for judgments, and even juridical texts (internal frame of reference).

An interest in the connections between law and literature emerged at the start of the twentieth century (the celebrated list of novels about the law drawn up by John Wigmore in 1908). However the flourishing of such an interest in philosophy of law can be seen since the 1970s, a period when various interdisciplinary currents in law studies developed.

The causes behind looking for links between law and literature were the problems of communication between non-lawyers and lawyers. The latter – as a result of a hermetic legal and juridical language that is difficult to understand – were seen negatively with increasing frequency, and were criticized for being a closed corporation. Studies in the field of law and literature

were supposed to offer a remedy for this phenomenon and to lead to a renewed humanization of the legal professions, and also of legal education. It was thought that the study of *belles lettres* would lead to a change in the language used by lawyers, and by the same token lead to its greater communicative force. It might also have a positive effect on the whole system of the values adopted by lawyers.

But this approach is not homogeneous, and it is difficult to speak of the development of any common research tools, methodology, or theory. Sometimes, it is seen as part of American postmodern jurisprudence, showing – with regard to the subject of research or the methods adopted – links with the deconstruction of Jacques Derrida and the hermeneutics of Hans Georg Gadamer. Both Richard Posner and Ronald Dworkin have paid some attention to it too. However, because of the lack of homogeneity and because of the variety of studies devoted to the links between law and literature, it is difficult to speak of a unified and coherent approach in legal studies. However, the subject of research is shared by all studies in law and literature. So the key question here is: "What can a lawyer learn from a work of literature?" Here it is not at all a matter of general humanist values, the erudition, and the general level of knowledge that might be expected of a contemporary person, but rather the tangible, clear, and pragmatic value of such studies, although it may be said that reading literature develops a person and it allows lawyers to tear themselves a way from the technical language of normative acts. This approach also clearly connects with studies of language and interpretation. It uses tools of disciplines in language and literature, and also in a broad sense connects with cultural studies.

### [?] What is law and literature in the external frame of reference?

Many literary texts contain a vast weight of moral and legal content. The history of literature and the works that make it up offer many examples in which the subject of the law provides a background and sometimes, indeed, is a key element in the events presented in the literary text. Thus, for example, in Sophocles's

*Antigone*, we see a very serious discussion of the ancient dispute between natural law and positivist law. Among other texts that can be counted in the canon of legal literature are Franz Kafka's *The Trial*, Feodor Dostoyevsky's *Crime and Punishment*, George Orwell's *1984*, and many, many others.

Within the external frame of reference, literary texts are examined with regard to the appearance in them of material connected with law, lawyers, the justice system, the organization of the state etc. Literary works can constitute illustrations of concrete, important legal problems, demonstrating various perspectives, positions, and possible solutions. In this way, they may help both lawyers and, above all, persons who are not lawyers to understand the law. They, thus, influence social consciousness. Reading literary texts has a positive influence on lawyers themselves. When he made up and organized his list of novels about the law in 1908. Wigmore stressed that there is a minimum number of literary works that every lawyer has to read, both for reasons that we can call purely humanist and for those that are strictly professional. So within the literature and law approach, literature is seen both as a historical source and as an important element within the humanist tradition of claiming literature as having an educational function.

It must be added that with time the research subject within the external frame of reference, that is, the search for legal content in literary texts, has broadened considerably. Initially, it comprised only texts of *belles lettres*, but in time it embraced other forms of creative writing too, without, in fact, any limits, including limitations on genre. Thus, today research is pursued with regard to texts on the borders of literature and journalism, reportage, essay, and feuilleton pieces. Even poetry can be relevant here. The presence of law in film, too, is taken into consideration, although here film replaces the literary work. Just as there is a variety of literature containing legal material, so, too, the same can be said of many films. In publications on the subject, however, instead of the formulation "law in film," one often encounters the simple designation legal films or even legal cinema.

## [?] What is law and literature in the internal frame of reference?

Law as a cultural phenomenon also is a subject of interest for the law and literature approach. The law itself may be seen as a certain form of narration, which of its very nature takes on a quite formal and theoretical shape. Law may, thus, be regarded as a discourse of a literary character, in fact, a *sui generis* account/relation. This view of law is suggested, *inter alia*, by the legislator's use of the lexis and rules of natural language, and also of seemingly descriptive forms to express obligation. Reading a legal text only on the descriptive level, we learn from normative acts not only what the reality that surrounds us should look like (law answers the question: how should things be?), but also, if we accept that the dispositions of legal norms are fulfilled, allowing for certain mistakes in cognition, we learn how things are. It is even more possible to employ the tools offered us by literary theory in order to investigate the law itself. A normative act, accordingly, may be evaluated both from a legal and a literary point of view.

When, further, we acknowledge that the law itself is an important achievement of legislative art, we can also look in it for the features of a work of art, an esthetic artifact, to which the attribute of beauty can be ascribed, and which thereby constitutes a source of esthetic experience. Several legislative acts, for example the Napoleonic Code, have had a literary reception, above all by virtue of legal material in literary texts. One can even find the creators of such an act described as artists that have inspired the development of a literary current in interpreting law. A legislative instrument is, thus, understood in two ways within the literature and law approach – as a legal act and as a literary work. By the same token, it becomes the subject for two kinds of interpretation, and each of them employs methods that are appropriate for its field and for the purposes entailed by that field.

The interpretation of a piece of legislation is a particular sort of creative act. Interpretation, as with that of a literary work, can be seen to have a creative aspect. The outcome of that interpretation is never set in advance, both with that of a literary work and a legislative act. One speaks of a search for the law within an interpretation of the regulations contained in a legislative act.

One speaks, too, of a search for the intention of the legislator, just as one often looks for the intention of the creator of a literary work (as is reflected in the tedious question: "What does the writer mean?"). Further, advocates of interpretation of law as a literary text oppose the compulsion to apply principles and rules of interpretation set out in advance, and also deny that there is only one correct model of interpretation, to which one must aspire. They emphasize that there is no true or false interpretation, simply a better or worse one. Adopting this principle makes possible a far-reaching "interpretative creativity," which in common law has habitually been accepted, and for the definition of which Dworkin uses the concept of constructive interpretation. In this sense research in literature and law are close to semiotics and hermeneutics.

**[?] What new elements does the literature and law approach bring to the philosophy of law, and what are the prospects for this approach?**

Literature and law points to a return to a classical understanding of law as art, also by drawing attention to the fact that both legislation and the application of the law are, centrally, creative acts of the human will. In its broadest formulation, literature and law research – both in its internal and external frames of reference – can be included in an approach to legal reflection that is defined in relevant scholarship as the esthetics of law. Legal activity itself, strictly conceived, may be seen and scrutinized as a creative activity; in other words, one may evaluate both it and its effects from an esthetic point of view.

One may evoke here the paradigm of narrativity, in its most extreme form, a paradigm that rests on the premise that we all live in a world of narratives, which shape a substantial part of our lives. Each person is at once an author and an interpreter. This also applies to legal reality. In this sense, the distinction of two strands – law in literature and law as literature – loses precision.

The law and literature approach has developed, above all, in Anglo-Saxon legal culture, especially within American jurisprudence. Many American law schools offer lectures in this subject, and some even offer dissertation seminars in it. Such research is also

respected by large American legal firms. In the culture of Continental European law, the strong humanist bases of a legal education created such a high standard that the concept of "lawyer" was not merely the name of a profession, but also a synonym for an educated and well-read humanist. His/her knowledge of certain literary texts was customarily just a matter of good taste. Thus, the program-oriented principles of the law and literature approach cannot be a matter of surprise. Therefore, one may expect that this approach will develop further – even in times of a programmatic professionalization and de-humanizing of legal studies – both in an educational sphere, and as an inspiration for interesting interdisciplinary research of a profoundly humanist sort.

Chapter 8

# Natural Law

**[?] What is natural law?**

Natural law was, and still is, an object of interest and – above all – of dispute among representatives of various socially-focused disciplines, including philosophy of law. In addition the idea of natural law, and also the positive or negative (particularly from legal positivism) attitude to it, is one of the main issues in philosophy of law. Historically, at certain times this resilient idea has been dominant; at others, however, it has lost in importance, only to enjoy a renaissance after years of reduced impact. (This took place, for example, after World War II as a reaction to war crimes committed in accordance with Nazi "law.")

One could have the impression that on the level of social life, legal positivism, understood as a type of reflection on valid positive law, better answers the needs of contemporary societies in "peaceful times." However, the idea of natural law is often heard in times of crisis, for example, after experience of totalitarian systems. But also in democratic states that respect individual rights, within political discourse, for example, opponents of abortion, euthanasia, or civil unions/partnerships, evoke ill-defined natural law.

The ideas that make up natural law have a very long tradition, going back to ancient times, but they also turn up in the contemporary world. One can also note that the idea of natural law is an inspiration for the practice of creating law. This is indicated, for example, by the references in contemporary legislative acts to the natural dignity of the individual as a source of the individual's freedoms and rights.

In its classic, most wide-spread understanding, natural law is seen to constitute an eternal, unchanging, normative order that overrides positive law. For example, St. Thomas Aquinas insists on the existence of natural law – created by human beings by virtue of the existence of eternal law (to be found in the essential

being of God) – which is meant to be the basis for human (positive) law. However, the long period of time over which doctrines of natural law emerged, the changes in social conditions that accompanied these doctrines, and, indeed, their huge number and variety mean that it is hard, in any unambiguous way, to define what natural law is.

Because of their large number and variety, these doctrines are classified in various ways. For example, using the criterion of the source of natural law, one can distinguish religious conceptions (their source is a supernatural being – God) or lay ones (their source lies in a pantheistically conceived nature or in human reason). In turn, a criterion that refers to the differentiation of content from form of natural legal norms permits one to distinguish conceptions (called static conceptions) that are based on the premise of the universally enduring contents of natural law, and conceptions (called dynamic conceptions) that recognize that the forms of law are enduring, and into these may be inscribed varying historical contents.

Further, several authors make a distinction (which is, in a sense, conventional) between the classical tradition of natural law, which includes thinkers working from ancient times to the period of World War II, and a contemporary tradition of natural law that develops in the post-war period. This division is, actually, largely artificial, since many contemporary authors look for their inspiration in older concepts (for example, J.M. Finnis draws on St. Thomas Aquinas and on the Neo-Thomists).

Despite this variety of conceptions of natural law, scholarship has attempted to create a catalog of the fundamental questions asked within these conceptions throughout history. The questions mentioned are those concerning:

1) the existence of natural law and the possibility of knowing its norms;
2) the essence of natural law;,
3) the content of particular norms of natural law;
4) the relation between natural law and positive law.

It is aptly noted here that a denial of the existence of natural law does not at all eliminate the rationality of the remaining questions. This refers to conceptions that treat natural law not just

as some normative order that overrides positive law, but that concentrate on standards of creating positive law and on evaluations of the content of positive law.

An example of a contemporary and highly influential conception of natural law, which concentrates not on the content of the norms of natural law (and their relations with regard to positive law), but on how a system of norms should be constructed and how it should be applied in order to be recognized as a legal system, is Lon L. Fuller's concept of the morality of the law. Fuller formulates eight requirements for "the inner morality of the law," which should guide the work of the legislator:

1) the generality of the law;
2) the promulgation of the law;
3) the law cannot be retroactive (it must be prospective, although some exceptions are permissible);
4) the clarity of the law;
5) contradictions must be avoided in law (the principle of lack of contradictions);
6) it must be possible to follow and fulfill the legal norms – they cannot demand the impossible;
7) the constancy of law over time (the stability of the law, the lack of too-frequent changes);
8) the congruence of the actions of public institutions with the law (the rule of law in the establishment and execution of the law).

According to Fuller, whether a legislator can effectively direct the life of the society subject to him/her depends on the fulfillment of these principles.

On the other hand, one can point to the contemporary ideas of John M. Finnis, which have been very influential in Anglo-Saxon legal culture. These concentrate on the content of natural law. Finnis sets out a list of fundamental values, which provides a basis for practical argumentation. These values are: life, knowledge, play, esthetic experience, sociability and friendship, practical reasonableness, and "religion." These values are practical principles that precede morality. Thus, one must formulate moral norms on the basis of these principles. These moral norms will be the basis for making positive law.

Of course, these two conceptions do not exhaust the spectrum of contemporary views on the essence of natural law.

Finally, one must note that, traditionally, conceptions of natural law are opposed by legal positivism (which is, of course, much more recent than the idea of natural law). However, currently the controversy between legal positivism and doctrines of natural law (or rather between positivism and non-positivist conceptions of the law) has been transformed and often does not relate to natural law, however understood, but above all to the relationship of law and morality.

### [?] How is the concept of natural law used in contemporary practice in creating and applying law?

In contemporary legal practice in the West, natural law ideas have a greater influence on the practice of creating law than on that of applying law. Legislation inspired by natural law can fundamentally smooth out tensions between natural law and legal positivism. Several commentators believe that natural law "enlivens" the form of natural entitlements or, more precisely, of human rights.

Historically, the conception of natural human entitlements, which developed at the turn of the seventeenth and eighteenth centuries, became an inspiration for creating legal regulations that refer to protecting individual rights. (Initially, this applied to law within several states, and later to international public law.) Contemporary groundings of human rights may be of two kinds: those deriving from natural law, which posit that human rights are independent in their existence from the will of state authorities; and positivist ones, which accept that the existence and content of human rights have their source in positive law. A justification deriving from natural law for individual rights appears to underlie, *inter alia*, the Polish legal system. Thus, according to art. 30 of the Constitution of the Republic of Poland, the source of the individual's and the citizen's freedoms and rights is his/her natural and inalienable dignity. (The question is justified that is put in the part of this study entitled "Dignity": "Does the regulation contained in art. 30 of the Constitution of the Republic of Poland mean that the Polish legislator recognizes the natural

law sources of individual freedoms and rights?") Looking for the groundings of human rights in concepts of natural law leads to defining human rights as rights that a human being is entitled to by virtue of being a human being, independent of the acts of statutory law. Further, it is necessary to include among the fundamental elements of the conception of human rights the insistence on those rights' universality, naturalness, and inalienability, on equality of rights, and on dignity as their source.

However, in the practice of applying law, the category of natural law may be used really only in the role of the "natural law argument." Marek Zirk-Sadowski writes thus:

> […] in the majority of legal cultures that are connected with the conception of the rule of law a clear appeal in legal discourse to a defined philosophical position, and solving a legal dispute on the basis of that position would violate the principle of equality before the law. Philosophical views have this about them that they cannot be given as axioms. [Zirk-Sadowski, 2000, p. 150–151]

A "natural law argument" is based on a differentiation of positive law and the law of nature that stands above it, but it is also based on the assertion that positive law draws the strength of its validity from this normative order that is superior to it. However questioning the argumentation that draws on the idea of natural law, even if both sides to a dispute agree that there does exist some natural law make seek to demonstrate that it is impossible unambiguously to establish the norms of natural law. For example, if we accept that natural law applies and that one of the most important norms of this law is a norm that protects human life, even so it may turn out to be controversial whether that protection applies from the moment of conception to that of a "natural" death – from birth etc.

Here we get to the problem of the validity of the law in an axiological framing. This issue indicates one of the fundamental axes of the dispute between the conceptions of legal positivism and natural law. One can accept that law applies in an axiological, when legal norms are "strengthened" in the sphere of basic social values, such as, for example, justice, appropriateness, and

good. Of course, for legal positivism there is no necessary connection between law and these values.

Currently, it is unusual to encounter radical conceptions that proclaim that the norms of positive law apply only when they are in accord with or do not contradict the norms of natural law or specific social values. In turn, conceptions that accept that the result of a lack of accord between positive law and the norms of natural law is a derogation of the norms of positive law, assume that such a result only occurs when that lack of accord is "flagrant" (this applies, for example, to the Radbruch formula). However, most frequently the assertion that positive law does not respect specific values, leads to suggestions that it be changed.

It must be mentioned that courts, for example, in Poland, refer with unusual infrequency to arguments that have their source in the idea of natural law in the justifications of their decisions.

**Works cited**

Zirk-Sadowski, Marek. 2000. *Wprowadzenie do filozofii prawa*. Kraków: Wolters Kluwer SA.

Chapter 9

# Legal Realism

**[?] What is legal realism?**

The term "legal realism" refers to several currents in legal thinking: Scandinavian realism, American realism, and the free law school. Their common feature is a naturalistic attitude, and opposition to the legal metaphysics that, in the opinion of its adherents, characterizes legal positivism and doctrines of natural law.

A naturalistic attitude is an expression of a philosophical view on the subject of the status of social reality and on ways of examining it. Hence ontological naturalism is distinguished from methodological naturalism. Ontological naturalism argues that every subject and every occurrence are a part of nature, from which view proceeds methodological naturalism, which advocates using models from the natural sciences to investigate social phenomena. The methodological naturalist is not necessarily an ontological one.

In turn, legal metaphysics is a matter of using legal concepts in such a way as if real beings were their equivalents in time and space. Nineteenth-century legal positivism, in the version defined as *Begriffsjurisprudenz* (conceptual jurisprudence) best fulfills this model. It concentrated on the analysis of concepts detached from their application in real life, omitting social and individual interests in the course of this analysis. Adherents of this approach believed that legal understanding can be compared to mathematical operations. They ignored the aims and tasks of the law by, *inter alia*, avoiding the question: "Why is the law, in fact, as it is?" Rudolf Ihering (1818–1892), a critic of this way of thinking, and a representative of *Interessenjurisprudenz* (jurisprudence of interests), wrote colorfully that in a conceptual heaven "no one asks: why," and all concepts deformed by a consideration of their usefulness are placed "in a conceptual cabinet of curiosities from the field of curiosities of pathological anatomy."

In this context, the most naturalistic and anti-metaphysical of these realisms is Scandinavian realism. Its creator and "spiritual father" was Axel Hägerström (1969–1939) of the University of Uppsala, but its principal adherents were Anders V. Lundstedt (1882–1955), also of the University of Uppsala, Karl Olivecrona (1897–1980) of the University of Lund, and – best known in Poland – Alf Ross (1899–1979) of the University of Copenhagen. It is important to note, however, that – besides acknowledging an intellectual debt to Hägerström – the authors included in this tendency, in fact, differ on many issues. For example, Ross was a supporter of the philosophical views of logical positivism, while Hägerström, and following him, Lundstedt and Olivecrona, rejected logical positivism. They differed, too, in terms of what they thought should be the subject of legal studies, and, particularly, whether legal studies should attempt to construct a definition of law, as Lundtstedt and Olivecrona argued, or whether they should concentrate on an analysis of the logical structure of the language used in legal doctrine, as Ross believed. Lundstedt and Olivecrona were in agreement as to the metaphysical character of assertions that the rules of law apply or have no force of validity. Further, Ross is the author of a celebrated predictive conception of the validity of the law. According to this conception, the statement "X is a valid law" means, first, that judges will proceed in accordance with this law, and second, that they will feel obliged to do so.

A common motif of their scholarly work is a critique of the way in which fundamental legal concepts are used. A vivid example is Lundtstedt's activity. As a Social-Democrat, he was a member of the Swedish parliament for twenty years, and he expressed his philosophical-legal views in debates. In the 1920s when changes to inheritance law were considered, and Conservatives complained that changes of this kind violated the law of property, Lundtstedt responded that the law of property does not exist. In his view, the statement that the law of property is protected by the state puts the matter upside down. That an owner can enjoy his/her possession, does not derive from the existence of a law of property, but from the existence of imposed sanctions.

Exceptionally important for Scandinavian legal realists was the category of science/scholarship understood as an activity consisting of, at least, the description of reality. The inspiration behind this current, Hägerström did not share the radical opinion of the nineteenth-century lawyer Julius Hermann von Kirchmann on the subject of the scientific/scholarly possibilities of legal studies. The latter writes that "jurists have become worms that live on rotten wood, and legal studies have become the handmaiden of the chance, of error, of passion, and of incomprehension. He believes that legal studies do have the potential to become a science one day. In the way of such an ideal, however, there stand various delusions, in the shape of the intellectual illusions that Francis Bacon wrote of. Among these, illusions of the market place (*idola fori*) are very important. These consist of the use of words that have no equivalent in reality, and that have no empirical reference. Legal language, in the view of realists, is saturated with such terms. These include, for example, "claim," "obligation," and "law of property." Realists, therefore, concentrate on demonstrating that no element of reality corresponds to those terms. At the same time, as has been recently pointed out, it is not accurate to say that Scandinavian realists attempt to define legal concepts in terms that possess empirical meaning. Quite the opposite, they insist that an attempt of this kind is condemned to failure. Because they are naturalists, they do not commit this kind of naturalistic error.

The critical approach that they represented assumes, perforce, a limited vision of reality, and, thus, of what one can recognize as existing. From this point of view, the ontology posited by, for example, Hägerström was not complicated. He declares that materialism is the only possible way to see the world. Thus, there exists only one reality, which comprises objects localized in time and space. There do exist people, and also psychological processes, because these are in an indirect fashion connected with time and space: they are experienced by people who are situated in time and space. What does not exist in time and place, does not exist. Value definitions, like "good" and "just," express only the feelings of the subject that uses them. This means that one cannot speak of the existence of values. It was, indeed, on this basis that Hägerström criticized legal discourse that suggests the real existence of

obligations and entitlements. Such a discourse and its conceptual framework were criticized by Ross in a brilliant and famous article from 1957 entitled "Tû-Tû."

**[?] How, for example in the *tû-tû* argument put forward by Ross, is it possible to claim that several legal terms are without linguistic meaning?**

Ross makes the point of departure for his argument the conviction that functions among the members of a certain tribe that if someone violates a specific taboo, this means that that person become *tû-tû* and must undergo ceremonial purification. Any attempt to explain this term is condemned to failure because it is an expression of superstition, and, thus, without any linguistic meaning at all; no state of things is its equivalent. At the same time, by using this expression, one can effectively formulate statements about facts, and also directives relating to conduct. Ross gives the following examples:

1) if a person eats the chief's food, that person becomes *tû-tû*;
2) if a given person has become *tû-tû*, that person should undergo a ceremony of purification.

These may be reduced to the following formulation:

3) If a person eats the chief's food, that person should undergo a ceremony of purification.

This is the result of applying the rule of formal logic that says that "if a is b, and b is c, then a is c." Ross claims that fundamental legal concepts, such as, for example, "claim," are used in a similar way as the expression *tû-tû*. Lawyers customarily argue, he claims, as follows:

1) if a loan has been made, the lender is entitled to a claim for its return;
2) since the lender is entitled to a claim for the return of the loan, the return should take place on the day on which is falls due.

However, both these statements can be reduced to one:

3) if a loan has been made, its return should take place on the day on which it falls due.

Thus, the term "claim" has no linguistic meaning and does not refer to any reality outside language. It is something like the des-

ignation *tû-tû*, although lawyers use this word as if it meant some newly emerged entity between the legal fact that is the making of a loan and the legal consequence that is the obligation to return it. One can, therefore, argue that legal discourse is saturated by residues of magical thinking. Ross does not, however, stop at this observation, and, via the example of the law of property, he looks for a rational reason that could justify this kind of "magical" manner of presenting legal norms.

Giving up the term "property" would mean that is necessary to formulate many rules constructed in a way in which a defined legal fact would be matched by a defined sum of legal consequences. The task, however, of legal studies is to so conceptualize legal norms that they make up transparent tools that are easy to use. The term "property" does, indeed, serve this purpose. It comprises a sum of possible legal consequences in the event that certain defined legal facts occur.

In this case, the term "property" links the disjunction of sentences relating to the facts of the case and a conjunction of legal consequences. However, Ross stresses that it is a mistake to treat property as a consequence of a specific legal fact. In legal language statements take the form of the following:

1) If A has lawfully purchased and object […], ownership is thereby created for him.
2) If A is the owner of the object, he has (among other things) the right to recovery

But this certainly does not mean any more than a reformulation of the rule that a given fact (buying an object) incurs a specific legal consequence in the form of a right to recovery. However, to say that property has been called into being, is, in Ross's view, nonsense. Terms such as "property" only fulfill a technical function, which is useful in presenting legal norms (technique of presentation).

Ross's critique of the way in which legal concepts are employed is currently the point of departure for constructing inferential conceptions of the meaning of this sort of concept.

**[?] What is American legal realism?**

Until the middle of the nineteenth century, a conviction was prevalent that the application of the law is uncomplicated and logical, because it is a deductive operation that consists of establishing the facts of a case, next establishing a legal basis, and finally designating the character of those facts from the point of view of established legal norms. But after the mid-nineteenth century, this conviction began to be shaken on both sides of the Atlantic. In Europe it was opposed by Eugen Ehrich with his concept of *Freirecht* and his view that in legal understanding there is nothing that is specifically logical and nothing that is specifically legal. In North America, the opposition took the form of the views of the American realists, which can be presented in abbreviated form by citing Oliver Wendell Holmes's famous observation that the heart of the law is not logic but experience.

American legal realism was an approach that flourished in the 1920s and 1930s. As opposed to Scandinavian realism, it had many adherents, and hence was a very varied movement. Among its precursors are the famous Supreme Court justice Oliver Wendell Holmes (1841–1935). However, its main representatives are usually seen to be professors of law, Underhill Moore (1879–1949), Felix Cohen (1907–1953), Karl Llewellyn (1893–1962), and Roscoe Pound (1870–1964), and a judge, Jerome Frank (1889–1957). They opposed the method employed hitherto of conducting legal studies, which had brought these down to an analysis of rules and court cases. They suggested undertaking empirical research into the law, in order, *inter alia*, that – as Llewellyn writes – "the sad German" could not say "The Legislature may repeal my whole Wissenschaft tomorrow" [Llewellyn, 1949, p. 1287]. They did not limit themselves to making recommendations. Moore examined the decision-making practices of banks on the basis of banking law. Llewellyn and E. Adamson Hoebel did research into the legal rules functioning within the Cheyenne people. Their interests centered on how to conduct studies of the law and its functioning in practice, and particularly studies of the application of the law. Law in books was not important, but law in action. As Holmes writes: "[…] if we take the view of […] the bad man we shall find that he does not care two straws for the axioms or deductions, but he does want to know

what the Massachusetts or English courts are likely to do in fact." [Holmes, 1897, p. 994] This decision, however, is conditioned not only by recorded legal regulations, but also by the broad social context in which the decision is made. The realists drew their points from a detailed observation of processes of applying the law, drawing more or less far-reaching conclusions from facts that are known to all practitioners of the law. Hence comes the possible impression that their theses are banal and obvious, an impression linked to the general acceptance of these very theses. This is expressed in the saying current in American legal culture that we are all realists now.

### [?] According to American realism, to what degree do legal norms mark the content of decisions made in applying the law?

At first glance, this question may seem strange and incomprehensible, since in a democratic state the agencies applying the law have to issue their decisions within the limits of and on the basis of the law. What is more, there exists a widespread conviction, which may be reconstructed on the basis of publications relating to legal doctrine, that the majority of decisions is given on the basis of the law. It is this very conviction, however, that American realists put into doubt. For this reason, in Anglo-Saxon literature they are called skeptics. However, the skepticism of American legal realism is often erroneously understood, an example of which is the way in which the views of this approach are presented by H.L.A. Hart in *The Concept of the Law*. He classes them as "disappointed absolutists."

Brian Leiter argues that we must distinguish the views ascribed to the realists (the received view of realism) from the actual views that they professed (core claim). Among the views ascribed to them are four theses: realism is a descriptive conception of the application of the law, according to which judges have at their disposal an unfettered freedom of decision, issuing decisions supported by their own tastes and confessed values, subsequently justifying these in a manner that is merely a rationalization that refers not to the real impulses and motives behind a decision, but to legal norms and principles. According to Leiter,

American realism did really have a descriptive character, but its fundamental thesis was the view that the rationale behind judges' decisions is not legal rules, but the facts of the case.

In other words, they claim that the law does not determine the content of court findings (legal indeterminacy). In Hart's widely used formulation, the law is indeterminate, because it is formulated in a natural language that is marked by so-called open textuality. This feature means that the terms of this language, alongside any clearly positive or clearly negative extension, potentially also possess a range of meaning in which it is not clear if a given subject is or is not being referred to. For example, it is known that a twenty-year-old man is the referent of the phrase "young man," and it is known that an eighty-year-old man is not its referent. But the problem arises as to whether a thirty-year-old man is the referent of this phrase. In this last case, we are dealing, as Hart puts it, with a sphere of semantic shadow. In this kind of situation, Hart acknowledged that the judge has freedom of choice. In opposition to Hart, the fact of open textuality leads representatives of Critical Legal Studies to argue that no decision specified by legal reasons (global indeterminacy), and, thus, in every case any finding may be in accord with the law. Contrary to widespread belief, the realists adopted a weaker position. They argued that the indeterminacy of the law appears at the level of cases that go to appeal. However, the do not locate the sources of indeterminacy in linguistic features, but in the existence of self-contradictory rules for making interpretations.

One can see the thesis of the indeterminacy of the law on the level of explaining decisions and on the level of justifying them. Indeed, the question of the real causes and motives behind a decision taken by a judge is one thing, and the question as to whether the reasons set out in a legal justification really do justify a finding is another. The distinction derives from one in the philosophy of science: the context of discovery and the context of justification. The context of discovery is all those psychological and sociological factors that have led the researcher to formulate specific statements, for example, Newton's apple and Archimedes's bathtub. However, the context of justification involves an indication of the rules for the justification of statements that

aspire to be called scientific. In the case of a court decision, the context of discovery is a matter of the above-mentioned psychological motives for making the decision. It is in these that American realism is interested.

For a clearer grasp of the problem, let us take as an example two findings of the Polish Supreme Administrative Court (Naczelny Sąd Administracyjny), which were given in remarkably similar cases (V SA 1512/99; II SA/Po 1478/00). The facts were the following. In both cases, women had entered into religious/confessional marriages, despite the fact that the civil law regulations in force at that time (the 1950s) prescribed a civil wedding as the only valid form of marriage. After their husbands' deaths at the end of the 1990s, they applied as the widows of war veterans to have the appropriate entitlements granted them. The Office for Veterans' Affairs (Urząd ds. Kombatantów) turned these applications down, arguing that the women were not the widows of veterans because they had never entered into a marriage that was legal in terms of civil law.

Different findings were given in these two cases. In its first opinion, the Supreme Administrative Court, arguing that the case involved a situation of "qualified concubinage," recalled that in other areas of law the legislator recognizes this kind of relationship, and grants various entitlements to such relationships. It referred to the constitutional principle of equality and the right of respect for private life in the European Convention of Human Rights. As a result, the court argued that to deprive the claimant, who had entered into a confessional marriage, of the entitlements belonging to a veteran's widow would be a manifestation of discrimination. The court's second opinion, however, did not share this position, limiting the normative basis for its finding to the provision of the law on veterans in which the phrase "veteran's widow" is used. As a result, it upheld the decision of the Office of Veterans' Affairs.

So it seems that the skepticism of legal realism is not so strange after all. Both decisions were certainly made "on the basis of the law," refer to analogous factual states, and yet those decisions are divergent. In particular, the content of the first decision confirms the realists' thesis – that judges make their decisions un-

der the influence of the facts of a case. The justification of the decision referring to legal provisions is really only a rationalization of that decision. An interpretation of the first finding made in the spirit of American realism would lead to the statement that the court was probably guided by a sense of appropriateness. It had acquainted itself with the facts of the case, but the arguments put forward in the justification, in accordance with the rules of systemic commentary and interpretation, constitute no more than a rationalization of the decision. The key problem for realism arises here, that is the possibility of predicting the content of judicial decisions.

If, indeed, the reasons that guide the judge are not legal norms, how can his/her decisions be accurately foreseen? In this matter, realists differ among themselves. Jerome Frank takes a radical position, emphasizing the variety of judges' personalities. The judge's "personality character, intelligence and integrity of our judges determine the kind of judicial justice we obtain […] The so-called element in the judicial process is central; the legal rules are among the deflecting factors." [Frank 1931, p. 242] The consequence of this view is that it is impossible in practical terms to foresee the content of court decisions.

Commentators also point to the sociological wing of American realism, represented, among others, by Llewellyn, Cohen, and Moore. These lay stress on the "situation type" as a determining factor in bringing about a court decision. Within the framework of type of situation there exist defined rules that constitute normal or desirable conduct in a given socio-economic context. An illustration of how this type of situation can be understood can be seen in the titles of the handbook written by Leon Green, one of the realists perhaps less well known in Poland. Instead of traditional doctrinal categories, these titles refer to factual situations, for example, "surgical operations" and "care of animals." In the work of the sociological branch of American realism, it is possible to discover certain decision models that make it easier to foresee future court decisions.

## Works cited

Frank, Jerome. 1931. "Are Judges Human? Part Two: As through a Class Darkly," *University of Pennsylvania Law Review and American Law Register*. Vol. 80. No. 2 (Dec., 1931).

Holmes, Oliver Wendell. 1897. "The Path of Law," *Harvard Law Review*. Vol. 10.

Llewellyn, Karl. 1949. "Law and the Social Sciences: Especially Sociology," *Harvard Law Review*. Vol. 62. No. 8.

Chapter 10

# Theories of legal argumentation

**[?] What is legal discourse?**

Contemporary legal studies opposes an argumentation model to the classically understood syllogistic model of the application of law. This argumentation-based model consists – to put it at its simplest – of constructing arguments and comparing them. It is a consequence of determinations made on the basis of theories of legal argumentation. In order to understand the argument-based model, it is, thus, necessary to look at specific theories of legal argumentation.

When describing theories of legal argumentation, it is necessary to accept that a detailed discussion is not possible here, nor is it even possible to list all such theories, since the philosophies of law that have an argument-based dimension are many. So one must concentrate on the two most important models: the topical-rhetorical one and the procedural one. The first of these has developed since the 1950s, as a result of the work of Chaim Perelmann, among others. The second, which is based on theories of communication and procedural theories of practical discourse, began at the end of the 1970s in the work of Robert Alexy, although also in that of other authors.

The key concept for each of these theories of argumentation is discourse. Argument-based discourse constitutes a sub-type of universal discourse. It is distinguished by the aim of making arguments and, effectively, by the achievement of the intended persuasive aim. If we draw on the division into theoretical discourse and practical discourse, we can see that the topical-rhetorical model is marked by the fact that its aim is to establish the truth. The procedural model, however, is marked by the fact that it leads to the achievement of a specific result. According to Jürgen Habermas, despite the fundamental cognitive difference between opinions and norms, the procedural conditions for ratio-

nal discussion of opinions (theoretical discourse) and of norms (practical discourse) are in principle the same. If we look at the relations of practical discourse and legal discourse, it is possible to distinguish three possible situations: first, a clear distinction of legal discourse from practical discourse; second, a recognition of legal discourse as model case of argument-based discourse; and third, a recognition of legal discourse as a special case of practical discourse. If we accept that legal discourse is a special case of practical discourse, it is nevertheless necessary to remember that the aim of discovering the truth is also of fundamental importance here. However, the law itself, as a discursive object, is a space for determining conflicts between subjects of the law.

Characteristic for theories of legal argumentation are ambitions to create an ideal argument-oriented model, and more precisely the formal conditions that every practical discourse should fulfill, in order to be recognized as capable of being accepted. That is, to be recognized as legitimate and rational. Although the criterion of truth moves into the background here, the criterion of rationality (which fundamentally comprises the criteria of justice, legitimacy, validity, and authoritativeness) becomes key, as does the criterion of effectiveness (whereby the latter is of a strictly empirical character). Thus, the basic features of argument-based discourse are rationality and practicality.

Habermas tried to indicate the conditions of correct discourse, when he pointed out that this kind of discourse will be effective of the subjects participating in it fulfill at least the following basic demands:

1) comprehensibility – they formulate their utterances in a manner that is comprehensible to the other participants;
2) truthfulness – they advance only such theses with regard to the truthfulness of which they themselves are in no doubt;
3) sincerity – utterances are in accordance with real intentions and aims;
4) appropriateness/legitimacy – utterances are not inconsistent with recognized social norms.

In its ultimate effect, such discourse should be conducted in order to achieve a consensus. We are, thus, dealing with an ideal communicative situation when the speaker has the intention of communicating truthful opinions, so that the listener can obtain true information from the speaker. The speaker must sincerely express his/her intentions, so that the listener may believe in the speakers' utterances. The speaker must choose an utterance that is appropriate and legitimate, so that the listener can accept this utterance, and also so that the utterance can be accepted in relation to a defined social and normative background. The ideal communicative situation is not, however, an empirical phenomenon, but is, on one hand, an idealizing assumption, but, on the other, it may be an assumption made by the participants in the discourse.

One can see from this that comprehensibility, truthfulness, sincerity, and appropriateness/legitimacy are of a relational character, and refer not so much to the speaker's intentions, as to the relations that exist between him/her and the listener. Here Habermas gives his own sense to understanding, among the conditions for which he includes the agreement of the subjects as to the appropriateness of an utterance in relation to a collectively recognized normative background. Thus a condition of understanding is, in fact, consensus, which is of key importance for Habermas. On the way to consensus, the truthfulness of described opinions is determined (consensual theory of law), but also the appropriateness of norms and evaluations. Thus, truth as well as appropriateness and rationality are consensual in character, and they are determined via discourse. Discourse so understood should ensure equality to its participants (in particular, by guaranteeing all participants in the discourse the same possibilities of articulating their interests and of justifying their legitimacy by means of arguments), which is created by the above-mentioned procedural conditions that make for an ideal communicative situation. Here it is assumed that argumentation can take as long as necessary to reach a consensus as to the general character of the interests of the participants in the discourse. An understanding is also assumed in relation the norms that regulate the satisfaction of those needs. Therefore, in a contemporary democratic state governed by the rule of law, there should be on-going discourse, including legal discourse, within the communicative community.

However, one must recall that every actually occurring discourse is subject to many limits, such as limits of time and space. It cannot go on forever, nor can everyone to whom a given case applies participate in it, and so on. It is worth stressing that the argument-based discourse conducted within a court case is further determined by procedural provisions, and – alongside legal norms – by ethical norms. This applies both to its course and to the choice of admissible arguments.

**[?] What does the topical-rhetorical model consist of?**

Chaim Perelman, together with Lucie Olbrechts-Tyteca created the conception of a new rhetoric (their joint work published in 1958 is entitled *Traité de l'argumentation. La nouvelle rhétorique*), which led to the development of Perelman's own philosophy of law, and particularly to the development of a theory of legal discourse. Perelman arrived at this as a result of the unease and disappointment he experienced during his positivist studies. These inclined him to search for some logic behind value judgments, and the search led him to an interest in rhetoric. Characteristic for Perelman's work is logical and analytic method, despite the fact that these features are not present in his conception itself. However, this method allows him to be included among analytic philosophers of the law. He thought his considerations and concepts universal in the sense that he felt they related both to so-called systems of statute law and to systems of common law. He drew inspiration and examples from court decisions in various states.

Legal rhetoric can be understood in a two-fold way. On one hand, it can be seen as a department of contemporary rhetoric, built upon the achievements of classical rhetoric. It departs from the latter's ethical premises. It also draws on the contemporary achievements of particular sciences and branches of knowledge, such as, psychology, communication theory, sociology, sociotechnology, but also logic, especially, so-called informal logic, from which the topic, the theory of argumentation or, indeed, new rhetoric, derive. Divided thus, legal rhetoric constitutes a collection of practical recommendations, addressed to the lawyer in various professional situations. It is worth adding that rhetoric, understood in this way, as what is fundamentally a normative

theory of argumentation, does not only describe argumentation, but also teaches which arguments to use in specific situations, especially with regard to types of audience/auditors.

On the other hand, legal rhetoric (new rhetoric) can be seen as one of contemporary philosophical-legal conceptions, seeking possible solutions with regard to the controversy between natural law and legal positivism. It also seeks possible solutions with regard to the syllogistic model of applying the law, which, in the light of revealed weaknesses and theoretical problems, it is necessary supplement with argumentation-oriented elements. Thus, the term legal rhetoric is used currently both to designate practical rhetoric, which is in large measure a development of classical rhetoric, and to designate certain legal concepts relating to legal reasoning, interpretation of law, justification of interpretative decisions, and, finally, the substance of the law. Perelman's work can, thus, be seen in a two-fold fashion. On one hand, he attempts to create an alternative legal philosophy, which has come to be designated new rhetoric. On the other hand, his work can be treated in an unusually practical manner, as a collection of pieces of advice and recommendations relating to legal discourse, even without regard to the whole conception of new rhetoric. However, one must point out – and Perelman did this himself bluntly – that rhetoric is not just an unsystematized collection of rules. He thought himself that if it is important today to emphasize the role of rhetoric, this is because in his research he had become convinced of the importance of that discipline for contemporary thought.

In describing the approach in legal philosophy that is called New Rhetoric, it is important to mention that it is an approach that has a clear anti-naturalistic orientation, and this allows it to develop particular research methods. However, it is marked by philosophical minimalism, and does not formulate its own philosophical premises, and especially it formulates no new conceptions of cognition and truth that differ from classical ones. Contemporary conceptions of legal rhetoric have a very practical orientation. One must note, however, that they attempt to answer one of the basic questions of philosophy and theory of law – what is law? Their aim is, further, to develop objective methods of legal research, and, above all, of applying

the law. In this sense, they knit together practical knowledge from the field of rhetoric with a new philosophical-legal conception, built up on the achievements of existing philosophy. Finally, Perelman's philosophy of law is clearly anti-positivist. It rejects the syllogistic model of applying law, demonstrating that the judge who decides a case in adversarial proceedings by no means works on the principle of logical inference. Indeed, that judge takes account of a host of other elements that are ignored by the representatives of classical legal positivism. These elements include, above all, the argumentation used by the parties. Thus, Perelman's theory of argumentation offers an alternative to the syllogistic model of applying the law.

Perelman came to his ideas in his search for a universal formula for justice (the period of his positivist work). He notices that every formula of justice is rooted in varying forms of arbitrariness, on which every normative system is based. That is why he transfers his research from justice to justification, in order finally to seek out the logic of value judgments. Perelman particularly bases his ideas on Aristotle's *Rhetoric*. However, he understands rhetoric in a much broader way, as the art of convincing through discourse, and in the field of rhetoric he places topic, dialectic, and all other techniques of argument, thus broadening the scope of the discipline described by Aristotle, Cicero, and Quintilian.

Rhetoric is, thus, understood as a technique for discursively attaining acceptance of statements made by a person, but also of evaluations and norms. Here Perelman distinguishes two types of inference: analytic inference, based on logical inferences, which lead to establishing truth (theoretical discourse); and dialectical inference, which leads to the determination that is most appropriate and rational (practical discourse). Acceptance can be attained in the course of discourse that aims to convince an audience. The justification of a thesis leads to the justification of someone's accepting that thesis.

Perelman distinguishes two types of audience: the usual and the universal. This distinction is dependent on the type of discourse used. With a usual audience it is possible in the process of convincing it of something to operate in various ways, including with all kinds of "persuasion." However, the validity of arguments is all

that counts for the universal audience. Here the essence of each discourse is that its aim is to convince an audience that a specific statement is correct. This is also the criterion for evaluating argumentation as effective in relation to a specific audience. For Perelman, the universal audience of thinking persons becomes a formal category, based on an idealizing premise. Such an audience consists of all rational and well-informed persons), or all well-informed persons who are prepared to accept generally valid postulates and reasonings. As Marek Zirk-Sadowski writes:

> Of course, one can never gather together such an audience. Perelman, however, considers that, if it were possible, it would turn out that arguments are effective for it, to which one can ascribe objectivity, rationality, and universality. [Zirk-Sadowski, 2000, p. 129]

Zirk-Sadowski adds:

> Here an Enlightenment optimism is clearly visible, because, in fact, in an audience of 'enlightened persons' only such arguments would be effective that were analogous to the Kantian imperative. Indeed, Perelman refers directly to this imperative when he describes the universal audience. [Zirk-Sadowski, 2000, p. 129]

Argumentation is a means of influencing the audience, but conducting argumentation is, in this sense, social-linguistic action. Arguments have varying powers of conviction, depending on what audience they are used before. Rational argument is the one that can count on the acceptance of the widest possible audience. The circumstance that a certain argument is effective in relation to a specific audience does not determine whether it is objectively valid, because this is decided by the universal audience. The universal audience's recognition of the argumentation means that it has been accepted. Hence discourse is valid, and a maximum of rationality is reached, when it is accepted by the universal audience. Perelman also reduces the criterion of rationality and objectivity of a discourse to its acceptance by the universal audience. From this results one fundamental principle – that the speaker must adapt to his/her audience. Although logical argument is conducted without regard to the addressee

of the argument, nonetheless the argumentation process is directed to a more or less defined audience.

The judicial decision has an important place in Perelman's thinking. When a judge has to give a decision in the process of applying the law, he/she remains in a permanent situation of decision. Such a situation exists when we are dealing with a state in which it is possible to choose among several alternate ways of acting. In addition, the verdict will be influenced by the arguments of those involved. Perelman described the internal communication of judges in the process of making a decision – understood as convincing themselves within interior discourse – as the most important paradigm of all specific kinds of rhetoric.

In the process of convincing others, lawyers use defined intellectual schemes, which one can call topoi. Their development came from observing in discussion certain established phrases, formulations, and reasonings, which began to be learned so as to be used at the right moment. Perelman believes that in argumentation topoi fulfill a function similar to axioms in a formal system. They are divided into shared topoi, accepted by all to whom they are addressed, and special topoi, which have been developed within a given field of knowledge – here legal knowledge – and which are accepted by persons in possession of a specific specialist knowledge. However, as Perelman points out, in legal argumentation extra-legal arguments also matter. In discourse, evoking special topoi does not usually require justification, because they are universally accepted within a given legal culture. Although a conflict is possible between the particular topoi invoked by the parties, it is the role of the judge to choose the most appropriate for the given state of facts.

The main part of new rhetoric consists of a catalog of techniques of argumentation, which Perelman attempts to divide into several categories (quasi-logical arguments, arguments based on the structure of reality, arguments that create that structure). Nonetheless, in Perelman's understanding, the theory of argumentation does not constitute a closed canon of rules of conduct. His conception is a synthesis of broadly conceived logic and rhetoric. These make up a method for research into law.

In a topical-rhetorical framework, therefore, the theory of argumentation is distinguished by the following characteristic features:

1) the object of legal rhetoric is the analysis of discursive techniques used in the resolution of disputes; the aim of these techniques is to evoke or strengthen support for statements set out for acceptance;
2) legal discourse refers to rationality and legitimacy, not to truth;
3) discursive techniques are based in their link with truth, not so on formal logic, as on a type of argument that is peculiar to law;
4) legal topoi are a special kind of legal argument; they are, in other words, basic principles of law accepted in a given legal culture, rules of interpretation etc.;
5) the effectiveness of convincing an audience depends to a large extent on the features of the audience itself.

As a result of the above points, we can conclude that law is a collection of norms, which can count on social acceptance and convince those interested. So it is of an argumentation-communication-oriented character. However, a lawyer's decisions, in applying a norm to settle a concrete case, are appropriately legitimate when they are convincing for an interested public.

**[?] What does a procedural model consist of?**

Robert Alexy, drawing on the achievements of the Frankfurt School, especially Habermas's work, created the so-called theory of argumentation. He accepted the premise that legal discourse constitutes a special case of general practical discourse, which, along with his notion of practical reason, is the basis of his theory. The subject of this discourse is the justification of normative statements and legal findings in relation to the obtaining legal order.

As a justification of his thesis about legal discourse being a special case, Alexy demonstrates that legal discourse, like practical discourse, relates to practical questions, in other words, to what should be, to what is prescribed, forbidden, and permitted. He adopts the following premises: general practical discourse constitutes the real basis for a decision, and legal discourse only plays a role as secondary legitimation, concealing behind the so-

called façade of law the real criteria of decisions taken (the thesis of the façade-like nature of legal discourse); legal argumentation is sufficient only up to a certain point, at which specific legal arguments are exhausted and must be supplemented within the framework of general practical discourse (the thesis of the complementarity of general practical discourse); finally, the application of specific legal arguments should be connected at all stages of argumentation with general practical arguments. Thus, so-called rules of transition from general practical discourse to legal discourse must play an important role.

Alongside the necessity of observing the general rules of practical discourse set out below, it is essential that legal discourse be always conducted in direct connection with the law as it obtains. In Alexy's view, a statement is objectively accurate if it is the result of a procedure of rational discourse. Practical discourse, including legal discourse, is characterized by a claim to appropriateness, which means that it ought to lead to the discovery of answers the operations of which are appropriate, in other words discursively justified or justifiable. The scope of legal discourse and the character of its claim to appropriateness are, however, different, because they are relative in relation to the law as it obtains, in the framework of which this discourse takes place.

Alongside the rules of practical discourse formulated by Habermas, Alexy, in addition, selected, for the requirements of legal discourse, a set of procedural rules. Thus, legal discourse must take place within the framework of established procedures, which ought to ensure reaching one accurate verdict. Accordingly, Alexy sought criteria of rationality and legitimacy in universal rules of discourse. The idea of rationality and of legitimacy is ultimately expressed in the six following, formally conceived, principles:

1) consistency;
2) purposeful rationality;
3) verifiability;
4) coherence;
5) general applicability;
6) truthfulness and openness.

It is important that a legal discourse conducted thus excludes the risk of ambiguity that must arise in practical discourse. It is

worth adding that the basic conditions of discourse and any kind of communication at all are the following rules, which, however, may further develop and select further rules:

1) no speaker may contradict him/herself;
2) every speaker may only defend what he/she him/herself believes in;
3) every speaker must use a defined predicate in that same sense, where a definition of the same (relevant) objects comes into play;
4) different speakers may not use the same expression with different meanings.

It is easy to see that there are more similar and valid rules. Here it is worth citing – following Jerzy Stelmach – a catalog of rules that serve the rationality and legitimacy of practical discourse. They are a development of the above-cited catalogs. In Stelmach's view, practical discourse should:

1) be conducted with a conviction of its legitimacy;
2) be conducted with respect of the principles of truthfulness;
3) be conducted with respect of the principles of freedom;
4) take account of the basic principles of linguistic communication;
5) be conducted only for hard cases;
6) take into account established facts;
7) tend directly toward its end/purpose;
8) take into account generally accepted standards, practices, and customs.

**Works cited**

Zirk-Sadowski, Marek. 2000. *Wprowadzenie do filozofii prawa*. Kraków: Wolters Kluwer SA.

# Part IV

# IDEAS

Chapter 1

# Dignity

**[?] What is dignity?**

Dignity is an anthropological and philosophical category. It is also a legal term and a concept analyzed, in, *inter alia*, philosophy, philosophy of law, jurisprudence, in the practice of creation and application and – primarily – in the supervision of consistency within the legal system (realized, for instance, in Poland, *inter alia*, by the Constitutional Tribunal). In other words, our first question should be a basic one: what is dignity? In simple words (and at the risk of being accused of making this fundamental issue trivial), one could say, that, essentially, we have as many answers as questions, because we do not have a precise and clear definition of this concept (even though much has been written on the matter). One thing is certain – that, in this form, or in a different one, this concept is a creation of culture (mainly from the West), even though dignity, in a certain way, is thought of as a "natural" human trait. The only problem with this concept is that the term "dignity" (Latin *dignitas*) concerns an abstract phenomenon, a quality identified and defined by different cultures. Its existence and qualities cannot be verified in an empirical way (in contrast to many different natural human "attributes," for instance the human body, DNA and even freedom, for example understood as freedom from coercion).

Dignity, a concept known since ancient times, has been (and still is) understood in many different ways. For many years now, we can distinguish at least two fundamental ways of understanding this concept. As Maria Ossowska writes: "In the first version, there are people who have dignity, and there are those who do not. […]. In the second version, everyone has the right to live a dignified life because of our privileged position in nature" [Ossowska, 1970, p. 52]. This second version of understanding dignity (we are human-beings, therefore we deserve to be treated with dignity), after the genocide of World

War II, became the basic foundation for the protection of human rights. We can see its influence in many international laws concerning the protection of human rights, and also in the constitutions of many countries. When looking at the problem of a possible universal human rights law, in a pluralistic world, we should ask ourselves: Can the concept be the theoretical basis for a universal theory of human rights?

The "positivization" of dignity, that is, regulating dignity in positive law, has caused it to become a legal term – which does not necessarily mean the source of dignity is positive law. We must accept that positive law only "proclaims" (a natural, inalienable) human dignity as the source of human freedoms and rights, or the source of the protection of the individual. But we still have a problem with defining dignity, with relation to determining its role and meaning for a modern legal system. It is especially important to determine the relationship between dignity and human rights. In addition to this, dignity, human rights, and personal rights are categories which appear in the entire legal system (they exceed the scope of any one branch). They are very central, and shape the status of the individual in society and in the state.

**[?] What role does the category of dignity for the individual play in modern legal orders, and, especially, how does it work in the Polish legal system?**

A provision that talks about "the individual's innate dignity" can be found in many international documents concerning the protection of human rights (The Universal Declaration of Human Rights from December 10, 1948, has a very special and symbolic meaning here). A similar situation exists with many modern constitutions of different countries (for example, Germany, Greece, Spain, Portugal) and also in the Polish Constitution. Article 30 of the Polish Constitution declares that: "The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities." The Polish Constitution's preamble also talks about "the inherent dignity of the person." A good example of a regu-

lated international law which refers to the category of dignity is one from April 4, 1997 – the Council of Europe Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine. This convention recognizes the primacy of interest and well being of human beings over the interest of the community and sciences. This also obliges the participant states to accept in their internal law the appropriate means to protect the dignity and identity of every human being in relation to biology and the practice of medicine. In contrast to this, art. 1 of the Charter of Fundamental Rights of the European Union passed by the European Parliament on November 14, 2000 says that "Human dignity is inviolable. It must be respected and protected."

These and other international and internal regulations show that dignity has become one of the most important values that should be realized in modern legal systems. Especially art. 30 of the Polish Constitution, which was mentioned earlier, has a fundamental meaning for understanding the axiological assumptions that are at the base of the constitution. The meaning of this provision is not only intellectual, but also – in the light of the direct application of the provisions of the Constitution of the Polish Republic (art. 8 para. 2) – practical.

The character of art. 30 in the Polish Constitution is debatable. In literature, it has been proven that dignity, in the light of the regulation in the Polish Constitution, first, is "inherent and inalienable" and it is "inviolable." This means that it is a primary value and it is more important than the will of the constitutional legislator. Second, it is a normative source of basic laws and the freedom of the individual. Third, finally, the public authorities are by law required to respect and protect human dignity, and, as a consequence, the rights and freedoms of the individual person and the citizen that result from such dignity. This means that the constitutional legislator cannot freely decide on the content of these laws and freedoms. It is worth mentioning that if human dignity is "inviolable," the duty of respecting it weighs not only on the shoulders of the public authorities, but also on every other legal subject, whereby the public authorities are also required to create proper conditions to protect dignity.

According to the Polish Constitution, the concept of the individual's dignity means distinguishing the human being ("the sanctity of the human being") as the most important community value. Dignity is something that every person deserves, regardless of their subjective beliefs and actions. In order to protect the human rights of the individual, other individuals may have their freedom limited. Understanding dignity this way makes us look at art. 30 of the Polish Constitution as the only basis for the Constitutional Tribunal to give a finding or judicial decision. In legal doctrine, we can see a completely different way of thinking, which in accordance with art. 30 of the Polish Constitution shows that the constitutional legislator decided to "confirm" the existence of dignity, which should not have any normative meaning (we should not institutionalize the concept of human dignity, because that could lead to some official vision of dignity, and the state authorities should not force their point of view concerning dignity on the individual). Considering this viewpoint, we come to the conclusion that, in practice, the Polish Constitutional Tribune and art. 30 of the Polish Constitution were already treated as the only basis for jurisdiction.

Irrespective of the above, we must point out that at the source of the regulation contained in art. 30 of the Polish Constitution, we have a philosophical concept that assumes the existence of certain things (qualities) connected immanently with the human being. These things exist independently of the will of the lawmaker – the lawmaker only "proclaims" their protection. The basis of their existence, realization, and protection in the area of human rights is inborn human dignity. Accepting this kind of concept leads us to the conclusion that it is not international laws or any regulations of positive laws that are the essence of the freedoms and rights of the individual. The source of these freedoms and rights cannot be thought as a social contract or the will of a nation. If the source of freedom and human rights is not a positive law, only the individual's inborn dignity, we should ask: Did Polish legislators assent to the natural-law conception of law in the area of freedom and human rights?

**[?] Does the regulation contained in art. 30 of the Polish Constitution mean that Polish legislators agree with the natural-law sources of the freedom and rights of the individual?**

This is where a dilemma appears that is hard to solve, because according to art. 87 para. 1 and 2 of the Polish Constitution, the sources of common binding laws in Poland are: the Constitution, laws, ratified international agreements and decrees, and in the sphere of the operation of the agencies that established them – acts of local law.

According to Piotr Winczorek, "The Polish Constitution of 1997 is in philosophical-legal terms contradictory." The author, quoting art. 30 of the Polish Constitution, underlines that "in the intention of the constitutional legislator the presented formulation in an obvious way takes away from the freedoms and rights of people their positive-law character." But when summing up his thoughts on the subject of this regulation, he does not give a definite answer whether natural law is, in this case, the source of law. On the other hand, he does write that: "natural law has not been cited by the constitutional legislator as the source, which provides material as important normatively as rule-making acts mentioned directly in the Constitution, or acknowledged in an indirect way" [Winczorek, 1999, p. 33].

There exist two fundamental views on how to create laws – first, creating laws can be treated as the expression of will on the part of the legislator (extreme and moderate concepts of voluntarism); second, the creation of law can be treated as discovering or acknowledging rules by the legislator that exist independently of the legislator's will (extreme and moderate concepts of discovering law). Comparing these concepts to the regulations from the Polish Constitution, one should point out that activities of Polish legislators should partially have a voluntarist character to them and partially be based on discovering law.

Opponents of this concept of discovering law in the area of freedoms and rights of the individual, claim that, in reality, it is hard to distinguish domains in which laws are supposed to arise as a result of the legislator's will, from those in which existing rules would be "discovered." Difficulties would also be caused

by distinguishing the actions of the legislator that would rely on "creating" law, and those that would rely on "discovering" law. It is also doubtful whether certain accepted legal procedures of the Polish Constitution (like voting or a referendum) would work in terms of "discovery" of law, in other words – according to what procedures legislators should "discover" laws. In addition to this, what would differentiate the actions of the legislator who "discovers" law from the actions of a legislator working in accordance with the voluntarist way of understanding legislative activity?

The above doubts concerning the practice of creating laws must not prejudge – even though this is going against a clear regulation that is found in the Polish Constitution – the issue of the legal source of freedoms and rights of the individual. One of the most important things is that the regulation contained in art. 30 of the Polish Constitution formally commits the public authorities to respect and protect an "innate," "inalienable," and "inviolable" human dignity (which description indicates a form of dignity independent of the will of the state).

It must be mentioned that the constitutions of other countries that (just like the Polish Constitution) recognize human dignity as an inviolable quality, oblige state authorities to respect and protect dignity, and make the protection of dignity the highest constitutional norm, the most important legal value. On the other hand, these constitutions give dignity different functions, in other words, they either recognize dignity as a source of individual freedoms rights, or they do not recognize it this way and they reject the concept of natural law as the basis of statutory law.

### [?] How can we understand dignity of the individual as a legal category?

The addition of normative content into the idea of protecting the innate dignity of the human being developed in the twentieth century, a side effect of the experience of totalitarian government. Nowadays, we can talk about the existence of a rule that respects the "innate dignity of the person," which takes the form of a principle of demand, and of a principle of standards.

As the principle of demand, it indicates a defined axiological goal, in the framework of an international system that protects human rights, and in internal law, and it compels normative solutions, which lead to, or should lead to, an optimal realization of the goal. As a norm of principle it is, however, an interpretational directive ("if in doubt one should interpret *in dubio pro dignitate*").

We should come to the conclusion that the terms "dignity" or "the individual's innate dignity" are not defined in normative acts of internal and international laws. In jurisprudence, we can differentiate personal dignity (personality), as a kind of legal good (protected by, for example, on the basis of art. 23 from April 23, 1964 – Civil Code, *Journal of Laws* No. 16, pos. 93 with amendments), and as a good of human beings, for every person, strongly connected with human rights. The second kind is the basis for the protection of all goods and values connected with human beings who deserve these rights for the sole reason that they belong to the human race, and at the same time these goods and values fully express the value of humans. It is not wise, though, radically to oppose these two references to the term "dignity" (personal and human), because violating individual dignity usually threatens human dignity.

Human dignity can be felt and understood by every individual in a different way, intuitively through, for example, references to personal experiences, but at the same time it is a barrier which is supposed to protect the individual even from subjective damage that is not perceived by that individual.

In relation to the category of dignity, one can make the objection that because it does not have a strictly defined and unequivocal content, it is hard to acknowledge it as the basis for the protection of human rights. As Marek Piechowiak notices:

> Dignity is a kind of reality which cannot be simply legally formulated. On the other hand, it can be, and is, indicated by formulas and should be acknowledged this way in the process of creating law and interpretation. In order to point out elements of reality, we do not have necessarily to possess a knowledge of all the contents that are important for understanding law: all we need, for instance, is to say that it is all about the thing which determines the difference between humans

and other beings and what the reason is for treating humans in such a special way. [Piechowiak, 1999, p. 87]

It seems that a task that is more important than "positive" attempts to define dignity is its formulation through presenting situations which are threats to humanity. The reason for this is that no action, be it public or political, or even private, should violate the dignity of people. As an example, we can easily present actions which violate dignity: torture, forcing people to give false testimonies, depriving people of their freedom, physical and mental bullying, racial discrimination, sexual/gender discrimination, insult, defamation, breaching private and intimate spheres, treating people as objects, and many more. Sometimes violating some of specific individual goods (for example, freedom, privacy, and others) will not be the equivalent of violating an individual's dignity, which is confirmed by regulations allowing the limitation of laws protecting these goods.

We must point out that the above understanding of the protection of "innate human dignity" can be treated as a result of an intellectual compromise – the "pushing beyond the brackets" of dignity is a common element of different theories which look for a justification for human rights. We must ask then, could dignity in the future become the theoretical basis for creating a universal concept of how to protect human rights in the entire world.

Everything that has been written about here concerns, in particular, the conflict of legal goods in the area of human rights, which means that a legal regulation of methods and normative bases of solutions and resolving conflicts, which are the result of these kinds of dispute, should be according to rules of respect for the dignity of every single person. Authorities which create and practice laws often find themselves standing before a difficult dilemma concerning which exceptional values justify the protection of some goods at the cost of others.

## Works cited

Ossowska, Maria. 1970. *Normy moralne. Próba systematyzacji*. Warszawa: PWN.

Piechowiak, Marek. 1999. *Filozofia praw człowieka. Prawa człowieka w świetle ich międzynarodowej ochrony*. Lublin: Towarzystwo Naukowe Katolickiego Uniwersytetu Lubelskiego.

Winczorek, Piotr. 1999. "Kilka uwag o konstytucjonalizacji "źródeł prawa" w akcie z 2 kwietnia 1997 roku." In: Leszek Leszczyński, ed., *Zmiany społeczne a zmiany w prawie. Aksjologia, konstytucja, integracja europejska*. Lublin: Wydawnictwo UMCS.

Chapter 2

# *Ius* and *lex*

**[?] What was the historical origin and meaning of the distinction of *ius* from *lex* in Roman jurisprudence?**

In Roman jurisprudence, which shaped the bases of our legal culture, two terms were used to define "law" – on one hand, *ius*, and on the other hand, *lex*. This tradition has lasted till today, although it has taken on a somewhat different meaning. In modern legal studies, the issue of the relation between *ius* and *lex* is, indeed, subject to different interpretations, depending on the theoretical and philosophical premises accepted; at the same time, however, it has actually taken on a paradigmatic dimension.

In contemporary Latin legal terminology, the distinction of *ius* and *lex* has special significance, because almost all known legal maxims and dicta, both of a theoretical-legal and a philosophical-legal kind, and also those that are applicable in concrete sets of doctrine, refer to one of these two concepts. In these maxims, *ius* is most frequently the synonym for law in general, the idea of law, sometimes also justice (*iusticia*). However, *law* identifies law that has arisen by force of decisions made by a legislative authority (*auctoritas*) – a normative act, positive law, statute law, written law, and also valid law. This phenomenon, indeed, has its Roman origins. However, on one hand, its significance goes far beyond Roman private law, and, on the other hand, it is not an exclusively historical phenomenon, and it finds a broad application in contemporary legal studies and legal practice.

Further, one can go deeper into the history of human thought, and demonstrate that the Ancient Greeks already made a distinction between *dike* and *nomos*, which later were seen to a certain degree as the equivalents of the Roman division into *ius* and *lex*. Even more, the literature points to the presence of similar differentiations (although culturally, of course, somewhat different) in

the conception of law in civilizations outside Europe, for example, in China and Japan. Currently, the distinction is reflected in different languages, as, for example in English (*right* and *law*), French (*droit* and *loi*), Spanish (*derecho* and *ley*), German (*Recht* and *Gesetz*), Polish (*prawo* and *ustawa*), Russian (*право* and *закон*), and Italian (*diritto* and *legge*). Most frequently, except perhaps in English, this is a matter of distinguishing law from legislation. The concept of "law" is quite precise, whereas, of course, that of "right" is the opposite and rather ambiguous.

However, a simple distinction between right and law is not a complete explanation of the deep philosophical-legal meaning of the Latin terms *ius* and *lex*, especially in their current sense. It must be stressed that in the classical sources no definitions of these concepts have survived, because Roman lawyers, being, above all, practitioners of the law, attached no weight to definitions of the law and were excessively moderate in their attitude to theoretical and abstract questions. They approach the hard art of definition with particular caution. The best expression of this is the following statement of Javolenus Priscus, contained in the *Digests*: *Omnis definitio in iure civili periculosa est: parum est enim, ut non subverti posset* [Iavolenus, D. 50, 17, 202], (which means that every definition in civil law is dangerous; for there are few that cannot be subverted).

In Ancient Rome, the concept *ius* was original in a historical sense, but at the same time, much more ambiguous. As the law relating to the sphere of human action protected by the state, it was opposed to the concept *fas*, which was divine law relating to the religious sphere. In literature on Roman law, five meanings of *ius* are given:

1) a collection of legal norms regulating some field of life (objective right), for example, civil law;
2) entitlement (subjective right), resulting from objective right, for example, the right to property;
3) the place for carrying out a jurisdiction or the agency carrying out the jurisdiction;
4) the first stage in a normal civil trial;
5) law in general.

In turn, the concept of *lex* (plural *leges*) appeared later (in the *lex Hortensia* from 287 BCE), and in its basic meaning it was the synonym of legislation (or more broadly, a normative act). Under the republic, *leges* were the basic source of law, passed at an assembly of all fully-qualified citizens. In other meanings, the term *leges* was also used to designate, for example, the ordinances of the Emperor and his officials, contractual clauses added to legal acts, and the statutes of corporations.

One problem is the semantics of the concepts *ius* and *lex*, but the other is the mutual relation between them. In this final context, it is worth recalling that in Latin the word *ius* means not just right, but also pottage, soup, and sauce. In connection with this, Witold Wołodkiewicz writes thus about the relation of *ius* and *lex*, as understood by Roman jurists:

> The quality of the soup/sauce (*ius*) is determined both by the ingredients used and by the skill of the cook who prepares it. The high quality of legal *ius* is determined by the sources on which the legal order is based (*leges et mores*), and the appropriate transformation and presentation of them by the jurist. In this sense, the activity of the jurist as a necessary element in the process of creating law does, indeed, suggest the association with the activity of the cook, who when preparing a dish employs the appropriate ingredients and ways of preparing them. This analogy is clearly stressed by Isidore of Seville who wrote that "the sauce of the kitchen master (*ius*) is given a similar name to right/law (*ius*), since legislation is an ingredient of the law/right." It is in the context of these considerations that one must see the famous definition of law that derives from Celsus, which is passed on by Ulpian and contained in the beginning of the Justinian *Digests*, and which argues that a right is the capability of accomplishing that which is good and proper (*ius est ars boni et aequi*). The jurist appears in this definition as a master who through his capabilities (*ars*) develops the right/law. By developing a legal norm, he should apply the criterion of appropriateness, fitting in, however, in the positive legal order. [Wołodkiewicz, 2002, p. 61]

**[?] How is the division into *ius* and *lex* interpreted in contemporary legal philosophy, and why should these two concepts not be identified with each other?**

It must be acknowledged that in contemporary philosophy of law, a great deal of attention is paid to the problem of the relation between ius and lex, and that is the case in all the dimensions of the phenomenon of law – creation, application, interpretation, validity, and observation. Immediately after World War II, this was connected with a critique of legal positivism and a powerful renaissance of doctrines of natural law. This discussion was particularly lively in German legal studies, and although it lasted only a short time (only a few years), it left permanent traces in German legislation. This can be best seen in art. 20, para. 3 of the German Basic Law.

> The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.

In German legal studies and the jurisdiction of the Federal Constitutional Tribunal, this regulation is the subject of numerous and fundamental controversies. But in the opinion of a clear majority of commentators, the appeal to right and law is incontrovertibly a reference to the Latin terms *ius* and *lex*. The linking of the executive and the judiciary power by law and justice (that is, *ius* and *lex*) means that this formula takes on particular significance on the level of the application and validity of the law. On the first level, it is a matter of the fact that the law as *lex* only constitutes the possibility of achieving law in the sense of *ius* in conditions of a concrete legal finding. So we should not automatically identify these concepts as synonyms, but it is also not correct to separate them, because without a legal norm (*lex*), we are not capable of achieving a concrete, appropriate legal decision (*ius*). Legal reality, as the contemporary German philosopher of law Arthur Kauffmann indicates, is a compression of positive elements and justice. In the process of applying the law, *lex* is logically primary, but ontologically and historically, *ius* is.

Even more complicated are the relations between *ius* and *lex* in the second dimension, mentioned above, that is, within the valid-

ity of the law. Here we enter the most controversial aspect of the conflict between doctrines of natural law and legal positivism (in contemporary terms: between positivism and non-positivism). We are dealing here with the problem of the validity of a legal norm that contradicts a moral norm in an extreme fashion. This can be seen, in particular, in the well-known Latin maxim *lex iniustissima non est lex* [a very unjust law is no law].

Further, the problem does not just concern the issue of the validity of the law, but also its creation. Let us take note that a short time before art. 20, para. 3 of the German Basic Law was passed, the eminent German philosopher of law Gustav Radbruch wrote in 1947 in an article with the characteristic title of "Gesetz und Recht":

> "Law and right" – we used to believe that in these two words we express the same thing. Every law was for us a right, and every right a law; legal studies meant only interpretation of law and jurisdiction meant solely the application of the law. We called ourselves positivists, and the positivism that identified law and right is complicit in the participation of German legal studies in the creation of the state of law of the National Socialist years. Positivism made us defenseless against lawlessness, insofar as only understood how to accept the form of the law. We have had to understand that there exists a lawlessness in the form of law – a "legal lawlessness" – and it is only by a measure of right that is beyond the law that one can define what right is, whether we call that right which is beyond law natural law, divine law, or the law of reason. [Radbruch, 1990, p. 96]

When he looked at the problem of so-called legal lawlessness, Radbruch, therefore, confronted all lawyers with a fundamental and forever relevant question: Does the legislator, creating law in the sense of *lex*, encounter no barriers or limits at all; or, on the contrary, is the legislator bound by certain values, which immanently dwell in the very idea of the law in the sense of *ius*?

We can only hope that the study of the philosophy of law offers an answer to this question. An answer may be suggested by the Arab fable often cited by the contemporary German legal theorist Günther Teubner:

> An old wealthy bedouin sheikh wrote his will and divided his fortune, a large herd of camels, among his three sons. Achmed, the eldest son, was to inherit the first half of the fortune, Ali, the second son, should get a fourth, Benjamin, the youngest son, a sixth. When the father died, unfortunately only eleven camels were remaining. Achmed, of course, demanded six of them and was at once contested by his brothers. Finally, when everything broke down, they returned to the khadi. He decided: "I offer you one of my camels. Return it to me, Allah willing, as soon as possible." Now, with twelve camels, the division was easy. Achmed got his half, Six camels, Ali got a fourth, three camels, Benjamin a sixth, two camels. And indeed, the twelfth camel was left over, which they kept and fed very well and happily returned to the khadi. [Teubner, 2005, p. 111f.]

For law and lawyers, very varied morals may flow from this fable. One could point, for example, to the following: the work of every lawyer, both the theoretician and the practical lawyer, is fundamentally a matter of looking for the twelfth camel. In the sense of statute law (*lex*), the law is often not perfect, and we are faced with the necessity of finding a certain "excess" (*ius*) permitting a rational and correct decision to be made. Sometimes, when the norm is unambiguous and the factual state arouses no doubt, this process of looking for the twelfth camel will be comparatively easy. In practice, especially where there is a conjunction of the law with other normative systems, it may, however, come to so-called hard cases. Then the relation between *ius* and *lex* appears in all its sharpness.

A clash of *ius* and *lex* can occur not only in the course of applying the law and in estimating its validity, but also in relation to creating, interpreting, and observing it. This problem takes on especial significance in periods of historical change. The "caliph" who lends us the twelfth camel (*ius*) to solve a legal equation, and to whom one must return the beast, is simply a broadly understood notion of the law (*ius*, once again), in accord with three elements: certainty, utility, and justice. Hard cases demonstrate that there exists an immanent connection between *ius* and *lex*. For the purposes of this handbook, let us adopt the following formula, which sets out the relation between these two concepts that are so fundamental for lawyers: *ius* without *lex* is helpless, but *lex* without *ius* has no soul.

## Works cited

Radbruch, Gustav. 1990. "Gesetz und Recht." In: Gustav Radbruch. *Gesamtausgabe*. Vol. 3. *Rechtsphilosophie III*. Heidelberg: C.F. Müller Juristischer Verlag.

Teubner, Günther. 2005. "Alienating Justice. On the Surplus Value of the Twelfth Camel," *Ius et Lex*. No. 1.

Wołodkiewicz, Witold. 2002. "Ius et Lex w rzymskiej tradycji prawnej," *Ius et Lex*. No. 1.

Chapter 3

# Legal certainty

**[?] What is the relation between the certainty of a decision to create a law and the certainty of a decision to apply the law?**

Legal certainty is one of the basic values of the legal order. The stress on achieving certainty is all the greater, the more the social world is perceived as disordered, unstable, and unpredictable. For Gustav Radbruch, who to define it used the term "*Rechtssicherheit*" (legal certainty), it was one of the three notions of the law, alongside justice and utility. Lawyers, however, have a problem with legal certainty. This is not just a matter of problems in elucidating the concept, but also of problems in finding an answer to the question as to whether it is a constitutive feature of law. That would mean that an uncertain law is not a law. Or, one can ask, is legal certainty an unattainable ideal for which one should never cease to strive?

The connection between legal certainty and the rule of law, and the principle of a democratic state governed by the rule of law, is beyond question. This connection is instrumental: in a state governed by the rule of law, the law should not be a source of uncertainty or of threat to the individual. Such a conviction is also apparent in the judgment of the Polish Constitutional Tribunal, in the opinion of which "legal certainty makes it possible to predict the operations of state agencies and to foresee one's own" (judgment of Constitutional Tribunal [TK], April 2, 2007, SK 19/06, OTK-A 2007, no. 4, item 37). Deeper reflection that draws on existing legal concepts, such as the creation and implementation of the law, leads to a conclusion that this formulation is inadequate. It is true that both expressions "certainty of the decision to create a law" and "certainty of the decision to apply a law" are explained with the help of the category of predictability. This means that both the decision to create a law and the decision to apply a law

are certain when they are predictable; but in the case of each of those expressions, the conditions of predictability vary.

With regard to the certainty of the decision to create a law, one must note that the Constitutional Tribunal underscores many times that citizens should not be surprised by legislative decisions. However in practice, even the frequent revisions of one legal act are not recognized by the Constitutional Tribunal as a violation of the principle of legal certainty, if, indeed, those revisions are conducted while maintaining the principles of correct legislative procedure. However, if the revision is announced, for example, by the political party with a majority in the *Sejm* (Parliament), and the media properly covers the plan, but if, for example, a too brief *vacatio legis* is planned, then the revision may be seen as violating the principle of legal certainty. One can call the first situation one of political unpredictability in the creation of law, and the second that of juridical unpredictability. Only the latter concerns the Constitutional Tribunal, while for the social reception of processes of law creation, political predictability is more important, that is, what is commonly called the stability of the law.

Finally, a third aspect of the predictability of the process of creating law is the possibility of formulating an accurate prognosis relating to the content of a future legal act, in a situation in which the legislative process has begun. This derives from such factors as: the importance of the problem to be resolved; the level of media interest connected with this, and the interest of political subjects present in parliament; and the presence of a social factor.

In the matter of court verdicts, the subject of prediction may be the very fact of the issuing of a given verdict or the content of that verdict. A prediction of content derives from very many factors. Jerzy Wróblewski, when constructing the concept of objective legal certainty – that is, a certainty that is independent of the knowledge of the subject that wishes to predict a given decision – points to the following: features of the valid law; the properties of legal language; the interpreter's evaluations; the kind of accepted evidential theory, etc. Which of these factors is more important for legal certainty, has been a subject of dispute in legal philosophy. The conviction that one of the factors that determine the predictability of court decisions is the manner

of formulating and systematizing legal rules, was nourished by nineteenth-century legal positivists, who saw the application of the law as a mechanical activity, simply a "deductive" one. American legal realism questioned this position, asserting that legal rules do not always determine the content of a decision. Among the representatives of this current, Jerome Frank maintains that the personality of the judge is decisive, as a result of which the predictability of decisions is made difficult, if, indeed, it is even possible (see: Legal realism). The creator of normativism, Hans Kelsen also draws attention to the fact that legal rules cannot fully determine the content of a decision. He showed that even the order to arrest person C issued by person A to person B is not able to indicate in detail how person B will behave.

Wróblewski conceptualized these disputes, suggesting the concept of the ideology of a bound court decision, and that of an unconstrained court decision. He also put forward his own idea of a third way, that is the ideology of a law-governed and rational court decision. This accepts the emphasis of the ideology of a bound court decision on a strict observing of valid law, but it rejects as unrealistic the elimination of evaluations from the processes of creating law. With regard to the ideology of the unconstrained decision, Wróblewski's idea accepts the role of evaluation in applying the law, but rejects the suggestion that evaluations are completely unconstrained.

**[?] What is the rationale behind differentiating formal and material legal certainty?**

A lawyer's way of understanding legal certainty ("law is certain when it is predictable") can be criticized on several grounds. One of the troublesome consequences of explaining law through predictability is the view advanced by Aleksander Peczenik that during the Third Reich the decisions of the Nazi authorities were quite predictable for Jews. Hence, alongside predictability, he proposes a second criterion for legal certainty, that is, acceptability. In his terminology, decisions to apply the law that are exclusively predictable guarantee formal legal certainty. If, however, a decision is predictable and acceptable, then we can speak of material legal certainty. The result of interpretation to be accept-

able must be in accord with the system of values of the legal community. [Aarnio, 1987]

### [?] Is legal certainty an unattainable ideal or rather a feature of the law?

Defining legal certainty as the predictability of court decisions raises the doubt as to whether legal certainty can ever be achieved in any legal system. After all, predictability is only a greater or lesser degree of probability, and this may change depending on the type of case (civil, criminal), the lawyer's qualifications, or the evidentiary material that has been assembled, and, finally, on the precision of the legal normalizations relating to the case. The legislator can only influence the last of these. It is a myth to believe that it is possible to construct a law that is clear and that arouses no doubts. This is so not just because of the feature of natural language that is its "textual openness" (see: legal realism), but also because that very "clarity" is variable depending on the linguistic competence of the receiver of the text. Factors of this kind justify the traditional formulation that a state governed by the rule of law, and thus legal certainty, constitute a Kantian regulative ideal: it is unobtainable, but it is worth the effort to get close to it.

One must note, however, that in another sense legal certainty is thoroughly attainable and is frequently attained in democratic states. It is known who is entitled to make law; there are rules setting out from when and to when and what regulations are to be recognized as legal. In democratic countries it is standard to have a right to go to court, and a right to an honest and unbiased trial, etc.

Robert Sommers differentiates legal formality from the formalism of the law. Formality is linked to the public recognition of the law, and that form consists of procedures of making and proclaiming law, and also changing it. The formality of the law can be defined as the "good" side of legal certainty. However, legal formalism is not a feature of the law, but it is a feature of the application of the law that consists in the limitation to exclusively defined arguments, for example, linguistic ones, with a complete rejection o a holistic approach to settling legal disputes. Formal-

ism would, then, be the "bad" side of legal certainty. In specific legal cultures, the formality of the law is a fact. Thus, it is hard to define this dimension of legal certainty as a regulative ideal. In this sense, rejecting thinking about legal certainty as a regulative ideal can be seen in a formula like "law is certain because it is just the law." This is a manifestation of the ontological interpretation of legal certainty. The same can be said for the statement that the certainty of the law constitutes a defining feature of the law, because different aspects of the legal system are structurally stable, which means that the maintenance of the system is resistant to minor perturbations. On this basis, one can compare a legal system to a building that is subject to various stresses, for example, the wind, which, however, do not cause the complete collapse of the structure. In the case of the law, the perturbations are of a different kind and relate to: language as a tool of legal communication or communication among lawyers; factual states to which the law is applied; and the very changeability of the law. Therefore Bartosz Brożek appropriately differentiates concepts of legal certainty: communicative ones, qualifying ones, and dynamic ones. He offers the following definitions:

1. Law is certain in a communicative sense if a minor change on the part of the sender of a communication in legal language causes equally minor changes in the reception of this communication.
2. Law is certain in a qualifying sense if minor changes in the factual state do not cause substantial changes in the legal qualification of a given behavior.
3. Law is certain in a dynamic sense if minor legislative changes do not bring with them substantial changes in social relations in general and in legal practice in particular.

On the basis of the first definition, it is an error to aim for a maximum precision of legal language, since the creation of subsequent legal definitions entails costs in interpreting the law. The law cannot demand too great a cognitive effort from its addressees. For this reason, Brożek thinks, the homogeneity of jurisdiction does not guarantee the predictability of court decisions, because to obtain information on the subject of a so-called line of jurisdiction is too costly, economically ineffective, and, in consequence, unpredictable. Ultimately, changes in the law, if they re-

main within reasonable limits in terms of frequency, do not lead to legal uncertainty, and such a formulation of dynamic certainty does not lead to a conflict between certainty and flexibility.

## Works cited

Aarnio, Aulis. 1987. *The Rational as Reasonable. A Treatise on Legal Justification*. Dordrecht: The Reidel Publishing Company.

Chapter 4

# Obedience

### [?] What are the classical arguments that set out to justify the moral obligation to obey the law?

Let us imagine, in a certain large European city, in the middle of the night, on a not-too-wide street utterly without motor cars, at a red light, there stands a pedestrian. She has stopped precisely because of this light. When she starts to reflect on the situation she finds herself in, she starts to see its absurdity and as a result starts to ask herself if it is reasonable to wait till the lights change. She does not question the legal obligation to stop, but she does ask whether in very situation every legal rule established in a democratic state is justified. Is there a moral obligation to obey the law? Many of the arguments that aim to justify the character of this obligation were already set out by Plato in the dialog entitled *Crito*, in which Socrates demonstrates why he should not escape from the prison in which he awaits the death penalty that has been passed on him. Nowadays, we rather perceive the weakness of these arguments, and think that the insistence on the moral character of the duty to obey the law is pushed too far.

### [?] What is the concept of the *prima facie* obligation?

The moral obligation to obey the law can be of an absolute or a *prima facie* sort. An absolute obligation means that the obligation exists independently of the content of the law and with no exceptions. It is a radical position, and it is hard to find a philosopher who would maintain it. Thus, the central plane on which this dispute takes place can be reduced to the question: Is there a *prima facie* duty to obey the law? A *prima facie* duty is explained thus: a given subject S has a *prima facie* duty to do X when and only when there exists a moral reason to do X by subject S, such that if S does not have a moral reason not to do X that is at least as strong as that justifying doing X, then the failure to do X is wrong. [Smith, 1973]

**[?] What does the "fair play" argument consist of?**

Herbert Hart and John Rawls are seen as authors who put forward this argument. Hart refers to the concept of a shared undertaking. In his view, if a group of people conduct a certain enterprise in accordance with defined rules, then those people who follow the rules have a right to expect that people who profit from the fact that those former people follow the rules, will also observe those rules. Rawls, in addition, gives conditions under which a given enterprise is a source of the obligation to obey: the success of the enterprise depends on a near universal observance of the rules; keeping to the rules demands sacrifice in the sense that it limits someone's freedom; finally, the enterprise is in accord with the requirements of justice. Both Hart and Rawls argue that the duty of obeying the rules of an enterprise does not derive from its usefulness, reciprocal promise, or agreement. They see a legal system as this kind of enterprise.

Several criticisms have been made with regard to the "fair play" argument. It has been suggested that it may, indeed, be justified within small groups formed by choice, in other words, where not obeying the law leads to the harm or the loss of another participant in the enterprise. In the case of a legal system, which is an enterprise on a "grand scale," there are many acts that violate valid rules, but which do not lead to this kind of negative consequences for others. Robert Nozick argues that the attainment of advantage/profit does not justify the duty to obey the law and uses the famous example of the broadcasting system that it was decided on to erect on the property of a community of 365 people. The group of those behind the project decided that every inhabitant had a duty to devote one day a month to conduct a broadcast. The fact that he/she profited from listening to the radio, even without choosing to do so, does not in Nozick's view, justify a duty to follow the rule. Let us add that in the above example the person who did not wish to devote one day to run the broadcasting system, did not participate in the decisions of the group behind the scheme. So Nozick describes a situation in which people participating in an enterprise render a service to themselves, but, at the same time, there arises a service to someone else that cannot be avoided. Availing oneself of the broadcasting system is not a good "that it is possible not to want."

However, it can be pointed out that there exist goods that it is impossible not to want, like, for example, security/safety. Critics of an excessive role taken by the state point out that the state does not have to be the only supplier of this kind of advantage, and that, indeed, the price that must often be paid for this good in the shape of limits on freedom of choice, is too high.

**[?] What does the argument from consent consist in?**

Plato writes:

> But whoever remains with us, having observed how we decide lawsuits and take care of other civic matters, we claim that this man by his action has now made an agreement with us to do what we command him to do, and we claim that anyone who does not obey is guilty three times over, because he disobeys us who gave birth to him, and who raised him, and because, despite agreeing to be subject to us, he does not obey us or persuade us if we are doing something improper, and although we give him an alternative and don't angrily press him to do what we order but instead we allow either of two possibilities, either to persuade us or to comply, he does neither of these. [Plato, *Crito*, 51E]

This argument says that the very presence of a given subject in a state signifies his/her consent to the legal order that applies in it. This agreement may be factual, for example, through participation in elections, or assumed, for example, through not leaving the country, or finally hypothetical. The argument that refers to assumed consent is easy to shake, by raising the objection that a person may not have the financial means to leave or the possibility of settling elsewhere. One can also say that this is a fairly brutal way of putting the matter, which could be paraphrased: you will obey the law or get out of the country. Hypothetical consent invokes the concept of rationally thinking individuals, who would certainly express their consent to keeping the law, if they were given the opportunity. Conceptions of the social contract (for example, Rawls's) are based on this kind of construct, with its veil of not knowing (see: the part of this handbook on John Rawls's ideas). It is, however, sensibly argued that invoking hypothetical consent justifies the duty to obey a law that rational

individuals would consent to, but it does not justify the duty to obey a particular law that is valid at a given moment.

### [?] What does the argument from the common good consist of?

Plato writes:

> Well, look at it this way. If the laws and the community of the city came to us when we were about to run away from here, or whatever it should be called, and standing over us were to ask, "Tell me, Socrates, what are you intending to do? By attempting this deed, aren't you planning to do nothing other than destroy us, the laws, and the civic community, as much as you can? Or does it seem possible to you that any city where the verdicts reached have no force but are made powerless and corrupted by private citizens could continue to exist and not be in ruins? [Plato, *Crito*, 50B]

This argument indicates the consequences to which disobedience of the law can lead. The conclusion is as follows. To acknowledge that one person can violate the law leads to an acknowledgement that this right applies to everyone. However this would have fatal consequences for the legal order, and this is where the duty to obey the law derives from. Often this kind of argument is concealed in a question of the sort: "What would happen if everyone did this kind of thing?" Here the object of the question is negatively evaluated.

This kind of reasoning – based on the principle of generalization – can lead, in the opinion of M.B.E. Smith, to absurd consequences of, for example, a prohibition on eating lunch at five in the afternoon, since "What would happen if everyone did that?" The consequences of dividing the day up so would, indeed, be destructive of public order. It is in this way, *ad absurdum*, that the lack of foundation of the argument of common good is demonstrated.

Within the argument from the common good, one also encounters the argument that disobedience to the law sets "a bad example." This is doubtless so in a situation in which the witness of, for example, the violation of traffic regulations concerning red lights is a child. However, children are not witness to every violation of legal norms. Further, often no one is a witness to such a violation.

Hence Joseph Rad acknowledges that while, in fact, most people are not as influential as the Archbishop of Canterbury, they can influence the views of other people. Nonetheless, this does not justify the assertion of a universal duty to obey the law, since the argument from the "bad example" does not refer to all cases.

To demonstrate the existence of a duty to obey the law, the argument is also put forward that better consequences result from conduct in accord with a rule than in accordance with one's own opinion. This is an argument that is utilitarian in spirit. However, it does meet with the accurate objection that there exist situations in which everyone's keeping the law without any exceptions does not lead to the best consequences. There do occur situations in which exceptional disobedience by some persons, along with a continued recognition of the principle that everyone should observe the law, leads to better consequences than when the law is obeyed without exception. It may be that if someone crosses the street on a red light, more good results than if he/she had waited for the lights to change. The conclusion is that a utilitarian justification of the duty to obey the law does not hold up. It results in laying the burden of decisions on the individual, who has to determine if obeying the law, or not observing it as an exception, leads to better consequences,

**[?] What does the communitarian argument consist of?**

This argument declares that we are obliged to obey the law because we belong to a specific community. The duties that result from belonging to this community are called collective or community duties of role. Such a community may be family, workmates, people who share our interests or views, etc. A view that communitarians contest is that the condition of accepting an obligation is expressing consent to it. This kind of position – a voluntarist one – was put forward, for example, by Locke. However, Dworkin considers that the bonds that constitute a community frequently derive from ["series of choices and events that are never seen, one by one, as carrying a commitment of that kind. […] It would be perverse to describe this [history we have with friends"] as a history of assuming obligations. [Dworkin, 1986, p. 199] The same is the case with regard to citizenship, as a result

of which, according to communitarians, individuals that are citizens have a moral duty to obey the law.

However, it has been pointed out that this kind of argumentation goes too far, because it rather hastily sees the duty to obey the law as having a moral justification. This justification is not established by playing the role of a citizen; similarly, being an agent of the *Gestapo* whose job is to denounce members of a resistance movement does not mean that there is moral obligation to do this kind of work.

**Works cited**


Dworkin, Ronald. 1986. *Law's Empire*. Cambridge (Mass.): The belknap Press of Harvarad University Press.

Plato. *Crito*. Trans. Catha Woods and Ryan Pack, http://www.pitt.edu/~mthompso/readings/crito.pdf.

Smith, Malcolm B.E. 1973. "Is There a Prima Facie Obligation to Obey the Law?," *The Yale Law Journal*. No. 82(5).

Chapter 5

# Truth

**[?] What does the phenomenon of the "ambiguous deficit" of truth in jurisprudence consist of?**

Philosophical reflection on truth has a very long history dating from early antiquity right up to very contemporary times. Over the centuries, it has been overgrown with such a multiplicity of concepts and such an enormous literature, enough to fill a large library. From the perspective of the philosophy of law, the following issues are of particular importance:

1) defining the problem of truth in the theory and philosophy of law:
2) formulating the causes of the existence of a multiplicity and variety of conceptions of truth in general philosophy;
3) indicating the areas of jurisprudence that are relevant from the perspective of theoretical and philosophical aspects of the problem of truth;
4) identifying the philosophical conceptions of truth that can be applied in law in all its dimensions, that is, creation, application, interpretation, validity, and observance.

If it were just a matter of considering the problem of truth in relation to the theory and philosophy of law, the author's task would be relatively simple. The number of studies devoted to this issue is quite small. Most frequently, two books are mentioned in this context: Dennis Patterson's, *Law and Truth* (Oxford University Press, New York–Oxford 1996) and Anna Pintore's *Law without Truth* (Deborah Charles Publications, Liverpool 2000). Also mentioned is a single-subject number of the *Harvard Journal of Law and Public Policy* (2003, vol. 26), which contains materials from a symposium entitled *Law and Truth*. Nonetheless, legal-theoretical and philosophical-legal aspects of the concept of truth are scattered throughout literature devoted to the theory of legal argumentation. However that may be, we are dealing

with a certain ambiguous deficit of interest in the problem of the truth in the field of theory and philosophy of law. This is an ambiguous phenomenon, because although comprehensible and explicable, it is not ultimately justified.

It needs to be emphasized here that theoreticians and philosophers of law do not attempt – quite reasonably – to create their own concept of truth that would be adequate for the needs of legal studies broadly understood. They rather adapt for their purposes one of the numerous ontological, epistemological, and axiological versions that have been developed in general philosophy. As a result, the issue of truth in relation to all aspects of law, but especially the question of the logical status of legal norms, and the possibility/impossibility of evaluating them within the categories of truth/falsehood, are dealt with by scholars who function on the border of philosophy and broadly conceived jurisprudence. This means principally those who in the theory and philosophy of law concentrate on the subject of analysis and that of legal logic. When we speak of a deficit of interest in the problem of truth in theory and philosophy of law, we are thinking of reflection on the law, and not of the theory and philosophy of individual sets of legal doctrine. An exception in this respect is the doctrine of law and of the criminal trial, because the number of studies devoted to the theory and philosophy of truth is in this field relatively large. However, these are most frequently truth in evidentiary proceedings in the context of a fair trial, and, thus, they do not exhaust all the philosophical aspects of the matter.

One can suggest that one of the causes of the above-mentioned deficit in the matter of truth within theory and philosophy of law is the *sui generis* ambivalent attitude of lawyers to truth in general. Already in antiquity, in legal discourse Roman jurists liked to use the formula *verum est* (it is truth) both in establishing the content and the validity of a norm, and in the process of interpreting it. This was, in part, a result of the law-creating, and, in part, of the casuistic and practical nature of jurisprudence at that time. Its representatives did not precisely distinguish – as we do now – truth from other values – justice, appropriateness, rectitude, good, etc. "It is not by chance that linguists of the late imperial period stress the exchangeability of *verum* with concepts that are unambiguously evaluative, such as justice (*iustum*), rectitude

(*rectum*), and good (*bonum*)" [Giaro, 2011, p. 2968]. Rendering truth categorically autonomous and shifting it to the sphere of logic came much later, when at the end of the nineteenth and the beginning of the twentieth century, when the linguistic turn occurred in philosophy and analytic philosophy of language developed and formed the basis of contemporary legal theory.

I will not offer here any analysis of the causes why the nineteenth century saw a break with the Roman tradition. Let us rather turn away from the historical dimension of this phenomenon and deal with it in a paradigmatic manner. If we accept that the Latin legal terminology that is currently used in on-going legal doings and circles (legal discourse), then an analysis of the comparatively few (*sic*!) maxims that refer directly or indirectly to truth (*veritas*) may lead to very interesting and surprising conclusions that bear witness to the specifics of the legal mind.

From a legal-theoretical and legal-philosophical point of view, I accept that the contemporary lawyer moves (and, in practice, frequently tosses about in) within a certain scale marked out by two well-known Latin axioms, which today, however, can be seen as rather banal slogans. One limit is marked out by the formula that descends to us indirectly from Ulpian's "*dura lex, sed lex*" (the law is harsh, but it is the law). For many, this is the epitome of an extreme, soulless legal formalism and/or strict legalism, on the level of the validity of law (that's a harsh law, but it nonetheless applies), of its application/interpretation (it's a harsh law, but it has to be applied/interpreted strictly), and of observing it (that's a harsh law, but it cannot be broken). In fact, almost no sensible contemporary lawyer accepts it uncritically, but in common use, especially among non-lawyers, it is quite widespread.

The second limit is set by the maxim that comes from Saint Augustine, *lex iniusta non est lex* (an unjust law is no law at all). Even if lawyers value the moral message of this formula, in practice they do not actually know what they should do with it. For obvious reasons, they cannot uncritically accept its radicalism, because they realize that legalism has a certain immanent value, and they know very well what legal anarchy brings in its wake. However, they should not completely forget of the philosophical-legal wisdom that inheres in it, especially when we are deal-

ing with law that flagrantly violates elementary moral standards, and sometimes with law that is actually criminal itself. But if we leave these two extremes (which of necessity somewhat depart from the main subject of this chapter), we may look closely at what, from the point of view of truth (*veritas*) stands at the center of this space. The following diagram may make this clear: with varying degrees of intensity, on the left-hand side of the scale, we are closer to legal formalism; on the right-hand side, we are nearer to justice, idealistically conceived. One of the maxims is placed at the middle of the scale, because it may indicate both one and the other.

Even a cursory analysis of these maxims leads to interesting conclusions as regards the relationship of lawyers to the problem of truth. The Hobbesian *auctoritas non veritas facit legem* can be seen as the proclamation of a positivist paradigm of the valid power of the law, and that a long time before the emergence of legal positivism as theoretical-legal and philosophical-legal tendency. A norm is valid because it proceeds from a duty constituted authority (*auctoritas*) disposing of the power of a law-creating *fiat*, and not because the norm possesses this or that content (in this case, *veritas*). In this sense, its counterbalance is the maxim *lex iniusta non est lex*, since it refers to the content of the norm. With a morsel of good will and imagination, Hobbes's formula, if it is treated paradigmatically, can also indicate Kelsen's division into *Sein* and *Sollen*, on one hand, and, on the other, the thesis concerning the exclusion of legal norms from the operation of the logical test of true/false. This model of reasoning, when transferred to the level of applying the law, results in the maxim *res iudicata pro veritate accipitur* (a thing adjudged must be taken for truth). This, however, means no more than that we do not question the veracity of the findings of a final legal judgment. Truth so conceived draws its force not from accordance with reality, but from the competence of the appropriate agency in the empire of the application of the law.

Those maxims go further that refer to fiction and conjecture/supposition. Here, indeed, we are fundamentally dealing with conscious contradiction of reality, and, thus, of Aristotles's classic conception of truth. In reality, they plan a very important practical role in the system of law and in the process of its application.

In this sense they fit into a pragmatic theory of law. They do this all the more because immediately afterward come maxims that somewhat blunt the issue: fiction and conjecture have to give way to the law. Further, the maxim *plus est in opinione quam in veritas*, once more with a small amount of good will and imagination, can be ascribed the function of a theory of consensual truth. Finally, there is the last of the maxims place in the above scale – *iustitia non novit matrem nec patrem solum veritatem spectat* (justice knows neither father nor mother, but truth alone). It is only on the surface that this appears an empty idealistic slogan.

In collections of legal maxims, we can find two more that refer to the truth, although they come from extra-legal and extra-jurisprudential sources. The first of these is *nimium altercando veritas amittitur* (by too much altercation truth is lost), which can be seen as the original model for the conditions of rational discourse asset forth by Jürgena Habermas, which he sees as the bases for a consensual theory of truth. In the second, *propter scandalum evitandum veritas non est omitenda* (it is wrong to avoid the truth in order to avoid scandal), it is possible to perceive the archetype of recognizing the particular value of truth in public life, and of the injunction, to put it in colloquial language, not to sweep things under the carpet.

### [?] What are the causes of the "embarrassment of riches" of concepts of the truth in general philosophy?

The state of interest in truth in legal theory and philosophy may be seen as an ambivalent deficit, but in general philosophy, particularly epistemology, we are dealing with the opposite situation: a genuine embarrassment of riches. It is a source of trouble, not just for philosophers, but also lawyers, who have difficulty in choosing the most suitable for the requirements of jurisprudence from among the various concepts, definitions, types, criteria, and theories of truth.

From a philosophical point of view, the problem of truth was has been and remains to this day an open problem. It is no coincidence that contemporary philosopher take as their departure point this well-known excerpt from the Bible.

> Pilate therefore said unto him, Art thou a king then? Jesus answered, Thou sayest that I am a king. To this end was I born, and for this cause came I into the world, that I should bear witness unto the truth. Everyone that is of the truth heareth my voice.
> Pilate saith unto him, What is truth? [John 18. 37–38]

Philosophers are particularly inspired by the last question. No answer comes, for Pilate expects none. If there were an answer, there would be no problem of truth. In *belles lettres*, there have been attempts to make up a further part of his dialog, but all that has happened is to deepen doubts. For example, the contemporary French dramatist, essayist, and writer Eric-Emanuel Schmitt has Jesus answer Pilate, embarrassing the Roman by answering his question with another: "Indeed, and what is the truth?" This state of affairs is splendidly conveyed in a humorous manner in the famous triad of Father Józef Tischner in his history of philosophy written in the Polish of the southern mountains: "świętoj prowdzie, tyż prowdzie i gówno prowdzie" (haily trooth, yer ain trooth, and fuckall trooth [holy truth, your own truth, and no truth at all]). Translated into the language of philosophy, this is basically the quintessence of the complexity of the problem of truth – on one hand, absolute truth, on another relative truth, and finally falsehood as the opposite of truth.

A detailed presentation of all the theories of truth that have emerged in philosophy would, of course, substantially exceed the limits of this essay. The problem is not a matter of the longevity of traditions that reflect on truth, which reach back into antiquity. Up to the end of the nineteenth and the beginning of the twentieth century, the dominant position was maintained by the only realist classical theory, which was created by Aristotle and continued in various versions by Thomas Aquinas, Descartes, Leibniz, and Kant. It is only from the so-called linguistic turn made at the turn of the twentieth century, which led to the development of the philosophy of language, that a differentiation of theories of truth emerged. In the last few decades, further developments in the philosophy of mind, analytic philosophy, epistemology, logic, etc. have stimulated a positive explosion of such theories. Before offering a classification of fundamental theories of truth, it is, however, worth reflecting on the causes

of this excess of riches. In order to make the story simpler, and in order not to expand beyond the limits of this essay, I will almost exclusively here base myself on Jan Woleński's observations. In his view, it is necessary, above all, to define what tasks a theory of truth needs to fulfill. This comes down to answers to nine basic questions [Woleński, 2003, p. 7–47; 2005, p. 142–180]:

> What are the bearers of the truth?
> Is truth an epistemological, ontological, or even axiological concept?
> Can truth be defined, and if so, how?
> What does the criterion of truth consist of, and how does it refer to the definition of truth?
> If we assume that the possible bearers of truth can also be bearers of falsehood, is the division into truth and falsehood disjunctive and complete?
> Is this division stable, which is the equivalent of the question whether truth is absolute or relative?
> How can we classify theories of truth, what relations exist among them, and, in particular, between a chosen conception of truth and other possible theories?
> What is the relationship of truth to other concepts and problems of philosophy?
> What is the relationship of truth to logic, science, art, religion, law, etc.?

Once we realize how different answers to each of these questions can be, the riddle of the existence in philosophy of a multiplicity and variety of conceptions of truth appears to be solved. Individual philosophers have differently defined and do differently define the very concept of truth, its bearers, criteria, essence, and possibilities of definition, etc. that it is difficult to expect that there can be one universal and absolute conception of truth. Further, among scholars there is not even any agreement as to how to systematize, classify, and distinguish already-existing conceptions: in terms of definitions and criteria; realist/anti-realist; classical/contemporary; substantial/deflationary; material/procedural; subjective/objective; pragmatic/a-pragmatic; epistemical/non-epistemical, etc. In a somewhat simplified fashion, but one based on a rich relevant literature, let us, thus, adopt the following outline of a division of theories (concepts) of truth from a historical and contemporary perspective.

| Classical theory and its modifications |
|---|
| **Aristotle, *Metaphysics,* IV, 1011 b** |
| **St. Thomas Aquinas**<br>*Veritas est adaequatio rei et intellectus* (Truth is the conformity of intellect and things) |
| **Correspondence**<br>G.E. Moore, B. Russell, L. Witgenstein |

| Older non-classical theories |
|---|
| **Coherence**<br>F. Bradley, B. Blanshard, O. Neurath |
| **Pragmatism**<br>Ch.S. Pierce, W. James, J. Dewey<br>**Consensus**<br>J. Habermas, K.-O. Appel |

| Modern theories, including: |
|---|
| **Semantic**<br>– The theory of Alfred Tarski as a logical recalibrating of correspondence theory – widely recognized as a universal defining concept |
| **Deflationary**<br>– Redundancy theory<br>– Disquotational theory<br>– Prosententional theory |
| **Axiomatic** |
| **Epistemical** |
| **Postmodernist** |

### [?] What areas of jurisprudence are relevant from the point of view of the problem of truth?

The average lawyer's knowledge on the subject of the above-mentioned theories of truth is relatively small. This can come as no surprise, and I do not think there is any urgent need to change this state of affairs. Even specialist philosophical-legal literature

demonstrates that in the work of a lawyer only some philosophical theories of truth can have any application (greater or lesser). These are, above all, the correspondence theory (a continuation of classical theory) and the coherence theory, the pragmatic theory, and the consensual theory. Possibly applicable, too, is Alfred Tarski's semantic conception of truth, as a recalibration of correspondence theory on the level of a meta-language of universal meaning. Among theoreticians and philosophers of law, there is much less interest in other modern conceptions, for example, deflationary theories.

With regard to another issue, that is, establishing the areas of jurisprudence that are relevant from the point of view of the problem of truth, authors point to various, but in several points related, questions. For example, according to Giovanni Tuzet, one can point to four issues:

1) the possibility/impossibility of subjecting legal norms to a test of truth/falsehood;
2) the veracity of information used in the process of creating law;
3) truth in the process of legal interpretation and argument;
4) truth as the aim of a trial in court.

Tomasz Gizbert-Studnicki sees this problem as a matter of sentences formulated through legal principles and doctrine. He asks which of them can be subject to evaluation in terms of truth/falsehood:

1) sentences relating to the validity of norms;
2) sentences relating to the meaning of a legal text;
3) sentences relating the social functions and the social effectiveness of the law;
4) sentences relating to the evaluation of the law.

In conclusion, the author emphasizes that this is not an enumeration, and that the logical status of these sentences varies. Sentences in point 4 concerning evaluation are not at all subject to the test of truth/falsehood. Sentences from point 3 are verified in the same way as any other statement in the empirical sciences. Therefore, only the sentences from points 1 and 2 are of interest from the point of view of the logical evaluation true/false.

I believe this makes it possible to distinguish at least seven areas of jurisprudence that are relevant from the point of view of truth – truth that is not necessarily and not in all cases understood in terms of logical calculus:

1) the logical status of legal norms;
2) the veracity of information used in the process of creating law;
3) truth in the process of the interpretation of law and legal argumentation;
4) the social functions and the efficacy of the law;
5) evaluation of the law (for example, moral, praxiological, economic, and political);
6) truth as the aim of the court trial;
7) truth as an element in legal institutions and legal studies.

Each of these issues is so large and complex, that an exhaustive presentation of it would go beyond the limits of this essay. For example, the most fundamental, but at the same time most complex, question about the logical status of legal norms would demand many matters to be established, *inter alia*: a consideration of the so-called Joergensen dilemma; a choice between cognitivism and non-cognitivism; making more precise the concept of a norm, the truth, and criteria of truth; accepting or rejecting the existence of a logic of norms; the possibility of entering the sphere of multi-value logic, etc.

We can, thus, conclude that the fields indicated above attest to the possibility within jurisprudence of not applying a correspondence theory of truth, but also a coherence, pragmatic, and consensual theory. If we recognize truth as the accordance of "something with something" (and "someone with someone"), each of these theories can be placed within this convention: the accordance of sentences and things (correspondence); the accordance of sentences among themselves (coherence); the accordance of theory and practice (pragmatism), and the accordance of discursive participants among themselves (consensus). The opening up of jurisprudence toward other disciplines of knowledge within the so-called external integration of various legal theories entails the necessity of seeing them in an integral connection with semantics, epistemology, and ontology.

As we have seen via various philosophical connections, the problem of truth is, indeed, complex. But when the problem moves to law, it becomes even more complex. Partly, this is a result of the fact the law itself is a heterogeneous phenomenon. It is not just language (the analytic theory of law), but also social fact (sociology of law), a psychological experience (psychology of law), and a bearer of values (axiology of law). The legendary American judge Oliver Wendell Holmes wrote in 1881 in the opening pages of *the Common Law*: "The life of the law has not been logic; it has been experience." This opinion has been the subject of very varied interpretations right up to the present. For our purposes, let us accept that Holmes was wrong: the life of the law is both logic and experience.

**Works cited**

Giaro, Tomasz. 2011. "Rzymskie prawdy prawnicze. Eksperyment myślowy." In: *Aurea praxis, aurea theoria. Księga pamiątkowa ku czi Profesora Tadeusza Erecińskiego*. Vol. 2. Warszawa: LexisNexis.

Woleński, Jan. 2003, *Epistemologia*. Vol. 3. Kraków: Aureus.

Woleński, Jan. 2005. *Epistemologia. Poznanie – prawda – wiedza – realizm*. Warszawa: Wydawnictwo Naukowe PWN.

Chapter 6

# Equality

**[?] What is equality in contemporary political philosophy?**

The idea of equality is one of the central categories of philosophy in general, and philosophy of law and politics in particular. In fact, political philosophers devote much more attention to its meaning than do philosophers of law; but, on the other hand, it is hard to set out a clear line of division between these two philosophical disciplines. This is all the more so because currently the principle of equality is the subject of constitutional regulation. Thus, it is difficult to imagine that while making an interpretation of the relevant provisions of the Constitution of the Polish Republic, the Constitutional Tribunal would ignore the insights of contemporary legal and political philosophy. The literature usually opposes the idea of equality and the idea of freedom, and sees the conflict between them as insoluble. However, recently certain arguments have emerged that attempt to reconcile these two values.

In the view of the contemporary Canadian political philosopher Will Kymlicka:

> So the abstract idea of equality can be interpreted in various ways, without necessarily favouring equality in any particular area, be it income, wealth, opportunities, or liberties. It is a matter of debate between these theories which specific kind of equality is required by the more abstract idea of treating people as equals. Not every political theory ever invented is egalitarian in this broad sense. But if a theory claimed that some people were not entitled to a equal consideration from the government, if it claimed that certain kinds of people just do not matter as much as others, then most people in the modern world would reject that theory immediately. Dworkin's suggestion is that the idea that each person matters equally is at the heart of all plausible political theories. [Kymlicka, 2002, p. 4]

At the same time, in the literature it is emphasized that two fundamental strands have developed in the contemporary debate on the nature of equality.

> The ideal of equality has led a double existence in modern society. In one guise the ideal has been at least very popular if not uncontroversial and in its other guise the ideal has been attractive to some and repulsive to others. These two aspects of equality are *equality of democratic citizenship* and *equality of condition*. [Arneson, 2007, p. 593]

If we recognize that the idea of equality is, indeed, on one hand, the most basic problem, and, on the other, the most controversial problem in contemporary philosophy of morality, politics, and law, then it is appropriate to call in the figure of Ronald Dworkin. Dworkin's so-called integral philosophy joins all these elements. First, it is not only a philosophy of law, but also a philosophy of morality and politics; second, it applies equally to the issue of the equality of democratic citizenship expressed in modern constitutions (political-legal equality), and to the issue of the equality of conditions determined by the rules of distributive justice (social equality); third, it continues to be a subject of interest in world scholarship, and the author himself until recently (he dies on February 14, 2013) played an active role in debates on the nature of the idea of equality.

The question, of course, arises as to what is the logical and chronological relation between the two above-mentioned currents in the contemporary debate over the idea of equality. *prima facie*, it appears that the discussion of equality as an element of distributive justice comes first. The point of departure here is the universal formulae proposed by Plato (*Laws*, VI 757). This can be seen too in Aristotle (*Politics*, III 9 [1280a]). Political-legal equality is really a product of modern times, and at present it is discussed, above all, in the context of appropriate constitutional and international-legal arrangements, and on the basis of the decisions of constitutional courts and international tribunals. Thus, a further part of these discussions concentrates, on one hand, on equality in the sense of distributive equality in contemporary political

philosophy and philosophy of law, and, on the other hand, on Dworkin's thinking in this matter.

However, the thesis of the original nature of social equality and the secondary nature of political-legal equality is, as I have suggested, only a *prima facie* conclusion. If we look closer, it turns out that in contemporary debates, these two perspectives on equality are closely connected with each other. As a result, any discussion of the juridical aspect of the idea of political-legal equality conducted on a constitutional level, to some degree provokes conflict around the idea of social equality that is conducted on the level of political philosophy. Thus, for the sake of clarity, one should also discuss the basic elements of the principle of equality that have been adopted in contemporary constitutionalism. The appropriate provisions of the Constitution of the Republic of Poland can serve as examples.

**[?] In terms of the Polish Constitution, what is the content of the principle of equality?**

In the Polish Constitution, the principle of equality *sensu largo* is defined in art. 32, on one hand, as equality *sensu stricto*, and in this sense, it means the right to equal treatment from public authorities on the level of the application of the law (equality before the law) and its making (equality in the law) (art. 32, para. 1). However, on the other hand, it is defined as a prohibition of discrimination, for any cause, in political, social, or economic life (art. 32, para. 2). In literature on constitutional law, the prohibition of discrimination is often identified with equality in the law. However, for the purposes of this chapter, I have adopted a classification that, on one hand, lays stress on the positive (equality) and negative (discrimination) aspect of the issue, and, on the other, indicates the possibility of violations both on the level of application of the law, and on that of making law. Initially, the principle of equality, particularly equality before the law, was applied, above all, to the issue of the application of the law. Within the general theory of fundamental rights, Robert Alexy indicated in a very convincing way that a so-called right to equality should also be applied to the making of law. It appears that the preamble of the basic legislation refers to a broad understanding of

the principle of equality as a certain idea, for it reads: "all citizens of the Republic [are] equal in rights and duties in relation to the common good – Poland."

There is also a reference to equality in art. 33 relating to the equality of women's rights, but from a normative point of view, this constitutes something of a constitutional *superfluum*, since its disposition is already present in the general principle expressed in art. 32. The introduction into the basic legislation of a separate regulation relating to women's equality was, however, justified by factual considerations and by the educative role of the Constitution. It must be stressed, also, that the broadly-conceived problem of equality appears in other places in the Polish Constitution (art. 6, 11, 60, 64 para. 2, art. 68 para. 2, art. 70 para. 4, art. 96 para. 2, art. 127 para. 1, and art. 169 para. 2), but this is not always linked to the principle of equality *sensu stricto* and the prohibition of discrimination. The principle of equality applies not only to all citizens, but also to persons who are not Polish citizens (foreigners, stateless persons). Even more, in practice it is applied not only to physical persons, but also to legal persons and to other organizational units that do not possess legal personhood.

In contemporary constitutionalism, it is accepted that the principle of equality should constitute the foundation and immanent feature of, on one hand, civic society, and, on the other, of the democratic state of law. Just as human dignity is seen sometimes as "a principle of principles" in an axiological dimension, so equality (German *Gleichheit*, Polish *równość*) can be treated in this way in a social, political, and juridical dimension. In the judgments of the Constitutional Tribunal, it is often written of as "the first of principles."

Of course, this does not mean that the principle of equality is deprived of its axiological dimension. On the contrary, according to some authors, only the combined treatment of equality, dignity, and freedom makes it possible to understand the constitutional system of values. Today, the principle of equality so understood has a very broad application in all areas of human life, and filters from the constitutional level along and throughout the entire legal system, penetrating its various branches – civil law, financial law, economic law, trade law, criminal law, trial law, and family law, etc.

In a historical sense, equality was, of course, a dynamic category, and its content and meaning evolved along with the advance of civilization and political, economic, and social development. Thus, it is difficult to compare the relevant solutions come to by Polish basic laws – from the May Constitution of 1791, through the March Constitution of 1921 and the April Constitution of 1935, up to the July Constitution of 1952. There is no doubt that the issue of equality has never played such a great legislative role as it does now on the basis of the Constitution of the Republic of Poland. It is impossible to detach the contemporary importance of the principle of equality from the environment in which it functions, and, especially, from the idea of a civic society and a democratic law-governed state, or, indeed, from international protection of human rights.

In the systematic organization of the Polish Constitution (1997), the principle of equality is in chapter 2 placed before a parenthesis of a detailed catalog of freedoms, rights, and duties of the person and citizens, in the form of a general principle, alongside, *inter alia*, the principle of dignity (art. 30) and freedom (art. 31). It must be stressed that in European Law, equality is similarly placed in the Charter of Basic Right of the European Union. There, too, it is one of the general principles, alongside dignity, freedom, and solidarity.

In the history of political-legal thought, the idea of equality has been most frequently confronted with the idea of freedom. With a degree of simplification, one can say that while freedom has constituted, especially in the nineteenth century, the basis of liberal doctrines, equality has always stood at the center of socialist movements. It must be stressed, however, that the political thought of the French Enlightenment, especially that of Charles-Louis Montesquieu (*The Spirit of the Laws*) and Jean-Jacques Rousseau (*The Social Contract*). From a historical point of view, however, the problem has a substantially broader dimension and a substantially longer tradition: tan attitude toward the principle of equality among people, from Antiquity to the modern world, has always been the basis for constructing various visions of the social-political order, and depending on whether it was a positive or a negative attitude, varying conceptions arose based on egalitarianism, or the opposite, elitism. However in the condi-

tions that obtain in mass societies, from the perspective of modern scholarship this picture can be seen as an over-simplification. Indeed, disputes continue whether the values of freedom and equality can be reconciled, but the stereotype that identifies them respectively and exclusively with right-wing or left-wing political tendencies belongs to the past.

Contemporary tendencies in ethics, political philosophy, or philosophy of law are reflected in contemporary constitutionalism. Currently an attempt is being made so to formulate the text of a constitution, including constitutional catalogs of freedoms and human and citizen's rights, that the complementary realization of different values can be implemented. In the theory of human rights, three so-called generations of human rights are distinguished, subordinated to specific ideas:

1) freedoms and personal rights, and freedoms and political rights deriving from the idea of freedom;
2) freedoms and economic, social, and cultural rights deriving from the idea of equality;
3) rights of solidarity deriving from the idea of solidarity.

The division into three generations of human rights arose, above all, within the doctrine of international law, but it has also been applied, *mutatis mutandis*, in the field of the theory of constitutional law. It must, however, be stressed that equality on the basis of the constitution has a substantially broader dimension, and is not only the idea underlying freedom and economic, social, and cultural rights, since as a principle of law it permeates the entire catalog of freedoms and human and citizen's rights. Among the ideas of freedom, equality, and solidarity, there may, indeed, arise conflicts, but it is the constitution and generally accepted standards of international protection of human rights that should constitute the normative basis and plane for solving them, through social-political discourse within the framework of so-called deliberative democracy.

However, one must acknowledge that inasmuch as the principle of human dignity constitutes a standard that is widely accepted in the constitutions of contemporary democratic states, nonetheless the principle of equality is a standard accepted universally. A decided majority of the constitutions of contemporary

democratic states contains solutions similar to the one cited above from art. 32 of the Polish Constitution. On one hand, this means that equality is treated as the general principle placed before a catalog of freedoms and human and citizen's rights. On the other hand, however, this also entails indicating its double meaning: equality before the law and equality in the law, and also the prohibition of discrimination. From the literal wording of art. 32 of the Polish Constitution, not two but three principles derive (equality before the law, the right to equal treatment, and the prohibition of discrimination). However, it appears that the first two constitute a normative unity, and make up the principle of equality *sensu stricto*. It is not clear what equality before the law could consist of, if not a right to equal treatment from the agencies of public authority in terms of the application (equality before the law) and making (equality in the law) of the law. However, the prohibition of discrimination as a prohibition on arbitrary interference with the principle of equality *sensu stricto* is something quite different.

Equality before the law (or the *isonomia* of ancient thought) and where appropriate equality in the law, on the basis of the Polish Constitution mean, to paraphrase Dworkin, an attempt at a compromise between treating all equally and treating all as equals. In other words, this is not a general prohibition on differentiating the legal situations of individuals, but it is a prohibition on that sort of differentiation that is based on arbitrary criteria, apart from factual inequality, and which leads to discrimination or unjustified privilege. In this sense, the principle of equality is linked with the idea of justice. It is obvious that law can, and even should, differentiate individuals and social groups in terms of their specific features (for example, age, health, family or financial situation). It is simply the case that individuals that are equal from a specific perspective defined by the law, should be treated equally, and what is similar should be dealt with in a similar way. In this sense, "the principle of equality is not absolute" and "permits the differentiation of the legal situation of similar subjects," but this "must be justified – only if such a justification is absent does this differentiation assume the character of discrimination (privilege) and contradict art. 32 para. 2 of the Constitution."

So we can see clearly that both aspects of equality – equality before the law and equality in the law (art. 32 para. 1), and the prohibition of discrimination (art. 32 para. 2) – are closely linked. This second aspect of the principle of equality (that is, the prohibition of discrimination) is defined in the Polish Constitution in an exceptionally broad way. This distinguishes art. 32 para. 2 both from other analogical solutions adopted in the constitutions of contemporary democratic states, and from the regulations contained in acts of international law (for example, art. 14 of the European Convention on Human Rights, or art. 2 para. 1 of the International Covenant on Civil and Political Rights). It is most common to indicate criteria on the basis of which discrimination should not take place – for example, gender/sex, race, skin color, language, religion, political views, economic status, birth, etc. However, art. 32 para. 2 of the Polish Constitution does not enumerate these criteria and provides a general prohibition of discrimination "in political, social, or economic life for any reason."

In the work of the Constitutional Tribunal, the principle of equality *sensu largo* plays a very important role – references to it appear in a large number of decisions, both after the Constitution of the Polish Republic came into force, and on the basis of the July Constitution of 1952. Of the three principles place in front of the constitutional catalog of freedoms and human and citizen's rights (that is, dignity, freedom, and equality), it is the last of these that applied decidedly most frequently. In general, one can say that in judgments of the Tribunal it has been interpreted in three basic contexts: the injunction to treat equals in the same way and the similar in a similar fashion; the admissibility of justified differentiations; and the linking of equality with the principle of justice.

**[?] What are the four fundamental elements of the paradigm of the idea of equality in contemporary philosophy of law and political philosophy?**

One can say, therefore, that in contemporary constitutionalism (constitutional law and the study of constitutional law), the principle of equality in the sense of political-legal equality is generally accepted and is a fairly uncontroversial paradigm. Even if its interpretation meets with substantial difficulties and controver-

sies in decision-making practice and in the view of legal doctrine, this applies rather to details than to fundamental principles. For the sake of accuracy, however, it must be stressed that there are voices that cast doubt both on the rationality and content, and on the practical juridical meaning of varying types of constitutional formulations of the principle of equality; these are quite few in number.

On 1982 in the *Harvard Law Review*, Peter Westen published a long article with the striking title of "The Empty Idea of Equality." His argument has, it must be said, more opponents than adherents, but it cannot be ignored in legal discussions of the substance and functioning of the principle of equality. I do not have enough space to analyze Westen's fundamental thesis concerning the contentless character of equality in detail. However, we can point out that it concerns the insistence that in legal language equality is only a rhetorical embellishment, which can readily be given up without doing harm to the idea of justice. Westen gives the following examples. On the building of the U.S. Supreme Court, there is the motto *Equal Justice under Law*. What does that really mean? Why is it not simply *Justice under the Law*? It is the same with the Fifteenth Amendment to the U.S. Constitution and its so-called *equal Protection* clause. Why is it not just *Protection*?

However, it is different in philosophy of law and political philosophy. Here it is hard to speak of the development of any unambiguous, universal, and generally accepted paradigm, especially in the matter of the idea of equality in the sense of social equality. Even more, a decided majority of contemporary authors accept a very variedly understood idea of equality, but there is also a very large group of scholars who contest any manifestations of egalitarianism. Even though this issue has subject literature that runs to many items, and which is very difficult to deal with in its entirety, this issue remains relevant today, and also in practice. For example, in response to President Barack Obama's proposals to reform the U.S. health care and social insurance systems, the libertarian philosopher Tibor R. Machan brought out a book with the very revealing title *Equality, So Badly Misunderstood*. In Poland, the discussion on the matter of state intervention in the financial market to protect individuals who take loans in Swiss

francs was nothing other than a location of the problem in the categories of so-called luck egalitarianism and, connected with this, the responsibility for the consequences of life choices made by individuals.

It must be stressed here that for the purposes of this chapter, I am employing a certain conceptual cluster that is "philosophy of law and political philosophy," but, in truth, all this is largely about political philosophy. Contemporary scholars who deal with the idea of equality, both in approval and in criticism, are frequently not philosophers of law (or lawyers) *sensu stricto*, but rather general philosophers, ethical thinkers, political scientists, sociologists, and even economists. These include: Richard J. Arneson, Isaiah Berlin, Gerald A. Cohen, Stefan Gosepath, Jürgen Habermas, Friedrich A. Hayek, Will Kymlicka, Thomas Nagel, Jan Narveson, Kai Nielsen, Robert Nozick, Derek Parfit, Thomas W. Pogge, John Rawls, Thomas Scanlon, Samuel Scheffler, Amartya Sen, Peter Singer, James P. Sterba, Larry Temkin, Ernst Tugendhat, Michael Walzer, and Bernard Williams. Thus it is no surprise that there is a wide difference of opinion among these authors when they look at the idea of equality in the sense of social equality. Defining the principles of a rational distributive justice (*ergo* also of the idea of equality) requires not only philosophical knowledge, but also expertise in economics, political science, social psychology, and sociology. The problem of equality in the sense of social equality is much more complex and controversial, and much more difficult to solve, than the phenomenon of equality in the sense of political-legal equality.

Philosophy of law, *par excellence*, does not, in fact, devote much space to issues connected with the idea of equality. If the subject of equality appears in studies, handbooks, or anthologies of texts in this field, then the focus is rather on the problem of the relations between law and morality, or of the philosophical bases of constitutionalism, and the principle of political-legal equality as a central element of this philosophy. However, it is difficult to draw an exact demarcation line between philosophy of law and political philosophy. There are scholars who combine both disciplines, as, for example, Joseph Raz, Jeremy Walton, and Ronald Dworkin (whose views are discussed below). It is, nonetheless, striking that in the work of these authors, an interest in matters

connected with the idea of equality grows proportionally to the degree to which connections between philosophy of law and political philosophy are posited.

There is no space here to discuss all the aspects of contemporary political philosophy's treatment of the principle of equality. But there is no doubt that egalitarianism continues to be a central issue in this field, alongside concepts like liberalism, communitarianism, democracy, identity, and justice.

Accordingly, let us attempt only to reconstruct the basic elements of the paradigm of this discussion. If we look at general philosophy *in genere* and political philosophy *in specie*, it can be reduced to a few fundamental questions. Attempts can be made to answer these questions, but it must be stressed that the answers are very varied. Of course, the question "What is equality?" is central. It is, however, so general that it has to be made more precise. In consequence, one asks the several questions. First, "Equality of what?" – of prosperity, resources, chances, possibilities, abilities? Second, "Equality of (between) whom?" – what are the criteria of similarity and difference among people, which we should consider in the process of treating them equally or unequally? Third, "Equality when?" – as a point of departure or as a correction of an inequality that has emerged (in other words, *ex ante* or *ex post facto*)? Fourth, "Equality why?" – does equality possess some immanent moral value, and, if so, what is the relationship of that value to others: freedom, dignity, justice, solidarity, etc.?

### [?] What does Ronald Dworkin's conception of equality consist of?

There is no doubt that Ronald Dworkin has a special place among scholars who link philosophy of law and political philosophy and who pay great attention to the matter of egalitarianism. Although philosophers of law like Joseph Raz or Jeremy Waldron touch on the issue of equality in an incidental manner, with Dworkin we are dealing with the development of a dense and consistent concept, sometimes called the theory of liberal egalitarianism. In any case, Dworkin is perhaps the only philosopher of law who attempts to answer all the particular questions

asked above concerning the paradigm of the idea of equality in the sense of social equality: What? Of (between) whom? Whose? When? Why?

Dworkin's theory of liberal egalitarianism is relatively well known in Poland, either through direct discussions, or through Polish translations of his work. This is particularly true of his hypothetical construct of an auction conducted *ex ante* for equality of resources, but one that is corrected *ex post* by a system of insurance that ensures a just approach to luck egalitarianism. In what follows, I do not offer a detailed discussion of Dworkin's ideas in this matter, but I refer the interested reader to the texts referred to. However, it is worth at least briefly looking at this issue.

Above all, egalitarian formulations of varying kinds appear in Dworkin's first big work, *Taking Rights Seriously* from 1977. For a lawyer, these are interesting because in their synthetic quality they recall, to some degree, the above-mentioned elements of the paradigm of equality in the sense of political-legal equality (above all, equality before the law and equality in law). Dworkin proposes, first, that the essence of equality can be reduced to a right to equal concern and respect, and, second, that one can distinguish treating all equally from treating all as equals. Thus, we have here a general answer, but still an answer, to the question "What is equality?"

Dworkin went on to develop his views on equality in four articles published in the 1980s. It is characteristic of Dworkin that these essays are numbered as parts that are linked to each other, and also provided with a common title, *What Is Equality?* Dworkin criticizes and rejects, above all, the idea of equality of welfare ("Equality of Welfare"), and then goes on to endorse equality of resources ("Equality of Resources"). He confronts equality with freedom ("The Place of Liberty"), and finally considers the substance of political equality ("Political Equality"). The basic work by Dworkin in the field of liberal egalitarianism is, however, *Sovereign Virtue* from 2000. Here the author develops the ideas first put forward in the texts mentioned above, but he also goes a step further. He sees equality in the formulation of a right to equal concern and respect as a fundamental virtue that legitimates the liberal-democratic sovereign. To the questions asked above con-

cerning equality, Dworkin gives the following answers. *Equality of what?* – of resources, but not welfare. *Equality for whom?* – for individuals treated not equally, but as equals. *Equality when?* – both *ex ante* (the hypothetical auction) and *ex post* (a system of insurance, luck egalitarianism). *Equality why?* – as a legitimatization of the liberal-democratic order (the sovereign's virtue), complementary and not in competition with freedom.

Dworkin's last book is *Justice for Hedgehogs* from 2011. There he does not only repeat all the central elements of his theory of liberal egalitarianism, but also reinforces them with a position of axiological monism. Here, as in all his writing, Dworkin insists that freedom and equality can be reconciled, but in *Justice for Hedgehogs* he adds that they are just as essential as dignity, justice, and democracy. In the very first sentence, he writes that his book defends a great and traditional philosophical thesis: the unity of values.

This view arguing for the unity and lack of conflict of values such as dignity, equality, and freedom has become increasingly widespread in legal studies. For example, Susanne Baer – without acknowledging Dworkin – adopts this position. In Baer's view, these values should be presented not in the form of a hierarchically constructed pyramid, but rather as the three vertices of a triangle setting out the space of individual rights. The virtue of such a formulation is a recognition of constitutional unity and of the necessity of all three values, without privileging any one of them.

It is also worth mentioning another graphic vision of the legal system, which has appeared recently in the context of the conception of global law. In the view of Rafael Domingo, the author of this suggestion, the legal system has the structure of a pyramid, but this is not a flat figure as in the hierarchical model developed by Hans Kelsen. It is instead a three-dimensional polyhedron. The base of this model is a broadly understood humanity, but its vertex is a person embodying the values of human dignity, personal liberty, and equality among persons. The base and the vertex of the figure are linked by seven surfaces that reflect justice, rationality, coercion, universality, solidarity, subsidiarity, and horizontality.

## Works cited

Arneson, Richard J. 2007. "Equality." In: *A Companion to Contemporary Political Philosophy.* 2nd ed. Robert E. Goodin, Philip Pettit and Thomas W. Pogge, ed., Malden–Oxford–Carlton: Blackwell Publishing.

Kymlicka, Will. 2002. *Contemporary Political Philosophy. An Introduction.* 2nd ed. Oxford–New York: Oxford University Press.

Chapter 7

# Solidarity

**[?] Why does the idea of solidarity interest sociologists more than it does philosophers of law?**

In contemporary philosophy of law and political philosophy, relatively little pace is devoted to the problem of solidarity. In Anglo-Saxon jurisprudence and political philosophy, this concept barely makes an appearance. In the relevant European literature, including that in Polish, references usually have a historical focus, and deal with the sociological concepts of Emil Durkheim (the division into mechanical and organic solidarity) and Ferdinand Tönnies (the distinction of *Gesellschaft* and *Gemeinschaft*), and their legal application by Leon Duguit (socialization of law as an expression of social soldarization). But if solidarity appears in contemporary philosophical-legal analyses, this is most frequently not *expressis verbis*, but in a manner that is concealed in one way or another by justice, especially in considerations of broadly conceived social justice.

It is somewhat different in sociological writing. Here we can certainly find texts that refer directly to the concept of solidarity or social solidarity, but, even so, these are not always references that are as frequent and as extensive as one might expect. This is a result, perhaps, of the fact that sociology has developed more along the lines laid down by Max Weber, and even in part by Karl Marx, than by Emil Durkheim and his division into mechanical and organic solidarity. But that does not finally explain why solidarity did not become an absolutely central sociological category, since even in Weber's writing it plays a very important role as an element of social relations. Here, let us adopt as a working thesis that solidarity as a kind of social link is not in a position to explain all the complicated processes of human actions or all of the mechanisms of the functioning of social structures. This especially applies to contemporary times, and perhaps that is why in contemporary sociology and social psychology – as opposed

to the discipline in the classical period of its development at the turn of the nineteenth into the twentieth century – solidarity plays a less central and a more subsidiary role.

The sociological formulation of solidarity often differs from that appearing, more or less clearly, in the philosophy of law and political philosophy. Here matters of distributive justice are less important, as are ethical norms in interpersonal relations. To a much greater degree, it is a matter of a feeling of identification with the values and interests of a given social group: class, nation, ethnic group, professional organization, etc. In this sense, in sociological literature, which refers, *inter alia*, to the writings of Georg Simmel and Talcott Parsons, solidarity is placed together with loyalty, and is an element of the structure of social belonging.

> When there is talk of 'solidarity,' we are dealing with a whole range of different possible connotations of this concept, with varying synonyms such as bond, cohesion, coordination, and integration. All these have a rich sociological tradition. They define basic issues in sociology and a central plane of theoretical disputes that are carried on within it. [Kaczmarczyk, 2005, p. 13]

In this context, in sociological literature three basic perspectives are distinguished for looking at the issue of solidarity understood in terms of a social bond – individualistic, normativist, and creationist. The first refers to human action from the point of view of its aims; the second refers not to the rationality of the subject, but to the specific content of the moral bond; the third concentrates on the mechanisms whereby this bond arises. Solidarity so understood may have different normative meanings, and it may arise at very different levels of the social structure – from the most elementary (community), through more complicated and differentiated direct links (national community, political community, multicultural community), right up to the global community.

However, there is a certain paradox linked to this. The concept of solidarity – which in principle possesses decidedly positive moral, political, and social connotations – can in certain contexts take on what is finally a pejorative connotation. The relevant literature points out that it is to solidarity understood in one way or another that nationalist, racist, and totalitarian ideologies refer,

for example, fascism (Nazism) or Leninism. In classical sociology, solidarity does not necessarily have any anti-individualistic or anti-liberal connotation. However, in nationalist, racist, and totalitarian ideas, it certainly takes on this coloration.

> The individual was subordinated to the collective interest of the nation, and the value of individual freedom was rejected. Fortunately, neither the fascist nor Leninist idea of solidarity prevailed in politics in Western Europe. [Stjernø, 2005, p. 283]

In the last few years, the weight of discussions about solidarity has shifted from the national level to an international and/or trans-national level. If we recognize that there is something like leading ideas in law, then we have to acknowledge that not only solidarity has experienced a "globalization," but also dignity, equality, freedom, and especially justice. Sometimes there is even talk of the birth of a new global law, based on all these principles. Here solidarity is expressed in a form modeled on classical legal maxims: *in solidum agi praeceptum est* (the law enjoins us to act in solidarity). It is the same with other elements of this notion of global law – dignity, equality, freedom, and justice. Thus, we have the following: *dignitas et aequalitas iuris universalis sunt aurigae* (dignity and freedom are the guides to global law); *iustitiam humano consortio tueri universalis iuris est* (the maintenance of justice in the human community is the mark feature of global law); and *nullum ius sine libertate, nulla libertas sine dignitate* (there is no law without freedom, and no freedom without dignity).

In moral philosophy, political philosophy, philosophy of law, and theory of constitutional law, the above is accompanied by a clear tendency that one could call legal axiological holism. This consists in recognizing that values like dignity, equality, justice, and freedom are constituent elements of one idea of law, and that they do not have to be antonyms of each other. Dworkin proposes this kind of understanding in his last book, which in many ways is a summation of all his work to that date. This is evident in the book's opening sentence: "This book defends a large and old philosophical thesis: the unity of value." [Dworkin, 2011, p. 1] One can find a similar position among several theoreticians of constitutional law. For example, Susanne Baer suggests recog-

nizing dignity, equality, and freedom as the vertices of a triangle, the surface of which is filled with individual rights and freedoms. This kind of graphic formulation of the matter of basic principles means that all of them, as in a triangle, are equally important for the idea of the law, and that none of these values should be sacrificed for another.

In truth, neither Dworkin nor Baer consider the idea of solidarity in their writings. However, for the purposes of this essay and in order to provide a complete image of the idea of the law, it seemed necessary to do this through the formulation of a separate principle functioning in a complementary way alongside dignity, equality, justice, and freedom. Such a formulation certainly has a certain tradition in political philosophy. For example, let us, on one hand, point to Jean-Jacques Rousseau's republicanism, which in many authors' view possesses clear elements of solidarity, and on the other, to Hannah Arendt's ideas, who recognized solidarity as one of the basic principles of a democratic society, along with freedom, pluralism, and equality.

**[?] How can one understand the concept of "solidarity"?**

That contemporary political philosophers, philosophers of law, and theoreticians of constitutional law, are basically silent on the subject of solidarity, or at least show great caution when dealing with it, does not mean that they do not take it into consideration in their analyses. This only means that usually the texts of constitutions, which form the basis for theoretical-legal and philosophical-legal deliberations, do not actually formulate the principle of solidarity *explicite*. They do so *implicite* as a component part of other constitutional values.

Partly, this is a result of the polysemantic nature of the very concept of solidarity. For example, if solidarity means a defined way of organizing society and the bonds that link it, and the state's distribution of social goods, this can be expressed, on one hand, by the principle of equality, and, on the other, by the principle of justice. Here the principle of solidarity can be decreed indirectly, and enforced through legal norms. However, if we substitute for the concept of solidarity a sphere of feelings such as sympathy, empathy, sensitivity, fraternity, etc., then that sphere can certain-

ly be found in several principles, for example, dignity and justice, but at the same time, it is difficult to subject it to legal regulations of an imperative kind. There are, of course, certain exceptions: for example, the duty under criminal law to offer help to another in specific circumstances. One can see that at the base of this kind of obligation, there lies, in the last analysis, the elementary moral norm of human solidarity. However, in general terms, solidarity, understood in this way as an element of the idea of justice, can also be achieved through legal norms, for example, with reference to educational programs, but without any guarantee of success, since the imperative nature and the effectiveness of this kind of norm is merely relative.

In any case, the question that was once put in German-language literature on the subject remains relevant: Can solidarity be compelled? Where solidarity means the conceptual basis of institutionalized forms of social organization and of principles of distributive justice, the answer is certainly yes – however, not always, and not in every situation. However, where we are dealing with the sphere of human feelings, the answer is largely no, and if it is ever yes, then with great difficulty.

The distinction of these two different meanings of solidarity (discussed here as examples) can be clearly seen in the relevant contemporary literature, both legal literature and philosophical literature. In the former, for example, Otto Depenheuer writes of "solidarity in the constitutional state," and sees this as the basis for a "normative theory of division [that is, distributive justice – J.Z.]." He continues, "The legal-state treatment of the distributive state will only be appropriate when we supplement the principle of legal-state distribution with the principle of solidarity-focused distribution." [Depenheuer, 2009, p. 12] In relevant philosophical literature, Hans Joas, for example, when he discusses Richard Rorty's work, links solidarity with the reaction to cruelty, and, thus, with the sphere of human feelings.

> Rorty's intentions in this disturbing analysis of cruelty are clear. He sees in the protection from humiliation the common ground shared by all human beings, the ethos for shaping public life, the meaning of 'solidarity'. Here, solidarity is not given by a shared goal or shared values, but, rather, only by the shared hope that we can be protected

> from humiliation. Rorty wants to teach us not to seek mutually binding values, but to put into practice the minimalist ethos of the prevention of cruelty by becoming more sensitive to the views of others, and thus to the dangers of humiliating them. [Joas, 2000, p. 159]

Rorty, as opposed to other authors, does not link the concept of solidarity with some feature inborn in human nature. For him, it is rather a function of progress in civilization.

> The view I am offering says that there is such a thing as moral progress, and that this progress is indeed in the direction of greater human solidarity. But that solidarity is not thought of as recognition of a core self, the human essence, in all human beings. Rather, it is thought of as the ability to see more and more traditional differences (of tribe, religion, race, customs, and the like) as unimportant when compared wit similarities with respect to pain and humiliation – the ability to think of people wildly different from ourselves as included in the range of 'us.' [Rorty, 1989, p. 192]

The two meanings of solidarity given above indicate, however, that we may be dealing, on one hand, with the sphere of law, and, on the other, with the sphere of ethics. Both these aspects of the issue are still the subject of scholarly interest, but it is necessary to supplement such interest with one more perspective – the social one. Only such a complex treatment of solidarity on three intersecting planes can lead to what is not just a correct understanding of its function and content, but also to an effective solution to the whole matter. If we do not do this, we will continue to go round in a circle of empty conceptual declarations. In law, these will be ill-defined programmatic norms, and in ethics they will be expressions of naïve benevolence. In the social sphere, they will be no more than truisms reiterating that bonds exist in every social group.

Let us employ an example that, on the surface, seems not to relate to the problem of solidarity at all. In reality, this example reveals a certain mechanism whereby norms emerge that are complementary in legal, moral, and social terms. The example is the decisions of American courts in the mid-nineteenth century on the subject of slavery. Even if there were those in contemporary U.S. society who claimed that the brutal pursuit of escaped slaves

for the purpose of restoring them to their owners provokes opposition from the point of view of the development of civilization (to a certain extent, this is how Rorty would understand it), this growing moral sensibility (that is, human solidarity) was not at all translated into legal practice or social structure.

It is true that there were some acts of judicial disobedience, but they were quite isolated. Generally, as for example in the standard case *Dred Scott v. Sanford* from 1856, the judges when they came to their decision had no problem with elementary human solidarity not because none of them was a morally sensitive person, but because the law and social structure placed the Black population outside the borders of this concept. As a result, the problem of cruelty toward slaves was not, actually, a moral problem, since it related to things, not to people. Even if a judge of that time had wished to look at the case from an ethical point of view, it would have been an ethics suspended in a vacuum, without any legal or social underpinnings whatever. Many years had to elapse before a law emerged that was in accord with moral development, and even more years before this was reflected in actual social structure.

As I noted, this example only superficially appears not to relate to the issue of solidarity, but is, in fact, deeply linked to it. It demonstrates that in the sphere of values like solidarity, we have to take all relevant perspectives into consideration, that is, moral, legal, and social ones. In contemporary literature on the subject, it is argued that solidarity is both a social norm and a constitutional norm that functions in the social order, which is, of course, a moral order.

### [?] Does the idea of solidarity influence concrete constitutional-legal solutions – and how does it do so?

With regard to the normative imprecision, polysemy, and lack of homogeneity of the concept of solidarity, its philosophical-legal reconstruction requires the establishment of certain methodological principles. There is no doubt that solidarity itself should be a subject of greater interest to philosophy of law and political philosophy than has hitherto been the case. This is so because we live in a world that is torn between two extremes – on one

hand, individualization, and, on the other, globalization. Both these processes, although each in its own way, can have a truly positive effect in the form of greater freedom and welfare, but they may also be a substantial threat to the proper functioning of the state and law, by disturbing social cohesion and lowering the level of solidarity.

From this point of view, a certain degree of surprise is provoked by the fact that in the literature that attempts to set out the subjects for philosophical-legal and philosophical-political discussion at the beginning of the twenty-first century, the topic of solidarity, at least that formulated *expressis verbis*, is, in fact, almost entirely ignored. However, it should be pointed out that the reproach of the literature's reticence *vis-à-vis* the matter of solidarity applies to a lesser degree to German scholarship. Here on can find texts that cannot be ignored when looking at this issue. In German scholarship, scholarship is, further, not just of interest to philosophers of law, but also to scholars who operate on the borders of general philosophy and sociology.

Solidarity dressed up in this or that legal norm, or seen as a subject of ethical, political, or legal discourse, may, however, perform very different functions. Partly, this depends on the structure of those norms, and partly on their conceptual provenance. This second matter is especially important, since it has precedence in relation to the former. To simplify somewhat, one can say that the permeation of legal norms by ideas, including that of solidarity, takes place according to a specific sequence: first, it is most frequently a doctrinal proposal (an ethical, philosophical, legal, or sociological one), which is subsequently accepted by the programs of major social movements or political parties, and which finally through the constitutional and/or legislative process penetrates specific general and concrete legal solutions.

If we recognize that the paradigm of modernity in the philosophical sense of that word is marked by the three famous words of the French Revolution – liberty, equality, fraternity – it may appear that solidarity constitutes a straightforward and direct continuation of the third of these, that is *fraternité*. From the perspective of the later development of political-legal thinking this would, however, not be a fully justified conclusion.

It is true that there are authors who attempt to draw an evolutionary line for the concept of solidarity from revolutionary civic patriotism and amity up to the contemporary cosmopolitan global legal community, but it seems that, on the basis of the philosophy of law and political philosophy that we are discussing here, this would be a fairly complicated and controversial procedure. Of the three slogans of the French Revolution, fraternity was forgotten fastest, and the primary focus has been on liberty and equality, and especially on the potential conflict between them. Further, this dispute, conducted – to simplify things – along the line of libertarianism-communitarianism has lost none of its relevance.

But in this fundamental dispute, one can see that there is no place for fraternity. Here John Rawls is an exception in contemporary political philosophy. It is true that for him, too, the ideas of liberty and equality are of fundamental importance, but, at the same time, he also returns to the concept of fraternity, although he does so, as it were, by the back door and in a specific sense.

> In comparison with liberty and equality, the idea of fraternity has had a lesser place in democratic theory. It is thought to be less specifically a political concept, not in itself defining any of the democratic rights but conveying instead certain attitudes of mind and forms of conduct without which we would lose sight of the values expressed by these rights. Or closely related to this, fraternity is held to represent a certain equality of social esteem manifest in various public conventions and in the absence of manners of deference and servility. No doubt fraternity does imply these things, as well as a sense of civic friendship and social solidarity, but so understood it expresses no definite requirement. We have yet to find a principle of justice that matches the underlying idea. The difference principle, however, does seem to correspond to a natural meaning of fraternity: namely, to the idea of not wanting to have greater advantages unless this is to benefit of others who are less well off […]. The ideal of fraternity is sometimes thought to involve ties of sentiment and feeling which it is unrealistic to expect between members of the wider society. And this is surely a further reason for its relative neglect in democratic theory. Many have felt that it has no proper place in political affairs. But if it is interpreted as incorporating the requirements of the difference principle, it is not an impracticable conception. It does seem tah the institutions and policies which we most confidently think to be just satisfy its de-

> mands, at least in the sense that the inequalities permitted by them contribute to the well-being of the less favored […]. On this interpretation, then, the principle of fraternity is a perfectly feasible standard. Once we accept it we can associate the traditional ideas of liberty, equality, and fraternity with the democratic interpretation of the two principles of justice as follows: liberty corresponds to the first principle, equality to the idea of equality in the first principle together with equality of fair opportunity, and fraternity to the difference principle. In this way we have found a place for the conception of fraternity in the democratic interpretation of the two principles, and we see that it imposes a definite requirement on the basic structure of society. The other aspects of fraternity should not be forgotten, but the difference principle expresses its fundamental meaning from the standpoint of social justice. [Rawls, 1999, p. 90f.]

If we acknowledge that fraternity is, at least to some degree, the prototype or indeed synonym of solidarity, then Rawls's explanation confirms the thesis that in philosophy of law and political philosophy, these problems are usually concealed in reflections on justice, understood in some way or another. Let us, therefore, pass on to those concepts that have referred directly to the idea of solidarity, and not necessarily in connection with the third slogan of the French Revolution. If philosophy of law and political philosophy have had some influence on the entry of the idea of solidarity into legal texts, this has not happened in a straightforward way, but through the mediation of three main traditions.

Steinar Stjernø, whom I have quoted above, demonstrates very convincingly that alongside the sociological thought that develops in the nineteenth century (Emil Durkheim, Leon Duguit, Otto von Gierke, Eugen Ehrlich, George Scelle, and Ferdinand Tönnies), there is, on one hand, the ideology of socialism (broadly conceived) (Marxism, reformism, revisionism, Austro-Marxism, Leninism, anarchism), but, on the other, also religious conceptions (both Catholic and Protestant). Thus, the idea of solidarity appears both among left-wing legal philosophers inspired by so-called ethical socialism (for example, Gustav Radbruch) and also among progressively inclined theologians (for example, Heinrich Pesch).

Radbruch is of particular interest here. For him, a solidarity-based social ethics should go beyond both the exclusively conceptual nature of fraternity as the third component of the French Revolutionary slogan (*fraternité*), and also the exclusively moral nature of the Christian injunction to love one's neighbor (*Nächstenliebe*). Radbruch calls this new social ethic (*neue soziale Sittlichkeit*) unambiguously and directly solidarity (*Solidarität*). Today, the way in which solidarity extends from sociology to religion results in various references in diametrically opposed political programs, from those of Social Democrats to those of Christian Democrats.

In the tradition of classical sociology, its direct influence on philosophy of law and political philosophy from the perspective of any further development of the idea of solidarity has been relatively small. But we can speak of a very important indirect influence, especially if we think of jurisprudence (in broad terms). The development of sociology, on one hand, caused the emergence in the course of time of a new field of knowledge, that is, sociology of law. On the other hand, it compelled philosophers of law to change at least partly the paradigm of their scholarly discipline, and it demonstrated the necessity of taking account of the social dimension of the law, and not just its moral (natural law) or linguistic (legal positivism) dimensions. Even more interesting is the penetration of the idea of solidarity into legal texts via the mediation of political parties.

Stjernø reconstructs in some detail ideas of social solidarity in the programs of both European social-democratic parties and also of European Christian-democratic ones. In truth, these involve very different concepts of solidarity, but in the history of constitutionalism one can point to an example of their marriage – the German Basic Law of 1949. Indeed, if one looks at the discussions carried on in German constitutional circles in the second half of the 1940s, it is difficult to resist the impression that the final text is the expression of a compromise between socialism and Christian-democracy, at least as far as the construction of the principles of the democratic, law-based, and social state.

## Works cited


Depenheuer, Otto. 2009. *Solidarität im Verfassungsstaat. Grundlegund einer normativen Theorie der Verteilung.* Norderstedt: Books on Demand GmbH.

Dworkin, Ronald. 2011. *Justice for Hedgehogs.* Cambridge (Mass.)–London: The Belknap Press of Harvard University Press.

Joas, Hans. 2000. *The Genesis of Values.* Chicago: The Chicago University Press.

Kaczmarczyk, Michał. 2005. "Pojęcie solidarności w teorii socjologicznej." In: Marek Latoszek, ed.,*"Solidarność" w imieniu narodu i obywateli,* Kraków: Arcana.

Rawls, John. 1999. *A Theory of Justice.* Revised ed. Cambride: The Belknap Press of Harvard University Press.

Rorty, Richard. 1989. *Contingency, Irony, and Solidarity*. Cambridge: Cambridge University Press.

Stjernø, Steinar. 2005. *Solidarity in Europe. The History of an Idea*. Cambridge: Cambridge University Press.

Chapter 8

# Equity

**[?] What are the meanings of the term "equity"?**

The idea of equity has always accompanied the phenomenon of the law. In a classical understanding, it is not identified with the concept of justice, although there is no doubt that both these values are interrelated. Often, in relation to currently valid law or future law, the demand is made that it ought, above all, to be equitable. Generally, this means that the process of applying general and abstract legal norms should generate a concrete and individually "equitable" result. In contemporary legal systems there are, in principle, two models for achieving the demand for the law's equity, and for achieving any necessary correction based on the argument from equity. Both models can be appropriately subordinated to the system of common law – especially the English one – or to a system of statutory law.

Equity is not clearly defined either in everyday language or in legal language. It is generally accepted that synonyms of equity are words like "the rule of law," "fairness," and "justice." Commentators see three poles of meaning of the concept. First, "equitable" means what "is in accord with truth." Second, the adjective "equitable" means "justified." Third, the view is advanced that to call something equitable is the same as to say it is "just."

In the philosophy of law, we meet with equity in the second or third of these meanings. The criterion of equity carries with it a clear evaluative and axiological potential. Further, it refers to the universal demand that decisions, findings, norms, and arguments, etc., be justified. Thus, equity is a value that either constitutes the external ideal of the law and, simultaneously, the criterion of its evaluation, or that – in Aristotle's formulation – a value immanently linked with the idea of the law and embodied in the law.

**[?] What is the classical conception of equity?**

The distinction between equity and justice as a purely legal idea is already present in Aristotle's writings. For Aristotle, equity (*epiekeia*) is the correction of legal justice in a concrete case; it is something that "aims in parallel" at the abstract justice encoded in the general concepts of the law. Where general legal justice does not operate because of the specifics of a case, equity should intervene to correct this. It should fill a gap or a mistake left by the legislator.

The Romans rendered the Greek idea of equity in Latin as *aequitas*, which term embraced what was honest and in accord with conscience. In Roman legal practice, especially in the oratory of the rhetoricians, equity, thus understood, was often opposed to the not always sufficiently flexible letter of the law (*aequitas sequitur legem*). Together with the development of Roman law, the rules of equity began formally to influence the application of the law, and even the material-legal content of norms, through the praetors' jurisdiction.

In the late Middle Ages, the concept of equity began to return to legal theory through the re-discovery of Roman law by the glossators. St. Thomas Aquinas adopted in principle Aristotle's concept of equity, placing emphasis, however, on the demand rather to protect the common good than the individual good. St. Thomas considered that a refusal strictly to enforce the letter of the law is justified if its literal application seriously endangered the good of the community. In that case, the supreme power in the community may decide to renounce the law in a concrete case.

**[?] What is individual equity, and what is general equity?**

Currently it is traditional to point to two kinds of equity: individual or autonomous equity and general equity, which is also called relational equity. Individual equity refers to situations in which the agency applying in a concrete and individual case a norm that is generally abstract undertakes a correction of the content of a decision, if it were to lead to an unambiguously inequitable finding. An appeal to the argument from equity may be justified because of elements and circumstances of the factual state of affairs, meaning that the content of the disposition of the norm,

if formally applied, is linked with a flagrant violation of the sense of justice. Individual equity, thus, constitutes a remedy in cases in which the legislator cannot foresee all the possible configurations of facts. Its application is justified by the maxim *summum ius summa iniuria*. As I.C. Kamiński rightly points out, in this case "equity does not question the legal provision 'in general', but only moves to limit the scope of its application." [Kamiński, 2003, p. 34] The matter is different in the case of general equity. Here it is a question of translating the legal norm into the model that is the equitable norm, which does not belong at all to the system of legal norms. This kind of equity is called relational, because it is focused on the comparison of norms that belong to different collections or even systems. Equity manifests itself in this case in the form of a general and abstract model, into which the particular norm can be translated. It can, thus, be an evaluative point of reference for law, and even create validating criteria and lead to undermining the validity of norms that are thus seen as inequitable. Finally, it may also serve to create legal norms based on a pattern of equity, especially if there is a gap in the legal system.

**[?] What institutions implement equity in statutory law?**

In legal theory, one can in principle distinguish two ways of avoiding excessive legalism and inelasticity in the law, initiating mechanisms based on a broadly understood equity. In civil law systems, these functions are fulfilled by general clauses or by indeterminate phrases that are introduced into the contents of provisions. Sometimes even the legislator appeals to "reasons of equity" (see art. $417^2$ of the law of April 23, 1964 – Civil Code, Journal of Laws Nr 16, pos. 93 with amendments) or "principles of equity" (see art. 1194 § 1 of the law of November 17, 1964 – Code of Civil Procedure, Journal of Laws Nr 43, pos. 296 with amendments).

In fact, general clauses are very important in achieving an equitable law, since as a reference to correct systems of norms, values, and evaluations, they potentially make it possible to apply the law in a more flexible way. Thanks to this, where the legislator permits, an agency or a court through reconstruction and application of a general-abstract norm has the possibility of correcting the norm in relation to the specific circumstances of a concrete

and individual case by appealing to requirements of equity. This is especially important in factual states that the legislator has not foreseen or did not take into consideration when the general and abstract principle was established. It also applies to hard cases. As Kamiński notes, this legislative technique realizes the praetor's function in assisting, supplementing, and correcting the law (*adiuvandi vel supplendi vel corrigendi iuris civilis*).

Among concrete examples of the application of this solution, special attention should be paid to an appeal in Polish law to "principles of equity." Means of implementing the principle of equity do not, however, end here; the principle is also fulfilled by general clauses and indeterminate phrases in their functional meaning, which collectively are described as "equity-oriented." These must include, above all, references to principles of social intercourse, good faith, good habits, and established customs.

**[?] What is equity in English law?**

The second model of how to avoid the inelasticity of the law by appeal to the criterion of equity is the creation of separate, autonomous system of legal equity. The beginnings of this idea can be seen in the above-mentioned Roman praetorian law, but it is best seen in English law in the form of the so-called system of equity. This emerged in stages, as an answer to the inadequacies of an in time more and more ossified system of common law, based primarily on action for damages. The need of adjudicating outside common law appeared in stages, especially in those fields where in the light of legal precedence, there was a lack of an effective claim or remedy, or where, in general, common law did not know certain concepts and institutions (for example, trusts). In response to these inadequacies, first the king, and then from the fifteenth century the Lord Chancellor and the Court of Chancery determined those "extra-systemic" cases. They were guided more by the demands of equity and fairness than the demands of the letter of the law. The performance of jurisdiction within the framework of equity was, thus, very discretionary and intuitional. This is made vivid in the saying, well-known in English legal culture, that the understanding of equity varies with the length of the Chancellor's foot.

The institutionalization of the system of equity occurred in the seventeenth century when King James I determined the growing conflict between common law judges and the Chancellor in favor of the latter. By the nineteenth century, the equity system was fully shaped, with the organized and increasingly formalized jurisdiction of the Court of Chancery. In the second half of the nineteenth century, the system of equity, now itself overgrown with precedents, lost its earlier elasticity. The Court of Chancery was suspended by reforms to the justice system in 1873 to 1875, when the High Court of Justice took over jurisdiction both of common law and equity. However, this very reform introduced the principle that in the case of conflict between rules of law and rules of equity, equity is more important. Currently, the system of equity still functions and has developed in such areas as trusts, property law, protection against forfeitures and penalties, and also in the area of equitable remedies.

**Works cited**

Kamiński, Ireneusz C. 2003. *Słuszność i prawo. Szkic prawnoporównawczy*. Kraków: Kantor Wydawniczy Zakamycze.

Chapter 9

# Justice

**[?] What is justice according to Plato?**

Justice certainly belongs to that group of philosophical-legal concepts, the various faces of which would make even Proteus envious. In principle, every political-legal system, just as every philosophical system uses the term "justice." However the content that lies behind the term is often diametrically different.

The first searching reflections relating to justice appear in the texts of ancient philosophers. In these the adjective "just" is applied to specific individuals, and to social constructs, with the state at the head. Plato, when he sets out to construct – at least on a declarative level – a definition of justice, states simply that everything is easier to see on a great, rather than a small, scale, and therefore, instead of considering why one can call a specific person just, it is better to consider why the word "state" might have this attribute ascribed to it. Next, having accepted that justice is a feature of the state, Plato sets out to describe that very – ideal – state. The state is to consist of three classes: ordinary citizens, soldiers, and rulers (guardians). This division is a result of natural differences between people. It was obvious for Plato that people are not born equal. Each, according to his/her nature is disposed to something else. While one person has musical ability, another is not able clearly to sound out a scale. Some have mathematical skills, while others are born humanists – and so on. We are different. These differences are to establish the place of a person in the world and in society.

In Plato's view, and in that of many of his contemporaries, every thing possesses a defined place in the world and functions to fulfill: a stone, a plant, an animal, a human being, and even the gods. Thus, it would seem appropriate, and on a social and political level, just, that every individual holds that precise place, fulfills that precise function that, in accord with the workings of fate, or

natural law, he/she is supposed to hold and fulfill. So if someone demonstrates artistic skills, he/she should be concerned with art; mathematical abilities may predestine an individual to become involved in economics or architecture, etc. In this way, the individual is able, on one hand, to achieve self-realization, attaining satisfaction from life; on the other hand, such an individual brings profit to the community. Similar criteria – Socrates clearly underlines this, at least in the version passed on by Plato – are to apply to politics and politicians. People in possession of specific attributes should become politicians. The fact that someone is a splendid craftsman, farmer, or painter, does not of itself make that person someone who should speak in matters concerning the governance of the state. In this case, it is evident that other skills and personal qualities are required.

We will be dealing – according to Plato – with justice on the level of the state, when every class, and from a closer perspective every individual, will perform his/her duties and develop his/her distinctive virtues. At the same time, this is the way that the individual can attain happiness. Unhappiness – for the individual too – comes from forcing the individual to do things to which he/she is not destined by nature. To use figurative language, we can say that the just state is a state that resembles a well-functioning organism, in which every organ fulfills the function that has been prescribed it.

Once the just state has been described, one can pass to the description of the just individual. As in the state it is possible to distinguish three classes, so on the individual level, three parts of the soul can be seen: the appetitive (the equivalent of the common people), the spirited (the equivalent of the soldiery), and the logical/rational (the equivalent of the guardians/governors). Further, just as we can use the term just of the state when the particular classes are in harmony, so we call an individual just when the particular parts of the soul fulfill their functions and when it one is not supreme at the cost of the others. Here it is striking that Plato does not ascribe the adjective "just" to the individual because of his/her functioning in the world, and does not evaluate the individual from the perspective of the human/the environment (other people, the state, legal norms), but in confrontation with his/her own nature. In other words, justice is

a feature of the human being him/herself, and not a description of relations that link him/her with the world. Let us note that contrary to linguistic custom, this is a vision that is very distant from contemporary thinking.

**[?] What are the kinds of justice according to Aristotle?**

A second, very important division of justice is offered by Aristotle, Plato's pupil. Aristotle remarks – in a way that strikes a chord today – that justice is achieved differently on the level of creating law and in the process of its application.

The first kind of justice, called distributive justice, refers to the way in which a division of goods is made among the members of a specific group, for example, a state. The criterion on the basis of which division is made is obviously of key importance for distributive justice: services to the state, social position, sex/gender. Or perhaps everyone should participate in the goods in the same way? Currently, when one speaks of distribution of goods, the term "distributive justice" is used, but the goods that are divided need not have an exclusively material character. It may equally well involve a share in rights. Within distributive justice, there is also a discussion of issues of equitable share in burdens that the individual must bear in relation to the state. For example, the question can be asked whether persons whose incomes are diametrically different, should pay take at the same level (of course this means nominal size, and not a relationship in percentage). Also should a person who works two times more and three times more effectively than another person receive the same monthly salary as the second person? In terms of rights, the question of access to pre-natal examination is discussed: should it be guaranteed to all who wish it, or only to those persons concerning whom there is a defined likelihood that they may pass on genetic illnesses to their descendants? Should the opportunity to adopt a child be reserved for persons in a marriage, or should it also exist for those who live together or for those who live alone? Should it be reserved for those of a defined sexual orientation?

Justice connected with the application of the law is corrective justice. If the harmony of the natural order or a defined model of the distribution of goods is violated, then there is a need to

restore that harmony. "Hence the unjust" – declares Aristotle – "being here the unequal, the judge endeavors to equalize it: inasmuch as when one man has received and the other has inflicted a blow, or one has killed and the other been killed, the line representing the suffering and doing of the deed is divided into unequal parts, but the judge endeavors to make them equal by the penalty or loss he imposes, taking away the gain." The most straightforward model of corrective justice is given in the famous maxim "An eye for an eye, a tooth for a tooth." [Aristotle, *Nicomachean Ethics*, 1132a]

> Retaliation also is just; not, however, as the Pythagoreans maintained. For they thought that it was just that a man should suffer in return what he had done. But this cannot be the case in relation to all persons. For the same thing is not just for a domestic as for a freeman. For if the domestic has struck the freeman, it is not just that he should merely be struck in return, but many times. And retaliatory justice, also, consists in proportion. For as the freeman is to the slave in being superior, so is retaliation to aggression. It will be the same-with one freeman in relation to another. For it is not just, if a man has knocked out somebody's eye, merely that he should have his own knocked out, but that he should suffer more, if he is to observe the proportion. For he was the first to begin and did a wrong, and is in the wrong in both ways, so that the acts of injustice are proportional, and for him to suffer more than he did is just. [Aristotle, *Magna Moralnia*, 1194]

**[?] What are procedural justice and substantive justice?**

With regard to law, it is necessary to mention two more types of justice, procedural justice and substantive justice. Procedural justice, also called formal justice, refers to the mechanisms of making decisions, including the application of law. It is not the result itself of applying the law, for example, the content of a judgment, but it is concerned with whether that judgment was given in accordance with defined procedures, or whether those were violated. The realization of defined formal conditions, for example, ensuring that everyone has the opportunity to vote during voting, directly transfers to the evaluation of the results of a given procedure. A good illustration of achieving procedural justice is found in sporting competitions, for example, in swimming. Whether the result is just – that is person A takes first place, per-

son B takes second, etc. – depends on whether all participants have been ensured the same conditions: the same distance, the same starting moment, etc.

Substantive justice, also called material justice, refers to the effects of the creation, interpretation, application, and execution of the law. To return to the example of the verdict, when emphasis is laid on substantive justice, one must focus on the content of that judgment. In other words, a situation is possible in which a judgment is given in accordance with defined procedures, or a parliament passes a law while following all the rules of procedure foreseen for this type of situation, and yet, despite that, all this is flagrantly unjust, for example, it deprives a defined minority of political rights. It should be noted that from this perspective, a concrete decision is evaluated by setting it against the ideal model of an equitable decision. In other words, law is a subordinate system in relation to another, distinguished system, for example, the natural order, divine laws, morality, ethics, etc. In a situation of extreme conflict of the law with the norms of another, higher type, it is even possible to say that this is not law, and a concrete decisions does not have any legal consequences.

**[?] What are the premises of John Rawls's theory of justice?**

Current discussions of justice, at least in the philosophical-legal field, must refer to the theory of justice formulated by John Rawls. With a great deal of simplification, we can say that in Rawls's view, a just legal system is a system in which we would agree to function, without knowing in advance what place it would be our lot to take in it. If we had no information concerning who we would be, what our talents would be, what our sex/gender, race, religion would be, into what family we would be born – and nonetheless we would agree to be born within a defined political-legal order, then we must adjudge such an order just. Let us note here that Rawls accepts that people differ in their visions of what is good and what is bad, they have different visions of the happy life, and they pass differing moral judgments. Consistent with this, Rawls gives up trying to construct a system in which defined acts or solutions would be matched with a priori models. These models are, of course, the subject of controversy, and

justice cannot depend directly on something that is the subject of antagonisms. It would not then be justice, but an imposition of the vision held by the more powerful.

How can one remove the ballast of these antagonisms and establish principles that we can call truly just? Rawls proposes a kind of thought experiment. When choosing principles that we call just and that form the underpinnings of a political-legal system, we have to stand behind a veil of ignorance. As I mentioned above, the veil of ignorance separates us from information relating to our roots, our family background, social position, our natural gifts, our world view, etc., in other words, everything that might be a source of bias. In this way, when we define the principles of a political social order, we will not be able to "establish" it so that our group is privileged over others. We simply do not know what group will be our group.

Placing the individual behind a veil of ignorance also results in that individual's losing any possible privileged position that is the result of unequal risk. If we accept that one party knows that he/she will be born into a well-off family, he/she may support a system in which, for example, private health care will be very highly developed, while the public health care system will be marginalized. Let us note that the fact of being born into a poor family does not absolutely rule out access to private health care. The individual may attain a material status that makes it possible to use that kind of service. Nonetheless, the necessity of putting a greater effort into this than others have to, influences the evaluation of the system in which such differences exist. The veil of ignorance, thus, constitutes a guarantee of impartiality and the equality of individuals in the primary situation – that is the conclusion of the social contract.

Behind the veil of ignorance, we also lose any knowledge of our conceptions of good and bad. From a moral point of view, we become equal, provided only with an elementary sense of justice. When we settle on basic principles with others, we will not be in a position to impose any moral system. As a result, we will probably agree to a political-legal system in which everyone will be able (although perhaps within limits) to chose and realize the vision of the good life that he/she recognizes as appropriate. However, the

question must be asked as to what choice would be made behind the veil of ignorance. What would be the basic principles of the just political-legal system? Rawls formulates two such principles.

1. Every person must have equal right to the broadest basic liberty that it is possible to reconcile with the same liberty of others.
2. Social and economic inequalities should be so set up that
   a) they are of maximum use for the most disadvantaged, and simultaneously
   b) they are connected with the accessibility of offices and positions for all, under conditions of genuine equality of opportunity.

Accepting Rawls's perspective does not lead to choosing a system in which absolute equality would dominate. Rawls certainly realizes that we are inclined to risk. We can risk taking a weaker position in society, if the chances of getting a better one will be higher than in other systems that lay emphasis on egalitarianism. The risk, however, cannot exceed defined limits.

To sum up, it is necessary to note that the basic advantage of Rawls's theory is that it supplies criteria that make it possible to evaluate political-legal solutions without it being necessary to set these against moral norms, which in pluralist societies are often the subject of dispute and discussion.

**Works cited**

Aristotle. *Nicomachean Ethics*. H. Rackham, ed., http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0054%3Abekker+page%3D1132a%3Abekker+line%3D1 (accesed: 10.06.2016).

Aristotle, *Magna Moralnia*. Transl. St. George Stock (Internet Archive, 1915), https://archive.org/details/p2workstranslat09ar (accesed: 10.06.2016).

Chapter 10

# Freedom/Liberty

**[?] In what aspects can freedom be considered?**

As a category, freedom is understood differently by people and is differently defined. Its bibliography is rich and there is much controversy surrounding it. It is an object of interest in many disciplines, including, philosophy, philosophy of law, legal studies, sociology, psychology, political science, and others. A presentation of the whole complex issue of freedom, in its various aspects, would exceed the limits of this chapter.

A distinction must be made – using the simplest terms – between the "general" category of freedom and "specific" freedoms (such as, for example, freedom of speech, freedom of assembly). Marek Piechowiak, in the context of the provisions of art. 1 of the Universal Declaration of Human Rights (the first sentence of which reads: "All human beings are born free and equal in dignity and rights"), writes that this clause refers to "[…] freedom as a certain attribute of a human being, which should not be confused with specific rights – rights of liberty or freedoms of various kinds understood as simple or derivative legal situations […]." [Piechowiak, 1999, p. 93]

One can note that in the Constitution of the Polish Republic, the principle of human freedom (art. 31), along with the principle of dignity (art. 30) and the principle of equality and the prohibition of discrimination (art. 32) create the "axiological system of the fundamental law" that applies to the status of the individual, and that is linked to the concept of natural law. Also in this case, Jerzy Zajadło stresses, the idea of freedom (or liberty) is distinguished as a legal principle from concrete personal and political freedoms, and from social, economic, and cultural ones that are guaranteed in chapter II of the Polish Constitution.

It is possible to view human freedom generally understood, and also particular freedoms, in the context of ideas – of values

and political slogans – in the normative context that relates to the legal regulations that serve the achievement and protection of these freedoms, and in the context of the real "performance" of freedom by people and the practice of its realization (protection), since this is the concern of a range of public and non-public institutions set up to protect the freedoms and rights of the individual.

Further, it is clear that the category of freedom is closely connected with many other, very important categories that cannot be reduced to a common denominator, such as: subject status (this means the recognition of a human individual as a subject that is vested in freedom), equality (this means that all people to the same degree are vested in or should be vested in freedom or freedoms), and inborn and unalienable dignity (as the source of freedom and individual rights).

The development of the conviction that a human being (as a subject) is vested in freedom, and next that that freedom (at least formally or theoretically) belongs to every human being in equal measure, is one of the central moments in the history of Western culture. One can see the beginnings of this conviction in early Christian doctrine ("There is neither Jew nor Greek, there is neither bond nor free […]" [Galatians 3:28]), but it developed over a long period of time until it found its formal expression in modern and contemporary times, *inter alia*, in the shape of legal prohibitions of slavery.

### [?] How do contemporary thinkers see the category of freedom in different ways?

In the last several decades, the issue of freedom has found expression in a range of often contradictory conceptions. To refer to some of the most influential views, for example, Isaiah Berlin makes the well-known distinction between negative liberty – which means a lack of coercion, this being understood as the deliberate interference of other people in the individual's sphere of action (lack of freedom is not attested by the mere inability to achieve various purposes, but it occurs when the achievement of a purpose is made impossible by other people) – and positive liberty – which means the desire of an individual to be "master

of his/her fate," to be directed by his/her own motives and intentions, and not to be subject to external factors.

Berlin was a spokesperson for negative liberty. He writes:

> Pluralism, with the measure of 'negative' liberty that it entails, seems to me a truer and more humane ideal than the goals of those who seek in the great disciplined, authoritarian structures the ideal of 'positive' self-mastery by classes, or peoples, or the whole of mankind. [Berlin, 1969, p. 171]

Piechowiak, considering the concept of freedom (based on the recognition of the dignity and equal rights of all people) as one of the bases of the anthropology of human rights, notes:

> The concept of freedom accepted here is not the conception of so-called negative freedom, which is characterized exclusively in categories of 'freedom from.' Certain states of human existence and the aims of human activity are positively distinguished as realizing a human being as a free being. Nevertheless, this is not positive freedom as understood by Isaiah Berlin, since it is not the case that the state distinguished as realizing a human being is always unambiguously determined independently of the unconstrained choice of freedom by the subject and by other members of society. [Piechowiak, 1999, p. 95]

In turn, Ronald Dworkin, referring to the conception of freedom as a lack of restrictions imposed by the government, argues that this concept is neutral in relation to the kind of action that a human being can undertake, since it insists that the freedom of human being is diminished, both if it makes it impossible to say something, and if it makes it impossible to commit murder or to slander someone. Dworkin thinks that liberals (like Berlin) reject the view that the limitation of freedom embraces only those cases in which it is made impossible for the individual to do something which, in our opinion, he/she should be able to do, since (as liberals argue) would be an unacceptable conceptual confusion, permitting totalitarian governments to assert that they only forbid people to do what is bad. In Dworkin's view, a decided majority of legal regulations limiting the freedom of individuals does not deprive the individuals of anything that they have a right to pos-

sess. Dworkin argues that if we have a right to basic freedoms (for example, freedom of speech), not because our freedom is threatened in some particular way, but because an assault on our basic freedoms hurts or humiliates us in a manner that is not limited only to an influence on our freedom, then what we have a right to is not "freedom in general," but values, interests, or positions, which may, in fact, be subject to limitation.

Friedrich August von Hayek – the great economist and philosopher, Nobel Prize winner, advocate of the free-market economy – defines individual freedom (personal freedom) as a lack of constraint/duress from the arbitrary will of other people. This is a state at which it is necessary to aim, although it may not be fully achieved in society. In Hayek's view, freedom's only violator can be coercion on the part of others. Hayek distinguishes freedom understood in this way from political freedom (people's participation in elections, in the legislative process, and in control of the administration – in his view, to ensure political freedom for society is not to guarantee the freedom of individuals), and "inner" freedom ("metaphysical" freedom – meaning that a human being is guided in his/her actions, above all, by his/her own conscious will, reason, firm conviction, and by not transient emotions or moral or intellectual weakness). According to von Hayek, the most dangerous thing is to confuse individual freedom with freedom as power (of doing specific things according to one's conviction, the ability to realize desires, "freedom from" impediments), since to identify the first freedom with freedom as power can lead to the exploitation of the word "freedom" to justify means (for example, the redistribution of wealth, if the freedom of the individual is identified with that individual's possession of resources) that destroy the individual's individual freedom.

However, Zygmunt Bauman, who sees freedom not as a universal human state, but as a historical and social construct, argues that in the contemporary world, an individual's individual freedom is, above all, the freedom of the consumer. Not all members of society are able to achieve their aims within this framework, and not all can afford to. In the world of consumers, it is only theoretically that all people are vested in the same freedom of choice, and, in practice, it is only at the top of the social hierarchy that

choice is unconstrained. The lower down the hierarchy, the less the choice is, and one of the alternatives that confront society is to find a way so that individual freedom, in which each is vested, should actually and practically become his/hers.

Thus, the contemporary understanding of freedom, as attested by the above and other examples, is a matter of fundamental controversy.

**[?] What characterizes the relationship between freedom (freedoms) and law – or, is law the source of our freedom?**

Thinking about the problem of freedom has a long history; its beginnings go back to antiquity. In modern times, the texts of many philosophers consider the issue of the relation between freedom and law. The following are some models of this concern:

1) Thomas Hobbes, who considered that the existence of law means a limitation of freedom, but that this is a necessary condition of maintaining our life and our peace.
2) John Locke, who considered that freedom belongs to a human being from birth, and the state and the law have the task of guarding this.
3) Jean-Jacques Rousseau, who insisted that true freedom is political freedom, which is a matter of obedience to a law that we have participated in establishing.

John Stuart Mill is one thinker who continues and develops Locke's liberal ideas. In his celebrated *On Liberty*, Mill formulates a principal that relates to the limit of social coercion toward the individual.

> That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. [Mill, 1863, p. 23]

Contemporary legal theory uses the expression "freedom protected by law." As Wiesław Lang writes:

> The paradigm of a legal situation defined by the term freedom is a situation in which the action or the renunciation of action on the part of the subject are behaviors that are not forbidden or not obligatory. This is freedom protected by law since its violation constitutes a violation of the law. [Lang, 2004, p. 207]

This understanding of freedom, the borders of which are set by prohibitions and injunctions, is typical for legal positivism, which posits – to simplify somewhat – that the source of the individual's freedom is positive law. Currently, however, there is an increasingly wide-spread conviction that the source of the freedoms and rights of the individual (of every individual) is his/her innate and inalienable dignity. This is reflected in acts within the area of international defense of human rights, and in the constitutions of many states in the world. This connection with the concept of natural law leads to the conclusion that positive law is not the source of freedom, but rather only has the task of protecting it.

The paradoxical conception that positive law is not the source of freedom finds its "positive" expression, *inter alia*, in the Polish legal system (see art. 30, sentence 1 of the Constitution of the Republic of Poland: "The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens").

This traditional controversy relating to whether the source of freedom is positive law or whether freedom is a value that is independent of the will of the legislator, has currently lost some of its importance. This is due, on one hand, to the "positivization" of the sphere of freedoms and individual rights in acts of international and internal law. On the other hand, it relates to a conception, often adopted in these acts, that sees the source of freedoms (and rights) in dignity. At the same time, this "positivization" (consisting in the inclusion of the sphere of individual freedoms with the protection of statutory law) means the victory of the idea that proclaims that without the protection of the law there is no freedom, but only license and chaos.

One should point out that the idea of freedom (which constitutes the basis of liberal doctrines) has in history been opposed and still is opposed to the idea of equality (which is central to social-

ist movements), but it must be stressed that at present the radical opposition of freedom and equality is a huge simplification. Legal regulation, however, of human freedoms and rights is so constructed that it ensures the complementary achievement of various values. Generally conceived freedom, and also specific freedoms that belong to human beings, are not treated (on an intellectual and normative level) as absolute values, since certain other values that are especially important (*inter alia*, the freedoms and rights of other individuals) can justify the limitation of freedoms.

One must note that freedom is one of the fundamental concepts of legal studies, both in theory and philosophy of law, and it is also fundamental within studies of legal doctrine/principles, especially constitutional law (freedom in general and particular freedoms are treated here as constitutional values), criminal law (freedom as a protected good), and civil law (freedom as a personal good). Finally, freedom in general and particular freedoms are protected in international law relating to the protection of human rights.

The presence in acts from the area of international protection of human rights, of norms that protect a value defined as "freedom" or "right to freedom" (compare, for example: art. 1, 3, and 4 of the Universal Declaration of Human Rights from 1948; art. 4 and 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms from 1950; and art. 8, 9, 10, 11, and 12 of the International Covenant on Civil and Political Rights from 1966), and also the regulation of "particular" freedoms (for example, freedom of speech, freedom of conscience and religion, and freedom of assembly) in these acts – these suggest that in the twentieth century, people from different cultures have placed importance on this value (or these values). This regulation is of a universal kind – embracing the whole world or at least part of it. On the other hand, we have to realize that the issue of setting out an untouchable are of freedom for the individual may be understood differently by people who come from different cultures. This applies to the general category of freedom as well as to specific protected freedoms.

## Works cited

Berlin, Isaiah. 1969. "Two Concepts of Liberty." In: Isaiah Berlin. *Four Essays on Liberty*. London: Oxford University Press.

Lang, Wiesław. 2004. "Prawa podmiotowe i prawa człowieka." In: Michał Balcerzak and Jan Białocerkiewicz, ed., *Księga jubileuszowa Profesora Tadeusza Jasudowicza*. Toruń: TNOiK.

Mill, John Stuart. 1863. *On Liberty*. Boston: Ticknor and Fields.

Piechowiak, Marek. 1999. *Filozofia praw człowieka. Prawa człowieka w świetle ich międzynarodowej ochrony*. Lublin: Towarzystwo Naukowe Katolickiego Uniwersytetu Lubelskiego.

Part V

# HARD CASES

Chapter 1

# Do *hard cases* exist and if so what are they?

### [?] What is the difference between Hart's and Dworkin's positions on hard cases?

Philosophy of law becomes particularly meaningful to lawyers in situations where they have to face solving one of so-called hard cases. The traditional paradigm of hard cases was defined during a heated debate between Hart and Dworkin. However, this term could be interpreted as having a broader meaning – as being a conflict of law with itself or with other normative systems and other aspects of social reality.

In modern theory and philosophy of law the concept of so-called hard cases is most often connected with Anglo-Saxon legal culture and especially with the integral philosophy of law of Ronald Dworkin. This is hardly surprising. The problem of hard cases is, in fact, directly proportional to the role played in the legal system by the bodies administering the law, especially by courts. This, of course, does not mean that hard cases are unique to the Common Law model and are totally alien to Continental legal culture. However, for the purpose of this chapter, it is assumed that the meaning of the concept in question is narrow, perhaps even too narrow, because it is in fact limited to the process of administering the law and, consequently, also to its interpretation. In the literature referring to the work of Dworkin, one can come across the following definition:

> A hard case in the most general sense occurs when a judge is not able to provide a definite rule that has been set by a certain authority; however these are also cases of decision-making difficulties arising as a result of a lack of consensus among lawyers. [Wojciechowski, 2004, p. 11]

Sometimes the term hard cases is used intuitively to describe cases that were particularly complex and at the time shocking to the public. A typical example might be proceedings in cases of genocide – Stephen Landsman gave his book on the Nuremberg trials and the famous trials of Adolf Eichmann, John Demanjuk, and Imre Finta, a very distinctive title – *Crimes of the Holocaust: The Law Confronts Hard Cases*. The term does not always necessarily relate to such spectacular cases. Other authors, in this context, discuss the issue of the government's intervening in the freedom of individuals, for example: the issue of the obligation on motorcyclists to wear helmets, physician-assisted suicide, using marijuana, abortion, or parents' refusing medical treatment of their children. Some authors also use the term hard cases when referring to complicated constitutional cases and complex problems arising within regimes that violate human rights on a large scale, later solved during periods of revolution as a matter of so called transitional justice. The latter are particularly interesting, as they are associated with the fundamental question of the limits and possibilities of using legal regulation (especially the criminal code) in the process of bringing the past to justice and putting history on trial.

According to Brian H. Bix, the difference between a hard case and an easy case can manifest itself in three aspects: degree, time, and the certainty of agreement, which properly educated and sensible lawyers can (or cannot) reach in a given case. Hard cases, looked at in this context, come in various mutations also as seen by other authors, who differ not only in their understanding of the substance of hard cases, but more importantly in the way they suggest solving them by the court that is applying and interpreting the law. According to Małgorzata Król, one can, therefore, distinguish, in addition to Dworkin's ideas, other approaches to the matter in question, for example Herbert L.A. Hart's, Neil McCromick's, Aleksander Peczenik's, or Jerzy Wróblewski's.

To be precise, it has to be noted that hard cases, despite the fact that this specific term was not necessarily applied yet, first appeared in John Austin's positivism and later in a more sophisticated version of his work proposed by Hart. Dworkin's concept, however, was an elaborate critique of such an approach towards positivism in general, especially of Hart's concept. Apart from

a similar understanding of the essence of the problem, there is no doubt that coining the term hard cases is, however, most commonly associated with Dworkin, even though Hart uses similar wording in the afterword to his core work *The Concept of Law*. In 1975, Dworkin published in the *Harvard Law Review* an extensive essay with the exact title "Hard Cases." What can be considered extremely characteristic is the fact that the paper was a revised version of the opening lecture given by the author in 1971, when he took over the chair of the jurisprudence faculty at Oxford University from Hart himself. Both authors differed considerably in approaching the problem of solving hard cases and the outcome of any given solution.

According to Hart, who believed the legal system to be made entirely of rules, solving hard cases required going beyond the system thanks to so-called open texture concepts. On the basis of positivism, this obviously caused some difficulties, associated with a possible legislative character of the court's decision. Moving away from the model of simple subsumption and breaking a direct relationship between a rule and a verdict, therefore, results in:

> A judge is left with nothing but discretionary jurisdiction and going beyond the law. […] Hart attempts to get past the difficulties associated with holding the position that deems a judicial decision made in a hard case to be a legislative decision. That is because such a solution is, from a positivist perspective, unacceptable. Therefore, Hart suggests we assume that such a decision falls within the scope of a common criterion for a correct (i.e. lawful) judicial verdict. This criterion is determined by the semantic scope of rules that include open texture expressions. Going beyond this scope is, according to Hart, going beyond the criterion for correctness. [Król, 1998, p. 99]

Dworkin assumes something completely different. He believes that the legal system consists not only of rules, but also of principles and policies. While making a decision in cases where there are no explicit regulations, that is, rules set, a judge does not have – as in Hart's work – to go beyond the legal system. On the contrary, he/she should look for a solution within the system, drawing on rules and/or guidelines. According to the assumptions of positivism, when a judge makes a ruling in a hard case they are obliged to abide by legal rules. Thus, the judge is bound by a kind

of a corset, which he or she cannot escape. The judge, therefore, seeks a solution that is not optimal overall, but one that is optimal given the specific circumstances. According to Dworkin, whose aim was to create an integrated philosophy of law, this is inadequate or even wrong. A legal rule may indeed prove insufficient to make a right ruling – right, using Gustav Radbruch's terminology, in terms of justice, purposefulness, or legal security. While Hart in such situations equips the judge with the power to issue decisions "freely," an integrated philosophy of law remains within the boundaries of the legal system and requires an appeal to the rules of law. In Dworkin's opinion, judicial settlement of hard cases cannot be based on creating new legal rules *ad infinitum*; one has to uncover the criteria "hiding" within the legal system as rules and guidelines.

We are then dealing with a kind of a paradox: Hart – a positivist – is trying to find a solution to hard cases within non-regulatory standards, while Dworkin – a non-positivist – is trying to do so among the rules and guidelines that are an inherent part of the legal system.

The phenomenon of law includes five "dimensions," that is, creation, application, interpretation, validity, and compliance. However, within the field of legal philosophy and theory, the matter of hard cases, in the traditional sense, includes only the process of applying the law and the interpretation associated with it. This is also the direction in which the understanding of hard cases seems to be headed in terms of legal argumentation. In relevant Polish literature, Jerzy Stelmach argues that hard cases are an essential part of any kind of a practical argumentative discourse, and of legal discourse as one of its branches in particular. Practical discourse, however, is not applicable when it comes to easy cases that are straightforward, unambiguous and uncontested.

> Thus, we can begin the discourse only when we are dealing with a so-called hard case, that is – one that cannot be settled using standard methods of interpretation – a mere theoretical discourse. Indeed, the development of the whole contemporary theory and philosophy of legal argumentation, among other things, was paired with the study of such cases. [Stelmach, 2003, p. 38]

As in the work of Hart and Dworkin, the theory of legal argumentation also uses the category of hard cases only within the aspect of applying the law and/or its interpretation. Properly conducted legal discourse should then remain closely connected to the law in force:

> If a legal discourse was not conducted in direct relation to the law in force (such a possibility indeed does exist), then it would just become an ethical discourse. Thus, in order for a legal discourse to be considered legally valid and effective, it needs to have a dogmatic character. […] The starting point of legal argumentation is to determine the law applicable to the case in question. All preliminary decisions are usually made still as a part of the theoretical discourse, which makes it possible to establish the factual and legal status quo, are therefore assumptions *de lege lata*. Practical legal discourse takes us into the realm of assumptions *de lege ferenda*, that is – proposed law. […] In easy cases, decisions made as a part of theoretical discourse suffice, and their outcomes have in fact an algorithmic (repeatable) character. When taking on a practical discourse, we begin to "look for the law," which somehow automatically moves us to the realm of assumptions *de lege ferenda,* which, of course, must always remain "directly connected to" (that is, remain in accordance with) the law in force, even when they have a precedent as an outcome. [Stelmach, 2003, p. 59–61]

Within the theory of judicial interpretation one can bring up another, very important difference that exists between the concepts of Dworkin and Hart. According to Dworkin, in hard cases there is only one correct (right) solution (the right answer), which a model judge – Hercules – should find by referring to rules and guidelines that are a part of the legal system. If that were really the case, then, first, practical discourse would be redundant and the limits of the theoretical discourse would suffice; second, we would not be, in fact, dealing with a hard case but an easy case instead. So it is exactly the opposite – the essence of a hard case lies precisely in the fact that the process of argumentative discourse can lead to several solutions that can be justified on the basis of the adopted criteria of rationality and fairness. Then and only then, additional criteria, which make it possible to choose a single solution, can be added to the discourse.

Both Dworkin and legal argumentation theorists offer a case, which in the late nineteenth century was tried in the Court of Appeals in New York – Riggs v. Palmer (judgment of December 8, 1889) – as a classic example of a hard case. The issue in question was whether the killer can inherit from his/her victim. According to Dworkin, it is a classic example of a hard case, in which rules of law do not enable the achievement of a satisfactory resolution. However, we do not have to look for a solution outside the legal system; on the contrary – we can use the *ex iniuria ius non oritur* rule, which allows us to deny the perpetrator the right to inherit from a victim despite the absence of ambiguity in terms of the will of the latter. In other words, the legal principle "no one should take advantage of the evil they commit" makes for an exception to the rule of law. It should be added, though, that the verdict was not unanimous. Judge John Gray had a dissenting opinion, which argued that the case should be decided on the basis of the applicable rules of law, which do not exclude the killer from obtaining the inheritance. Being the killer, he has already been penalized for his actions, and there are no legal grounds to do so also in the context of inheritance law. The deciding factor should be the clearly expressed will of the deceased. We cannot assume a negative judgment, as we cannot know for sure if the deceased would not after all have forgiven their killer, if he/she knew that this was his/her murderer. We cannot exclude the possibility that deep affection and blood ties would prevail.

Jerzy Stelmach and Bartosz Brożek conduct a detailed logical analysis of the Riggs v. Palmer case and point to a certain practical danger that stems from the ruling of the New York court. Rules can "produce" exceptions to the rules and the number of these exceptions is theoretically unforeseen. Therefore, a legal rule can never be fully formalized as there is always the possibility that in some unforeseen situation this rule will "produce" an exception. This, however, seems to be the essence of hard cases.

### [?] What is the concept of hard cases *sensu largo*?

The remarks above were aimed to: first, confirm the existence of the hard cases phenomenon; and second, determine its understanding within the field of contemporary theory and philosophy

of law, especially the philosophy of legal argumentation. We are then dealing with a certain established paradigm, to which this essay is an exception. For its purpose, a far broader and slightly different understanding of both the essence of hard cases and the scope of application of practical legal discourse is assumed.

First, hard cases appear not only during the process of applying the law and its interpretation, but they can be also applied to the other "dimensions" of the phenomenon of law – creation, validity, and compliance. In this context, a factor that determines whether we are dealing with a hard case or an easy case, can be considered the multiplicity of possible solutions that can be justified in the process of practical discourse on the basis of the adopted criteria of rationality and fairness. A hard case in this sense is not an exclusive domain of the judge seeking a solution to a particular case, in which there is no obvious rule of law available. Similar argumentative problems may also be encountered, on the one hand, for example, by a legislator who decides to regulate or to refrain from regulating certain social relations, and, on the other hand, for example by a citizen deciding whether to invoke the institution of civil disobedience or to abstain from it. This does not change the fact that in judicial practice hard cases appear most frequently in the process of applying the law and/or its interpretation. It also applies to the aspect the validity of law, for example when a court is faced with an extremely rare and at the same time extremely tense choice resulting from the confrontation of the *dura lex sed lex* and *lex iniustissima non est lex* rules. The history of the last few decades clearly demonstrates that, even though it may appear so, this choice is not only a hypothetical fantasy of philosophers of law. What is interesting is not only a specific decision made in reference to hard cases, but also the philosophical and legal context and the general problems that are associated with making this decision.

Second, one can refuse fully to accept the previously outlined thesis on the necessity of conducting the argumentation in direct connection with the law in force. This narrows down the context of hard cases because it refers to its appearance only within the aspects of applying the law and its interpretation. Nevertheless, it can be concluded that this direct connection with the law in force during the process of legal discourse is actually likely to

appear. However, expanding the context of hard cases to, for example, the process of creating the law may make this relationship stop being a necessary relationship. Sometimes the legislature faces a decision that is not directly related to the law in force as it enters the area of *terra incognita*. Taking away the necessary aspect of this relationship does not automatically determine that the practical discourse will stop being a legal discourse and will be confined only to the field of ethical discourse. The essence of legal discourse is determined not by the necessity of a direct relationship with the law in force, but by a legally adequate subject of the discourse referring to hard cases in this context.

Third, hard cases occur primarily where there is a clash of the law with other normative systems. Traditionally, it is emphasized that most often it is a question of the relationship that may exist between law and morality. According to some authors, it is this area to which we should apply a much broader understanding of the hard cases issue than is established in contemporary theory and philosophy of law. Although the issue of conflicts of legal norms with moral standards is of paramount importance, at the same time, one can point to other areas where this confrontation may cause significant effects. In each of them, there are examples of widely understood hard cases, as we are faced with having to choose between different rationally justified and legitimate solutions. Thus, it is always a choice between different values; in this context, an argumentative discourse is also an axiological discourse. What is more, these moral dilemmas appear not only when law faces ethics, but also in other areas such as ecology, economics, media, medicine, customs, politics, etc. One cannot obviously overlook hard cases that fit the paradigm defined by the argument between Hart and Dworkin. However, in this case, the matter is not related to a conflict of the law with other normative systems, but paradoxically to a conflict of the law with itself. Finally, we can also come across hard cases, the solving of which will simply require referring to the so called rules of prudence and so called common sense.

Oliver Wendell Holmes, famous judge and one of the founders of American legal realism, wrote in his dissenting opinion attached to the ruling of the US Supreme Court in the *Northern Securities Co. v. United States* case from 1904, "great cases like hard cases

make bad law." In American jurisprudence this sentence was and still is cited so frequently that it can be practically considered a kind of legal topos. According to Holmes, the statement that the hard cases in question make bad law, however, had a specific *hic et nunc* meaning – it meant assuming that the essence of the Common Law is the fact that the judge makes a ruling in a given case first and only then, on its basis, attempts to define the rule. Cases that were grand and spectacular on one hand, yet complicated in terms of ethics and politics on the other, thus made for bad law because they were atypical – rules established on their basis referred to extreme situations and went beyond the standards and needs of the common legal proceedings at the time. Holmes's observations can also be associated with the danger mentioned before by Stelmach and Brożek – the "overproduction" of exceptions to rules.

Nowadays Holmes's thesis is brought up more and more often within the context of complex ethical, political and legal problems, or it is put through substantial verification. Perhaps this is because it is, indeed, the other way round: maybe what makes a good judge or even a good lawyer are actually hard cases? At this point, we shall only state that hard cases imply the didactic value of this part of the philosophy of law, which is a function of a practical mind as defined by Immanuel Kant. For the purpose of this essay, following Dietmar von der Pfordt, it is assumed that the broad meaning of the philosophy of law includes, on one hand, theory of law (a theoretical mind that analyses, generalizes, and systematizes), and, on the other, legal ethics (a practical critical mind). For a lawyer dealing with a hard case, the theory of law is no longer enough, he or she has to refer to the practical mind, *ergo* to the philosophy of law *sensu stricto*.

Hard cases show that there is an immanent relationship between *ius* and *lex* – *ius* without *lex* proves helpless; *lex* without *ius* very often becomes cruel. So what is actually the relationship between law and what can be widely understood as the humanities? What actually is law: also a part of the culture of humanities, or merely a tool of social engineering? Are the problems underlying hard cases just a taboo, which can be broken, or perhaps an archetype we do not want to undermine? Finally, do hard cases really make bad law, or perhaps vice versa, do hard cases make

a good lawyer? It is thus hard not to agree with the opinion of the well-known Australian judge-Michael Kirby that "to judge is to learn," and therefore "formalism, and a purely mechanical approach to judicial function, undermines the true fulfillment of the judicial role." [Kirby, 2007, p. 36]

**Works cited**


Kirby, Michael. 2007. "To Judge Is to Learn," *Harvard International Law Journal*. Vol. 48.

Król, Małgorzata. 1998. "Koncepcje trudnych przypadków a prawomocność." In: *Teoria prawa. Filozofia prawa. Współczesne prawo i prawoznawstwo*. Toruń: Uniwersytet Mikołaja Kopernika.

Stelmach, Jerzy. 2003. *Kodeks argumentacyjny dla prawników*. Kraków: Wolters Kluwer SA.

Wojciechowski, Bartosz. 2004. "Rozstrzyganie tzw. trudnych przypadków poprzez odwołanie się do odpowiedzialności moralnej," *Studia Prawno-Ekonomiczne*. Vol. 70.

Chapter 2

# Great disputes

## 2.1. Hart v. Fuller

**[?] What characterizes the key aspects of the relationship between law and morality?**

The relationship between law and morality is a basic topic of the philosophy of law. The discussion on the relationship between law and morality is made difficult by the ambiguity of the concepts embraced by law and morality. The relationship between law and morality is extremely complex and views on this subject are derived from doctrinal assumptions. An important problem of practical importance is the existence of a subject-matter conflict between a legal norm and a moral norm. In that case a person who addresses a legal and moral norm at the same time is unable to meet either of them, because following the legal norm they are breaking the moral norm and vice versa.

One of the debates on law and morality was the famous polemic between Herbert L.A. Hart and Lon L. Fuller. It is thought to be one of the most important philosophical and legal disputes of the twentieth century. It is based on two articles that appeared on the pages of the *Harvard Law Review* in 1958: "Positivism and Separation of Law and Morals" by Hart and "Positivism and Fidelity to Law – A Reply to Professor Hart" by Fuller. Both philosophers continued the dispute that began on the pages of the *Harvard Law Review* in their later works, contributing to the forming of new fundamental assumptions in legal positivism and non-positivism.

The relationship between law and morality is a rudimentary subject of dispute between legal positivism and doctrines of natural law. In accordance with the generally understood legal positivism, law is legitimized without any reference to values. Doctrines of natural law, on the other hand, recognize the link between legal norms and the rationality of human nature, which is able ob-

jectively to recognize an existing system of values. This doctrine also stresses that the legal system should at least be compliant with the system of moral values. In recent years, however, what has clearly separated itself from the dispute commonly referred to as "legal positivism versus the law of nature" is the "positivism versus non-positivism" debate. While presenting the relationship between law and morality, the following areas should be outlined:

1) differences between legal norms and a moral norms;
2) the systemic relationship between law and morality;
3) the structural relationship between law and morality;
4) the subject-matter relationship between law and morality;
5) functional mechanisms of law and morality.

We can differentiate between legal norms and moral norms by looking at their following qualities: the wording, the origin, the conditions of application, the sanctions for non-compliance, and the way one familiarizes oneself with their contents. Views on the systemic relationship between law and morality, based on the criterion of categorization, can be outlined in three doctrinal positions:

1) the supremacy of law over morality;
2) the supremacy of morality over the law;
3) the autonomy of law and morality.

The structural relationship between law and morality is based on of the fact that normative systems of law and morality are tied to each other – both at the stage of setting the norms and while applying them. Determining the structural relationship between law and morality is a matter of rules of the legal system. Legal systems contain numerous references to moral norms, both direct (for example, general clauses) and indirect (for example, the introduction of value-based terms into legal norms). In addition, what should be noted is the phenomenon of the incorporation of moral principles into the legal system and into the interpretational relationship (the use of ethical principles in the process of interpreting the law). The incorporation of morality into legal norms is based on the inclusion of moral principles to the legal system by, for example, introducing a law, the content of which is the existing moral norm. What is particularly evident is the incorporation of moral norms into contemporary systems of human rights protection. Human rights are actually defined as

a manifestation of natural laws, or, in a way, also as a manifestation of what can be widely understood as morality, within the legal system.

Looking at the dependencies in terms of content between law and morality, one should analyze the subjective and the objective aspect of legal and moral norms. The criterion of the subject includes the addressees of norms. In the case of legal norms, a given group of addressees means legal subjects in general (individuals, legal entities, so-called unincorporated legal entities). Moral norms, on the other hand, are directed only towards individuals. The criterion of the subject of this division is based on drawing attention to the substantive scope of the regulation of legal and moral norms, as well as their interaction. Traditionally, two competitive theories are outlined: 1) the inclusion of norms, and 2) the crossing over of norms.

Frequently, the content of legal norms coincides with corresponding moral norms. However, moral norms often prove more demanding than legal norms and sometimes are even indifferent to the behavior sanctioned by the law or evaluate it in a completely different way. Hence a popular view is to assume that the content of legal norms should comply as much as possible with moral norms accepted by society. It should be pointed out that one of the most interesting contemporary phenomena associated with an individual objecting a legal norm, the content of which he/she finds unacceptable, is so-called civil disobedience.

The functional relationship of law and morality is based on their mutual and actual effect on society. On one hand, law opens itself up to moral norms; on the other hand, it can lead to their weakening. The connection between law and social changes that occur in reality is an important aspect of the existence of the law. The material content of the law is, on one hand, a reflection of the changes occurring within society, including the area of a broadly defined morality; on the other, it is an agent of initiation and application of these changes. In this context, we can distinguish the adaptive function that law holds over morality, when the law adjusts to the moral norms that are in force within society, and the modernizing function of the law, which enables the law to be ahead of changes in morality, to create and

to shape them. It must also be emphasized that the impact of the law on the area of morality does not only concern people's external behavior. The law equally shapes human inner experience, human relationships, evaluations, attitudes, and decision making. M. Cieslak, however, very accurately perceives that – unlike morality – law is purely social, because it "does not deal with the acts of a human being in relation to him/herself." The impact of the law on morality can be defined as a social and ethical function of the law, in which legal norms, on one hand, acquire the content of moral norms within a certain range, and, on the other, they themselves shape and support relevant assessments and norms of a moral character in the public awareness.

Jerzy Zajadło outlines four currently dominant theoretical approaches towards the problem of the relationship between law and morality. These are:

1) ethical and legal nihilism, negating the existence of any relationship between law and morality;
2) ethical and legal reductionism, seeking to minimize the relationship between law and morality, deeming it undesirable and unnecessary;
3) ethical and legal normativism, assuming the usefulness of the relationship between law and morality, even when it is not necessary;
4) ethical and legal essentialism, assuming the existence of numerous relationships between law and morality and their necessity.

As some of the most frequently raised contemporary issues of an ethical and legal nature, one should mention the controversy that surrounds, among other things, the death penalty, abortion, euthanasia, legalizing civil partnerships, and animal rights.

### [?] What are the main themes and viewpoints in the debate between H.L.A. Hart and L.L Fuller?

One of the most famous disputes concerning the relationship between law and morality is the Hart v. Fuller debate. It is based on two articles that appeared on the pages of the *Harvard Law Review* in 1958: Hart's "Positivism and Separation of Law and Morals" and Fuller's "Positivism and Fidelity to Law: A Reply to Profes-

sor Hart." Both philosophers continued the dispute that began on the pages of the *Harvard Law Review* in their later works, contributing to the forming of new fundamental assumptions within legal positivism and non-positivism. The most important topic of the Hart v. Fuller debate was determining the relationship between legal norms and moral norms. The Hart v. Fuller debate took place in a unique historical context in which the experience of war, a period of unprecedented contempt for the fundamental rights of human beings, was still recent and vivid. Its content directly refers to the experience of World War II.

The pretext for the debate was how to settle the past in terms of criminal law by post-war German courts. Indeed, the post-war period was a time of significant transition from war to peace that included the necessary resolving of the criminal past, especially the Nazi legal system. It is worth noting that in periods of rapid political transformation, it is common to refer to natural law, to go beyond the positivist conception of the law. On the other hand, on should not overestimate the direct impact of the political situation and the critical political views at the time on shaping the beliefs of Hart and Fuller. For example, what Tokarczyk rightly notes in reference to Fuller, is that the important impact of the political context of the post-war bringing of the totalitarian lawlessness of World War II to justice, significantly diminishes when one considers the fact that his views were formed on American soil.

An important point of contention in the Hart v. Fuller debate was the view on a specific case of making the past face criminal justice after World War II. One of the key aspects of the discussion was to consider a specific case of the criminal liability of the informer in post-war Germany. German courts brought criminal charges against a woman, who during World War II had denounced her husband before the Nazi authorities for expressing malicious opinions about Hitler. The denunciation led to a death penalty conviction in accordance with the Nazi legislation that was in force at the time. However, the sentence was not carried out and the convict was sent to fight in the war. After the war, the woman was judged as criminally liable, although by denouncing her husband she had, in fact, acted in accordance with the law that was in force in the Third Reich. Hart explains the facts of the case as follows:

> In 1944 a woman, wishing to be rid of her husband, denounced him to the authorities for insulting remarks he had made about Hitler while home on leave from the German army. The wife was under no legal duty to report his act, though what he had said was apparently in violation of statutes making it illegal to make statements detrimental to the government of the Third Reich or to impair by any means the military defense of the German people. The husband was arrested and sentenced to death, apparently pursuant to these statutes, though he was not executed but was sent to the front. In 1949 the wife was prosecuted in a West German court for an offense which we would describe as illegally depriving a person of his freedom (*rechtswidrige Freiheitsberaubung*). This was punishable as a crime under the German Criminal Code of 1871 which had remained in force continuously since it enactment. The wife pleaded that her husband's imprisonment was pursuant to the Nazi statutes and hence that she had committed no crime. The court of appeal to which the case ultimately came held that the wife was guilty of procuring the deprivation of her husband's liberty by denouncing him to the German courts, even though he had been sentenced by a court for having violated a statute, since, to quote the words of the court, the statute "was contrary to the sound conscience and sense of justice of all decent human beings." This reasoning was followed in many cases which have been hailed as a triumph of the doctrines of natural law and signaling the overthrow of positivism. [Hart, 1958, p. 618-619]

Hart strongly criticized the decision of the German court, like other similar rulings at that time, pointing out that the Nazi law was in fact legally binding and cannot be considered invalid because of its immoral, unjust, or even draconian content. In his analysis, Hart strongly appealed to the post-war views of Gustav Radbruch, a German philosopher of law, the creator of the famous concept of the statutory lawlessness and supra-statutory law, referred to in literature as Radbruch formula.

In Hart's opinion, by convicting the informer the German court stated that the Nazi law is invalid because of its conflict with natural law. Despite the fact that this view was a result of a mistake (in fact according to the Bamberg court, the rulings of the Nazi courts were consistent with the law in force at the time, which did not automatically exclude the possibility of pursuing criminal prosecution in accordance with the new legal system), this led to

Hart's formulating a thesis, according to which we can either assume the lawfulness and impunity of the actions of the accused in the aforementioned case, or we should accept retroactive criminal legislation. However, the validity of the Nazi legislation cannot be denied only because it was criticized for its immorality. Hart argued that the actions of the informant wife were lawful at the time they were carried out; thus, the only way to treat them as basis for criminal responsibility is enacting retroactive legislation. Any other approach to the problem, especially claiming that the Nazi laws were not applicable because of their immoral character, in his opinion, meant mistaking the notion of the law for the assessment of the law in terms of its moral or immoral content.

Hart argued that the relationship between law and morality is not necessary, and what he suggested was based on assuming the existence of two fundamental concepts of law – the narrow concept of law and the wider concept of law. In his view, laws of nature operate using the wider concept of law, assuming an ethical and legal essentialism; legal positivism, however, goes beyond the wider concept of law, according to which the law is made of rules that have been formally established and are effective despite their moral or even immoral content.

Thus Hart, the creator of the modern concept of legal positivism, adopted a position according to which law and morality do not necessarily have to be linked. Even if the law is wrong, unjust, and immoral, it remains the law. He takes into account its potential violations, but excludes the possibility of contesting its legal status. He agrees fully with the view of Austin, according to which "the existence of the law is one thing, but the value of the law, or the lack of it – is another." Hart did not deny that, in fact, the relationship between legal and moral norms often does exist, but in his opinion they are not relevant to recognizing the norms as binding. Consequently, mixing law with morality, despite the similarities between them, is not right and should be rejected. The validity of the law should depend only on its being established in an appropriate procedure by an authorized entity.

According to Hart, every legal system can function effectively, even if it is unjust or considered simply immoral. The law of the Nazi regime serves here as the best example. The injustice and

depravity of humanity at that time, however, cannot be – as critics of positivism see it – a direct result of legal positivism. According to Hart, opponents of legal positivism, first, incorrectly simplify the positivist outlook on law making positivism responsible for downgrading legal norms to only orders, and, second, unjustifiably combine statements referring to what the law should be with a discussion on the essence of the law as such.

Fuller stepped forward with a criticism of Hart's views. He was strongly opposed to the separation of obligation from being. What was extremely important for Fuller was the idea of being loyal to the law, which cannot be limited only to determining what the law is, but must also seek an answer to the question of "what good law is." One, therefore, cannot be limited to stating that "law existed in the Nazi system, even if it was bad law." This is so because, first, this observation in no way reflects the true nature of the Nazi law, and second, Nazi law did not even meet the formal requirements generally proclaimed by the legal positivists. Fuller then concludes that the Nazi law cannot be qualified as law arguing that Hart is too quick to acknowledge the lawfulness of morally abhorrent deeds. Referring to the case of the criminal liability of the informer that was the subject of the polemic with Hart, although Fuller emphasizes the shortcomings of the Nazi legal system, he – like Hart – points to the purposefulness of retroactive criminal legislation. Later, Fuller presents in detail his suggestions for possible ways of bringing the past to justice, using the fictional example of the regime of the Purple Shirts.

According to Fuller, given the purposefulness of the law, it cannot be understood without combining its description and evaluation at the same time. According to Fuller, Hart ignores the purposefulness of the law, or to say the least, does not give it due attention. If Hart duly took into account the role of the purposefulness of the law, he could not maintain his methodological view on the separation of obligation from being, or in other words, description from evaluation. Fuller argues that the law is, above all, a purposeful undertaking which seeks to subject human behavior to certain rules. Therefore, what is far more important than the ontological definition of the law is to seek an answer to the question of "what is good law?" In his opinion, this is what fidel-

ity to the law is based on, and this does not allow the conclusion that there was law in the Nazi system, not even bad, draconian, and malicious law.

According to Fuller, what is most important is the so called internal morality of the law, because it determines how the principles of legality should be constituted and how to apply them. His concept of *the law of morality* is a special kind of doctrine of the law of nature. Fuller presented eight requirements for the construction and application of the system of rules, the fulfillment of which allows one to consider it a legal system. These requirements (of the law of morality) can be briefly outlined as follows:

1) generality of the law;
2) public promulgation of the law;
3) no retroactive law (some exceptions are allowed);
4) clarity of the law;
5) lack of contradictions within the law;
6) possibility of obeying the law;
7) constancy of the law (no frequent changes);
8) accord between the actions of public institutions and the law.

**[?] What is the significance of the dispute between Hart and Fuller for the contemporary philosophy of law?**

Most importantly, the Hart v. Fuller debate played a part in forming new fundamental postulates of legal positivism and non-positivism. Many authors have noted that the positions represented by the two scholars contradict each other, yet are equally necessary. Furthermore, this debate, the most famous lawyers' dispute of the last century, has become a subject of keen interest of jurisprudence in Common Law countries and has become an important part of legal education. Discussion of the Hart v. Fuller debate went far beyond the original bounds of the dispute. Jerzy Zajadło indicates that today, fifty years after the debate, one can point to four important effects of the dispute that have made a mark on the current problems of jurisprudence. These are: first, creating new dynamics and shapes of disputes between positivists and the advocates of the concept of natural law, and thus opening the possibility of a search for the so-called third way;

second, creating an alternative to the extreme directions of legal immoralism and legal moralism; third, bringing out the diversity of the problems associated with rapid transformations of the legal system, for example, those associated with the phenomenon of transformational justice; fourth, an awareness of the recentness of questions concerning the essence of the law, not only in times of evident and blatant conflict of statute law with human rights in a broad context, especially in countries with a totalitarian past, but also in connection with various phenomena occurring in stable democratic countries that negate the heritage of human rights protection, such as the attempt to legalize torture.

**Works cited**

Hart, Herbert L.A. 1958. "Positivism and the Separation of Law and Morals," *Harvard Law Review*. Vol. 71. No. 4.

## 2.2. Hart v. Devlin

**[?] What was the story behind the dispute between Hart and Patrick Devlin?**

The relation of law and morality has been a subject of interest for the philosophy of law since the inception of the discipline, and it would seem that any doubts in this matter should have already been resolved a long time ago. However, it turns out that discussions on this topic never lose their current relevance. Among many of the questions asked, the ones which deserve most attention are on the topic of morality being imposed by law. In many cases legal norms are exact copies of moral norms, regardless of how widely they are accepted. On one hand, this facilitates the entrenchment of these rules by sanction, and on the other hand, they attain the rank of a legal duty. However, it sometimes happens that a law will serve to impose such duties upon an individual, willing or not, aimed to serve their well-being. The approval of such a view leads to many questions – should law reflect morality at all? If so, then to what extent, and what about the moral norms accepted only by a certain part of society? Is it certain that we are allowed to impose them? Should law change as moral values do?

One attempt at answering these questions was the well-known heated discussion between and Lord Patrick Devlin, which flared up in the 1950s and 1960s after the publication of the Wolfenden Report. The grounds for this debate were provided by Devlin's *The Enforcement of Morals*, a lecture later broadened and published in book form, and *Immorality and Treason*, as well as *Law, Liberty and Morality* by Hart. This discussion has not lost its current relevance and the question of distinguishing the limits of acceptability for the use of law in the enforcement of certain ethical judgments and evaluations remains one of the most frequently discussed problems in philosophy of law.

In the early 1950s, the Committee on Homosexual Offences and Prostitution was established after a succession of well-known British men were convicted of homosexual offences. The Committee was tasked with setting the direction of change for criminal law in respect of punishing certain offences against decency. The Wolfenden Report (1957), named after the chairman of the Committee, recommended that homosexual behavior between consenting adults in private should no longer be a criminal offence. The report also suggested a stricter criminal justice policy towards prostitution. Although it took ten years for this recommendation to be implemented, the Report included a remark that the role of criminal law in the field discussed by the Committee, so in the domain of widely understood decency, is "to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young wak in body or mind, inexperienced, or in a state of special physical, official or economic dependence." [The Wolfenden Report, 1957, pp. 9–10] Thus private morality and immorality *are not the law's business*.

The first to comment on the Report's recommendations was Lord Patrick Devlin who was strongly against the reform of British criminal law. Hart, on the other hand, supported the conclusions of the Report and attacked Devlin's stance, thereby sparking the above-mentioned exchange of views.

**[?] What were the main views held by Devlin?**

First of all, Devlin disagreed with the "harm principle" being used as the foundation for criminal law, as was mentioned in the Report. The principle, articulated by John Stuart Mill, holds that the only justifiable purpose for limiting the actions (freedom of choice of behavior) of others by law is to prevent harm to other individuals. Therefore, each individual answers to society only for the actions which directly concern others, that is, that disturb their freedom.

However, Devlin argued that since criminal law also penalizes conduct which results in no harm to others (for example suicide, which was a crime in the UK until the 1960s), then in reality its role is to protect any values which, in accordance with the ideals of democracy, express the will of the majority. Society does not only create the administration of a state, but above all, it creates a collection of ideals (political, cultural, moral) in which some values simply must be protected by law, and their violation is treated as an act of hostility against the public. That is also why each individual – regardless of one's personal views – must accept them, if the individual wants to function within a given society.

It should be clearly noted that Devlin denied the existence of an exclusively private sphere, since every action was to be, to some extent, a matter of public interest. However, this public morality (though it would seem more fitting to call it the dominant morality) was to bind and connect society, like some seamless web, conditioning its creation and continued existence. This argument was defined as the "Separation Thesis" by Hart, and almost instantly became the source of the criticism of Devlin's views.

The content of common morality has not been determined in any way, because, according to Devlin, distinguishing any boundaries to define it is impossible. He only indicated that immoral behavior is met with intolerance, outrage, and disgust, and that these feelings should be strong enough to be considered significant. The moral disapproval justifying the criminalization of an act must have been a phenomenon of appropriate intensity. Because such judgment belongs to the sphere of emotions, and is characterized by a considerable degree of subjectivity, the

most appropriate outlook was to belong to the average man on the street, the so-called man on the Clapham omnibus.

In answer to the question whether shared morality changes or not, Devlin admitted that its contents can undergo change and that happens with regard to the state of knowledge, the passage of time, or social changes. At the same time, he stressed that a reasonable legislator will respond to such changes with an appropriate level of caution and on every occasion will balance the shifting borders of tolerance with the need to sustain the integrity of society, because the second value – the protection of society – is much more important that any of individual rights. Criminal law was, above all, meant to set the minimum for citizens, and not to force any form of moral perfectionism upon them. Therefore, Devlin treats it instrumentally – as a tool in the hands of a society fighting for its survival.

**[?] What accusations did Hart and Dworkin level against Devlin's ideas?**

Such an understanding of legal moralism – a view allowing the use of means of penal repression to induce behavior which is generally accepted as in line with common morality in order to maintain the unity of an organization, and in a stricter sense, a view which allows the penalization of immoral conduct, regardless of whether it causes any damage to others – was met with overwhelming criticism by the majority of scholars in contemporary legal studies. The strongest objection was voiced by the British professor Herbert L.A. Hart who provided very harsh criticism of most of Devlin's statements, though his critique slightly softened later. Hart referred primarily to the three main premises of Devlin's theory.

The starting point and at the same time the most controversial of his statements is the social disintegration thesis. Hart accuses Devlin of not presenting any arguments in support of this thesis, and of referring only to generalities. According to Hart, Devlin treats his thesis as an empirical statement, whereas there is no historical record showing that derogating from a generally accepted sexual morality poses any danger to the existence of any societies. Devlin also fails to provide proof, and so Hart states,

with the use of a strikingly eloquent metaphor, that Devlin's position is as unconvincing as the Roman emperor Justinian's claim that homosexuality is the cause of earthquakes.

Initially, Hart also categorically rejected the notion of the necessity of a shared morality within a society perceived as an entirety of ethical norms accepted in a given time and place, while at the same time conditioning the continued existence of the said society. Later on, he finally agreed that a kind of consensus can be observed, but it cannot incorporate the entire canon of values but only the most fundamental issues, identified later as the minimum content of natural law. Considering these values in a comprehensive way would have to lead to the conclusion that norms and judgments have a fixed, unchanging value, and so, any modification of them would lead to the disintegration and collapse of some social organisms and the possible emergence of new ones in their place. Meanwhile, in Hart's opinion, the violation or even modification of moral norms does not necessarily have to lead to the disintegration of society, but may even accelerate its development. Many moralities can exist side by side within a society while tolerating each other. It should be noted that Hart admits that the theories of imposing morality could prove to be successful in some societies, namely, ones with a high degree of homogeneity concerning morals. This, however, is rare.

When it comes to the issue of determining the content of a common moral minimum, Hart, as the heir of utilitarianism, refers to the earlier mentioned concept of harm by J.S. Mill. Stressing the need for a critical explanation of the basis of all moral norms, Hart criticizes Devlin for not being able to distinguish the difference between actions performed "at home" and those which take place openly, in the public domain, and that he treats them in a uniform way. Meanwhile, positive morality (defined as generally accepted norms regarding good and evil, which, however, are not made by the legislator) was to Hart something completely different from general morality as seen by Devlin. These sets (of values) do not need to have the same content at all. Finally, Hart criticizes Devlin for not understanding the principles of democracy and labels his proposed version of morality as populism in law. In his opinion, when formulating the concept

of a common morality, Devlin confuses the assertion that power belongs to the majority, with the notion of the infallibility of the said majority.

A similar opinion regarding Devlin's view was held by Ronald Dworkin, who used his stance to formulate the so-called "conservative thesis," according to which the public has the right to defend, by the use of law, those institutions which are assigned a certain moral value, and in this sense the will of the majority should be decisive for the legislator. Nevertheless, Dworkin notes that moral judgments are often based on prejudice, thoughtless reactions, or false incentives; therefore, the lack of approval of certain behaviors is not necessarily caused by categorizing them as immoral and dangerous to society. Deciphering the content of common morality, therefore, requires reflection as to whether there are any moral convictions, rules that underlie the approval and disapproval of certain behavior, and whether these beliefs are universal. According to Dworkin, they are what creates the morality of a society, which Devlin wanted to protect with the help of criminal law.

**[?] What importance does this debate hold today?**

For over half a century, there was a consensus that much might be said on both sides of the argument, but, in the opinion of the majority of authors, Hart emerged as the victor of the discussion. At the same time, the social and cultural transformations of the twentieth century, which rejected religious values and gave prominence to liberalism and ideological pluralism, seem to confirm this view, as the concerns about the imminent collapse of societies in which a so-called common morality is subject to gradual deregulation do not seem to be coming true. However, what deserves mention is that Devlin avoided references to metaphysics and hardly appealed to religious truths in his rhetoric, which makes his standpoint highly versatile. The arguments presented by both lawyers remain valid not only in certain, morally controversial cases regarding the private sphere, but also in any hard case. These arguments can be raised in almost every discussion about the enforcement of morality by law (for example, while discussing the admissibility of euthanasia or abortion,

the legalization of certain kinds of narcotics, the legitimization of humanitarian intervention, or even the introduction of emission standards for the amount of pollutants released into the environment).

## Works cited

The Wolfenden Report. 1964. Report of the Committee on the Homosexual Offences and Prostitution, with introduction by Karl Menniger M.D. New York: Lancer Books.

Chapter 3

# Law's conflict with law

## 3.1. The plank of Carneades

**[?] What lies beneath the concept of "the plank of Carneades of Cyrene"?**

Around 156–155 BC whilst participating in the Athenian embassy in Rome, the Greek rhetorician and sophist Carneades of Cyrene (219–129 BCE) delivered two famous speeches about justice. In the first speech he glorified justice as evidence of prudence because of its care for others as well as because of its ability to rise above one's own interests. In his second speech, he condemned it and ascribed to it relations with stupidity, hypocrisy, and guise, and blamed it for allowing dishonesty to be taken as a virtue. The ability to balance arguments for and against, as well as an ability to illustrate his lectures with colorful examples, brought Carneades admiration and respect, and his views were often recalled and assured his fame.

One of the most famous excerpts that illustrate the speeches mentioned above is the philosophical-legal experiment commonly referred to as "the plank of Carneades." This *hard case*, as we would say today, is a classical illustration of the state of necessity, the struggle of two shipwrecked persons, two survivors of a maritime disaster in a situation where only one may be saved by a drifting plank. The main ethical dilemma concerns the answer to the question about the permissibility and legality of killing another person to save one's own life.

**[?] How does Carneades present the "factual state" of the famous case and how does he judge the shipwrecked persons' actions?**

Carneades himself did not leave behind any written works. The mentioned story is known to us primarily thanks to Cicero who

referred to this example in one of his most important philosophical treaty *De Officiis* and most likely in *De Re Publica*; however the main parts of the second treatise have not survived to this day.

Carneades is supposed to have used the following example:

On the open sea, far from land, a catastrophe takes place; only two men survive. On the water" surface near the survivors there floats a plank capable of supporting the weight of only one of them (*tabula naufragio duorum non capax*). It is clear that the shipwrecked men s will soon weaken and will not last long enough for rescue to come. So only the one who manages to stay on the piece of wood, will have the chance to wait for rescue. The first man swims to the piece of wood and supports himself on it. However he notices that the second survivor is heading towards the same plank. Realizing his uncertain fate, the first survivor hits the other a forceful blow, knocking his fellow survivor out, pushes him off the piece of wood, and the weaker of the two immediately disappears into the abyss of the sea.

Using this example Carneades proves that the just and good man may be unreasonable, and the prudent man may be wicked. The use of force toward another person, and even more causing his/her death, certainly constitutes a lawless act, and thus violates the virtue of justice. However, if the stronger of the shipwrecked men had not used violence against the second survivor, he would certainly have to be described as a just man, but also a stupid one, since he would not have paid due respect to his own life. At the same time, it must be underlined that Carneades as a skeptic who questioned whether empirical knowledge about reality was possible and refused to evaluate it in categories of truth or falsehood, does not prejudge whether people will never and at any cost try to avoid another's harm. In his case, however, Carneades completely ignores any other possible ways of behaving.

### [?] What are Immanuel Kant's thoughts on "the plank of Carneades?"

Immanuel Kant (1724–1804) achieved a more thorough analysis of this case in his *Metaphysics of Morals*, grasping *ius necessitatis* in a way similar to representatives of modern criminal law studies. One must remember that Kant would connect the concept of

law, on one hand, to a sense of inner duty, and on the other hand, to the existence of state coercion (*ius strictum*). Above all, law was meant to prevent illegal intervention of some into the common and primary freedom entitled to others by virtue of their humanity. However, Kant accepted the existence of less strict laws, free from coercion. These are: equity (*Billigkeit*), understood as a duty to compensate for harms done and to offset losses; and right exercised in a state of extreme necessity (*Notrecht*). The first assumes law without coercion; the second assumes coercion without law. In both cases, behaviors undertaken for appropriate and higher motives will achieve these.

Let us leave restorative justice beyond the scope of this discussion, in order to explain that law under extremely dangerous circumstances, according to Kant, should allow one to attack another, even if the latter did no harm. There is also no mention of an attacker, unlawfully seeking somebody's life, whose imminent attack could be diverted only if the intended victim attacks first, so there is actually no threat of causing harm. For these reasons *ius necessitatis* is subjective and requires the court to apply law "with reason." Therefore, according to Kant, an act committed by the stronger of the survivors with the intent to stay alive cannot be considered guilt-free (*inculpabile*), but unpunished (*impunibile)* at most. In the case described above, while taking the life of the weaker of the survivors, the protagonist could expect the court to understand the difficult circumstances, take into consideration the fact that he was guided only by his survival instinct, and there was no other possibility to his actions. Because necessity has no law, *necessitas non habet legem,* according to Kant, the stronger of the survivors should not be punished at all. It is not acceptable for the law established by government and provided with criminal sanction to force people to perform heroic actions.

### [?] What axiological problems of a state of necessity can be inferred from the "plank of Carneades" dilemma?

As indicated by criminal law specialists, the classic "plank of Carneades" dilemma today appears most often, for example, in cases of Siamese twins whose separation may involve the necessity of sacrificing the life of one of the siblings, or the so-called ticking

bomb scenario, where the admissibility of sacrificing the life of a group of people taken hostage by terrorists in order to save the lives of others is considered. Many potential cases of necessity are considered to be examples of hard cases, in which the typical legal argumentation collides with morality and the necessity of justice, which is often demanded by a public opinion that is outraged by the crime. Despite the fact that the assessment presented above does not cause for much controversy and the doctrine of necessity can be found in almost any currently applicable criminal laws, an analysis of court decisions shows that applying it in practice is extremely rare. The reason for this is that it is often accompanied by numerous philosophical and legal problems, referring mostly to prioritizing some goods over others.

The fundamental problem, thus, concerns the prioritization of legally protected goods. Undoubtedly, different legal goods, as culturally conditioned values that have been formed under the influence of factors such as the historical past, the socio-economic situation, human relationships, the political system and the system of exercising power, carry different weight and very often are of a different character. We can distinguish between tangible and intangible, joint, collective, and individual goods. Some of them are easier to compare (for example, tangible assets), although, even in this case, using a simple economical profit and loss statement is unacceptable, as it could lead to turning the legal norm that protects one of the goods of lesser importance into an empty norm. It is hard, however, to consider the rest of them measurable (especially intangible assets – life, health, dignity), and even within a single coherent legal system, it is extremely difficult or even impossible to determine their hierarchy. Nonetheless, there is a consensus about the fact that the most important good to be protected is human life and health, but in a situation where personal freedom competes with public safety the answer is not that obvious. This is because the law generally does not contain any direct guidance on the criteria for determining the hierarchy of legal goods, and the authority applying the law approaches it *ad casum* referring to, for example, axiological preferences of the legislator, constitutional semantics, criminal law, analysis of possible punishment for violating various norms, and criminal policy of the state.

In the case of "plank of Carneades," mentioned at the beginning, we are dealing with an even more complex situation because there are two goods of the same kind and the same character competing with each other – namely human lives. One of the survivors resorting to violence against the other survivor undoubtedly acts with the intent to deprive his "competitor" of life. His intention is to make the latter not reach or not hold on to a drifting piece of wood, which means his inevitable death. At first glance, the survivor, therefore, commits murder or agrees to murder being committed. But could the tragic circumstances of the maritime disaster justify his line of defense based on the state of necessity if the case was tried in a current Polish criminal court?

Article 26 of the Polish Penal Code states that: "It is not considered a crime, when a person is acting to stop the imminent danger that could harm any legally protected good, if the danger cannot be avoided and the good to be sacrificed is of lower value than the good saved" (para. 1). It continues: "It is also not considered a crime, when while trying to save legally protected good in a situation specified by para. 1, a person sacrifices a good that is not of obviously higher value than the good being saved" (para. 2). From the point of view of the legal character of this institution, in the first case we would be dealing with exceptional circumstances excluding the unlawfulness of the act under the Penal Code; in the second case, on the other hand, the state of necessity excludes criminal responsibility.

In the first place, one must ask if case outlined by Carneades in his Roman speeches includes other grounds for pursuing the suggested line of defense, that is, whether there was a danger that threatened a legally protected good, and if so, was the danger imminent, was it not possible to divert it in any other way but to sacrifice the legally protected asset, was this action really intended to divert the danger, and what relationship remains between the goods being saved and being sacrificed?

The danger is meant as an objective, not imaginary, state in which there is a probability of depletion of a legal good. Because the situation in question concerns a survivor who pushes his opponent off a plank, the good at stake here is the life of the stronger survivor, which is protected under Polish law by the norm

contained in art. 38 of the Constitution. The danger here stems from a sudden and unforeseen event, a maritime disaster, which took place away from the mainland in an unspecified location. The risk of drowning of a person without a vest or other safety equipment is then imminent and direct – a delay in taking any action could result in the survivor's drowning. It is impossible to determine if and when help might arrive, and it is clear that fighting the waves and ocean currents will result in loss of strength and, consequently, in speedy loss of life. Apart from a drifting piece of wood, which can keep only one person from drowning, there are no other elements that could serve as support for the tired victims of the catastrophe. The main actor of this case can also fear that the other survivor will try to take away his place on the plank when he reaches it. Thus what seems to be the correct conclusion is that pushing one of the survivors off is actually the only action that in this situation serves the purpose of taking hold of the drifting plank, which in turn increases the chances of living to see possible help arrive and of surviving this tragic situation. Taking such action, although morally reprehensible, is to avoid negative consequences that endanger a legal good – human life – as a result of an objective danger.

What remains unsolved is the matter of the conflicting goods. Even at first glance it can be determined that we are not dealing with a situation specified in art. 26 para. 1 of the Penal Code, as the good being saved does not have a lower value than the asset being sacrificed. They both have the same value. In order to save one life, the other is put at risk. Here, it should be noted that according to some representatives of the doctrine, a legislator using the definition of a legal good cited above, uses a term that is too broad and for these reasons they advocate interpreting the principle of proportionality as proportionality of damages. Then we would have to, or could, come to the conclusion that taking the life of a weaker survivor will constitute less damage than two people drowning. The death of one of the survivors would, therefore, be less "valuable" than losing both survivors of the maritime catastrophe. However, this view cannot be accepted and it seems that it has clearly also been excluded by the judicature. Human life is a priority, and any relativization is unacceptable. Life cannot, therefore, be subject to evaluation based on age, health

status, potential chances of survival, or any other qualitative and quantitative criteria. A different interpretation of art. 26 of the Penal Code would violate the principle of proportionality and disparage the absolute respect for human dignity, which naturally demonstrates the need for protection of human life.

By fully accepting the notion of the equal value of human life, we must conclude that the behavior of the stronger survivor is not a crime because we cannot deem him guilty (art. 26 para. 2 of the Penal Code). This law regulates situations where there is no disproportion between the values of the protected goods, that is, the goods are of the same value, and when the sacrificed good is more valuable than the one being saved, but when this difference is not visible (obvious) in a dynamic situation in which is the offender at the moment of his action or inaction. The inability to deem the survivor guilty should be justified in this case by an abnormal motivational situation, which includes the first shipwrecked person's being driven by his instinct for survival. All the more is this so because he had to face the fear of the approaching "competitor's" rendering him unconscious and condemning him to certain death.

To conclude the foregoing discussion, it should be noted that the act committed in a state of necessity under art. 26 para. 2 of the Penal Code, despite the inability to deem someone guilty of it, remains an unlawful act. It is an attack on a legally protected good (it is human life that is being attacked, after all), against which one is entitled to undertake self-defense. Releasing the stronger of the survivors of criminal responsibility does not automatically mean that the weaker one is doomed and should blindly surrender to his fate.

## 3.2. Radbruch's Formula

**[?] What is the content and the internal-structure of the Radbruch formula?**

German lawyer and politician Gustav Radbruch (1878–1949), considered to be one of the leading representatives of legal positivism during the interwar period, somewhat modified his position under the influence of his experience with Nazi lawlessness, and

after 1945 he became more of a supporter of the concept of natural law. Whether or not Radbruch had actually switched from legal positivism to natural law is, in contemporary philosophy of law, a subject of fundamental dispute. In 1946, Radbruch published in the *Süddeutsche-Zeitung Juristen* a now legendary article under a very significant title "Statutory Lawlessness and Supra-Statutory Law" (*Gesetzliches Unrecht und übergesetliches Recht*), in which he presented a critique of legal positivism. It creates a philosophical and legal construction, which in modern scholarship is called the Radbruch formula.

What is considered Radbruch's formula in a broad sense are the following excerpt from the 1946 article Statutory Lawlessness and Supra-Statutory Law":

> The conflict between justice and legal certainty may well be resolved in this way: The positive law, secured by legislation and power, takes precedence even when its content is unjust anfd fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statut, as 'flawed law', must yield to justice. It is impossible to draw a sharper line between cases of statutory lawlessness and statutes that are valid despite their flaws. One line of distinction, however, can be drawn with utmost clarity: Whrere there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely 'flawed law', it lacks completely the very nature of law […]. Positivism, with its principle that 'a law is a law', has in fact rendered the German legal professuion defenceless against statutes that are arbitrary and criminal. [Radbruch, 2006, p. 6f.]

Contemporary philosophy of law assumes that we are dealing here with three interrelated claims:

1) the thesis of flagrant contradiction (*Unerträglichkeitsthese*);
2) the thesis of the lack of legal character (*Verleugnungsthese*);
3) the thesis of the defenseless of lawyers (*Wehrlosigkeitsthese*).

According to Radbruch (thesis 1) the idea of law consists of three basic values: legal certainty, purposiveness, and justice. However, there can be conflicts between these values occurring not only in totalitarian systems, but also under the rule of law. Under normal circumstances, they will be actually resolved by a lawyer in favor

of legal certainty. Sometimes, however, this inner-contradiction is so blatant and reaches such an "intolerable" level (*Unerträglichkeit*) that primacy should be given to the idea of justice.

Under the Nazi state (thesis 2), we were dealing, not only with such conflicts, but sometimes also with deliberate actions of the legislature aimed at violating the fundamental principles of justice, especially the principle of equality (for example, the racist Nuremberg laws). In this case, it is not only a matter of granting justice primacy, but in general, about acknowledging that the established norm should be denied any legal character (*Verleugnung*).

According to Radbruch (thesis 3), German lawyers were brought up in a spirit of absolute obedience to law as an extreme version of legal positivism (so-called *Gesetzespositivismus*) for decades. This particular positivist education made them defenseless (*Wehrlosigkeit*) in the face of laws that were wrong or even criminal.

**[?] What is the philosophical and legal importance of the elements of Radbruch formula?**

From the point of view of the long history of philosophy of law, theses 1 and 2 were not, in fact, anything original, as the issues raised in them have long been known. This was reflected, for example, in the Latin maxim *lex iniusta non est lex* (an unjust law is no law at all) formulated by St. Augustine. Thesis 3, on the other hand, is widely recognized as historically unjustified and wrong, because the causes of Nazi lawlessness were much more complex and can hardly be reduced to the disadvantages of a positivist education. Moreover, contrary to popular belief, legal positivism was not at all the dominant legal doctrine among German lawyers during the Weimar Republic, and especially not during the Third Reich. Still, the Radbruch formula is very popular in contemporary philosophy of law, which can be explained, on one hand, by the specific circumstances of the time and place of its origin, and on the other, by the unique personality of its creator. Besides, it is used in the process of putting aside the somewhat outdated "natural law versus legal positivism" dilemma, and in creating a modern paradigm of the relationship between law

and morality. This can be observed especially clearly in the famous Hart-Fuller dispute.

**[?] How was the Radbruch formula used in the jurisprudence of German courts in the so-called Berlin Wall shootings case?**

The specificity of the Radbruch formula is based, among other things, on the fact that as a philosophical and legal construct it was directly used in the jurisprudence of German courts in the process of coming to terms with the criminal past – after 1945 with the Nazi past, and after 1990 with the communist past. In contemporary philosophy of law, it provides a basis for criticism of legal positivism based on the so-called argument of lawlessness. However, it should be emphasized that use of the formula is increasingly limited to thesis 1, since thesis 2 has limited theoretical values because of the assumed deliberate intent of the legislator, and thesis 3, on the other hand, is not entirely historically accurate.

As such (thesis 1), the Radbruch formula was used by German courts in the 1990s in the process of bringing the communist past to justice. Here, it is a matter of the trials of persons responsible for conducting a particular regime on the German-German border during the 1945–1990 period, especially after the building of the Berlin Wall in 1961. This applied to various levels of authority of the former GDR – ranging from simple soldiers to their direct commanders, and on to the members of the National Defense Council and the Politburo of the SED (in the so-called *Mauerschützenprozesse*). In the justifications of many rulings, German courts referred directly to the Radbruch formula in terms of its *Unerträglichkeitsthese* (thesis 1), at the same time relying on a so-called human-rights-friendly interpretation.

**Works cited**

Radbruch, Gustav. 2006. "Statutory Lawlessness and Supra-Statutory Law (1946)," *Oxford Journal of Legal Studies*. Vol. 26. No. 1.

## 3.3. Legality and legitimization

**[?] What is the humanitarian intervention dilemma about, in context of the problem of the legality and legitimization of using force in international law?**

Legality and legitimization are concepts of the theory of law which are intuitively differentiated and used on a day-to-day basis by all lawyers. It is obvious that that which is legal should be legitimized and vice-versa. On the other hand, that which is deemed illegal does not deserve to be legitimized, at least in the sense of a positivist category. But at the turn of the twentieth century, events happening in the international arena provoked a fiery debate among lawyers and political philosophers, which revealed from the perspective of the law a dangerous dissonance between these two categories. NATO's armed intervention in Kosovo in 1999, which was meant to prevent a humanitarian crisis on a massive scale, but without a formal agreement from the United Nations Security Council, was evaluated by an independent international commission "illegal, but legitimized."

**[?] What is the origin of the problem of legality and legitimization seen in the NATO intervention in Kosovo?**

The problem of the dissonance between legality and legitimization in the context of the use of force in international law and related dilemmas of so-called humanitarian intervention appeared in philosophical – legal debate after the intervention of NATO forces in Kosovo in 1999. The rapidly developing crisis and a looming humanitarian catastrophe in the Balkans motivated some international community members to intervene militarily against Serbian forces, to protect civilians living in Kosovo. This decision was made even though there was a formal veto from Russia and China who were permanent members of the United Nations Security Council. NATO countries along with the United States of America stood before a great dilemma: should they hold back from using force against the regime of Slobodan Milošević, an action for which they had not received approval from the Security Council, or should they *de iure* – violating international law and the sovereignty of Serbia – end the reign of terror against civilians? We must remember that the decision for NATO's inter-

vention was taken in the context of still recent memories of the fighting in the region of old Yugoslavia, and especially in the context of memories of the genocide in Srebrenica in the summer of 1995. It was also important that there was a feeling of shame felt by many Western countries concerning the genocide in Rwanda in 1994, when the international community looked helplessly at the slaughter of about 800,000 people from the Tutsi and Hutu peoples, which happened over the course of only three months. That is why an international independent commission which was supposed to evaluate the actions taken by NATO in Kosovo – the International Commission on Intervention and State Sovereignty, created on the initiative of the Canadian Government – decided in a often quoted fragment from their report, that the humanitarian NATO intervention "was illegal, but it was also legitimized." The report went on to insist that it was crucial to close any gaps existing between these two categories. For a lawyer this saying generally seems a bit odd; that is why we need to take a deeper, wider and more thorough look at this from a philosophical-legal perspective.

**[?] What is the difference between legality and legitimization in the theory of law?**

Legality and legitimization are fundamental concepts in the theory of law. Legality can be defined as an agreement of specific legally relevant behavior or lack of action with a norm of positive law. Behaviors which are considered to be legal are actions or conventional actions which have a legal basis, which we can find either in a general norm, or in an individual norm. In the theory of law, it is commonly accepted that legality is an objective category, axiologically neutral, independent of circumstances referring to the motives behind legal behavior, or to judgment of or to the qualities of the law in question.

Legitimization appears to be a more complicated concept, with a meaning that is harder to define. It is connected with a certain justification and validation of a legal norm or also with argumentation which tries to prove the legitimacy or validity of law, its institutions, or also actions which are undertaken under its authority. In this sense, the subject who argues for legitimization

or its absence always performs an assessment of a given behavior, of a legal norm, or of the whole legal system, using a certain set of criteria and values. In contrast to the category of legality, legitimization seems to be a concept which is axiologically entangled. Using Gustav Radbruch's terminology, one can say that legitimization is linked, above all, with the values of justice and purposiveness of the legal system, while on the other hand legality is mainly about the safety of the law.

On the other hand, in political philosophy legitimization is looked at mainly from the perspective of the sanctioning or justification in a broader legal and moral context of the existence and the functioning of state power, especially if its actions are connected with the use of force (violence). It is obvious that in the ideal conditions of a legal order that is consistent both logically and axiologically, legality goes hand in hand with legitimization. Every action, especially in the area of applying and observing the law, should thus be legal, and in consequence should also be legitimized, on condition that we are dealing with a fair law.

### [?] What exceptions are there to the prohibition of use of force in international law, and is humanitarian intervention one of them?

In international law using force is essentially forbidden. Article 2 para. 4 of the United Nations Charter forbids nations from threatening or using force against the territorial integrity or against the political autonomy of another state. Further, para. 7 forbids intervention in internal affairs of any country, except actions by the UN Security Council according to chapter VII of the United Nations Charter in the event of a threat to or violation of peace, or an act of aggression. There are only two exceptions to using force that international law accepts: individual or collective defense in the event of an armed attack (art. 51 of the United Nations Charter) and an armed action authorized by a resolution of the Security Council (art. 42 of the United Nations Charter).

We can see the first exception being invoked in interventions during the Cold War, for example during the interventions of Tanzania in Uganda and Vietnam in Cambodia in 1979. The second exception leaves much more space for interpretation. The

United Nations Charter does not determine criteria, according to which it is possible to interpret the premise of "a threat to or violation of peace," or of the reason for actions, which is "preserving international peace and safety." In the 1990s the Security Council authorized in *ex ante* or *ex post* mode interventions in Iraq (the so-called first war), Somalia, Liberia, Haiti, Yugoslavia, Rwanda, Burundi, Sierra Leon, East Timor, and quite recently in, among other places, Libya. In most of these examples, the main or morally most important motives for intervention were humanitarian. In this way, especially in the Western doctrine of international law the argumentation has been developed that especially mass violations of human rights qualify as a danger or violation of peace and safety in the world. That is why these actions have been called "humanitarian interventions," which from a legal or moral point of view might seem an oxymoron. Even though some countries and more conservative lawyers do not agree with the possibility of sanctioning this institution on the ground of binding international law, because according to them it represents an unacceptable breach of the principle of the sovereignty and territorial integrity of states, the international community seems to be essentially in agreement that the issue of respecting fundamental human laws should not be reserved just for the competence of states (it does not belong to the so-called *domaine réservé*), and is a topic of interest for the international community as a whole.

To sum up, there is no current agreement stating that humanitarian intervention should be a separate, autonomous exception to the ban on using armed force or threatening to use force in international relations. At most, authors who are in agreement with this concept, express the view that this is a legal international norm *in statu nascendi*.

Chapter 4

# The conflict of law with other normative systems

## 4.1. Cannibalism

### [?] Can a state of necessity justify murder and an act of cannibalism?

In 1949 the *Harvard Law Review* published an article titled "The Case of the Speluncean Explorers" by Lon L. Fuller. The author presents in it a fundamental ethical and legal dilemma on the basis of a hypothetical hard case involving a group of cave explorers who are trapped following a cave-in and face the risk of death from starvation while waiting for rescue. One of Fuller's inspirations for the creation of this case was, *inter alia* the unfortunate and true story of the crew of the English yacht *Mignonette* and its legal conclusion in the *R. v. Dudley and Stephens* case. The story is one of a number of instances of cannibalism at sea, the dramatic circumstances and legal and ethical dilemmas of which shook public opinion on several occasions in the nineteenth century. The decision in the *R. v. Dudley and Stephens* case became a fundamental precedent in English law regarding this topic, still studied today by students of law in common-law countries.

In 1883, John Henry Want, a lawyer living in Australia, travelled to England with the intention of buying a yacht which would appropriately highlight his professional position and raise his social prestige within the high society of New South Wales. Want finally decided to purchase the *Mignonette*, a 20-ton yacht launched in 1867. The task of sailing the rather small vessel – considering travel on the open seas – from Southampton to Sydney was undertaken by Captain Tom Dudley, who selected a crew consisting of boatswain Edward Stephens, sailor Edmund Brooks, and a seventeen-year-old called Richard Parker. The yacht did not meet all the required technical conditions, given such a long and

dangerous journey, but the captain insisted on keeping the repairs to the minimum and setting sail as soon as possible.

The yacht finally left Southampton on May 19, 1884. The first few weeks of the cruise passed without any problems but after reaching the waters of the South Atlantic, on July 5, 1884, the vessel was hit by a severe storm which damaged the yacht beyond the hope of saving. Because of the captain's decision to chart a course away from the busiest trade routes, at the moment of abandoning the ship for a small lifeboat, the crew found itself approximately 1600 miles northwest of The Cape of Good Hope. Between them and the nearest island, Tristan da Cunha, was a distance of 680 miles. The only food they were able to rescue from the *Mignonette* was two cans of preserved turnip. The survivors had no supply of drinking water. All of this gave them little hope for survival. After a few days they managed to catch a sea turtle which along with the turnips allowed them to survive the next few days.

However, after only about a week, the exhausted crew started considering, for the first time, the possibility of sacrificing the life of one of the survivors in order to increase the chances of the others – cannibalism was an extreme measure, but it had been known for centuries to sailors in such situations. The idea of such a solution came from Dudley; however both Stephens as well as Brooks thought it was too soon to consider such a drastic measure.

Two weeks after the sinking of the yacht Richard Parker fell ill, most probably as a result of drinking sea water. His condition rapidly deteriorated, and he repeatedly lost and regained consciousness. In light of these circumstances, Dudley once again suggested that they draw straws on who would sacrifice his life. Stephens was more willing to accept such a solution this time, but Brooks remained opposed. At this point, Parker was no longer capable of stating his opinion. Nineteen days after the shipwreck, Dudley announced that if rescue did not come within the next day, he would kill Parker and drink his blood and eat his flesh in order to save his own life. He was at the same time convinced that it would only end the suffering and quicken the inevitable death of the very weak, and in truth, dying teenager.

Stephens gave his approval for such a solution while this time Brooks remained silent. With this decision, and with rescue being nowhere in sight, Dudley took Parker's life by slitting his throat with a knife. All three survivors, tired of the constant thirst, immediately began drinking the blood of their companion. For the next three days they lived on the body of Richard Parker, losing at the same time any hope for rescue. Then, on July 29, the German freighter *Moctezuma* came across the lifeboat and all three of the survivors were transported back to England. On September 6, they returned to the port in Falmouth.

The crew of the *Mignonette* did not conceal any of the events that took place on the lifeboat in July. They even transported the remains of Richard Parker to England in order for them to be buried. In accordance with the law, they gave an extensive and detailed report to the local authorities, convinced that they had not committed any crime, and that in light of a hopeless situation they acted in accordance with the custom of the sea. However, local police and judicial authorities forwarded the case to the Home Office in London. The Home Secretary, Sir William Harcourt, thought the case of the *Mignonette* provided a perfect opportunity finally to resolve the growing concerns associated with such cases, which from time to time took place in various parts of the British Empire. Determined to follow legal procedure, he remained indifferent to public opinion which strongly supported the sailors – treating them more like heroes rather than criminals – and demanded the prosecution of the survivors. In the end, it was decided to prosecute only Dudley and Stephens, exonerating Brooks.

The defense of the accused was led by the expert lawyer Arthur J. Collins (Q.C.), paid for out of a defense fund that had been established by the maritime community, while the prosecution was led by Arthur Charles (Q.C.). The prosecution claimed that English law does not allow the possibility of invoking a state of necessity as a defense of homicide. The prosecution admitted that the circumstances were extreme; however, they observed the existence of *actus reus* – the objective element of a crime in the form of perpetrating an act consisting of the actions of the accused – as well as *mens rea* – the subjective side as in the planned intention to take Parker's life. The charges were given evidential strength by

the testimony of witness Edmund Brooks who indicated the leading role played by Dudley, but at the same time highlighting the hopelessness of the situation and confirming his later participation in the cannibalistic act following Parker's murder. Because of the procedural steps taken by the judge, Baron Huddleston, the jury was only allowed the possibility of returning a so called *special verdict*, which was limited to stating the facts regarding the case. This resulted in the automatic referral of the case to a higher court, that is, to the High Court of Justice (Queen's Bench Division) in London. There the case was taken over by a panel of five judges led by Lord Coleridge. The defender, Arthur Collins, maintained his line of defense in the High Court, invoking a state of the highest necessity, of last resort, and of the necessity of a lesser sacrifice for a greater good. Because of the lack of precedent in this matter, Collins called upon a similar case, *U.S. v. Holmes* (1842) that permitted the possibility of considering a state of necessity in cases related to shipwrecks. This defense, however, failed and Dudley and Stephens were found guilty of murdering Parker and were sentenced to death by hanging. However, following a positive recommendation of the Home Office, Dudley and Stephens were pardoned by Queen Victoria only a few days later. The death sentence was commuted to six months in prison. They both left prison on 20 May 1885, a year and one day after embarking on the ill-fated voyage.

It is difficult to overestimate the precedential value that the *R. v. Dudley and Stephens* case provides for English common law. For the next century it established a view of the total inadmissibility of a necessity defense in criminal cases, especially those regarding murder. There is a predominant belief that the establishment of this type of general exceptions in legal cases may lead to abuses, and that a better solution is the individual mitigation of a sentence because of special circumstances in the case. Many of the cases of this type can be categorized as so-called *hard cases* in which law clashes with morality, and the views of judges and other professional lawyers with an often strongly divided public opinion. The question of the possibility of taking into account the criterion of necessity has returned in the past few decades of case law with the development of medical science, for example in cases involving euthanasia, abortion, or even the separation of

conjoined twins. Thus, the vivid legal and ethical dilemmas highlighted so clearly in the *R. v. Dudley and Stephens* case continue to occupy the minds of not only judges but also theoreticians and philosophers of law.

It should also be mentioned, by the way, that the case of *R. v. Dudley and Stephens* is also interesting from the perspective of the *law and literature* school in philosophy of law because it has had a significant influence on literature. One example is the novel *Lord Jim* by Joseph Conrad. However, greater emotions are provoked by the relation between the facts of the case with the story of the novel *The Narrative of Arthur Gordon Pym of Nantucket* by the American writer Edgar Allan Poe. In Poe's story there is an episode when four sailors find themselves stranded in a small lifeboat for many days without any food or water. A proposition is made to draw straws in order to determine whose life would be sacrificed for the sake of the others. As a result of the agreement, a sailor named Richard Parker is killed and later eaten by the others. What gives this a peculiar thrill is that the novel was published in 1838, and therefore 46 years before an unfortunate man bearing the same name embarked on the ill-fated voyage onboard the *Mignonette*.

### [?] What is the didactic meaning of *The Case of the Speluncean Explorers* by L.L. Fuller?

The situation in Fuller's fictional "Case of the Speluncean Explorers" is as follows. The case takes place in the distant future in the fictional country called the Commonwealth of Newgarth. The four defendants along with a fifth person – Roger Whetmore – are members of the Speluncean Society, and in May 4299 they embark on an expedition deep into the caves located within the territory of the country. While all the members of the expedition are well in the depths of one of the caves they are studying, a rockburst occurs causing a cave-in which blocks the only known way out. The emergency team, which is immediately dispatched, faces serious technical difficulties. Reaching the explorers turns out to be time-consuming, complicated, and costly. The efforts of the men and the machines are repeatedly thwarted by new cave-ins, one of which takes the lives of ten rescue work-

ers. The whole rescue effort is overseen by many specialists, and the explorers end up trapped underground for 32 days. During the first 20 days of the rescue effort there is no contact with the explorers. Finally, radio contact is achieved and the explorers are informed that the rescue effort will last for at least ten more days.

In light of that, the explorers ask for medical advice, describing their state of health and the small quantity of food rations they had brought and have already eaten. As a result, after an analysis of their situation, it turns out that their chances of surviving the next ten days without food are very slim. After an eight-hour radio silence, the speleologists reestablish contact with the rescue team. Roger Whetmore, speaking on behalf of the trapped explorers, asks the chief of the medical committee whether the chances for the survival of four people would be increased if they ate the body of the fifth explorer. Reluctantly, the members of the medical committee give an affirmative answer to the question raised. Then, Roger Whetmore asks for advice whether they should draw straws to decide who would be killed and eaten by the rest of the survivors. No one, however, is willing to advise the trapped explorers in this matter, and then radio contact is lost until the release of the cavers.

Upon reaching the survivors, it turns out that four members of the expedition killed and ate Roger Whetmore. Later all the survivors state that Whetmore had originally come up with such a drastic solution, as well as the idea of choosing the victim by casting a pair of dice which he happened to have with him. However, after agreeing upon all the rules, Whetmore withdraws his consent to participate in the proceedings, while the others refuse to accept his change of mind and decide to roll the dice on his behalf. Whetmore finally agrees to such a choice. He then loses the dice roll, which leads the others to kill and consume Roger Whetmore twenty-three days after entering the cave.

Fuller's intent was to provide such facts in the hypothetical case, which can undoubtedly be categorized as a so-called hard case, that would allow various judges, representing the main, albeit different practices of legal thought and views on the interpretation of the law and the role of the judiciary, to find in the case solid grounds for argumentation within the strand of thought they

represented. Similarly, the placement of the hypothetical case so far in the future is not accidental. Fuller states that the time elapsed between the present and year 4300, when the case is reviewed by the Supreme Court of Newgarth, is about the same as the time elapsed between the twentieth century and the era of the rule of Pericles in ancient Athens. By this, the American philosopher of law lets us know that the essence of legal and moral dilemmas has not undergone any significant change in the last twenty-five centuries and, according to him, there is no indication that future generations of lawyers will find better or easier answers to the difficult questions about the relation between law and morality.

In the second part of his text, Fuller presents five opinions of the members of the Supreme Court of Newgarth regarding the guilty verdict returned by the first instance. The law in Newgarth clearly states that the mandatory punishment for murder is death. The legislation does not allow justification of the crime; the only judicial decision allowed is self-defense if based on a precedent. Under these circumstances, Chief Justice Truepenny issues an opinion where, in line with positivist thought, he comes to the conclusion that the verdict reached by the first instance of the court is the only available lawful way of solving the case and advises his colleagues to reach a similar decision; however, he notes it should be expected and anticipated that the unfortunate speleologists should be granted clemency by the executive.

Justice Foster presents an extremely different opinion, referring directly to the "ancient" doctrines of natural law, introducing an argument in favor of their acquittal. According to him, the law of Newgarth does not apply to this case because the accused, at the time of committing the crime, were acting within a context and under circumstances which could not have been predicted by the legislator. In line with Foster's opinion, which called upon the maxim of *cessante ratione legis, cessat et ipsa lex*, they found themselves in a "natural state." They were fighting for survival in a hopeless situation and were therefore beyond legal jurisdiction, which is unable, in such circumstances, to maintain its normal role of regulating the coexistence between individuals. Justice Foster, on the other hand, by referring to a functional interpretation calls for the application of the provision penalizing murder,

as common sense would tell us, which, under the circumstances of the case, should mean the establishment of a new justification (exclusion of illegality) and the subsequent acquittal.

The third member of the arbitration panel – Justice Tatting – is not certain of any of the solutions. On one hand, he raises a polemic against Foster's reasoning by presenting a possible critique of natural law and attacking the ambiguity of Foster's opinion as well as Forster's criteria, based on which he built his philosophical and legal argumentation. Tatting also rejects Foster's purposive approach to statutory interpretation pointing at the problems with the multiplicity and often the contradictory character of the purposes of some norms, including those that criminalize the act of murder. On the other hand, Tatting perceives the decision to deem the explorers guilty of murder and to sentence them to death, as absurd. Thus, he concludes that, despite all possible efforts undertaken, he is not able to support either of the rulings and decides to withdraw from the case and abstain from voting.

The next opinion, written by Justice Keen in the spirit of fairly strict legalism, is far more clear-cut. Most importantly, he criticizes the opinion of the Chief Justice Truepenny on the range of possibilities of granting the defendants mercy by the executive branch, and points out that it is not an alternative the court should be considering at all. He also distances himself from Foster's opinion by standing up for the judges' obligation to keep the law separate from their personal moral beliefs. He further criticizes Forster's view and the arguments behind his interpretation by, first of all, being in favor of the legislative literal interpretation of the law, and second of all, in terms of the purposive interpretation, by referring to more of a historical interpretation and the implied intent of the original legislator, which in his opinion are impossible to reconstruct hence Forster's line of argumentation should be rejected. In conclusion, Keen constitutes that the conviction must stand.

The last opinion in this case belongs to Justice Handy. Assuming that the case in question belongs to one of the "easy cases," Handy accuses his colleagues of hiding the essence of the case under the "obscuring curtain of legalisms" and thus of being overly dogmatic. In his opinion, judges should pay attention to

public opinion polls, which show that approximately 90% of the respondents sympathize with the defendants and are in favor of their release. He argues that the justice system should generally fulfill the expectations of the society rather than stubbornly maintain this theoretical and dogmatic ivory tower. Furthermore, Handy refers to this argument guided by common sense and argues that there is no need for special legal efforts to simply deem the defendants innocent, which is the conclusion of his opinion.

Since the votes of the Supreme Court of Newgarth were even and Justice Tatting abstained from voting again, the verdict sentencing the defendants to death by hanging was sustained. Of course the case finale presented by Fuller, as well as the opinions of the five factious judges, are not the only possibilities. Fuller's proposal became an inspiration for further discussion on the hypothetical explorers' case and many authors have suggested their own alternative solutions. One of the first was Anthony D'Amato's proposal, who in 1980 added three new opinions to the case. In 1993, a symposium was held by the *George Washington Law Review*, which subsequently published new opinions, authored by seven distinguished law professors and judges, and edited by William N. Eskridge Jr. Another lengthy contribution was a book by Peter Suber (1998), who added another nine opinions to the case. Last, on the occasion of the fiftieth anniversary of Fuller's article in 1999, the *Harvard Law Review* issued another collection of six opinions written by leading scholars and edited by David L. Shapiro.

## 4.2. The cultural defense

**[?] What relations exist between criminal law norms and cultural (customary) norms?**

Nowadays, specific values often collide with cultural norms (including customary ones) among the minorities that inhabit the territory of a given state (ethnic, national, and religious minorities among others) with legal norms that apply to the entire society and, thus, include the minority as well. In such situations, the norms of the cultural minorities clash with the generally ap-

plicable legal system – in short: a conflict between social mores and the law arises.

Cultural differences between the addressees of legal norms may cause various interpretational and validation problems and result in questions about their scope within the process of applying and creating the law, for example, in criminal proceedings or while carrying out appropriate social policies on the part of the government.

In recent years, what has become particularly evident while applying criminal law, are dilemmas associated with considering the phenomenon of the so-called cultural defense, which means considering in the criminal courts' judgments the influence of a separate, specific cultural socialization on the offender's behavior. The development of the cultural defense phenomenon has provoked questions on its boundaries and its effects on the principle of equality before the law and on respecting human rights, especially the rights of women and children.

Currently the following relations between criminal law norms and customary norms can be outlined:

1) criminal law norms can be a limit to the cultural (and customary) autonomy of minorities;
2) criminal law norms are often in conflict with customary norms;
3) multi-culturalism and the variety of social mores of modern societies belong to the phenomena of the outside world and cannot be neglected while creating and applying criminal law;
4) criminal law norms and legal norms that guarantee multiculturalism can coexist, while the conflicts between them should be resolved with care, so as to avoid depreciation of criminal law, especially preventing it from serving its basic purpose of protecting the legal interests of society and individuals, which in many case means protecting basic human rights.

**[?] How do we define the concept of cultural defense and what examples of using the so-called cultural defense can be identified in criminal proceedings?**

What has emerged in recent years is the so-called phenomenon of cultural defense, which is based on the consideration of a different cultural socialization of the perpetrator of the criminal act as an argument in criminal proceedings, which often leads to a different, usually a more lenient assessment of the criminal liability of the perpetrator. A different cultural socialization of the perpetrator of a criminal act under Polish criminal law can, for example, diminish the degree to which the perpetrator is held responsible, or limit the social noxiousness of the act (or exclude it completely) and can also become a premise for formulating extra-statutory circumstances excluding criminal lawlessness by doctrine or jurisprudence. Critics of the phenomenon of cultural defense argue that it will result in breaking the principle of equality before the law and violating the rights of women and children, which most frequently fall victim to so-called culturally motivated crimes.

What we are dealing with in cases of so-called culturally-motivated crimes, is using arguments based on highlighting the different cultural socialization of the perpetrator by the defense in criminal cases. The most common example of this type of crime is so-called honor killings, which appear mainly in Western Europe and the United States and Canada. It is worth mentioning that in many cases of so-called honor killings, courts have significantly diminished the criminal liability of the perpetrators, taking into account specific cultural circumstances that are associated with the crime, especially motivation based on a wide range of cultural norms (and sometimes also religious norms). Critical evaluation of these practices is of utmost importance. What is sometimes questioned is whether so-called honor killings actually are a result of different cultural socialization of the perpetrators, and a question arises as to the extent to which they mean accepting legally and socially acceptable discrimination.

What often appears among crimes in which the cultural customs of the perpetrator are taken into consideration in criminal law assessment of the act, are sexual offenses. American legal literature

has popularized, for example, the *People v. Moua* case, in which the court changed the class of the offence because the perpetrator belonged to a cultural minority. The court applied a far more lenient penalty than what the initial charges suggested. The trial was held in 1985 and the situation was that Kong Pheng Moua, a Laotian from the Hmong tribe, performed a "marriage by capture" ritual on Xeng Xong, a woman from the same tribe in California. In this ritual, the bride-to-be is supposed to resist her future husband, which emphasizes the man's strength as well as the pre-marital purity and the virtue of the woman. In other words: the more the woman opposes the man chosen by her, the more the strength of the man and the virtue of the woman are emphasized. Of course the bride-to-be knows that she is dealing with her future husband so the capture and rape are only an act. However, Kong Pheng Moua's actions happened in California and, most importantly, they happened against the woman's will. Therefore, Moua faced kidnapping and rape charges. Referring to the perpetrator's belonging to a cultural minority during trial resulted in, as I said before, a significant change in the defendant's situation within criminal law and consequently in a substantial mitigation of his criminal liability.

In Poland, a lot of controversy surrounded the case of Marek K., a Romani man accused of a crime based on art. 200 of the Penal Code. In accordance with Romani tradition, Marek K. married and later had intercourse with a girl below the age of 15. The alleged offense was undoubtedly committed as a result of following the Romani tradition (having a traditional Romani wedding ceremony – the so-called *mangavipen*). The case lasted until March of 2007. Marek K. was convicted of having sexual intercourse with a person under the age of 15, for which he was sentenced to eight months imprisonment. The court suspended the sentence for a three-year probation period. The verdict gained a lot of media attention in Poland and was criticized by the Romani minority. Some authors are even considering specifying extra-statutory circumstances for a "Romani (Gypsy) wedding ceremony or marriage," which would negate criminal allegations in such cases.

Referring to the cultural diversity of a society (its diverse customs) in the process of applying the law may, on one hand, lead to a dangerous relativization, but neglecting or underestimat-

ing this factor, on the other hand, may result in a violation of the norms of criminal law.

**[?] What Polish criminal law institutions can be used to take into account cultural diversity in a criminal law assessment of an offense?**

Not only specific examples of the application of substantive criminal law, but also the content analysis of existing norms, make it possible to demonstrate possible relationships between multiculturalism and criminal law. Such institutions of criminal law as statutory and extra-statutory typical circumstances, justified unawareness of the unlawfulness of the criminal act (art. 30 of the Penal Code), judicial directives and principles of sentencing (53 Penal Code) can and should allow the use cultural diversity to achieve full criminal law assessment of the committed offense. Cultural diversity may also have no impact on the assessment of the degree of noxiousness of an offense carried out in accordance with the criteria specified by the Code (art. 115 para. 2 of the Penal Code). The defense, the prosecution, and, above all, the court can refer to the institutions mentioned above, when considering multiculturalism as an important factor in the application of criminal law. Regardless of legal and dogmatic analysis, the issue of multiculturalism may also be relevant to the philosophy of criminal law, namely to the problem of justifying criminal punishment, especially when it comes to the inner-rational justification of punishment, that is the justification of punishment in relation to the offender and to the government.

What can be of particular importance while considering different customs of cultural minorities in the process of creating and applying criminal law, is creating new counter-types, or applying the already existing, customary counter-types, arising from the development of the cultural identity of various minority groups – national, ethnic or religious. Multi-ethnicity is definitely a source of the development and legal validation of some customary circumstances, e.g. the so-called *polter abendu* (breaking glass) a wedding tradition practiced in many regions of Poland brought here from Germany, which is the basis for applying customary circumstances repealing the criminal unlawfulness of certain offences.

Distinct cultural socialization of the perpetrator may be a reason to accept the premise that he or she acted under excusable ignorance of the illegality of the criminal act. On the other hand, when assessing the degree of social noxiousness, according to art. 115 para. 2 of the Penal Code, the court takes into account, *inter alia*, the circumstances of the offense and the motivation of the perpetrator. Finally, the impact of cultural norms on the offender can reasonably be regarded as one of the factors affecting the assessment of the degree of fault and determining the appropriate punishment for an offender in accordance with art. 53 of the Penal Code.

**[?] What problems can cause the application of the so-called cultural defense in relation to the principle of equality before the law and the protection of human rights?**

The correct approach of contemporary legal systems to the problem of multiculturalism is becoming an important element in ensuring the principle of equality before the law (including human rights, which stem from it) by a state that holds to the democratic rule of law. By considering various customs and traditions of the addressees of legal norms, the application of the law today is increasingly based on referring to non-legal assessments in the determination of criteria of legal responsibility, including criminal responsibility. However, you can see that excessive inclusion of multiculturalism while creating and applying the criminal law may be used as justification for challenging the paradigm of the universal character of human rights, becoming the source of dangerous individual relativization. It is impossible not to note that the victims of so-called culturally motivated crimes are predominantly women and children. There may, therefore, arise situations in which referring to cultural defense in a criminal trial will destroy or significantly weaken human rights, including the rights of women and children.

## 4.3. The judge's conscience

**[?] What was the basis of the axiological conflict between the provisions of the Declaration of Independence and the Constitution of the USA?**

Philosophy allows us to understand that lawyers in their work operate within the boundaries set by extreme positions expressed in two well-known Latin maxims – *dura lex sed lex*, on one hand, and *lex iniusta non est lex*, on the other. To somewhat simplify this, the subject can be summarized in the following question: is the law right because it is valid, or, on the contrary, is it valid because it is right? This is particularly associated with the dilemmas a judge has to face while deciding upon a verdict in specific, sometimes very complex, cases. Philosophy of law does not provide the judge with an instant solution; yet it can outline the possible paths for him or her to follow. This matter will be paradigmatically examined below drawing on the examples of US court rulings in cases of slavery in the first half of the nineteenth century.

Louise Weinberg, an American comparative law and private international law specialist, declares very aptly that sooner or later the possibility of a serious conflict between law and morality, *ergo* enforcing an extremely immoral law (or using a broader term, an extremely unjust law) will always arise. In her opinion, what this problem means for jurisprudence is what theodicy means for religion.

While theodicy does not actually consider disobeying God's decision, even if one finds it unjust, within the field of law matters are much more complicated. In this context, legal literature most frequently mentions the institution of civil disobedience as a symbol of an individual's protesting against an obligation to comply with a law the results of which are clearly wrong. Civil disobedience refers to each and every citizen as a recipient of legal norms; however, here I wish to focus on the more complex dilemma of a judge facing the possibility (the necessity?) of disobeying a law that is evidently unjust (*judicial disobedience*). Although, from the philosophical and legal perspective the problem of judicial disobedience is actually unsolvable, especially within the realm

of legal positivism, in current literature it is still a subject of interest among ethicists, philosophers, and lawyers. This is hardly surprising – because it turns out that the fundamental problems of a moral and legal nature are a concern not only of a judge operating in the extreme conditions of a murderous totalitarian regime, but they can also arise in a democratic regime, or even within systems that *prima facie* meet all the requirements of democratic state governed by the rule of law. What is more, referring to the latter, the assessment of the behavior of judges facing the application of a clearly unjust law seems to be more rational, as it is not burdened with possible martyrdom. What can serve as the best example of this is the so-called Radbruch formula that has been revitalized in recent years. Expecting judges in Nazi Germany to carry out acts of disobedience against an utterly immoral law would automatically mean demanding of them a readiness for martyrdom and to sacrifice their own lives while defending a universal ethos. As we know, Radbruch, to some extent, justifies the German judges and blames legal positivism for that situation. Without going into further detail, let us conclude that the thesis arguing the judges' attachment to legal positivism, while morally appealing, it is completely untrue from the point of view of history. Although there in fact were some cases of judges' resistance, one has to admit that legal positivism was not the reason for their remaining merely incidental.

Therefore, in the history of law, one can find another, more appropriate example of the conflict between judges' conscience and their statutory duty to obey the law. This concerns court rulings in matters of American slavery during the fifty years preceding the outbreak of the Civil War. Paradoxically, the existence of American slavery was an anachronism clashing with certain conditions that surrounded it, both internationally and domestically. In fact, its development was favored only by the economic benefits for the Southern states, which were sometimes supported by the racist beliefs of the local political elite. All other factors – ideological, religious, ethical, economic, or political – undermined the rationality of its existence. In the external environment, looking at international law at the beginning of the nineteenth century, there was a rather widespread tendency to combat and prohibit the slave trade, which according to some

contemporary authors, to some extent, represents the real beginning of the development of the international human rights protection. On the other hand, looking at the domestic environment, it must be emphasized that it actually was the problem of slavery that finally accounted for the fundamental cause of the outbreak of the Civil War.

Unlike judges in Nazi Germany, the representatives of the American justice system, especially in the Northern states, faced, in fact, no consequences for potentially opposing the legislation that protected the institution of slavery. On the contrary, in cities such as Boston, for example, judges ruling in cases of returning runaway slaves to their owners in the Southern states met with protests of the pro-abolition public. Sometimes it was just the crowd pressuring the judges very strongly, which the judges did not give into against their own abolitionist convictions.

A typical example might be the case of a slave named Thomas Sims, who escaped from the state of Georgia in 1851. Even such a well-known and radical opponent of slavery as Justice Lemuel Shaw, the president of the Supreme Court of Massachusetts, felt obliged to comply with the provisions of the so-called Fugitive Slave Act of 1850 (which radically changed the previous regulations from 1793), and he upheld the decision of Judge Edward G. Loring ordering the delivery of Sims to his owner. The enforcement of this judgment was accompanied by such violent protests on the part of outraged citizens that the slave had to be escorted by the Navy to the ship designed to take him to Georgia. The case, indeed, developed further in a very interesting way, for Sims was later sold to the state of Mississippi, and then in 1863 during the Civil War he escaped again and returned to Boston. What is more, when in 1877 Charles Davens, the federal sheriff who made the arrest of Sims in 1851, became Attorney General, the former runaway slave gained employment in the Department of Justice.

Sometimes however, a judge, who ruled for returning a runaway slave against the demands of the public, had to face greater consequences. A typical example is the 1854 case of Anthony Burns. The verdict in this case, also by Judge Edward G. Loring, stating that a runaway slave was to be returned to Virginia, was accompa-

nied by protests of tens of thousands of citizens on the streets of Boston. The U.S. Navy had to be called for help again. After a year Burns returned to Boston because he was bought for the price of 1,300 dollars. However, the case was not over, for Judge Loring. In 1857 he was removed from his post by Governor Nathaniel P. Banks; nevertheless, for the sake of accuracy it has to be mentioned that only a year later President James Buchman appointed him to another court. However, all this only shows that the problem of slavery on the eve of the outbreak of the Civil War caused serious conflicts not only between Northern and Southern states, but also within the internal structures of the federal authorities.

Two other cases offer excellent examples: on the one hand, the 1842 case *Priggs v. Pennsylvania*, and on the other, the, *Dred Scott v. Stewart* case of 1857. The verdict in the latter is, according to some, the worst and the most shocking ruling in the history of the U.S. Supreme Court, which not only radically divided the judges, but is commonly thought to be the catalyzing force that made unavoidable an armed conflict within the Union.

The judgments in the cases of Priggs, Sims, Burns, or Dred Scott, each in their own way, only contributed to a gradual escalation of a process that began much earlier and had its roots in the 1770s and 1780s during the war for independence and during the drafting of the U.S. Constitution. The problem of slavery not only divided the so-called founding fathers and the representatives of the states, but was also the cause of the fateful conflict between the principles of the Declaration of Independence of 1776 and some pro-slavery provisions of the Constitution of 1787. Let us recall that some of the first words of the Declaration of Independence are:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

While the Constitution of 1787 avoided the word "slavery" with the use of euphemisms, at the same time it contained a number of provisions referring directly or indirectly to this institution, including, among others, the following:

> Seats in the House of Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. (art. I, section 2, clause 3 – the so-called *Three-Fifth Clause*)
>
> The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight. (art. I, section 9, clause 1 – the so-called *Slave Trade Clause*)
>
> No person held to service or labour in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due. (art. IV, section 2, clause 3 – the so-called *Fugitive Slave Clause*)

Indeed, it is *prima facie* difficult to think of it as compatible with the notion of freedom expressed in the Declaration of Independence if "persons held to service or labour" (that is, slaves), for the purpose of the electoral parity, were considered three-fifths of free citizens, or in the event of escape were to be passed on between the states, and trading them externally was allowed for a period of twenty years, until 1808 (while internal trade was actually legal until the adoption of the Thirteenth Amendment abolishing slavery in 1865). However, for the sake of accuracy, it should be added that the course of the Constitutional Convention proves that without these provisions the Constitution probably would not have been ratified, and, thus, the United States would not have arisen in their original form. Nevertheless, the problem of slavery was the reason why the resulting legal union was an "imperfect Union" from the very beginning.

Despite the fact that the so-called founding fathers considered this a temporary compromise, and some of them believed that slavery would in time disappear on its own, history did not confirm their hopes and beliefs. On the contrary, the problem of slavery grew, and did not diminish. During the war for independence the number of slaves in the colonies in North America

ranged from 400,000 to 500,000, on the day the Civil War broke out this number had reached four million. It had risen ten times. Even if we agree that the history of American constitutionalism, as Melvin I. Utrofsky and Paul Finkelman argue forcibly, was in fact a progressive "march of freedom," because of the problem of slavery and its further consequences resulting in racial segregation, it surely was not a march through a bed of roses.

### [?] What was the verdict in *Somerset v. Stewart* and how can it be interpreted?

In 1772, Judge Lord Mansfield, adjudicating the *R. v. Knowles, ex parte Somerset* dispute (later called *Somerset v. Stewart*, under which name it is known in current literature), used the phrase "let there be justice though the heavens fall" (*fiat iustitia, ruat coelum*). In colloquial language another version of this saying is more popular *fiat iustitia, pereat mundus* ("let justice be done, though the world perish"). This last proverb is usually a pejorative symbol of extremely formalistic legislation, but it can also have a positive meaning. In case of the latter, this could mean seeking justice against all odds and despite any potential consequences. Then *fiat iustitia, pereat mundus* could mean that "justice must be done and it must defeat the conceit of the great of this world." This positive context was also used by Judge Lord Mansfield in the decree cited below. I shall recall it here, as it is of utmost importance to the final assessment of the decisions of American courts in cases concerning slavery. The facts of this case are as follows:

James Somerset was a slave brought in from Africa in 1749. He was then sold in Virginia to a British customs officer Charles Stewart. In 1769 Stewart went back to London, where after two years his slave escaped. However, Somerset was soon captured by the men hired by Stewart and he was transported to the *Ann and Mary* a vessel berthed on the Thames; he was to be taken away to Jamaica and sold there. To Somerset's luck, there was already a very strong abolition movement in England at the time, which was led by an influential former of public opinion, Granville Sharp. The imprisonment of the slave was met with an immediate response from the abolitionists who, with the help of the lawyers they hired, applied for the slave's release based on

the *habeas corpus* procedure. Justice Lord Mansfield ordered the release of Somerset pending the final resolution of the case and preparation, lasting some months, for the hearing begun. Formally, one of the parties involved in the *habeas corpus* procedure was the captain of the *Ann and Mary*, John Knowles, as this was where the slave had been imprisoned.

During the preparations for trial, lawyers of both parties presented various arguments at incidental hearings; however, Lord Mansfield urged both parties to settle. He expressly tried to convince Stewart voluntarily to liberate Somerset. This was because he was aware of the consequences, including the economic ones, that a potential verdict vitiating the legality of Somerset's imprisonment would have, for the precedential nature of such a verdict might cause an avalanche of lawsuits against several thousand slave owners in England. When the attempts to persuade Stewart to settle failed, the aforementioned words were to be said: *fiat iustitia, ruat coelum*.

On June 22, 1772, Lord Mansfield made his final decision *in favorem* of Somerset, and while the heavens did not fall, the legend of the case commenced that was to mark the end of slavery in England… In reality, the legal sense of the verdict in *Somerset v. Stewart* was a bit different. First of all, because the verdict in Somerset's case did not mean the end of slavery in England, as the prohibition of the slave trade was not enforced until 1807, and total prohibition of slavery in the colonies took place only in 1833. Secondly, at the time of the verdict the type of slavery based on Virginia law and related to Somerset's legal status (so-called *chattel slavery*) no longer existed in England. Nevertheless, institutions similar to slavery (so-called *near slavery*) and other forms of serfdom (so-called *villeinage*) still existed. Third, the content of the justification of the verdict in the S*omerset v. Stewart* case does not state that Somerset stopped being a slave under Virginia law. He was merely not to be forcibly detained while in England because there were no legal grounds for such detention. Referring to this aspect, in Mansfield's verdict there appeared a sentence which was the source of the later legend concerning it. According to Lord Mansfield, slavery itself is so appalling that it cannot be supported either by the law of nature, or by the common law, and as a result it can be sanctioned only by positive

law. Because in England, such positive law did not exist and the positive law of Virginia applied only to the territory of Virginia, Somerset had to be released.

Let us note that Lord Mansfield did not refer to any moral arguments in particular. The justification of his decision remains entirely based on legal argumentation *par excellence*. The situation was similar in the judgments of American courts in cases of slavery cited above and, further, below.

Despite the fact that the judgment in the *Somerset v. Stewart* case was given during colonial times before the outbreak of the war of independence, in current literature it is widely considered a very important moment in the history of American constitutionalism. This is probably true because it had a very significant impact not only on debate in the Constitutional Convention, but also on subsequent judicial decisions, even if it was accompanied by a certain over-interpretation of the words of Lord Mansfield.

The problem with the final assessment of the importance of this judgment is based on the fact that we cannot be really sure where the real impact begins and where the accompanying legend, reinforced over decades, begins. Since Lord Mansfield gave an oral justification of his ground-breaking decision, we know it only from indirect sources. The literature emphasizes that there are at least five different versions of it, details of which differ quite significantly. There is no doubt, however, that judges, who later on in their judgments referred to the *Somerset v. Stewart* case most frequently quoted the passage, in which Mansfield said that the support for the existence of slavery must be found among positive laws as slavery itself goes against not only the laws of nature, but also against the traditional common law. Kunal M. Parker recently wrote that Lord Mansfield's fundamental conclusions regarding the relationship between the law of nature, common law, and positive law had an important impact on the subsequent debate on the legal grounds of slavery.

It should be emphasized that the words of Lord Mansfield passed on from generation to generation in various legendary versions did not have, in fact, much to do with legal precision and caused a lot of controversy. For example, what was the meaning of "positive law" in this context – simply a written legislative act, or per-

haps customary law as well? What was meant by the statement that slavery must be based on positive law – was it that it had to be proclaimed in accordance with the positive law, or was it that positive law could sanction the existing state of affairs by using so-called Slave Codes? If slavery goes against the laws of nature, then how can it by sanctioned by the positive law? Although the issue raised by Lord Mansfield was (and still is) fascinating and fundamental from the philosophical and legal point of view, American judges giving their judgments in specific cases were to act in accordance with legal reality, including the Constitution, and to have both feet on the ground, even if they sometimes attempted a very creative interpretation of the law in force. If they were ever guided by the *fiat iustitia, ruat coelom* saying, it referred to its positive rather than negative meaning in a very balanced way.

The specific and limited meaning of the judgment in the *Somerset v. Stewart* case was confirmed by some subsequent court judgments. A typical example is the Slave Grace Case of 1827. A woman named Grace considered a free person in Britain became, by the decision of the Court of Admiralty, a slave again when she voluntarily returned to Antigua, an island located in the Windward Islands archipelago.

**[?] What examples of American court decisions in cases of slavery could be selected to illustrate the dilemmas associated with judges' rulings?**

Philosophical and legal literature emphasizes that within the scope of the issue of judges' moral dilemmas, slavery cases tried in American courts can be divided into two basic groups: first, the so-called slaves in transit cases, which refer to situations of transporting a slave voluntarily into a free state territory; second, the so-called fugitive slaves cases, which refer to situations of slaves captured on free state territory to be returned to their owners in one of the slave states. The *Somerset v. Stewart* case, despite all differences, was in a way a combination of both these elements; it was about a runaway slave who was voluntarily taken to England.

The fundamental difference between slaves in transit and fugitive slaves' cases was based on completely different legal grounds and, as a result, on a different approach towards their resolution. In the case of slaves in transit, there was a problem with abiding by the rules of mutual courtesy (comity) in the relationships between particular states and, on this basis, mutually recognizing the states' individual legal regulations. In the case of fugitive slaves, matters were more complicated and referred to the essence of American federalism, especially the division of power between the states and the Union. Thus there appeared a question of which authority, State or Federal, was responsible for the enforcement of the Fugitive Slave Acts of 1793 and 1850, issued under art. IV, section 2, clause 2 of the Constitution (the so-called Fugitive Slave Clause). Both, the non-binding character of the aforementioned principles of comity and the unclear division of power between State and Federal authorities provided the judges in the Northern states with some opportunities to rule *in favorem* of slaves. However, the number of judgments given in both types of cases is too large and the cases themselves are too varied to be discussed in detail, not to mention the limited size this book. Thus, as an example, let us focus only on a few decisions of one judge, those of the already mentioned Justice Lemuel Shaw, as they seem to be the most representative ones in terms of the problem of the judge's conscience that is in question here.

The 1836 *Commonwealth v. Aves* case was about the fate of a six-year-old girl named Med, a slave brought voluntarily to Boston by her owner Mary Salter. The person sued by the abolitionist movement was Tomas Aves, Mary Salter's father, as it was his house where the young slave stayed. Justice Lemuel Shaw, relying largely on the judgment in the *Somerset v. Stewart* (*sic*!) case, applied an interesting legal construction. When he granted the girl her freedom, he decided that based on comity he cannot recognize Louisiana's property laws as they disagree with Massachusetts' criminal and tort laws. There is no doubt, however, that the decision, in addition to being based on a quite precisely conducted legal argumentation, in a way stems from the deeply-held abolitionist beliefs of Justice Shaw.

Justice Shaw's subsequent judgments in the *Commonwealth v. Porterfield* and the *Commonwealth v. Fitzgerald* cases of 1844

confirmed the line of reasoning he adopted in the *Commonwealth v. Aves* case. What is more, this line of jurisprudence has also influenced, not only the judgments of the courts, but also the legislation in other free states. However, Justice Shaw's judgments in cases of fugitive slaves appeared quite different as here the opportunity for pro-abolitionist actions was far more limited. Although in an 1836 case, with the use of a clever procedural trick, he managed actually to have two slaves who were detained in Boston onboard the ship *Chickasaw* – Eliza Small and Polly Ann Bates – set free, in George Latimer's case of 1842 he followed the law and refused to release from detention the detainee who had escaped from the state of Virginia.

The previously discussed problem of slavery and the court judgments associated with it are, of course, to some extent an extreme episode limited to a specific time and space, and from this perspective it has merely a historical meaning. On the other hand, it serves as an excellent source of philosophical and legal analyses touching upon the subject of potential judicial disobedience, which makes it of some universal value. This aspect of the problem in question is presented in modern jurisprudence when discussing the typology of different behaviors that a judge may demonstrate who has to enforce a law which absolutely contradicts his or her moral beliefs.

It is hard to separate these two perspectives – the historical one and the universal one – from each other, as they do overlap. While discussing the examples of American judges deciding upon slavery cases, the question of why under certain historical circumstances within the boundaries of a valid law and based on an actual situation, the judges chose to act one way or another, always arises. We have already observed this in the example of Justice Lemuel Shaw: on the one hand in the Aves' case, on the other in Sims' case. These two judgments were given at two different times (1836 and 1851) on the basis of different laws (common law and the Fugitive Slave Act of 1850) and in reference to two different situations (a slave in transit and a fugitive slave).

**[?] If we look at the judgments in cases of slavery paradigmatically rather than historically, then what four model choices would a judge, faced with a conflict of conscience, have?**

The historical perspective and the universal perspective differ significantly, as they refer to different questions and, as a result, require different answers. The historical perspective includes questions on what a judge would do in a specific case and what would be the hypothetical reasons of his or her decision. The universal perspective, on the other hand, includes problems with assigning a specific decision to one of the elements of the assumed model and with the resulting reconstruction of its philosophical and legal aspects, while still taking into account the historical context. So it is not merely an answer to a question of what the judge has actually done and why, but also, or maybe above all, an answer to the question of what he or she could have done given specific philosophical and legal assumptions.

What is considered groundbreaking within the field of American jurisprudence is the 1975 work of Robert M. Cover *Justice Accused*. Until then, the research on the legal aspects of slavery was of interest mostly to historians; however, Cover's book took the discussion to new theoretical, philosophical and legal levels. Today we are even one step further because the problem of slavery is of interest not only in terms of the problem of judicial disobedience discussed here, but is also of interest to the representatives of the latest trends in philosophy and law, such as, for example, Law and Literature or Law and Economy. This is hardly surprising as the problem of slavery was in fact, on one hand, a common theme of many literary works (for example, the works of Harriet Beecher Stowe or Herman Melville), and, on the other hand, apart from its moral aspects, there was a very concrete economic aspect to it.

These two aspects are analyzed from the philosophical and legal perspective by, for example, Mark Tushnet, who looks at the example of another famous judgment in the *State v. Mann* case of 1830. Without going into great detail regarding the facts of this interesting case, let us say that it was about the issue of taking criminal responsibility for depriving a slave woman of her life

who had tried to escape the punishment of flogging. John Mann, convicted of the offense by a court of first instance to a fine of five dollars, was subsequently released from any liability by the Supreme Court of North Carolina. In support of his judgment, Justice Thomas Ruffin emphasized that even though as a man he sympathized with the murdered slave named Lydia, as a lawyer he had to acknowledge that the power a master holds over a slave is absolute. In terms of morality, the case was so famous and interesting that Harriet Beecher Stowe, the author of the famous *Uncle Tom's Cabin*, based on it another of her novels (less known in Poland), *Dred: A Tale of the Great Dismal Swamp*.

It is interesting that Cover's book also starts with the literary aspect. Indeed, the author starts by recalling the character of Captain Vere from Herman Melville's novel *Billy Bud* as a classic example of a government employee who sacrifices his material sense of justice for the sake of formal obedience to a positive law in force. There is a very interesting connection between Melville's character and the judgments of American courts in cases of slavery. What is commonly believed to be the most spectacular example of a judge torn between his anti-slavery conscience and existing positive law, is that of the Chief Justice of the Massachusetts Supreme Court, Lemuel Shaw, who has been previously mentioned on several occasions. Lemuel Shaw was, in fact, Melville's father-in-law, and for historians studying literature, there is no doubt that it was he who served as a metaphorical prototype of the character of Captain Vere in *Billy Bud*. Based on the analysis of the judgments of American courts in cases of slavery, among other things, Cover concludes that the conflict between the judge's conscience and his or her responsibility to follow the law (the *Moral-Formal Dilemma*) can result in one of four possible outcomes:

1) escaping into formalism and applying the laws regardless of their moral or amoral character;
2) rejecting an immoral law and judging *contra legem* in accordance with one's conscience;
3) resigning from the post;
4) resorting to so-called creative judging or so-called subversion.

Subversion means bending the law to meet the standards of one's conscience knowing that this is a *contra legem* action, however veiled and hidden behind the curtain of specific argumentation. This differs from creative judging by the fact that the latter is not paired with the awareness of acting *contra legem*; on the contrary, when it comes to creative judging, the judge believes that he/she is acting in accordance with the law, even if its interpretation cannot be supported by any previous judgments.

Solutions 2 and 3 do not actually change anything because, in the case of an interpretation that is overtly *contra legem*, we are risking the possibility of the judgment's annulment by a higher court, while in the event of resignation, we are risking that the case will be forwarded to another, less sensitive judge. Thus, the only choice left is between solutions 1 and 4. Cover criticizes American judges deciding upon slavery cases for most frequently choosing solution number 1. Unfortunately, they were escaping into formalism, even it if was against their conscience. If Cover's diagnosis is right, then certainly one should question the reasons for which judges chose to act one way not the other. Regarding this aspect, current American jurisprudence is not unambiguous in answering this question.

In a review of Cover's work, Ronald Dworkin writes that escaping into formalism was not the only solution the judges deciding upon slavery cases had, especially when it came to fugitive slaves' cases, as they could have, using the appropriate interpretation, challenged the constitutionality of the Fugitive Slave Acts of 1793 and 1850.

William E. Nelson, on the other hand, believes that the reason for the judgments given in the cases in question was not the formalism of judges. On the contrary, it was the judges' pragmatism and instrumentalism. Judges' motivations were not really about whether or not a decision in a given case was morally acceptable, but about saving and preserving the integrity of the Union by the means of jurisprudence.

Finally, Anthony J. Sebok writes that he disagrees with both Cover's formalizing interpretation and the instrumental interpretation of Nelson. According to this author, various judgments of Justice Lemuel Shaw were grounded in a subtle from of legal positivism,

which allows the decisions to vary depending on the situation and the valid legal basis at a given time. It appears that the discussion on this subject, considering both its aspects, the historical one and the universal one, is still open.

In the latest literature on this subject, Jeffrey M. Schmitt recalls the aforementioned thesis of Dworkin and argues that the essence of the problem of jurisprudence in cases of slavery is not based on the conflict between the conscience of a single judge and his or her loyalty to the law. Considering the content and the spirit of the Declaration of Independence of 1776 and the Constitution of 1787, its natural law foundations should have been, after all, revisited. *Ergo*, the legality of slavery should have been questioned. Abraham Lincoln is said to have cited the following quote from the Book of Proverbs while talking about the relationship between the Declaration of Independence and the Constitution: "A word fitly spoken is like apples of gold in a setting of silver" (25:11). In this metaphor, the apples of gold are the idea of freedom manifesting itself in the Declaration of Independence, and the provisions of the Constitution are merely its silver setting. Such an interpretation of this relationship makes it so that there is justice (*fiat iustitia)* and the heavens do not fall (*non ruat coelum*), after all.

The previously discussed problem of slavery in the United States is an excellent example of all the aspects of a phenomenon referred to in current literature as the axiological neutrality of the law. Here we have presented everything that is characteristic of this phenomenon: first, the axiological dissociation between the ideals of the Declaration of Independence of 1776 and some specific provisions of Constitution of 1787; second, the direct manipulation of the legal text by euphemistically avoiding the word "slavery" in the content of the Basic Law; third, the split personalities of the founding fathers, for example, of Thomas Jefferson, who was a slave owner torn between his humanist ideals and his economic interests; fourth, the fact that the legislation of the Northern and Southern States differed drastically despite being placed under the single umbrella term of the uniform axiology of federal law; fifth, the moral dilemmas of judges torn between legal formalism and humanist abolitionism; and sixth, the aforementioned process of subversion within the scope of the legal interpretation of the law dealing with fugitive slaves and slaves in transit.

# Selected Further Readings


Adams, David M. 2005. *Philosophical Problems in the Law*. 4th ed. Belmont: Wadsworth.

Bix, Brian. 2009. *Jurisprudence. Theory and Context*. 5th ed. London: Sweet&Maxwell.

Brand, Jeffrey. 2013. *Philosophy of Law. Introducing Jurisprudence*. London–New Delhi–New York: Bloomsbur.

Brooke, David. 2013. *Jurisprudence. Questions and Answers 2013–2014*. New York: Routledge.

Coleman, Jules and Scott Shapiro. 2002. *The Oxford Handbook of Jurisprudence and Philosophy of Law*. Oxford–New York: Oxford University Press.

Coyle, Sean. 2014. *Modern Jurisprudence. A Philosophical Guide*. Oxford–Portland: Hart Publishing.

Del Mar, Maksymilian, ed., 2011. *New Waves in Philosophy of Law*. New York: Palgrave.

Feinberg, Joel and Jules Coleman, ed., 2008. *Philosophy of Law*. 8th ed. Belmont: Thomson Wadsworth.

Golding, Martin P. and William E. Edmundson. 2005. *The Blackwell Guide to the Philosophy of Law and legal Theory*. Malden–Oxford–Carlton: Blackwell Publishing.

Kavanagh, Aileen and John Oberdiek, ed., *Arguing About Law*. London–New York: Routledge.

Marmor, Adbrei, ed., 2012. *The Routledge Companion to Philosophy of Law*. New York–London: Routledge.

May, Larry and Jeff Brown, ed., 2010. *Philosophy of Law. Classic and Contemporary Readings*. Malden–Oxford: Wiley-Blackwell.

Mcleod, Ian. 2005. *Legal Theory*. 3rd ed. London: Palgrave.

Patterson, Dennis, ed., 1999. *A Companion to Philosophy of Law and Legal Theory*. Malden–Oxford–Carlton: Blackwell Publishing.

Reidy, David A. 2007. *On the Philosophy of Law*. Belmont: Wadsworth.

Tebbitt, Mark. 2005. *Philosophy of Law*. 2nd ed. London–New York: Routledge.

Wacks, Raymond. 2012. *Understanding Jurisprudence. An Introduction to Legal Theory*. 3rd ed. Oxford–New York: Oxford University Press.