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The Aprioristic and Transcendental Foundations of Law

edited by
Marek Zirk-Sadowski

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Tomasz Bekrycht
(1970–2021)

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BETWEEN APRIORISTIC AND TRANSCENDENTAL FOUNDATIONS OF LEGAL INSTITUTIONS: PROFESSOR TOMASZ BEKRYCHT AND HIS INTERPRETATION OF THE PHILOSOPHICAL FOUNDATIONS OF LAW (INTRODUCTION)

On March 11, 2021, a professor at the University of Lodz, habilitated PhD Tomasz Bekrycht, Vice-Dean of the Faculty of Law and Administration, a highly respected theoretician and philosopher of law, an outstanding artist and humanist, known not only in Poland, but also abroad, unexpectedly passed away.

Professor Tomasz Bekrycht was an extraordinary man with wide-ranging interests and numerous talents. One of the images that will remain in our memory will probably be the one when, after long and intense discussions on the philosophy of law, he sometimes reached for the trumpet, which he also played professionally for a long time. It is worth recalling that he was an outstanding virtuoso for eight years (1990–1998), employed as an orchestral musician (major trumpet) at the Musical Theatre in Łódź. Remaining sensitive to beauty, he also devoted his professional life to exploring the mystery of good, devoting himself more and more to the philosophy of law and ethics. The beginning of his research interests should be associated with the Kantian philosophy of law, which became the subject of his M.A. thesis entitled *The Liberal Concept of Law in Kant's Philosophy*, prepared under the supervision of Professor Mark Zirk-Sadowski. This work focused on presenting the Kantian philosophy of state and law from the perspective of the theory of knowledge and the science of morality, illustrating the thesis that the guiding concept of the Kantian philosophy of law is the idea of freedom secured by creating legal guarantees limiting arbitrary coercion. The particular subject of interest of Professor Bekrycht involved the relationship between external freedom and positive law, realised in the vision of the rule of law, realised today as a legal order modelled on the deductive system.

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Considerations devoted to this issue provided a permanent background for this author's later publications, starting with the article by I. Kant, "Die Kritik der Konzeption des Naturrechts", through a series of publications on human rights and the relationship of law and morality (Bekrycht 2004; 2009a; 2014; 2016; 2019), and ending with a monograph on the transcendental foundations of law, which was Bekrycht's habilitation dissertation (Bekrycht 2015). The aim of this last work, which was to some extent the culmination of earlier considerations on the transcendental foundations of law, was to present the phenomenon of positive law in relation to metaphysical and ontological justification. Thus, this work focused on the issue of the conditions for the possibility of the existence of law. Professor Bekrycht put forward the thesis that the conceptual elusiveness of positive law is based on the contradiction between the idea of freedom and the idea of necessity, and he also noticed that freedom provides us with a choice, and life provides the possibility of implementing this choice at the cost of self-limitation. Consequently, the phenomenon of positive law is revealed – according to Professor Bekrycht, it is a synthesis of that which cannot be reconciled: the idea of freedom on the one hand and necessity on the other. The second, extremely important stream of research by Professor Bekrycht was the phenomenology of law, and in particular the analysis of the philosophical and legal views of Adolf Reinach. He had devoted his doctoral dissertation to these issues, which was the first comprehensive study of Reinach's philosophy of law in Polish literature (Bekrycht 2009b). This work presented in a comprehensive and, at the same time, extremely insightful way issues at the junction of phenomenology and linguistic philosophy. Aprioric foundations of civil law as perceived by Professor Bekrycht is a research project aimed at reconstructing the theory of speech acts and its application to the analysis of problems in the field of dogmatic analysis of civil law on the one hand and interpersonal communication on the other. This work also deals with the problem of the relationship between the *a priori* foundations of law and positive law, in some way also anticipating the later findings contained in the habilitation thesis devoted to the transcendental philosophy of law. Certainly, the outstanding achievement of Professor Bekrycht is the Polish translation of Adolf Reinach's *Die apriorischen Grundlagen des bürgerlichen Rechtes* (2009).

Professor Tomasz Bekrycht also left behind publications devoted to logic, issues of legal methodology, and constitutional and tax law. Professor Bekrycht was the author of numerous works in the field of methodology of legal sciences, the ontology and epistemology of law, as well as semiotics and logical pragmatics. Certainly, however, a special area of his interest and intellectual activity was the phenomenology of law. He was a courageous researcher who did not hesitate to present in a new way the most difficult problems of the analytical philosophy of law. The achievements of Professor T. Bekrycht should be considered as very extensive; in total, they include 29 works of a very serious nature and over 24 articles, published to a large extent in foreign languages in reputable

international publishing houses, such as Brill, Wolters Kluwer, C.H. Beck, Ashgate, or P. Lang. Professor Bekrycht's scientific activity manifested in very active participations in international and domestic scientific events, during which he became known as an interesting speaker and an excellent discussant.

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A COMMENTARY ON KANT'S INTRODUCTION OF THE CONCEPT OF TRANSCENDENTAL DEDUCTION

Abstract. The aim of this paper is to show the place of legal analogy in Kant's introduction of the concept of transcendental deduction. After remarks on Kant's use of the term "deduction," transcendental deduction is characterised as the method justifying necessary statements about objects. It is argued that this method has normative elements. This leads to asserting similarities between epistemic obligation and legal obligation in the framework of transcendental philosophy.

Keywords: *quid facti*, *quid juris*, logic, deduction, obligation, validity, knowledge

KOMENTARZ NA TEMAT WPROWADZENIA POJĘCIA DEDUKCJI TRANSCENDENTALNEJ PRZEZ KANTA

Streszczenie. Celem artykułu jest pokazanie miejsca analogii prawniczej przy wprowadzeniu przez Kanta pojęcia dedukcji transcendentalnej, rozumianej jako metoda uzasadniająca konieczne twierdzenia o przedmiotach i zawierające element normatywne. To prowadzi do stwierdzenia, że, w perspektywie filozofii transcendentalnej, zachodzą podobieństwa pomiędzy powinnością epistemiczną a powinnością prawną.

Słowa kluczowe: *quid facti, quid juris*, logika, dedukcja, powinność, obowiązywanie, poznanie

My further remarks concern Immanuel Kant's *Critique of Pure Reason*, Chapter *A*, Section 1, § 13 (A85–B17) – "The Principles of Any Transcendental Deduction" (Kant 1933).

> When speaking of rights and claims, jurists distinguish in a legal action the question of right (*quid juris*) from the question of fact (*quid facti*), and they demand that both be proved. They entitle the proof of the former – which has to state the right or the legal claim – as *deduction.* Many empirical concepts are employed without anyone questioning them. Since experience is always available for objective reality, we believe – even without deduction – that we are justified in appropriating to them a meaning, an ascribed significance. However, there are also usurpatory concepts, such as *fortune* or *fate*, which, though allowed to circulate by almost

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> universal indulgence, are yet from time to time challenged by the *quod juris* question. This dormant form of deduction involves a considerable perplexity; it is not clearly legal or sufficient to justify their employment, being obtainable either from experience or from reason.
> Among the manifold concepts which form the highly-complicated web of human knowledge, there are some which are marked as pit for pure *a priori* employment, in complete independence of all experience; and their right to be so employed always demands a deduction. For since empirical proofs it does not suffice to justify this kind of employment; we are faced by the problem of how these concepts can relate to objects which they yet do not obtain from any experience. I entitle the explanation of the manner in which concepts can relate *a priori* to objects as their transcendental eduction, and from it, I distinguish empirical deduction, which shows the manner in which a concept is acquired through experience, and which, therefore, concerns not its legitimacy, but only its *de facto* mode of origination.

The German text (Kant 1926) runs as follows:

> Die Rechtslehrer, wenn sie von Befugnissen und Anmassungen reden, unterscheiden in einer Rechtshandel die Frage über das, was Rechtens ist (*quid juris*) von der, die die Tatsache angeht (*quid facti*) und indem sie von beiden Beweis fordern, so nenen sie den ersteren, der die Befugnis, oder auch den Rechtsanspruch dartun soll, die *Dedudukion*. Wir bedienen un seiner Menge empirischer Begriffe ohne jemandes Widerrede, und halten uns auch ohne Deduktion berechtigt, ihnen einen Sinn und eingebildete Bedutung zuzueignen weil wir jederzeit die Erfahrung bei *der* Hand haben, ihre objective Realität zu beweisen. Es gibt indessen auch usurpierte Begriffe, wie etwa *Glück*, *Schicksal*, die zwar mit fast allgemeiner Nachsicht herumlaufen, aber doch bisweieln durch die Frage: *quid juris*, in Anspruch genommen warden, da man alsdann wegen der Deduktion derselben in nicht geringe Verlegenheit great, inden man keinen deutlichen Rechtsgrund weder aus der Erfahrung, noch der Vernuft anführen kann, dadurch die Befugnis seines Gebrauch deutlich würde.
> Unter den mancherlei Begriffen aber, die das sehr vermischte Gewebe der menschilien Erkenntnis ausmachen, gibt es einige, diem auch zum reinen Gebrauch a priori (völlig unanhängig von aller Erfarhung bestimmt sind, und dieser ihre Befugnis bedarf jederzeit einer Deduktion; weil zu derm Rechtmässigkeit eines solches Gebrauchs Beweise aus der Erfahrung nicht hinreichend sind, man aber doch wissen muss, wie diese nBegriffe sich auf Objekte beziuehen können, die sie doch aus keiner Erfahrung hernehmen. Ich nenne daher die Erklärung der Art, wie sich Begriffe a priori auf Gegenstände beziehen können, die *transzendentale Deduktion* derselben, und untercheiden sie von der *empirische Deduktion*, welche die Art anzeigt, wie ein Begriff durch Erfahrung und Relexion über dieselbe erworben worden, und daher nicht die Rechtmässigkeit, sondern das Faktum betriift der Besitz entsprungen.

The first two sentences of the quoted text from the *Critique of Pure Reason* refer to the distinction between *quid juris* and *quid facti* as understood by jurists, and are usually regarded as explaining Kant's usage of the term *Deduktion*. Referring to Heinrich (1989), Henry E. Allison, a leading contemporary Kantian scholar summarises the issue in the following way (Allison 2015, 10):

> (…) Kant's use of the term "deduction" was borrowed from the legal system of the Holy Roman Empire, where *Deduktionschriften* were writings issued by the parties involved in legal disputes, most of which involved territorial claims. In short, understood by deduction not a deductive argument, but rather, an argument (of whatever form) that endeavors to justify

> a right to possess and use something, which in the case of Transcendental Deduction is a set of pure concepts of the understanding or categories.

This explanation alludes to German legal vocabulary employed in the Holy Roman Empire (of German Nation). However, the story is longer. As classical Latin (see Lewis 1879) explains (*inter alia*, because there are other meanings of "deduction" as well), "*deductio* (…) A putting out of possession, ejection, expulsion (…) *ex hac deductione rationis* from this course of reasoning."

Thus, we have two senses of *deductio*, namely (a) legal (or proto-legal), under which someone is removed from the possession; and (b) logical (rhetorical), i.e. one referring to an argument (more specifically, the reasoning replacing a wider issue with something more specific). A Latin dictionary for lawyers and historians (see Sondel 1997) lists, among other things, the following meanings of *deductio*: (i) lead out; (ii) reasoning; (iii) inference from the general to the particular; and *deduco ad iudicium* (translated as "present the case before court.") This last use is related to the distinction between *quid facti* and *quid iuris.* Thus, a party presenting a case *ad iudicium* should mention facts as well as elaborate the legal ground of the claim in question. *Deductio* covers both these components.

Due to the present meaning of deduction as a reasoning (inference) in which its conclusion logically follows from its premises, it is interesting to find historical sources of this usage. Unfortunately, at least according to my knowledge, we have only very general accounts of this problem. Ritter (1972; more precisely its 2nd volume, published in 1972), who produced the most comprehensive historical and systematic dictionary of philosophical concepts, mentions deduction in formal logical sense only. Eisler (1901) outlines the history of deduction from Plato to Kant (except the latter) in 9 lines without informing the reader who used the term *deductio* as the first one. Certainly, this label occurs in medieval scholastic writers. Goclenius in his *Lexicon, Philosophicum, quo tanquam clave philosophiae fores aperiuntur* (1613) says: "Deductio plurimis conuenit. Grammatica, Logica, Mathematica, Historica, Politica quaedam est. (…). Deductio logica est Concreto ab abstraction casuum a themata. (…). Logica etiam est rationis alicuius Deductio." This definition of logical deduction concurs with its understanding as the inference from the general to particular – Goclenius did not mention the legal meaning of deduction. All this data suggests that Kant actually employed the word *Deduktion* as it had occurred in the legal discourse. In fact, he did not speak on deduction as inference in his logical works (he used the word *Ableitung*). The terminological situation changed after Kant. As Wilhelm T. Krug (see Krug 1832; he was Kant's successor in Königsberg as the professor of logic and metaphysics) explains:

> Deduction (von deducere, ableiten) ist eigentlich Ableitung eines Satzes aus einem oder mehren andern. Weiss aber meim Beweisen auch etwas asus einen Andern und Gewissern (aber doch als schon ausgemacht Angenommenen) abgeleitet wird: so nennt man auch oft die Beweise

> *Deductionen.* Besonders pflegen die Rechtsgelehrten ihre Beweise so zu nennen, und zwar wiefern dieselben auf die Tatsache gehn, deductiones facti, wiefern sie aber auf die eigentliche Rechtsfrage gehn, deductiones juris. Die Philosophen, besonders die aus kritischen Schule, pflegenebenfalls ihrer Beweise aus der unspruglichen Gesetzmässigkeit des menschichen Geistes *Deductionen* zu nenen, und zwar *transzendentale.*

Thus, Krug distinguishes logical deduction, legal deduction, and transcendental deduction. Although he mentions proofs (*Beweise*) produced by jurists, he completely ignores Kant's link with jurisprudence and stresses that transcendental deduction is a speciality of critical (that is, Kantian) philosophy. Further development resulted in setting logical deduction as the standard – legal deduction is presently considered as the so-called practical (legal) syllogism of the form "if *A*, then ought to be that *B*, *C* happened, *C* falls under *A*, then *B* should apply with respect to *C*[1]."

The above remarks supplement Allison's conclusion about the legal genesis of Kant's usage of the concept of deduction. The reasons for this interpretation have very considerable evidence. Firstly, the logical usage was not yet established in philosophy and logic at the turn of the 18th and 19th centuries – this meaning, as Krug's dictionary documents, began to be dominant in the 19th century[2]. Secondly, the legal way of understanding Latin *deductio* and German *Deduktion* (or *Deduction*) had been fairly popular before Kant, although more in the medieval language and later among jurists rather than in the vocabulary of philosophy. Legal analogies support Allison's point that transcendental deduction provides the second-order warrant to first-order cognition. As he writes (see Allison 2015, 10):

> For Kant this second order-warrant is conferred by the categories and securing their normative status, which would also eliminate the spectre, is the task of the Transcendental Deduction. (…). Expressed in present-day philosophical parlance, Kant's Transcendental Deduction may be described as an endeavor to establish a "warranted assertibility" with regard to a unique set of concepts, which determines the grounds and boundaries of their legitimate use.

As Allison earlier says, a warrant "is required for (…) epistemic ought." This observation seems interesting and I will follow it to some (perhaps even a considerable) extent.

Most commentators see legal analogy in Kant's *Critique of Pure Reason* as merely a historical and terminological curiosity, accidental at most[3]. Yet, its

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[1] This is a very simplified schematisation. By the way, practical syllogism was already analysed by Aristotle.

[2] Yet the story is more complicated. The full title of John Stuart Mill's *Logic* (published in 1843) reads *A System of Logic, Ratiocinative and Inductive*, whereby "ratiocinative" means "deductive."

[3] See Messer (1922, 74); Eisler (1930, 83–84); Baum (1986, 52–53); Caygill (1995, 151–152); Gardner (1999, 136). Since I am not a Kantian scholar, the list in this footnote should be considered as a sample composed by an amateur – this remark concerns the next footnote as well. Nevertheless,

eventual substantial import is not taken into account[4]. I would like to propose a different insight – not a solution of the problem, but, rather, a suggestion of its setting in a different conceptual framework, more related to legal (more generally – normative issues) than traditional (even Allison's) hermeneutics. What is also noted by several commentators is that Kant also applied other legal terms, namely *Rechtsgrund* (legal foundation), *Rechtmässigkeit* (legal legitimacy), and *Besitz* (possession, but considered in the context of *quid facti* – as something factual, and *quid juris* – as something legally justified). Moreover, the sense of the word *Recht* seems to be relevant. In the German juristic language (like in many other, e.g. *droit* and *lois* in French or *ustawa* and *prawo* in Polish, but not in English; Latin words *lex* and *jus* are prototypes), the difference between *Gesetz* and *Recht* expresses an opposition between "what is stated by an authority" and "what possesses a justification in valid law"[5]. Thus, the word *Recht* has obvious links with *quid juris* and with the justification (*Rechtfertigung*) of our beliefs, not necessarily normative.

I do not suggest that Kant attributed a major importance to the legal distinction between *quid facti* and *quid juris.* Perhaps it was only a convenient heuristic device for him. However, let us take Allison's concept of epistemic obligation as providing a good starting point for my further considerations. He contrasts Hume as a proponent of relying only on an epistemic empirical warrant with Kant who demanded something (or rather much) more for the successful justification of our assertions. More specifically, although the former regarded empirical deduction as sufficient (and, of course, necessary) for epistemic warrant, transcendental deduction (I consciously do not use capitals) was indispensable for the latter. In other words, Hume reduced the epistemic warrant to collecting empirical data, but Kant argued against such a reductive step. Two additional remarks are in order here. Firstly, expressing the problem in terms of empirical and transcendental deduction dresses the issue in the Kantian language, because Hume could not use these categories; for him, deduction concerns relations between ideas, not matters of facts. Secondly, because Hume denied that obligation is derivable from it, he would probably reject the concept of epistemic obligation, or he could extend his thesis to the statement that is-sentences on epistemic warrant do not entail

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I am inclined to think that my picture of the Kantian scholarship is correct in this respect. Perhaps it is worthy to add in this place that the discussed issue provides an interesting case of the influence of law on philosophy.

[4] Except works mentioned in the previous footnote, one can inspect the following: Cohen (1907); Kemp Smith (1918); Paton (1936); Swing (1969); Howell (1992); Ingarden (2021). Even Allison's remarks suggest that the legal analogy had at most a heuristic significance to Kant.

[5] I neglect various aspects of this distinction related to the controversy between legal positivism and natural law theories, associated with the distinction between *Gesetz* and Recht, because they are not relevant to the topics discussed in the present paper. Hence, the word *Recht*, as I use it, has no moral connotations.

such obligation-containing-sentences. When generalising the legal analogy, we should distinguish between *quid facti* and *quid juris* epistemic assertions. For a Hume-like thinker, our first-order epistemic assertions constitue *quid facti* – one can alternatively consider *quid juris* problems, e.g. the problem of justification of induction, but such considerations are distinctively different from direct statements about facts. Kant also strongly separated *Sein* (being, reality, actuality) from *Sollen* (oughtness, what should be), but was looking for the legitimacy (*Rechtmässigkeit*) of our knowledge. For him, to use Allison's vocabulary, first-order assertions must be valid on the base of second-order settings.

We can assume that Kant accepted the thesis on the non-derivability of 'ought to' from 'is'. However, due to his general claims of knowledge, he was looking for a method of proving its legitimacy. Empirical deduction, whatever it is, cannot here help, because it answers questions of the *quid facti* type, i.e. produces synthetic *a posteriori* statements. Logical deduction (*Ableitung*) is also useless, because the status of premises is transformed to that of their conclusions – if (to simplify, I only consider reasoning in which there occurs one premise and one conclusion) the premise is analytic, synthetic *a priori*, synthetic *a posteriori*), the conclusion has the same character, respectively. For Hume, since knowledge is expressed by analitycals or syntethicals *a posteriori*, logical deduction and empirical deduction are sufficient, but Kant claimed that we need transcendental deduction (more generally, transcendental logic) in order to deal with syntheticals *a priori.* For instance (see Stuhlmann-Laeisz 1991), one of transcendental arguments has the following form:

(*) (A is *a priori* $\square$ *a priori* ($\Diamond A \rightarrow B$)) $\rightarrow$ *a priori* B

This formula means "if A is *a priori* and if possibility of A *a priori* implies B, then B is *a priori.*" Now, (*) is not a theorem of logic. Since, for Kant, if a sentence is *a priori*, it is also necessary, (*) implies ($\Box$ – it necessary that)

(**) ($\Box A$ $\square$ $\Box(\Diamond A \rightarrow B)) \rightarrow \Box B$.

Thus, transcendental logic allows deducing a necessary statement from possible and factual premises, like ($\Diamond A \rightarrow B$). More specifically, necessity (apriority) of B is concluded from necessity of A supplemented by necessary implication "if A is possible, then B." Although (**) can be introduced as a new modal axiom, the resulting system is more a formal theory of modality rather than a genuine modal logic.

According to Allison (see one of the quotations above), categories in Kant have a normative status. I agree with this opinion, but I think that it can be generalised to the entire transcendental logic, understood as the collection of arguments falling under the schemes of transcendental deduction (like (**)) and explaining how universal and necessary statements about objects are possible. It is another wording of Kant's famous question: how possible are propositions synthetic *a priori*? If we ascribe a normative character to transcendental logic, we can say that rules, like (**), concern the epistemic *Sollen*, an autonomous

region of thinking, not only independent from *quid facti*, but also conditioning our assertions of facts. This leads to a reinterpretation of the legal analogy. Take the term *Rechtmässigkeit*, which means legitimacy as legality. Correspondingly, the typical attribution of legality concerns our actions as conforming standards generated by legal rules, and Kant used the term in question just in this meaning. His interests concerning the concept of legality were limited to the question of relation between law and morality, e.g. the role of the former as a guarantee freedom of people living together in society. This situation did not force a deeper analysis of legality. This radically changed in post-Kantian legal philosophy, particularly related to Neo-Kantianism. Debates in this camp used the term *Rechtsgeltung* – legal validity[6]. Kelsen's pure theory of law with the idea of *Grundnorm* as a necessary condition of the validity of every system of positive law is perhaps the most clear example of the application of transcendental logic to the domain of *Rechtssollen*.

The last section suggests a stronger version of legal analogy in Kant. We have the realm of facts on which we make various syntheticals *a posterior.* However, they are possible, because we are equipped with the ability to use transcendental logic, a property of the mind as such. This explains why our knowledge of objects depends on transcendental elements and why epistemic questions *quid juris* are not reducible to responses concerning *quid facti.* If we inspect Heinrich Rickert's account of knowledge (see Rickert 1892; I use the paraphrase in Ajdukiewicz 1937), truth is generated by transcendental epistemic norms. The term "norms" is crucial in this context, because they organise the transcendental realm of knowledge, i.e. epistemic *Sollen.* Neo-Kantians went a step forward from Kant and separated *Sein* und *Sollen* more sharply than their master had. Yet, full consequences of the distinction between *quid facti* and *quid juris* in the frameworks of transcendental philosophy can be derived by appealing to Neo-Katnianism, especially Kelsen's legal theory. Thus, legal analogy, independently from its scope according to Kant's original account, shows a fundamental analogy between legal philosophy and epistemology, if both follow the idea of transcendental thinking. It is well-illustrated by a typical characterisation of epistemology (*Erkenntnistheorie*) made under the influence of Neo-Kantianism (Eisler 1925, 1):

> Theory of knowledge (…) asks for the essence and validity of knowledge as such. It founds common sense and scientific concepts and propositions, which are used "naively" or "dogmatically" as well as its concerns consists in proving these assumption for showing, whether and to which extent their *validity-claim* is justified.

If we replace "theory of knowledge" with "transcendental logic," we obtain an account of the second under Kantianism *sensu largo*, i,e. including

[6] I do not suggest that the term *Rechtsgeltung* had been unknown earlier, but only that its use had no particular theoretical import. Yet, the difference between *quid facti* and *quid juris* is important in every understanding of legal validity.

Neo-Kantianism as well. Clearly, commonsensical and scientific concepts employed naively or dogmatically deal with questions *quid facti* and must be supplemented by researches intended to prove *quid juris* claims. Thus, epistemic and legal *Sollen* share the same main problem of the relationship between 'is' and 'ought to', namely the epistemological and ontological grounding of the obligation as being *a priori* with respect to facts[7]. Kelsen considered the concept of the *Grundnorm* as the *a priori* (of pure normative reason) postulate for validity of legal systems. Thus, if we look at the relation between *quid juris* and *quid facti* in concrete legal cases, as it was observed by Kant, the former functions are *a priori* with respect to the latter.

Since Professor Tomasz Bekrycht investigated relations between legal theory and philosophy intensively and successfully, I think that the topic discussed in this paper is suitable for commemorating this distinguished scholar.

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[7] In order to avoid possible misunderstandings, I note that in my personal views, I am closer to Hume than to Kant. Although I accept that this does not imply obligation, I reject transcendental logic.

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KANT'S APRIORICAL IDEA OF LAW: TWO WAYS OF ITS JUSTIFICATION[1]

Abstract. Kant proposed an apriorical account of the idea of law, according to which the law's only legitimate goal is to guarantee for each citizen a possibly broad scope of external freedom compatible with the same scope of all other citizens. However, Kant did not make it entirely clear how this idea is to be justified. This paper presents two ways of justification, drawing on Kant's view of the human nature. The first one appeals to the apriorical components of this view (rationality, freedom, equality, and dignity), and the second one is based on its empirical components (the ambivalent account of human predispositions).

Keywords: idea of law, external freedom, the categorical imperative, radical evil

DWA SPOSOBY UZASADNIANIA KANTOWSKIEJ APRIORYCZNEJ IDEI PRAWA

Streszczenie. Kant zaproponował *aprioryczne* ujęcie idei prawa, zgodnie z którym jedynym prawomocnym celem prawa jest zapewnienie każdemu obywatelowi możliwie szerokiego zakresu zewnętrznej wolności dającego się pogodzić z identycznym zakresem wolności innych obywateli. Kant nie rozjaśnił jednak w pełni tego, jak należy to ujęcie uzasadnić. W artykule zostały przedstawione dwa sposoby jego uzasadnienia oparte na Kantowskim obrazie natury ludzkiej. Pierwsze z nich odwołuje się do apriorycznych elementów tego obrazu (racjonalności, wolności, równości i godności), drugi – do elementów empirycznych (ambiwalentnego ujęcia przez Kanta ludzkich predyspozycji).

Słowa kluczowe: idea prawa, zewnętrzna wolność, imperatyw kategoryczny, radykalne zło

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[1] I dedicate this paper to the memory of Tomasz Bekrycht, a great scholar, an expert on Kant's practical philosophy, and – above all – my dear friend.

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1. KANT'S IDEA OF LAW – LAW AS A MEANS OF THE PROTECTION OF EXTERNAL FREEDOM

Kant's idea of law, expounded most fully in the first part of his work titled *The Metaphysics of Morals*, has an apriorical character, i.e. it rests on the assumption that its basic, immutable principles can be derived *a priori* from pure reason alone[2]. The main results of this derivation, i.e. the principles that structure the domain of law, are clearly expressed in the following two passages:

> The concept of Right [Law – *Recht*], insofar as it is related to an obligation corresponding to it (i.e., the moral concept of Right), has to *do, first,* only with the external and indeed practical relation of one person to another, insofar as their actions, as facts, can have (direct or indirect) influence on each other. But, *second,* it does not signify the relation of one's choice to the mere wish (hence also to the mere need) of the other, as in actions of beneficence or callousness, but only a relation to the other's *choice. Third,* in this reciprocal relation of choice no account at all is taken of the *matter* of choice, that is, of the end each has in mind with the object he wants; it is not asked, for example, whether someone who buys goods from me for his own commercial use will gain by the transaction or not. All that is in question is *the form* in the relation of choice on the part of both, insofar as choice is regarded merely as *free,* and whether the action of one can be united with the freedom of the other in accordance with a universal law. Right is therefore the sum of the conditions under which the choice of one can be united with the choice of another in accordance with the universal law of freedom (Kant 1991, 56; Kant 2020, par. 231).[3]

> Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity (Kant 1991, 63; Kant 2020, par. 237).[4]

One should emphasise two crucial points of Kant's analysis of law:

(1) The concept which is fundamental for Kant's understanding of law is that of (external) freedom (*die äußere Freiheit*), i.e. of freedom to act as one wishes, without being compelled by others. It is fundamental in the sense that human beings have the (legal) right to this kind of freedom (provided it is compatible with the same scope of freedom of others) and that the *only* justification for imposing legal duties on citizens is external freedom's protection; no other justification, e.g. concern with the welfare of citizens, is legitimate (thus, one can legitimately assert

[2] The term "metaphysics" means for Kant precisely the inquiry into the *a priori* laws and concepts, and the results of such an inquiry.

[3] This last – especially important – sentence reads in the original: "Das Recht ist also der Inbegriff der Bedingungen, unter denen die Willkür des einen mit der Willkür des anderen nach einem allgemeinen Gesetze der Freiheit zusammen vereinigt werden kann."

[4] Kant dubs it "the only inner right" (as an *a priori* right, it is also a *natural Right*). Strictly connected with this right is Kant's definition of a lawful (right) action, the so-called Universal Principle of Right, which says that "An action is *right* if it can co-exist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law" (Kant 1991, 56; Kant 2020, par. 231).

that Kant was an adherent of the liberal view of the limits of legal intervention in social life).

(2) The protection of external freedom is realised by means of legal duties (prohibitions), which differ from the moral ones in that they do not have to be fulfilled for right reasons (i.e. just because they are duties): a merely "external" consonance of an action with them (which Kant calls 'legality – *Gesetzmäßigkeit*') is sufficient. Kant does not make it explicit why the law could not require the right motive (which, for Kant, is the satisfaction of a duty just because it is a duty), but, as it seems, two reasons stand behind this claim. First, one can hardly imagine a procedure which could determine whether an agent acted "out of duty" (i.e. had the duty as the only determinative ground of his/her action) rather than merely "in accordance with duty"; and such a procedure would be necessary for the *enforcement* of legal duties if they were to demand also a proper motivation (enforceability being a definitional feature of legal duties). Secondly, the very fact that the definitional element of law is that it makes use of sanctions – non-moral incentives – seems to imply that it cannot require that citizens comply with its precepts for morally-appropriate reasons.

As we can see, it is not difficult to understand what Kant means by law: the law is an instrument serving the protection of external freedom, and juridical (legal) duties need not be fulfilled just because they are duties (the law requires only the "legality" of our actions). The difficulties appear in two other points: when one asks whether a given action is compatible with everyone's freedom or not; and when one strives to reconstruct the steps of the reasoning (of "deduction") that led Kant to the endorsement of this – *liberal* – view of the limits of law. I shall not be concerned with the former difficulty, which has a technical rather than philosophical character, i.e. it can be overcome in the course of a careful analysis of various rights (property, family, etc.) with a view to establishing such a scheme of these rights which maximises the extent of freedom[5]. I shall only be concerned with the latter difficulty. This difficulty is a serious one, because one can hardly find passages in *The Metaphysics of Morals* in which this kind of deduction is explicitly conducted; rather, one encounters a meticulous (though immensely illuminating) analysis of various legal concepts, including that of freedom, which, nonetheless, does not sufficiently explain why Kant delineated the limits of law in this liberal way. Two ways of justification might seem plausible at first glance, but, as we shall see, they turn out to be rather unsatisfactory upon closer inspection.

Firstly, one could argue that Kant's account of the function of law had to be liberal, because it was constructed in the course of an apriorical analysis, which, as Kant believed, cannot focus on the "matter" of choices or relations between

[5] Of course, Kant presents such a scheme, which, though controversial in several points, has a very sophisticated form; he argues, for instance, that private property or the rule of the first appropriation of the land can also be derived apriorically.

people; it can concern only their "form" (and, if we consider human actions, their "form" is freedom). However, this path of reasoning is not cogent. One could point out (following Max Scheler or other proponents of the "material *a priori*" in ethics) that it is arbitrary to maintain that an apriorical analysis cannot concern "matter". It could also be argued that this kind of justification of the limits of law would be very weak: it should be construed as a testimony to the limitations of the apriorical method (as understood by Kant, i.e. limited only to the "formal" aspects of law) rather than as a plausible argument for the claim that the essence of law is the protection of external freedom.

Secondly, it could be claimed that the idea of law can be derived *directly* from the categorical imperative (in its first formula – the Universal Law). On this interpretation, the idea would be the result of the application of the procedure of universalisability to the question of the proper use of one's external freedom. This result could be spelled out in this way: "accord to yourself as much external freedom as you can wish to accord accord to other people". Schematically, this justification can be presented this way:

The Categorical Imperative in its Formula of Universal Law → The Idea of Law

It must be admitted that this interpretation is not entirely implausible: if we assume that the law deals with our external freedom and that the scope of external freedom must be determined by the procedure of universalisability (two fairly uncontroversial premises), then, apparently, we can infer that we can give to ourselves not more freedom than we are ready to give to others. However, there are two weak points of this argumentation. The first one is that the categorical imperative is focused not only on the external aspects of human actions, but also on their motivation, and, as was mentioned, legal duties do not require that agents discharge of them with the proper motivation, i.e. that the determining ground of their actions is the mere consciousness of the fact that they are duties. Thus, it is by no means certain that the categorical imperative can be legitimately used with regard to external aspects of actions alone. The second, even more important, weakness of this argumentation is the following: it seems that the only claim regarding external freedom which can be derived from the categorical imperative (assuming that it can be at all applied to external aspects of action alone) is that we should not grant to others less freedom than we are ready to grant to ourselves (or that we should give to ourselves the same scope of external freedom which we are ready to give to others); however, the categorical imperative cannot ground the derivation of the central thesis of Kant's idea of law, i.e. that the *only* function of law is the protection of external freedom and that the scope of this freedom should be *as wide as possible*, constrained only by the requirement of consistency.

Consequently, it seems that the answer to the question about the justification of Kant's account of the limits of law must be sought elsewhere. In my search for

this answer, I shall make three points: that the foundations of Kant's idea of law lie in his view of human nature; that this view embraces both apriorical and empirical components; and that even though apriorical components play the decisive role in Kant's justification of his idea of law, the empirical components provide the resources for its additional justification (even though this justification *is not* invoked by Kant himself). Needless to say, only the former type of justification – namely the derivation of the idea of law from certain apriorical theses about the human nature – preserves the apriorical character of this idea. Nonetheless, it would be interesting to demonstrate that this idea is supported also by Kant's empirical claims about the human nature.

2. KANT'S VIEW OF THE HUMAN NATURE

I do not propose to reconstruct the Kantian view of the human nature in all its complexity: this would be a daunting task, which could be hardly realised in this paper[6]. I will focus only on those components of this picture which are pertinent to the question about the justification of Kant's idea of law. As already mentioned, the components can be divided into apriorical and empirical. The former embrace rationality, (metaphysical) freedom, fundamental equality, and the dignity of human beings, while the latter embrace what I will call the 'ambivalent' account of human predispositions and inclinations. In the next two sub-sections, I will look more closely at these two types of components and trace their links with Kant's idea of law.

2.1. The apriorical components

In *Groundwork of the Metaphysics of Morals*, Kant established the categorical imperative as the supreme principle of morality (the principle which demands, in its Formula of Universal Law, that people should act only on such maxims, i.e. personal rules of conduct, that can be generalised) and argued that an act is genuinely moral if, and only if, the "unconditionally good will" stands behind it, i.e. the will which does the act prescribed by the categorical imperative "out of duty"/"from duty" (i.e. is motivated only by the reverence for this imperative); an act that only accords with the duty is, according to Kant, merely legal, not (genuinely) moral[7]. In order to establish the connection of this deduction with the view of the human nature, Kant engaged into "transcendental argumentation", i.e.

[6] Such a reconstruction can be found, e.g., in Wood (1999, part II).

[7] It is worth stressing that in conducting his deduction of this principle, Kant maintains that the analysis he provides is an analysis of common moral consciousness, which implies that if a "common man" (human being) were to look deeply into himself/herself to ascertain the way in which he/she makes moral judgments, he/she would be bound to agree with Kant's conclusions.

he asked about *the condition of possibility* of being moved only by the categorical imperative as well as *the condition of ascribing to us moral responsibility for our actions*. His conclusion was that this condition is (metaphysical) freedom, which, in its negative characterisation, is the "independence from being determined by sensible impulses,"[8] and in its positive characterisation – "the capacity of pure reason to be of itself practical"[9] (cf. Kant 1991, 42; Kant 2020, par. 213–214). As Tomasz Bekrycht put it:

> The critique of pure reason demonstrated that freedom is not logically contradictory, proving that it must belong to the sphere of the noumenal reality, the existence of which is the foundation of freedom. Since it is impossible for our theoretical knowledge to access this sphere, freedom is not subject to theoretical proof. However, knowledge of the idea of freedom is a practical necessity for the subject of moral action and, thus, it is not merely an arbitrary invention or a dogmatic premise, but a transcendental concept (Bekrycht 2019, 148).

Accordingly, if human beings were not endowed with the capacity for metaphysical freedom, they would not be able to assume the categorical imperative as the sole motive of their actions, and, consequently, they could not be blamed for their immoral (non-legal, i.e. either "externally" discordant with the duty, or legal but inappropriately motivated) actions. Thus, according to Kant, (metaphysical) freedom is the condition of the validity of the categorical imperative. This metaphysical freedom – freedom of the will – is in fact the spontaneity of reason itself, because, in Kant's view, will is, in fact, *practical* reason. Hence, for Kant, rationality and freedom are inextricably connected with each other. However, this argumentation does not exclude that freedom, being a condition of moral responsibility, is not more than fiction (it is merely an idea that has no counterpart in reality) and that, as a consequence, the categorical imperative is not valid. Kant did not provide an unequivocal solution to this problem, though, of course, he fully realised it and tried to tackle it in two different ways. While in the *Grounding of the Metaphysics of Morals* he made an attempt to provide an *independent* reason for the thesis about the freedom of will (he appealed in this context to the *spontaneity* of reason as evidence of this freedom), in his later work – *Critique of Practical Reason* – he abandoned this attempt: he treated the validity of the categorical imperative as the "fact of reason" (the consciousness of the binding force of the moral law being thus a primitive *datum*); consequently, he could claim that freedom of the will (as a presupposition of this validity) is not a mere idea, but an objective reality instead[10].

The claim about rationality and freedom as features of the human nature led Kant to endorse two other important claims. The first one is about the fundamental

[8] In the original: "jene Unabhängigkeit ihrer Bestimmung durch sinnliche Antriebe."

[9] In the original: "das Vermögen der reinen Vernunft für sich selbst praktisch zu sein."

[10] For an extensive analysis of this problem, see especially Paton (1946, 199–221) and Wood (1999, 171–174).

equality of all human beings. Since all human beings are endowed with the capacity for metaphysical freedom, and, therefore, all are equal in the domain of morality (each person has an equal capacity to acquire moral merits or demerits[11]) – the domain which is of paramount importance, it follows that all human beings are *fundamentally* equal (i.e. equal as moral persons), even though they may differ in their talents, inclinations, etc. Kant explicitly connected freedom with the right to equality (equal treatment) in the following passage:

> This principle of innate freedom already involves the following authorizations, which are not really distinct from it (as if they were members of the division of some higher concept of a right): innate *equality,* that is, independence from being bound by others to more than one can in turn bind them; hence a man's quality of being *his own master (sui iuris),* as well as being a man *beyond reproach (iusti*), since before he performs any act affecting rights he has done no wrong to anyone; and finally, his being authorized to do to others anything that does not in itself diminish what is theirs, so long as they do not want to accept it – such things as merely communicating his thoughts to them, telling or promising them something, whether what he says is true and sincere or untrue and insincere *(veriloquium aut falsiloquium)*; for it is entirely up to them whether they want to believe him or not. (Kant 1991, 63; Kant 2020, par. 237).

From the fact that human beings possess the distinctive features of rationality and freedom, and that these features are characteristic for all human beings, it follows that all of them have *intrinsic worth*, i.e. dignity: they are "beyond all price" – they constitute "ends in themselves."

Given the above account of the human nature, it becomes easier to understand why Kant endorsed the liberal conception of law, i.e. he confined the function of law to protecting our external freedom.

Firstly, the maximally wide scope of external freedom for each person compatible with the same scope for all other persons provides the space in which human beings can manifest in a possibly extensive manner their (metaphysical) freedom, and thereby undertake acts flowing from their reverence for the categorical imperative. It can therefore be said that the value of external freedom is instrumental to the realisation of the capacity for making (metaphysically) free choices. A similar point was made by, e.g., Jennifer K. Uleman, who wrote that:

> Willing (…) always sets our bodies in motion toward the realization of the object of our choice. For Kant, fee (autonomous) willing is the only unconditioned, absolute good. This claim may be of course construed in different ways. But no one may deny that the moral demand to protect and promote this good (free willing) entails protecting and promoting it in its external efforts. Whatever stymied that motion, whatever interfered with those efforts, can rightly be construed as interfering directly with Kantian freedom (Uleman 2004, 591–592).

[11] Kant put much stress on this equality, writing that: "in matters that concern all men without distinction [i.e., in moral matters] nature is not guilty of any partial distribution of her gifts, and (…) in regard to the essential ends of human nature the highest philosophy cannot advance further than it is possible under the guidance which nature has bestowed even upon the most ordinary understanding" (Kant 1963, B879).

Schematically, this justification could be presented this way:

The Categorical Imperative (in any of its formulas) → Metaphysical freedom → The Idea of Law (*The idea of law is justified by the assumption of metaphysical freedom, because it (the idea of law) creates the maximum space in which we can exhibit this freedom*).[12]

Secondly, one could appeal to the notion of human dignity and, thereby, to the third formula (of the Humanity as an End in Itself) of the categorical imperative. The argument would be as follows: since human beings are "ends in themselves", whose rationality and freedom ought to be respected, the law must not impose on them any duties (for instance, paternalistic ones) which could not be justified as a means of their protecting freedom, because this would amount to treating them as not fully rational. Schematically, this justification can be presented this way:

The Categorical Imperative in its Formula of Humanity → The Idea of Law (*The idea of law is justified by the Formula of Humanity, because it (the idea of law) guarantees that citizens will be respected in their humanity*).

The common features of these two ways of justifying the idea of law involve their appealing to metaphysical freedom (the second way does it in an indirect way, while the first one in a direct way), as well as their implying that Kant's doctrine of law cannot be detached from his ethical theory (because metaphysical freedom itself is justified on the grounds of Kant's ethical considerations). It must be added, however, that these two theses are not accepted by all Kantian scholars. For instance, Allen W. Wood – one of the most prominent experts on Kant's practical philosophy – argued that the "sphere of right" as understood by Kant is "independent of morality" (Wood 1999, 323). According to Wood, Kant's idea of law should be viewed as expressing the respect for our "humanity", i.e. our capacity to set ends (moral and non-moral ones) according to reason[13]. This claim can be interpreted in two different ways. The first is that the idea of law is ultimately embedded in the third formula of the Categorical Imperative, i.e. the Formula of

[12] Paul Guyer (2002) also argued that the idea of law is to be derived from the assumption of human freedom. However, his reasoning is slightly different: he asserted that this assumption is the *first component* of *two different derivations* – of the categorical imperative, and of the idea of law. Schematically: human freedom (as an unconditioned value) → the Categorical Imperative; human freedom (as an unconditioned value) → the Idea of Law. However, this reconstruction does not seem to be faithful to Kant's texts, since human freedom itself is derived by Kant, via transcendental argumentation, from the moral law (the categorical imperative); therefore, it should not be treated as the first component of his reasoning.

[13] The thesis that Kant's legal theory can be detached from his ethical theory was also defended by, e.g., Thomas W. Pogge (2002).

Humanity as the End in Itself, in which case the derivation would be ultimately moral. According to the second way of interpretation, it should be seen as asserting, from the prudential standpoint, that the Kantian idea of law most effectively protects the pursuit of our various desires[14]. However, this last interpretation encounters two difficulties: it seems to provide a too weak justification of the Kantian attachment to external freedom[15], because the prudential considerations may be used to substantiate its various – and far-reaching – limitations (e.g. of the paternalistic kind); and, given the weight which Kant attached to free will, it can hardly be claimed that it does not play any role in his justification of his idea of law. One may also add that apart from the fact that metaphysical (inner) freedom is the fundamental concept of Kant's practical philosophy, and thus cannot be discounted in the interpretation of 'external' freedom, Kant wrote explicitly in the part I of the *Preface* to *The Metaphysics of Morals* that freedom can be examined in the internal and external use of the capacity for choice (*Willkür*), which seems to imply that, in fact, there is, in his view, *one* concept of freedom[16].

To summarise, in *Groundwork of the Metaphysics of Morals*, Kant argued that the categorical imperative is the supreme principle of practical philosophy, i.e. both of legal and moral philosophy. The two ways of justification of Kant's idea of law presented above are not contradictory to this claim. However, they show that the derivation of this idea from the categorical imperative is more plausibly interpreted as *indirect* (mediated by the Formula of Humanity or metaphysical freedom) rather than as direct (i.e. susceptible to direct derivation from the Formula of Universal Law).

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[14] Wood argued, in the spirit of the second interpretation, that "our external freedom would be inadequately protected if we had to rely on people's moral virtue in order to get what is ours by right. A system of virtue cannot presume any virtue or good will even on the part of those who legislate and administer right" (Wood 1999, 323). However, this argument is implausible: those who assume the moral argument in favour of the maximum consistent external freedom for all citizens do not assert that this broad space can only be used to express our morally good will, but, rather, that it creates the space in which our freedom of will can manifest.

[15] The same could be said about another possible non-moral justification of Kant's idea of law, i.e. that the concept of happiness or welfare is too vague to become the basis of law. Kant did maintain that these concepts are too vague but, arguably, it was not his main reason for treating law as an instrument of the protection of external freedom.

[16] I cannot develop here another possible line of justification of Kant's idea of law, i.e. the one based on social contract. As is well known, in his legal and political philosophy, Kant also appealed to the idea of original contract (cf. Kant 1999): he claimed that only such laws may be promulgated which could be consented to by a whole nation. However, following Rousseau here, by "consent" he did not mean an empirical consent of real people (citizens), but, rather, rational consent (i.e. a hypothetical consent of people in so far as it is made in abstraction from their particular, empirical desires). Needless to say, it is by no means clear whether this way of limiting the sovereign as a legislator would lead to the liberal view of the limits of law. If it was Kant's opinion (as it seems so), it would mean that he did not appreciate the indeterminacy of the results of social contract, even if made by rational agents.

2.2. Empirical components

It should be noticed that the above account of the human nature does not tell us anything about the propensities of the human nature; it is limited to those parts of the human nature which can be reconstructed in an apriorical manner. The study of human inclinations and predispositions by definition does not belong to the area of *a priori*, but to the area of empirical investigation (which Kant calls "anthropology"). However, even though Kant is most famous for his apriorical study of the human nature, it must be stressed that he also worked out in much detail a very interesting and penetrating *empirical* picture of human beings, which can be invoked as a way of justifying his idea of law (though, as mentioned, Kant does not use it in this context). This picture was most fully presented in his two books: *Religion within the Limits of Reason Alone* (Kant 2008) and *Anthropology from a Pragmatic Point of View* (Kant 1978). I shall first provide a reconstruction of this view, and then I shall link it with the apriorical idea of law.

In *Religion*, Kant (2008) distinguished three human predispositions towards good and three human predispositions to evil. The first predisposition to good is the predisposition to animality, which is rooted in us as living beings, and thus does not require the use of reason for its functioning. This predisposition is, in fact, self-love (*Selbstliebe*) conceived purely physically, as embracing the instincts for self-preservation, for reproduction, for the care of children, and for community with other people. This kind of self-love is, therefore, not to be identified with egoism (tendency to give excessive weight to one's interests as compared with that of others'): it is basically good, though it can be put do bad use. The second predisposition to good is the predisposition to humanity, i.e. to self-love conceived comparatively. It manifests itself when comparing ourselves with other people, and it is connected with such basically good emotions and desires as, for instance, desire for equality, admiration, or desire for recognition, though it may also be put to bad use and generate envy, jealousy, excessive ambition, or desire for power. This predisposition characterises us not only as living but also as rational beings. The last predisposition to good – predisposition to personality – is rooted in us as not only living and rational beings, but also as moral (responsible) beings. This predisposition makes it possible for us to understand the moral law (the categorical imperative) and to have respect for it so that it may become a sufficient ground of our actions. I shall now turn to the second set of predispositions – to evil.

The least serious one is frailty (*fragilitas*), which is an agent's weakness in observing the rules he/she accepted; it consists in that even though an agent wants to comply with the rules *for right reasons* (i.e. just because they are moral rules), he/she fails to realise his/her intention because of the greater motivational force of some other (amoral or immoral) motives. The more serious type is impurity (*impuritas*, *improbitas*): an agent's motivation is "impure" if he/she observes moral rules not only "out of duty" – i.e. only because they are moral rules – but

also for some other reason; for instance, he/she may be telling the truth not only because it is a moral duty, but also because he/she is afraid that his/her lying would be detected and punished. Impurity is, therefore, a tendency to contaminate the motives of our moral actions by including among them immoral or amoral motives. As a result of this contamination, our moral actions are only legal (in accordance with the duty), not moral in the strict sense (done only out of duty)[17]. The third, and the most reprehensible, type of predisposition to evil is wickedness or perversity (*vitositas*, *corruptio*), which consists in that an agent prioritises self-interest or self-love over the moral law, and follows the moral law only if it serves his/her own interest. It is, therefore, a tendency to invert the proper hierarchy of motives of action. One more point needs to be mentioned regarding Kant's analysis of predispositions to evil, i.e. the meaning of the term "radical evil", which he regards as a deeply embedded feature of the human nature. The relationship between this term and the three predispositions to evil is not entirely clear. It seems that radical evil in a narrow sense is wickedness, and in a broader sense also weakness and impurity. Whichever of these two senses is correct, the radical evil in the Kantian sense proves to be relatively moderate evil: "radical" does not mean "extreme" or "absolute." Kant does not maintain that the reason why human beings infringe upon moral duties is that they derive some demonic pleasure from the very fact of infringing upon moral duty; they are not "absolutely evil", i.e. they do not commit evil just for the sake of committing evil. Kant categorically denies that human beings may take the violation of moral rule to be the reason of their actions. The question arises why Kant, who denies absolute evil, employs the apparently misleading term "radical evil" (resembling "absolute evil") to describe the human nature. Taken etymologically, however, the term is by no means misleading: as Kant reminds us, "*radix*" in Latin means "root"; and the most typical human predisposition to evil – impurity – consists precisely in contaminating the "root" of our moral actions, i.e. their motivation. Furthermore, the claim that the predisposition to evil is "radical" means also that it is deeply rooted in the human nature.

In summary, Kant's empirical account of human nature is neither optimistic nor pessimistic. It is not optimistic, because Kant admits that there exist in the human nature various tendencies to evildoing. But it is not pessimistic either,

[17] It is noteworthy that according to Kant, impurity is morally worse than frailty, even though an impure person acts in accordance with a moral rule, while the frail person fails to do so. This "ranking" of the badness of propensities for evil can be explained by the fact that the frail person tries to perform the moral duty for the right reason (even if he/she fails in her efforts), while an impure person performs the moral duty for the (partly) wrong reason; and, for Kant, the crucial factor for the moral evaluation of an act is its motivation. In order for this ranking to be plausible, however, frailty cannot consist in yielding to any temptation to act amorally or immorally; it must be a temptation to do something which is only moderately wrong, i.e. to experience sensual pleasure. Kant does not make this point clear but, arguably, only in this way his ordering can be defended.

because Kant clearly states that the human nature embraces also predispositions to good, and that predisposition to evil is never predisposition to *absolute* evil: the human will is good, i.e. it never wants to commit evil just because it is evil, and, the worst evil which it can commit (prioritising self-interest over the moral law) is far from being extreme. The human nature is, therefore, ambivalent – and as such needs to be "transformed" if it is to become truly moral. It is a task of each individual human being to undergo a moral transformation/revolution, which will enable him/her to follow moral rules for appropriate reasons, i.e. just because they are moral rules. In Kant's view, human beings are in a position to undergo such a transformation, because they have free will. In other words, predispositions (to good and to evil) never release us from moral responsibility for our actions, since they do not give rise to those actions on their own: the incentives that flow from them must always be incorporated by our free power of choice into the maxims of actions. It is the exercise of this power which is the direct cause of our actions. Thus, the origin of evil actions does not lie in the predispositions, but solely in the freedom of will, which decides to order those predispositions in a morally-improper way.

Now, having presented empirical components of Kant's view of the human nature, it is time to tackle the question of their relations with his idea of law. As was mentioned, Kant does not invoke this aspect of his view of the human nature in his analysis of the idea of law. Nonetheless, one can plausibly argue that such relations can be established. I shall start from making a general claim about the relations between views of the human nature and the attitude to freedom. The claim is that 'the assumption that human nature is morally ambivalent justifies granting human beings a broad scope of freedom, whereas the assumption that people are deeply immoral justifies imposing severe limitations on freedom'. This general claim can be substantiated along the following lines. The assumption that people are morally ambivalent justifies a relatively high level of trust towards them and, thereby, justifies granting them a wide scope of external freedom; simultaneously, it does not justify pursuing plans of radical social change – potentially dangerous for external freedom – in the name of the realisation of "the potential of goodness" inherent in the human nature. This is because the assumption that human beings are morally-ambivalent cannot justify the claim that this potential is really substantial. By contrast, the assumption that the human nature is inherently flawed, i.e. that people are deeply immoral, implies that people cannot be trusted; thereby, it justifies even the radical narrowing down of the scope of their freedom. Accordingly, this assumption leads to the conclusion that the power of government ought to be extensive in order to counteract the flawed human nature. It also justifies leading politics in the spirit of the "war rhetoric": since human nature is inherently flawed and thus humans are naturally disposed to act immorally (pursue wars, commit crimes, etc.), the government should be in constant readiness for fighting against internal and external enemies. Returning

to Kant, there is no doubt that his view of the human nature is ambivalent, justifying neither excessive distrust nor excessive trust towards the human nature (two assumptions that may, each in its own way, support the policy of narrowing down our external freedom). Accordingly, it can plausibly be asserted that this justifies granting human beings a wide sphere of freedom.

3. CONCLUDING REMARKS

I have presented two independent ways of justifying the Kantian idea of law as a means of protecting external freedom. The first way was based on the apriorical components of Kant's view of the human nature, whereas the second one was appealing to its empirical components. It is only the first way which is consistent with the apriorical character of this idea; to invoke the second one would amount to the "empirical contamination" of this idea (which, as it seems, is the reason why various empirical claims about the human nature made by Kant do not play any role in his justification of his apriorical idea of law). It does not alter the fact, however, that these claims endorse this idea in *its content* (i.e. in so far as it provides a substantive thesis about the protection of external freedom as the function of law), though, of course, not as far as its methodological character is concerned.

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OBLIGATION AND VALUE IN THE PHENOMENOLOGICAL PHILOSOPHY OF LAW (EDMUND HUSSERL'S WORKS)

Abstract. Basing upon the two fundamental works of Edmund Husserl (*Logische Untersuchungen* and *Idee*) the author presents Husserl's concepts of obligation and value according to the phenomenological reduction and the theory of the constitution of objects. Within the context of reduction the conclusions are: as according to Husserl the substance of normative sentences in valuation, the problems of obligation may be reduced to problems of valuation. The sense (Sinn) proves to be fundamental, prior to the existence. If anything should come to being in the ontological meaning it must become a moment of intentional life of consciousness. That is why the object and value exist in the same way but are only different names of some units of sense. The difference becomes clearer on a 'higher' level when they are characterised as intentional objects and the intentional experience directed towards them. Contrary to objects we can be directed towards values in a perceptible way (*erfassenseise*). The experience of value is always a based act. These acts are analysed against the background of *noesis* and *noema*. On the stage of constitution of the world it appears however that the substance of morality may be cognised with a personalistic attitude.

Keywords: principle of all principles, axiological attitude, phenomenology, *noesis*, *noemat*, constitute word, phenomenological reduction, *ego* and *alter ego*

OBOWIĄZEK I WARTOŚĆ W FENOMENOLOGII PRAWA PRACE EDMUNDA HUSSERLA

Streszczenie. Opierając się na dwóch fundamentalnych pracach Edmunda Husserla (*Logische Untersuchungen* i *Idee*) autor przedstawia Husserlowskie koncepcje obowiązku i wartości według redukcji fenomenologicznej i teorii ukonstytuowania się przedmiotów. W kontekście redukcji wnioski są następujące: jak według Husserla istota zdań normatywnych w wycenie, problemy obowiązku można sprowadzić do problemów wyceny. Sens (Sinn) okazuje się fundamentalny przed istnieniem. Jeśli cokolwiek ma powstać w znaczeniu ontologicznym, musi stać się momentem zamierzonego życia świadomości. Dlatego przedmiot i wartość istnieją w ten sam sposób, ale są tylko różnymi nazwami niektórych jednostek zmysłu. Różnica staje się wyraźniejsza na „wyższym" poziomie, gdy są one scharakteryzowane jako celowe obiekty i celowe doświadczenie skierowane do nich. W przeciwieństwie do przedmiotów możemy być skierowani ku wartościom w sposób dostrzegalny (*erfassenseise*). Doświadczenie wartości jest zawsze aktem opartym na drodze. Akty

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te są analizowane na tle *noesis* i *noema*. Na scenie ukonstytuowania się świata wydaje się jednak, że istotę moralności nie można poznać poza postawą personalistyczną.

Słowa kluczowe: zasada wszystkich zasad, postawa wartościująca, fenomenologia, *noesis*, *noemat*, konstytuowanie świata, redukcja fenomenologiczna, *ego* i *alter ego*

1.

Notions of obligation and value in phenomenological philosophy of law are the subject of the current article. An appropriate insight into this matter would be significant for several reasons. At least at first stages of its development, phenomenology was not supposed to be a philosophical discipline for which ethical problems would be issues of chief interest. It was contrived as a justification of objective possibilities of metaphysics for mere purposes of establishing human knowledge on lasting and truthful fundamentals. Phenomenology was then mainly the primary philosophy or a return to the sources of knowledge. That tendency was expressed in the watchword of a return to the "mere matters" recognised in the way in which this is expressed by "the principle of all principles": "that every originary presentive intuition is a legitimising source of cognition, that everything originarily (so to speak, in its 'personal' actuality) offered to us in 'intuition' is to be accepted simply as what it is presented as being, but also only within the limits in which it is presented there" (Husserl 1983). Based on this method, phenomenology was going to reveal the authentic being or explain the sense of basic concepts of particular fields of studies, or create the universal ontology by discovering a variety of regional ontologies. It proposed new fields of studies, which were to fulfil the task – pure studies of the essence.

The universal characteristics of the interests of phenomenology encourage posing a question on the consequences that follow its findings for disciplines such as ethics and the philosophy of law. The current work shall focus on the problem of obligations and values remaining all the time on the grounds of Husserl's philosophy. The recovery of at least the basic theses provided by Husserl on topics of the essence of regions being the subject of interest of those fields of studies could establish some basis to reconstruct the phenomenological ethics or theory of law. It is important given that some new streams of the philosophy of law have emerged more recently, and they markedly reveal their phenomenological characteristics. If we want to critically relate to them, the finding of those phenomenological assumptions and comparing them to the establishments provided on the grounds of certainly phenomenological studies may have significant sense for us at least when we recognise the internal consistencies of those new streams.

Certainly, the most fundamental categories of normative fields of studies are obligation and value. The analysis of these notions within Husserl's work is

a highly extensive task and it requires constant referring to the main findings of his philosophy. Therefore, we shall constrain our aspirations to demonstrating the most basic propositions, which follow two of Husserl's works: *Logical Investigations* (Husserl 1973) and *Ideas* (Husserl 1973). These findings will have some basic characteristics within one more dimension. For the mere creator of those works, his analyses had an introductory character at most. This is best expressed in Husserl's own words: "We have demonstrated phenomenology as a preliminary field of studies. Only the future can reveal to us how many of the analyses carried out here are ultimate. Certainly, more than one part of what we have described, *sub specie aeterni,* should be described differently" (Husserl 1983, 235).

Our considerations would be based on identifying two crucial moments in Husserl's philosophy: the moment of reduction and the moment of its evolving or constituting forms. While referring to the moment of reduction, we will make efforts to find the essence of the relationship of the obligation and value, the way of existence of values and matters, and, next, we will generally describe features of value-attributing acts seen as intentional experiences. Other problems will be interesting to us when we recognise the analysis of our research subject with the Husserl's theory of constituting forms in the background. This will be general characteristics of problems of a person, and first and foremost relations of persons described in *Ideas II.*

2.

We have said that we could conventionally distinguish within Husserl's philosophy its two significant moments: the moment of reduction and the moment of constituting forms. In the methodological sense, the moment of reduction is primeval in relation to the moment of constituting forms. Therefore, first we shall commence describing the results of Husserl's research into the obligation and value at the stage of reduction, and only next will we make efforts to analyse these issues in the context of matters of constituting the real world.

The purpose of the phenomenological reduction is revealing the pure awareness,

> demonstrating that the awareness in itself has its relevant being (*Eigensein*), which in its absolute essence, relevant to it, does not connect with the phenomenological exclusion. In this way, the essence remains as 'the phenomenological residuum,' as certain principally specific domain of the being, which actually may become the field of new field of studies – the phenomenology (Husserl 1983, 65–66).

The sense of those words can be explained more accurately in another point of the current work. For now, it is sufficient to suggest that the phenomenological

reduction enables such analyses of the subject sphere, which allows us to realise the role of the pure 'I' within constituting the real world. All the time-space world appears then as *being*, "which constitutes the awareness within its experiences, which principally is evidently comprehensible and available to expressions only as what identically within motivated multiplicities of manifestations – while outside of it, it is nothing" (Husserl 1983, 112). As is known, the reduction does not have characteristics of a one-off act, and the operation of its revealing contains a few stages. We could then differentiate between several forms of the reduction. The first one is eidetic reduction. It is important for us, because at that stage Husserl analyses the problem of obligation, studying the essence of normative disciplines. We can find this part of his considerations in the first volume of his *Logical Investigations* (Husserl 1900–1901). The way they are being made is related to the role that *Investigations* fulfilled in the development of Husserl's views. The logical issues were the topic of this work. To say it more accurately: "the justification of the newly pure logic and the theory of cognition" (Półtawski 1973, 36). The pure logic was to be a field of studies with ideal conditions of possibilities of any field of studies in general, and was to consist of two divisions: *apophansis* or formal studies of logical laws and relations between them, and formal ontology, which was meant to differentiate and explain "all the primary concepts […] >enabling< the cognitive relationship, in particular the theoretical relationship with some objective reference. In other words: this relates to concepts, which constitute the idea of theoretical unity or also concepts remaining with those last in a relationship established by the ideal laws (*im idealgesetzlichen Zusammenhang*)" (Husserl 1900–1901, 243 as cited in Półtawski 1973, 36). The matter was then about explaining the truthfulness of logical structures as ideal meanings (Półtawski 1973, 36). The first volume, in which we find considerations on the topic of obligation, had its purpose to refute the rule of psychologisms, while the second volume included six treatises with appropriate eidetic studies. It is a distinctive feature that they do not appear again in Husserl's later works to such a direct extent. Conclusions that the author drew gave him a form of authority of bringing the obligation-driven utterances to a different, from our point of view, type of lingual expressions. Only their closer description allows for a more direct analysis of the sense of the obligation-driven utterances within Husserl's works.

A highly extensive comprehension of the obligation-driven utterances was accepted in the first volume of *Logical Investigations*. Obligation-driven utterances are various kinds of requirements, orders, wishes, and desires of certain individuals, which can have autonomous as well as heteronomous characteristics. The starting point in the analysis of obligation-driven utterances defined in such a way is a proposition that all normative disciplines do not have separate characteristics, because they treat findings of theoretical fields of studies as their premises. For this purpose, an example of a normative proposition is

considered: "a soldier should be brave." Such a proposition is meant to mean that one could find good and bad among soldiers, and only the brave one would be a good and valuable soldier. The evaluation is, therefore, a thesis, which constitutes the theoretical fundament for the norm or a whole system of norms. Husserl's normative utterances always presume some evaluations (Husserl 1900–1901, 43). This, however, can express the sense of two situations: first of all that possessing certain attributes by something is the indispensable condition to recognise something as good. Secondly, for recognising something as good, it is enough that it possesses a certain property. Husserl means both situations when he refers to an act of evaluation. He finally reaches a conclusion that "(…) we could consider as the same and equivalent the following propositions: >A should be B< and >A which is not B is bad A< or also >only A which is B is good A<" (Husserl 1900–1901, 42). What we find as particularly important is the expression suggesting the equivalency and sameness of the normative proposition and the evaluation. It implies bringing the issues of obligation together with a group of subjects in philosophy related to attributing values.

2.1.

Given that the essence of normative utterances relates to evaluations, our query about the sense of obligation in Husserl's contemplations currently turns into a query about the sense of evaluative utterances. A broader extension of these matters can be found in *Ideas I*, in analyses focusing on the issues of *nous* and *noema*. In these contemplations, an act of evaluation is seen as a kind of intentional experience and considered in relation to the intentional analysis, or the analysis of *nous–noema* related structures. As a result, anybody who would like to demonstrate the issues of values in *Ideas I* must do it in relation to the whole set of issues, which is sketched within them.

As we have said, *Logical Investigations* first of all included the logical issues contemplated with the spirit of eidetic studies. The purpose of eidetic reduction was the explanation of the fundamental concepts of the fields of studies by descriptive demonstration of pure essences of matters given in the originary presenting actuality. That issue was accurately demonstrated in *Ideas I*. The eidetic reduction only allows for a transition from particular facts to their essences. "The essence (*eidos*) is a new kind of object. It simultaneously resembles the individual object in the individual actuality or experiential actuality and the pure essence in the significance actuality" (Husserl 1983, 9). The essence manifests in the acts of the significance actuality, whose specific feature is "that it has in its fundamentals some principal moment of actuality manifesting individually, non-differential re-appearing, being a visible part of something individual, though obviously without being its form of capturing

or any form of perceiving it within the being as the reality" (Husserl 1983, 10). Therefore, the essences do not ever become ">about which< objects." The essence is some kind of the resource of the specific predicables, which must serve the individual object, to allow other side and relative expressions for serving its purpose (Husserl 1983, 8). The essence of one individual entity may also have a different individual entity, while "the highest features significant to the kind" determine the domain of individual entities. The task of the eidetic studies consists in a description of different regions of being by capturing their essences, or the fulfilment of the ideal of the accurate eidetic studies. At the beginning, then, Husserl's purpose was to create the universal ontology by building the eidetic field of studies. Actually, in the first volume of *Investigations*, we could find the picture of the idea of pure logic. Having such considerations as a point of reference, Husserl presents the mutual relationship between the normative and theoretical fields of studies. When the problem of obligation already re-emerges as a problem of values, or, rather, one of its issues of the sphere of sensations and the will in the field of phenomenology, it also relates precisely with its new leading, thematic thoughts.

The novelty of *Ideas* involves mainly the transition of the assertions from the field of an object to the issues of the human subjectivity. More precisely, it relates to the pure awareness, which becomes revealed by the new method – the phenomenological reduction. The analysis of pure awareness could be described in terms of the well-developed concept of intentional acts in relation to the second volume of *Logical Investigations*. Given that with the aforementioned reasons we could grasp evaluations as a kind of intentional experiences, currently we also need to deal with this area.

The pure awareness appears as a result of transcendental reduction, or "suspensions" of everything that is external and substantial; it also appears as a revelation of what is immanent in the awareness. The externality is not only the empirical reality in the traditional meaning of this word. It is also any actual being and, therefore, also the psychological being. We then need "not to deal with anything outside of what we could make actual out of the essence and understand the pure immanence, of the mere awareness" (Husserl 1983, 136). The starting point within such limited Husserl's considerations is the awareness in the sense of the cartesian *cogito,* the comprehension as any experience of my 'I' in its fluid, particular shapes of forms such as: I perceive, I sense, I desire, etc. They are considered as a stream of experiences "that due to their own essence, they all merge with one another" (Husserl 1983, 68–69). Every such *cogitatio* has its own essence, which should be captured within its specificity, but "it is also about characterising the unity of awareness which is demanded what is relevant for the *cogitationes*, and it demands in such a necessary way that without that unity they could not exist" (Husserl 1983, 69).

The distinguishable feature of every act is its intentionality, or its direction towards externality[1]. In contrast to the stance from the period of the *Logical Investigations*, intentionality is unboundedly related to the awareness; it is its *a priori*. It is not, then, any of its separate acts; awareness or its every act is always targeted at something called the intentional object. That targeting or directing of the act at something does not mean that the intentional object of certain awareness is the same that the 'captured' object is. The 'capturing' of the object is just a certain particular manifestation of the act. If it reveals manifestation, then its intentional object is not only being realised and it is within the areas available to the spiritual perception of the targeting, but it is a captured, perceived object (Husserl 1983, 76–77). It is a remarkable differentiation in recognising values, because we cannot be directed towards anything without appropriate perceptions which capture surroundings; in other words, the distinguishable feature of an act targeted at a matter is firstly always the perceiving of matters. It is, however, different when we are directed at values. In this case, the intentional object only with certain 'objectifying' change of its treatment becomes the captured object. If I have an evaluative direction towards a certain matter, it does not mean that a value is the object of such an act: "as an object in the particular sense of the captured object, like as if we had to have it to judge, and similarly to all the related logical acts" (Husserl 1983, 76–77). What occurs in acts evaluating intentional objects is in its double meaning a two-fold direction towards something. We are concurrently directed towards some matter, but in a specific 'capturing' way, but also towards a value but not in the 'capturing' way. The value-attributing acts are, therefore, reinforced acts, which occur within the sphere of the will and sensations (Husserl 1983, 76–77). The feature of those reinforced acts is, however, the possibility of such a modification that their whole, complete intentional objects become noticed and due to that, elements of the natural world are not only the bare creations of nature, but also their accompanying 'surroundings' of values. Under such circumstances, we say that matters are valuable.

Currently, we can already see that acts of attributing values are such intentional experiences which contain the so-called supported or reinforced intentional acts, and that a value is an intentional object towards which we can never be directed in the capturing way. Only when we capture the full intentional object within an act – for instance when we notice the evaluative dimension of matters – can that value emerge, but also never autonomously as a matter. For this reason, when Husserl in his reinforced acts distinguishes the intentional object in the two-fold sense, he does not mention the bare matter and the bare value, but the bare matter and the full intentional object. He underlines this way that a value emerges as awareness founded in the awareness of matters "taking some fundamentals in relation to the matter," never autonomously (Husserl 1983, 77–78).

[1] I do not consider the matter of unconsciousness (Husserl 1983, 69–73).

That situation becomes even more complicated within acts reinforced to a greater extent. Acts of this kind are also typical of the sphere of sensations and the sphere of the will. We shall consider them when analysing the problem of existing values, which requires, in turn, dealing with the problem of existence of matters in general. For this purpose, we should explain the essence of Husserl's differentiation between immanent perceptions and transcendental perceptions.

The essence noticeable for the directed immanent acts is "that their intentional objects – if they ever exist – belong to the same stream of experiences as themselves alone" (Husserl 1983, 79). One *cogitatio* is here referred to another *cogitatio*; awareness and the object create one entity. In turn, in the transcendental acts, perception and a perceived object refer mutually to one another, but "they are not in a way principally necessary effectively and out of the inherent nature of each thing one entity and they are independent from one another" (Husserl 1983, 86). What happens here is a strong differentiation between the mere experience and a matter understood extensively as not only a physical thing, but also a psychological object, e.g. a specific personality of a person.

> The appearance (*Abschattung*) – whatever similar name it has – is something principally of a different kind than what it is out of its appearance (*das Abgeschattete*). The appearance is a form of experience. A form of experience is possible only as a form of experience, and not as something spatial. In turn, this what is manifested with an appearance (*das Abgeschattete*), is principally only possible as something spatial (actually it is spatial within its essence), however it is not possible as a form of experience (Husserl 1983, 88–89).

The essence determining the domain of forms of experiences is their perceptual dimension within immanent perceptions, while the inherent nature of each spatial thing is the lacking possibility of capturing it within such a set of perceptions. However, the difference between the immanence and transcendence also consists of different ways of proposing them. We perceive that a matter emerges with its appearances, and this follows the mere essence of the spatial thing. A matter always appears in relation to a specific, present perspective that we concurrently recognise. What belongs to the essence of the spatial thing is the "ideal possibility of making a transition towards permanent multiplicities of perceptions ordered in a particular way, which allow for prolonging them further and further, and therefore they are never closed" (Husserl 1983, 91–92). Simultaneously, it is important to remember that always within such a perception, it is a matter that becomes current, and not its imagined picture or its sign. A perception captures an object in its embodied presence. It happens, because for the mere essence of the perception of a thing a perception belongs through its appearances and appropriately the sense of its intentional object (a matter) is "that it can be specifically within such perceptions, which allow for its manifestation in its appearances" (Husserl 1983, 93–94). If this is not perceived and one attempts to distinguish an imagination from "a mere thing in itself," one finds himself/

herself in absurdity, because one goes beyond the sense of matters and the sense of perception. Out of the inherent nature of each thing, it also follows that there is some inadequacy. *Never* is a thing, as perceived in the multiplicity of appearances, given as a finite entirety. What currently constitutes the "actually presented" is *always* surrounded by the horizon of something undetermined for which we have expectations of a thing based on the familiarity with the essence. Such indeterminacy in advance indicates possible multiplicities of perceptions, while those moments come to their manifestations, and what was "clear becomes unclear, what was revealed, into unrevealed etc." (Husserl 1983, 94). And so on, towards infinity. In this sense, a certain inadequacy always connects with perceiving a matter; there is always a determined horizon of certain indeterminacy, or it is permeated with the sense of the matter. Generally, we could say that every transcendental being may come to the presentation in a way analogous as a thing, and so only through manifestations and, therefore, always to some extent inadequately.

Everything that refers to a matter losses its sense in considerations of experiences, and so also over the experience of attributing values. In the immanent perception, an experience does not manifest through its appearance. "The way of being of a form of experience is that it is principally perceivable in its reflection" (Husserl 1983, 99). It is a simple observation. For example, when one focuses on the directly sensual, feeling a related form of experience (value-attributing experiences belong to this group), then one has dealings with something absolute, "there are no parties, which could once in one way, and once differently manifest" (Husserl 1983, 95–96). This happens in the form of a reflection, or a simple observation, in which what is captured perceptually is not what is current, but it already had been before our awareness directed towards it. If then I am making an observation of a form of experience, "then I captured something what is absolutely itself in itself, whose existence principally cannot be negated, i.e. it is principally impossible to visually understand, as if it did not exist; it would be some absurdity to consider as possible, to determine that such a form of experience truthfully did not exist" (Husserl 1983, 100).

We can currently see the marked difference between the perceptuality of matters and the perceptuality of forms of experiences, including the value-attributing experiences, which has its effects in determining the existence of matters and experience. The existence of matters is, in some way, due to chance, which means that the course of experience can always make us resign from something that was already recognised within the being; it is a result of that constant "horizon of indeterminacy," in which a matter occurs. Existence of a form of experience is, in turn, always absolutely unquestionable and, therefore, it has the form of being independent from the existence of a matter. Furthermore, an object is never independent from that sphere of pure immanence, because if we can subject a transcendental perception to an act of eidetic contemplation, and in

particular an observation of a matter, then "an equivalent of our actual experience, known as 'the actual world' emerges as a chance of multiple multidimensional possible worlds and non-worlds, which from their side are not different from equivalents out of the essence of possible variations of an idea of 'experiential awareness'" (Husserl 1983, 106). The actual world emerges then just as names of certain units of sense referred to the absolute awareness attributing that sense (Husserl 1983, 128–129).

In this way, due to an operation of transcendental reduction, we achieve the sphere of pure awareness, in which a being is being constituted. It has the following meaning for our contemplations: the sense emerges as a more fundamental notion, earlier than a being. In order to perceive something as existing, it has to become a moment of intentional life of awareness. In this sense, the matter and value exist in the same way, and they are just different names of certain units of sense. That sense both in case of a matter as well as a value has a mutual source – the absolute awareness as a field of attributing meanings. The difference then is being sketched at the 'higher' level, when it characterises them as intentional objects and we study the intentional experiences of acts directed at them. In that moment, a difference is being sketched; a difference that we have mentioned: we can be directed towards a matter in a 'capturing' way, while it is not possible in case of values. Experiencing of a value is always a reinforced act. Therefore, when we already know what determines the existence of matters and values, we have to commence a more detailed analysis of reinforced acts to reveal the whole welfare of the intentional experience, which is the experience of values. It is, then, time to introduce into our contemplations the known Husserlian differentiation of two spheres of intentional experience: *nous* and *noema*.

2.2.

For Husserl, this differentiation had a fundamental meaning in the sphere of transcendental reduction. It relies on differentiating appropriate componential intentional experiences or their intentional equivalents. While recognising the '*nous*', he understands "the specifically complete intentional experience determined with the assertion of its noetic components" (Husserl 1983, 234). The essence of noetic experiences is a possession of a certain sense, for instance directing the pure 'I' on an object, which is presumed, and attributing it due to the sense as the captured one, recognised as valuable, etc. (Husserl 1983, 213). But everywhere, the components of the *nous*-related content corresponds with the "multitude of dates in the actual pure intuition, which can be manifested within appropriate 'noematic content,' or shortly in the '*noema*'; or the terms, which we shall refer to under all circumstances" (Husserl 1983, 214). For instance, a preference or liking has its 'liking as such.' If we apply the phenomenological

reduction to such a form of experience, then we are left with some relationship between the liking and what is liked, "the relationship, which in itself comes to its demonstration in the pure immanence" (Husserl 1983, 216–217). Phenomenology deals with exactly such situations. Therefore, after applying the transcendental reduction, a significant question arises: what is meant by "what is being liked as such"; what are the elements of the *noema*? As we remember, directing towards something is the fundamental feature of awareness and for this reason each of its acts is a noetic experience. However, the mere 'sense' does not use up the *noem*. The full *noem* creates a complexity of noematic moments, while the moment of sense is just the pure stem, the layer reinforcing other moments, which we call moments of sense in its extended meaning. We always have to deal with the co-occurring of the noetic and noematic moment in the intentional experience. This law has its power in all the varieties of intentional experiences such as recalling, perceiving, or creative fantasy. It also takes effect in the interesting to us variant of intentional experiences – within the value-attributing acts. Husserl very strongly underlines that although there is some noematic sense within each of the aforementioned kinds of experiences, it is always different under circumstances of different kinds of experiences. We could refer, then, to different *modi* of an object. For this reason, we should separate considerably different layers, which become grouped together around some central 'stem,' or around the pure sense of the subject.

It is then the same problem which we mentioned as generally characterising the value-attributing reinforced act, but in the new noetic-noematic shape. The value attribution appears as a higher-order *nous*, in which "in the unity of a specific experience multiple *nouses* occur, reinforcing one another and appropriately their noematic equivalents are reinforced *noems*" (Husserl 1983, 226–227). We then need to determine what is assigned to the *noems* of varying, detailed cases of value attribution by the essence of this kind of experience, and what is attributed with the details differentiating them.

One of the significant distinguishable features of the layering of the reinforced phenomenon is that the highest layers of the whole phenomenon may drop by the way side without causing the loss of completeness with the given intentional experience, i.e. accordingly to the law of parallelism of the *nous* and *noema*. Therefore, every intentional experience, and so the value attribution act, has its own *noema*. The fundamental layer of *noem* is the subject sense. The *noem*, being an exact equivalent of *nous*, is something transcendent in relation to the mere experience of *nous*, and it is not just contained within its area. "If in this way perceiving, judging, imagining reinforces the covering layer of value-attribution, then within its entity, whose some of the moments are able to reinforce the others, determined accordingly to its highest floor as a specific form of experience of value-attribution, we have different *noems* and senses respectively" (Husserl 1983, 231–232). 'What is perceived' is, therefore, the sense of perception from

one perspective, and it simultaneously enters the sense of specific value attribution and, in this sense, it reinforces it. This scheme may enrich different variants of noetic-noematic structures. However, the moment of value attribution occurs as not independent, because it is necessarily reinforced by some awareness of the matter. Only as a non-independent layer, it contributes to constituting the entire object. For this reason, Husserl indicates the necessity of certain differentiations. We have to separate appropriate *noems* of demonstrations from judgments which occur as valuable within the acts, reinforcing the awareness of values. Next, we need to separate matters from states of affairs already constituted as valuable, which reinforce the awareness of values. Then, we need to separate matters from states of affairs already constituted as valuable and their corresponding noematic modifications, until, finally, there are specific value attribution experiences and the complete *noems* which belong to them (Husserl 1983, 231). These are somehow three moments: 1) the mere matter which is valuable; 2) the subject creation constituted as valuable, which assumes its matter, and as a new subject layer it introduces worthwhileness (these two differentiations apply to the possession and a state of affairs, respectively); 3) the complete *noems* belonging to the specific value-attributing experience (Husserl 1983, 216–217). If we enrich now our contemplations with differentiating "the constituted object already as valuable as such from 'object' which occurs in the *noem*," then the problem of existing values will be completely clarified. As we remember, the phenomenological attitude relies on bracketing the whole reality. Despite this, what remains is, e.g., a relation between what has been perceived and the perception. This relationship is, however, demonstrated within the pure immanence. Thus, we should not pose a question when referring to the perception if something corresponds with it in the reality, because it is already absent for the reason of the above-mentioned intervention. In that moment, what had been before the reduction the object of perception or value attribution, currently can be found as what has been perceived (valuable) 'as such,' or the *noema*. We then talk about 'a tree,' 'a material thing' with quotation marks, while quotation marks express that radical modification of the sense of words. A matter in nature is not what a perceived 'valuable as such' matter is. Husserl gives some specific example here. A tree in nature can get burned, decompose into chemical components, "the sense however, the sense of such a perception, what necessarily belongs to its essence – cannot be burned (…) is separated with abysses from the whole nature and physics and also from any psychology – and even such a picturesque comparison, as naturalistic, does not express that difference sufficiently strongly" (Husserl 1983, 216). A phenomenologist does not hold off from any thesis relating to actual matters which Husserl recalls as 'just' matters. This is possible due to the transcendental reduction. Given this principle, it is not sensible to pose a question whether 'what has been perceived as such' actually exists, in the sense of 'just,' in the same way as 'what has been evaluated as such' cannot be contemplated in relation to its 'just' existence.

The above-mentioned considerations entitle us to draw the following conclusions:

We should differentiate objects existing 'as such' from objects which occur in the description of a perception in the noematic account. The phenomenological reduction constrains phenomenological considerations only with respect to the second kind of objects. It has its decisive meaning while recognising the sense of the existence of values – the problem which was described precisely, pointing to the role of the pure awareness for the existence of the world. Next, we should say that the difference between matters and values understood as this type of objects relies on differences between the ways they are being provided. A matter is provided within an act, in a capturing way, and occurs within the so-called reinforced acts. Such acts are distinguishable for structures of the higher sphere of awareness; in the case of values, this is a sphere of sensations and a sphere of will. Value attribution is, therefore, a higher-order *nous*, in which within a unity of a specific experience multiple *nouses* occur, reinforcing one above another, and appropriately to this, their noematic equivalents are reinforced *noems*. Such layerings typical of value attribution were talked about earlier. The last difference which needs to be recalled here can be found between the experience of value attribution and matters for the reason of their recognisability. We have explained these issues during the analysis of immanent and transcendental perception.

3.

Currently, we would like to take a stance regarding the views demonstrated a moment ago. It is obvious that philosophical studies with system-focus ambitions can be considered from two points of view: from the point of view of a different philosophy, in relation to the fundamentals of which we could find different ontological propositions, or also from the point of its internal consistency. Our contemplations to date have revealed the fact that Husserl's solutions regarding the issues of value (obligation) directly follow the most fundamental phenomenological theorems. Therefore, every polemic relating to those theses simultaneously affects the evaluation of the concept of values. The demonstration of a set of allegations provided against phenomenology would significantly go beyond the current work; therefore; we shall focus on some of them at the end of our present considerations.

Currently, we would like to take a stance regarding Husserl's proposed set of characteristics of a relation occurring between the notions of obligation and value. As we remember, Husserl in his contemplations reaches the conclusion that there is equivalency and sameness between a normative proposition and evaluation. In other words, this means the translatability of a language of norms into the language of evaluations. It seems that this type of a thesis could be refuted nowadays, and we will try to reveal appropriate pieces of argumentation. Recognising them as valid

directly leads to postulating a differentiation between the region of obligations and the region of values in relation to the field of phenomenology.

The notion of translation can be understood differently. In a more limited sense, equivalence or definitional equality is taken as a condition of translatability. Currently, we intend to focus on the notion of translatability understood more broadly as an equipoisal relation occurring between expressions mutually exchangeable within some class of contexts; the exchange does not take away from those contexts any property that they desire. In the case of our contemplations, we will be interested in the translatability with respecting the same meaning. Translatability between two languages can happen between them as entities or only between expressions from different languages (Marciszewski 1970, 231). In order to solve the problem of the translatability of evaluations into the norms, we need to answer two questions: a) is it possible to talk about the translatability of a language of evaluations into a language of norms?; b) if such translatability is possible, is this translatability between whole languages, or just between particular expressions of the language of norms and language of evaluations? We shall proceed with answering these questions.

In her considerations, Maria Ossowska distinguishes three kinds of norms: axiological norms, tetic norms, and purpose-driven norms (Ossowska 1957, chapter 5; discussion: Lande 1959, 765). The criterion of differentiation is the way of providing arguments on behalf of these norms. For axiological norms, arguments are constituted by pressure of evaluations, and in the case of two other types of norms, respectively – the pressure of the act of constituting and the pressure of certain factual relations. Since the relationship 'an evaluation – a norm' is significant only in the case of axiological norms, we shall focus on them right now.

We talk about an axiological norm when the expression: "For each A, A should be B" has its equivalent within the expression: "For each A, A which is not B is bad A" or "For each A, A which is B, is better A than A, which is not B" (Ossowska 1957, 120). The equivalence is recognised as a justification of a norm through the evaluation. A given person justifies a norm with evaluation; when given a question about why he/she recognises some evaluation, they would respond with referring to some evaluation. This type of 'equivalence' must assume the possibility of translatability from an evaluation into a norm if we understand the translation in the aforementioned way.

T. Kotarbinski goes even further in reaching conclusions. He describes normative propositions as certain evaluations, more precisely – evaluations of potential deeds (Kotarbiński 1961, 446). In this case, the difference between norms and evaluations fades away for the benefit of the latter. Views of such a type can, therefore, lead to conclusions that all or the majority of norms are hidden evaluations. Such a general thesis emerges as very risky in the light of the current modern studies applying the apparatus of deontic logic. K. Opalek carries out in

one of his works a thorough analysis of the mutual relation of interesting to us types of expressions (Opałek 1974, chapter 4), linking this issue with the analysis of the so-called optative expressions. From the syntactic point of view, these three types of utterances present themselves in the following way: if it is about directives – "D (*ut p*)." In the place of the D-operator, we can enter any proposition in the logical sense. For the symbolic presentation of optatives, one needs to take R. Carnapa's formula: "*utinam p*" ("hopefully p"). In turn, the evaluation composes either of W-operator and a proposition expressing a judgment in the logical sense, or of a name of a matter combined with W-predicator. W-operators are evaluative notions, for instance: good, valid; they can be positive (Wp) or negative (Wn). An example of an evaluation could be an expression: "It is good that you are a conscientious student," as well as a proposition: "Jan is a good man." Beside the differences in the linguistic structure, there is gradation of directives, evaluations, and optatives, for the reason of the scope of their topics. The topic of directives can only be a human behaviour, while the topic of optatives can only be behaviours and events (a state of affairs not created by the human aware behaviour). The topic of evaluations can be about behaviours, events, as well as matters. Human behaviours and events are presented in *ut I*-, *utinam I*-, and that-propositions, out of which the two first kinds occur in the subjunctive mode, while the third one constitutes a proposition expressing a judgment in the logical sense. Matters, in turn, are determined with names. Differences between evaluations and the remaining two types of expressions also occur on account of the way of presenting objects constituting their topics.

The way of relating *ut*- and *utinam*-propositions to their topics can be determined as 'purposefully prospective,' while evaluations, that-propositions are formulated with the indicative mode, not subjunctive one: they express judgments in the logical sense. The common feature of all the three categories of evaluations (behaviours, events, and matters) is demonstrating the topic in a way expressing thoughts regarding its realism. However, when evaluations of human behaviours and events are considered, the author reaches a conclusion that in terms of their syntactic structure, they can approach directives, and then they may have not only a structure: "W that p," but also: "W (*ut p*)"[2]. This fact leads to distinguishing evaluations of objects (behaviours or events) thought about as having a place (occurring), formulated in the indicative mode and containing "P," which represent in the logical sense: evaluations of objects (behaviours related to events) thought about in the purposeful-prospective way. Evaluations of the first group were called by the mentioned author the appropriate evaluations, and evaluations of the second group: quasi-evaluations. What is the relation of quasi-evaluations to the remaining two types of utterances? There is no difference between quasi-evaluations and optatives. Within an utterance: "It would be good if

[2] The exact explanation can be found in Opałek (1974, 96–101).

no raining happened to us" (schema "W (*ut p*)"), the word "good" may be replaced with "*utinam*." Hence inference that quasi-evaluations are latent optatives. In the second case, however, finding a relation is not that simple. A feature of directives is the so-called addressing or determining a relationship: an issuer of a directive – an addressee. In the meantime, most of optatives and part of quasi-evaluations do not contain an element of addressing. Only in the colloquial language could we attribute this feature to specific-individual quasi-evaluations of human behaviour, which can be brought to weaker type directives (advice, prompting, etc.) (Opałek 1974, 111). A conclusion which follows this contemplation suggests that quasi-evaluations are either latent, as they are presented in the form of value attribution with optatives, or latent directives[3]. One could not say this in relation to evaluations corresponding with the type: "W that p."

The above contemplations can raise some doubts, especially when a deontic proposition formula is considered "D (*ut p*)," for a schema "D, that p" or "D, that p occurs" is usually accepted in the deontic logic. However, a precious property of the entered differentiations is that they generally disable formulation of inferences, as to a relation of evaluations to norms. They refute theses that all norms are latent evaluations, or also that all evaluations are latent norms. This calls to question the assumption – indispensable for comparing law and morality – that moral systems formulated in the form of an ordered set of evaluations or ideas can be translated as a whole into expressions within a shape of a system of norm. An attempt of this sort is not possible at all when the supreme evaluations of a given system should be accepted as appropriate evaluations[4].

4.

At this stage, we are finalising our considerations regarding obligation and value in the context of a moment of reduction. As it was easy to notice, differentiating that aspect of our considerations had mainly conventional characteristics. Particularly in the last part of the second point, we already partly entered the area of issues of constituting. Currently, we wish to fully develop this thread. It will then be a different way of capturing the issues of interest.

We remember that the starting point of Husserl's considerations is natural cognition. Only transcendental reduction fully repeals that stance and reveals pure awareness as a field of attributing meanings, in which we notice noetic-noematic structures and the laws governing them. In this part of considerations, obligation and value were analysed in relation to the existence of a matter and we

[3] K. Opałek extends his analysis to other forms of evaluations (Opałek 1974, 111–113).

[4] On the relation of dividing evaluations to quasi-evaluations and evaluations appropriate for dividing to categorical and instrumental, see Opałek 1974, 101–102.

studied Husserl's concept of value-attributing acts. However, phenomenological studies are constrained to problems which we called here a moment of reduction. Husserl attempts in his considerations to 'rebuild' the natural world, but already as a creation of a constitution being made by pure awareness. "The world possesses its whole mere being as a certain >sens<, which assumes absolute awareness as a field of meaning-attributing operations (…)" (Husserl 1983, 128–129). As a result, this intervention leads to differentiating the world of nature from the spiritual world. Referring to what we had said in the former parts, we could say that the world of nature consists of matters provided within their appearances, featured with inadequacy, whose unity is a result of an act of awareness, which unifies those different horizons of the determinacy of matters[5]. However, what is the most significant to us is the solutions regarding the spiritual world, in which Husserl creates his construction of *Alter Ego*, and then attempts to sketch a theory of society, obviously again only at the level of basic studies. Then, we would like to request information regarding a place of a problem of obligation and value understood as elements of the constructed social world.

We also ought to remember that what governs these studies are the assumptions and results of analysis which Husserl had introduced in his former contemplations, though they are applied with other purposes. We underline that we are not interested in the mere theory of constituting, but its results. We shall not then deal with the important problem of phenomenological time.

4.1.

To date, we have considered the subject as the so-called pre-social subject which knows only two types of experiences: immanent and transcendental. In turn, a social subject can be described with the experience of other subjects, whose distinguishable feature is a moment of becoming present by empathising. This type of experience ultimately makes us distinguish the world of nature and the spiritual world.

Now, we shall take the solipsistic unit as a starting point (Husserl 1989, 103–127). It carries out an observation of itself, but reducing the body. It then finds 'I' as spiritual, referring to the stream of experiences. Spirituality is here specifically understood as associated with the lack of its settlement in the body. "What belongs to the essence of pure I is a possibility of originary capturing oneself, noticing oneself" (Husserl 1989, 107–108). 'I' is then given in the absolute undoubtedness; it is manifestable within a reflection and so it does not have anything mystical or mysterious in itself. Pure 'I' is variable in its activity, but the mere 'I' is not a subject to such transformations. It manifests as "absolutely personally within

[5] Problems of differentiating these two states of awareness are talked through in: Husserl 1989.

its unity non-manifestable through appearances, being adequately capturable in the reflective direction of a gaze, within the direction leading it back to itself as a centre of the awareness related functions" (Husserl 1989, 110–111). We remember that everything what presents itself as immanent perception is absolutely simple and explicit; similarly, then, 'I' does not hide in itself any multiplicity. From the transcendent 'I' one could differentiate a real psychic subject. Respectively, this differentiation could be replaced with terms of spirit and soul. In contrast to the pure 'I' that we have talked about, suggesting that it is not substantial, a soul is associated with substantial realism. It is, therefore, similar to a material matter. Every feature of personality belongs to psychological properties, intellectual disposition, sensuality, etc. We capture those psychic experiences always as 'something real' in the specifically phenomenological understanding of this expression. Thus, the analogy between a material matter and the soul follows the common part of the ontological form, which we have already talked about in the previous points of contemplations (Husserl 1989, 133). Going further in these solipsistic considerations, we could notice that there is a co-existing body within all the experience of objects. In relation to that, Husserl analyses situations when the object experienced through the body is the mere body itself. A result of such an experience is conclusion that the body constitutes in two ways: one the one hand, I experience it as a physical matter, while on the other as a matter in which 'I' exist. In other words, while entering a physical relationship with other material matters, the body provides not only the experience of external physical events, but also specific sensual experience (Husserl 1989, 152–153). In the case of the latter experience, the body is a place of localising feelings. This, in turn, is a basis to finding another difference between the body and physical matters. The body is an organ of the will of 'I', while the purely material matter can be only mechanistically moved (Husserl 1989, 159, we omit the issues of § 39). In this way, in a solipsistic primordial experience of the world, my body and other objects emerge, and among them also other objects, which reveal their similarity to my body. This similarity is connected with the sensation of separation of the body and leads to attributing it a sense of 'someone else's body', and it is the beginning of understanding another person's psychic life. It is a monad which, according to Leibniz, "does not have windows." Its subjectivity is, then, being recognised with empathising, transferring within an act of intuitional obviousness of my 'I' to 'someone else's body.' A different understanding of someone else's subjectivity is impossible (Husserl 1989, 165–169).

That *Alter Ego* is simultaneously an object of constituting *Ego* and a subject of its own constitutional acts. The sense of *Alter Ego* is that only in this case it is not possible to simplify the real being to intentional; the intentional being is here simultaneously real. This sense of 'the other' is absolutely presented within my awareness, and at the same time it occurs due to my awareness. Such a stance describes us within our social existence.

These contemplations are fundamental for making a differentiation between a natural stance and a personalistic stance in Husserl's work. Within the former one, the entirety of nature is the object of our theoretical interests – us ourselves, others, and matters are the topics of appropriate natural sciences. Within the personalistic stance, in turn, we live knowing that we are permanently subjects of the surrounding world; the world is for us. Being a person means 'to be a subject of a certain surrounding world.' "Concepts: I and the surrounding world inseparably refer to each other. While recognising that, to every person his or her surrounding world belongs, in turn multiple simultaneously communicating persons have their common surrounding world" (Husserl 1989, 195). Within the natural attitude or stance, the world is a set of matters, solids. Within the personalistic stance, these are practical objects, pieces of art, persons having their systems of customs and legal systems. Within this approach, a person is a carrier of certain only subjective world, which for any other subject cannot be the same. In the personalistic world, persons are given to each other not as objects, "but as subjects standing in front of each other" (Husserl 1989, 204). They affect each other by means of contractual relations.

> A community (*Sozialitat*) constitutes itself due to the specifically social, communicative acts, in which I turns to others and that I, and the others are aware also as those, to whom it is directed and who next understand this direction, potentially following it within its behavior, direct to it in their response in agreeable or antagonistic acts etc. Those acts are what creates between persons who already know about each other by means of the supreme awareness-related unity and it absorbs the surrounding world of matters into it as the common world surrounding persons dealing with such a stance… (Husserl 1989, 204).

The legal and moral phenomena take their essence from the personal achievements; they do not have sense outside of relations between persons. They are, therefore, recognisable only when acknowledging that personalistic approach. Since the personalistic stance is a chief feature of the humanistic studies, it is not acceptable to apply this approach with methods of natural sciences in the research of phenomena of the sphere of persons. Natural sciences deal with a human being only as a matter and they are entitled to carry out studies into relations occurring between the world of matters and personal spirits, as much as it is recognised that both belong to the unity of the objective space-time world of real objects (Husserl 1989, 200–201). They are not, however, able to permeate to the sphere of the world of persons, and then they could not describe phenomena which take their sense from the essence of relations between persons. In this way, Husserl sketches a research programme to study law and morality (obligation and value) within the *ontic* sphere. On account of the basic characteristics of considerations presented in *Ideas*, these suggestions were not developed by their creator. The problem of obligation and value analysed in terms of personalistic issues was undertaken only in the considerations of existentialists.

5.

The currently scratched issues of obligation and value reveal the fact that it is impossible to critically assume an attitude to Husserl's proposed solutions without understanding the entirety of his philosophy. As it was easy to notice, every traditional philosophical concept takes in it a specific, phenomenological meaning. Particularly, it is visible in recognising analysis regarding the essence of being. Generally, it is possible to say that a distinctive feature of phenomenology is bringing its objectivity to the egological sphere. The human subjectivity is simplified to the form of pure structures of reason. This fact determines the complete characteristics of phenomenology.

The path that Husserl went to find the absolute 'I' raises a series of doubts. The weaker dimension of this philosophy is its methodology. Before his own conclusions entitle him to this, Husserl assumes the existence of a unit separated from its empirical ties with the world. Both intuitionism and transcendental reduction somehow contain within an implicit assumption of an individual outside of the social world, outside of the culture and history; meanwhile, only the final conclusions of Husserl's analysis allow for constructing such an individual. The inference is, therefore, assumed already at the beginning of considerations. If this fact is noticed, one could call to question not only the realism of the phenomenological method, but also its necessity.

However, even if we agree with this postulate of Husserls', it appears that it inevitably leads to solipsism. In the construction of *Alter Ego*, a basic contradiction can be found: it is on the one hand an object of constituting my 'I,' and on the other – it itself makes constituting acts. As is suggested by Desanti (1963, 78–80), everything that was to be related to *Alter Ego* – its time, constitutions – had to be in advance deprived of its own autonomous meaning, because it was a result of constituting driven by *Ego*. Husserl uses the notion of constituting in two different meanings, without perceiving this fact.

Finally, the last of the main allegations which appear here is the alleged humanism of this thought. While this is true that it underlines the relationship of a human being with the world by revealing the latter as the world for humans, these ties have a one-dimensional character. The reality is integrated with a human being only through intellectual ties. Taking this function of awareness to the foreground and translating with it all the remaining kinds of human activity combines particularly strongly with the analysis of values. A value reveals itself exclusively as a unit of sense, whose source can be found in the pure awareness, and the only function of that awareness is the creation of a sense.

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MEDIATION AS A FACTOR STRENGTHENING THE COMMUNICATIVE ASPECT OF LAW[1]

Abstract. When reviewing contemporary concepts of law, it is easy to notice that many of them emphasise the role of communication and dialogue in law. This paper is an attempt to link the philosophical aspect with legal practice, picturing both the basic ontological concepts based on the communicative aspect and the mediation as a form of dialogue in law application process. The aim is to draw attention to the correspondence between the mediation and deliberative democracy in the multi-centric legal reality. The conclusion indicates that the professionalisation of the profession of mediator shall help in such a process.

Keywords: ontology of law, the essence of law, communication, law as communication, dialogue, mediation, legal dispute, decision

MEDIACJA JAKO CZYNNIK WZMACNIAJĄCY KOMUNIKACYJNY ASPEKT PRAWA

Streszczenie. Dokonując przeglądu współczesnych koncepcji prawa łatwo zauważyć, że wiele z nich podkreśla rolę komunikacji i dialogu w prawie. Artykuł jest próbą połączenia aspektu filozoficznego z praktyką prawniczą, ukazując zarówno podstawowe koncepcje ontologiczne oparte na komunikacyjnym aspekcie prawa, jak i mediację jako formę dialogu w procesie stosowania prawa. Celem jest zwrócenie uwagi na korespondencję pomiędzy mediacją a demokracją deliberatywną w multicentrycznej rzeczywistości prawnej. W konkluzji wskazano, że pomocna w tym procesie będzie profesjonalizacja zawodu mediatora.

Słowa kluczowe: ontologia prawa, istota prawa, komunikacja, prawo jako komunikacja, dialog, mediacja, spór prawny, decyzja

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1. INTRODUCTION

Not only scholars, but every lawyer and even a "user of law" (its addressee), i.e. all of us, have their own idea of what law is. Within *sensu largo* jurisprudence, there are numerous concepts about the essence of law (Oniszczuk 2004). At the same time, there is no single and unified definition of such notion. Law is most often understood as a set of facts or a set of norms. These facts may be of social (in which case it is a certain type of behaviour), psychological (law is a kind of experience), axiological (law is an instrument for the protection of certain values), or linguistic (law is a set of statements arising from legal texts – i.e. norms) nature.

The ontology of law as a part of legal philosophy has, contrary to popular belief, a rather important practical value. Since the law is binding upon its addressees (individuals and other subjects of law), it is extremely important what its content is. This, in turn, depends on the source of origin of this content, i.e. the essence of law. The legal traditions prevailing in a given legal culture and determining the legal order depend on an adoption – which is sometimes not fully realised – of the view on the very essence of law. The classic dispute between various legal-naturalistic concepts and varieties of positivism-alike concepts has been complemented by, *inter alia*, psychological, realist (in the American and Scandinavian version), autopoietic, hermeneutic, analytical-linguistic, and communicative concepts of law. Among those mentioned, the last four strongly emphasise linguistic and communicative elements: information processing, text interpretation and analysis, linguistic logic, speech acts, etc. This shows the importance of the role played by the word (especially the written word), language, and communication in law.

2. CONCEPTS OF LAW BASED ON COMMUNICATION AND DIALOGUE ISSUES

Therefore, regarding and accepting the adversarial nature of the very notion of 'law', selected conceptions of law have been described below in the context of communicative actions (Hoecke 2002). It serves as a starting point for considerations of the impact of the recognised concept of law on decisions regarding legal disputes and their resolution, including resolution by mediation. Law has been treated as a kind of *medium*, as a form of communication between the state and society, the state and the individual, as well as various social groups or individuals (addressees among themselves) that make that society up.

Theories that picture law as the result of horizontal actions assume that the source of law's legitimacy is a social consensus (agreement of all) or at least compromise (the effect of mutual recognition of certain expectations).

The negotiative approach to law has been proposed in the context of changes in the legal culture related primarily to globalisation processes. International actors (especially of a regional and supranational nature) as well as non-state actors (mainly of property substrate) have become the bearers of sovereignty, except for states, which was the classic paradigm. This results in the 'flattening' of processes (not of structures, though) related to the law-making and also law-application procedures. This indicates a shift from a vertical to a horizontal and network model (Haarscher 2005). Within the concept of law as communication, a systemic variant and a communicative variant can be distinguished.

Autopoietic concepts (Luhmann 1987), included in the first variant, picture law as an autonomous and self-controlled closed system. An autopoietic system is a system that relates to itself and is not externally controllable (although it can receive and take into account information from the external environment, and transform itself under its influence and in response to it). The concept of autopoietic law emphasises not only intrinsic controllability, but also the fact that traditional methods of vertical control derived from a hierarchical structure are incompatible with the multi-centric structure of modern societies (Luhmann 1983). This changes the role of the state from a controlling to a coordinating actor. Nevertheless, one of the basic functions of law remains the regulation of common and divergent interests as well the creation of material and procedural rules for dealing with conflict situations. It is realised increasingly through horizontal steering, i.e. the creation and introduction of new elements (norms) into the system through the consent of potential addressees and their participation. This, in turn, implies the introduction of negotiating elements into the procedures of law-making and application.

The theoretical elements outlined above correspond with the essence of mediation, particularly through the assumption of the consensuality of expectations and actions rather than the imposition of content and directions.

The communicative variant of the concept of law as conversation, on the other hand, refers to law as part of a broader theory of communicative society. In doing so, it coincides with negotiative and autopoietic concepts in pointing to a change in the position of the state, which becomes one of the negotiating partners, possibly the coordinator of the process, rather than an explicit superior. The theory of communicative action (Habermas 1979) is concerned with the interaction of people with each other through the communicative code (language and/or other signs and symbols). The aim of this interaction is – by its very intention – to achieve agreement among all participants of social interaction. Within such area of communication, both the expression of social will in terms of law-making as well as the amicable resolution of social and individual conflicts are included. Intentional-rational actions correspond with systems – such as the legal system. Communicative actions, on the other hand, comprise what is called the lifeworld – *Lebenswelt* (Habermas 1967). This notion covers phenomena such as society

or culture and, as for legal sciences – a legal order, containing apart from norms and rules also the so-called open criteria referring to extra-legal social norms as products of a given culture. As a result of mental transformations taking place in modern European societies, the law appears – as already presented in the concepts described above – as a system of agreements and understandings of various social partners, one of which is the state. This is primarily due to two factors – the increasing autonomy of citizens and their groups (even if this autonomy is partly illusory), and the change in the essence of sovereignty of modern states in the context of a globalised economy (even if this change is not always accepted in the political sense). Such an approach to law pictures it as the result of activity not of fictional legislator, but of the real individuals who make up society. In this sense, it is a dynamic process rather than a finished product.

The idea of law as a communicative action imposes and promotes a certain commitment, which is essential for a democratic society, to go beyond the boundaries of self-identity as well as the boundaries of a specific community in order to expand it and seek the most possible universal point of view. Thus, the concept proposes some ideal model of social organisation and relations. The fact that recently concepts such as 'dialogue,' 'tolerance,' 'pluralism,' 'divided sovereignty' have beenn subject to a trend towards a harsh – and often trivialised – criticism within an ongoing public debate does not mean that the theories described here have become obsolete. Indeed, the idea of a law that would be an outcome as close as possible to universal consent corresponds to the reality (and, therefore, the "lifeworld") of functionally and culturally-differentiated societies made up of autonomous individuals.

The concept of law as a communication corresponds significantly and clearly with the nature of mediation. First of all, the common starting point is the existence, search for, and finding of a common area determined by a communication code, procedures, and values, within which mutual rights and obligations are agreed. The mediation mechanism also presupposes the existence of rational individuals and the possibility of a rational interaction between them. However, it shall not be overlooked that the idealism inherent in this theory, especially the assumptions of the real equality and good faith of the participants, as well as the rationality of their arguments, can also determine the practical weakness of a specific mediation and pose a challenge to the mediator.

It is worth recalling that the first concept emphasising the close relationship between law and language, and thus communication, was legal hermeneutics (Leśniewski 2000). This is because hermeneutics as a general philosophy of understanding holds the view that the world and language cannot be separated, while understanding itself is "the process by which man expresses his relation to the world, gives it, as it were, meaning" (Wronkowska, Ziembiński 1997).

The concepts examined here are more than just a proposal for a multi-level interpretation of a legal text. They create an ontological issue and present law as the

result of interpretation. And since interpretation always comes from a particular subject, law appears as the result of the largely subjective reasonings and beliefs of the subject giving that interpretation. It is, therefore, understood as an *a priori* phenomenon, originating in the natural order; the legal act is a manner of its exercising, but ultimately its shape depends on the result of interpretation. This is because *ius* is meant to be used to make right decisions 'here and now,' while *lex* as an act composed of general norms can be applied to many cases (Kaufmann 1985). It is worth noting that such an approach is close to understanding law as a relation (Kaufmann 1986) and is also close to the convergence theory of truth and cognition, which are relevant to the theory (and practice) of mediation and to the dialogue in the process of the application of law.

Theories of argumentation, on the other hand, are based on the desire to avoid hermeneutic interpretative subjectivism and thus develop the methods that 'objectify' the understanding of a norm. They stand for what is called cognitive pluralism, i.e. the concept that it is possible to simultaneously accept two opposing judgements about the same subject, providing that they are both reasonable and fair (Perelman 1979). Thus, they assume the existence of different alternatives for action in a given situation, and make their choice dependent on the conviction of the audience, or on agreement between the parties. The way to make a choice can thus be through legal discourse (Alexy 1978), which is the basis for the settlement, or through colloquial discourse that turns into dialogue and leads to a solution.

R. Alexy's theory of legal argumentation, derived from the theory of communicative action, is at the same time not identical to legal rhetoric, i.e. Ch. Perelman's theory of argumentation, although both have similar assumptions about the acceptability of the results of communication by the actors involved in it. Both also relate primarily to processes of law application. Legal rhetoric, however, has primarily a practical orientation and refers to the centuries-old achievements of rhetoric as the art of persuasion, but emphasises not so much the veracity of arguments as the conviction of their veracity. Thus, it introduces into rhetoric, understood mainly as *ars bene dicendi*, elements related to ethics and social responsibility, consensual theory of truth, and proposes to look at law as "a set of norms that can count on social acceptance by way of convincing the actors concerned" (Wronkowska, Ziembiński 1997). The claims emerge through the acceptance of the participants in communication, i.e. based on the conviction of the truthfulness and validity of the agreed or accepted arguments. The same arguments can therefore be effective for some and ineffective for other participants in communication, depending on their particular needs, beliefs, or interests.

As for the applicability of the theory of argumentation to mediation, the most important common point here is the assumption of the existence – also in a disputed decisional situation – of different alternatives for action. Their choice can be made by means of an agreement between the parties, which arises from noticing, defining, and making the *loci communes* [En. common places] in the

context of the identity of the parties to the decision. What is at stake here is the interests, needs, or beliefs that – together with law – determine the arena of conflict and the area of agreement.

3. MEDIATION AND THE COMMUNICATIVE APPROACH TO LAW – CONCLUSIONS

In summary, the *loci communes* of the described concepts constitute more or less implicitly the following conclusions on the nature and the role of law – also in resolution of a legal dispute:

– the structure of communication within law is closer to a dialogue than to a monologue;

– the recognition of the plurality of identities and interests, mutual recognition and the search – through law – for areas of common ground makes it possible to come to an agreement;

– the holistic approach to conflict and the resulting legal dispute both increase such a possibility;

– there is the appreciation of the dynamism and permanent evolution of social relations followed by the law;

– the important role of the individual and of civil society is essential for Western philosophy of law;

– there is the repositioning of the state from an overarching actor to a facilitator and participant in arrangements.

Translating these philosophical and legal considerations into the language of legal practice, the above assumptions coincide with the idea of resolving legal disputes according to the Alternative Dispute Resolution (ADR) – including mediation as perhaps the most important of its forms – which is an amicable and conciliatory way of resolving conflicts and disputes based on the idea of seeking agreement in a conflict situation. The ADR is, therefore, in its essence, based on a dialogue and 'win/win philosophy,' i.e. seeking common solutions recognised (accepted) by all participants and preferring reaching an agreement over having a point. It thus corresponds with the concept of law as a horizontal, communicative, and argumentative activity; in short – law as communication.

Mediation itself is based on the following decision-making paradigms: 1) the decision to enter into the ADR rather than judicial mode; 2) identification of interests, expectations; and needs of the parties (replacing fact-findings); 3) the establishment of the common area (*loci communes*) and options for resolving the dispute within the limits of the law; 4) mediation 'subsumption'; and 5) autonomous final decision – i.e. the choice of consequences and drafting the agreement.

Autonomous decisions resulting from interaction have a greater potential for effectiveness than heteronomous decisions. However, horizontal models should not be idealised (which is a mistake often made by advocates and popularisers of mediation). It is worth stressing that not in every case should a conflict of individual interests or a legal dispute be resolved by consensual means, and the ADR is not by definition better than the judicial route.

Nevertheless, it should be highlighted that the idea of ADR – with all its advantages and disadvantages – strongly corresponds with current trends ongoing in the Western legal philosophy. Furthermore, the ADR correlates with the most relevant phenomena and changes taking place within European legal culture (Helleringer, Purnhagen 2014). Indeed, law is changing together with the social environment and the globalised and multi-centric reality. It can be legitimate to conclude that it now has a clear tendency to take on a framework character. The framework character tends to include predilection to submit a case to mediation.

Increasing a mediation area is thus an expression of a more general trend of the gradual evolution of contemporary legal systems from the model of law as technique to the model of law as communication. Despite the evident crisis of words and dialogue, as well as the decline in respect both for the philosophy of law itself and for the ideas and concepts developed by its European representatives that refer to communication, argumentation and recognition, and sometimes even attacks on rational discourse itself, it would be unfair to conclude that these concepts and their underlying values have been proved misguided. Therefore, they constitute the specificity of the European culture, including legal culture.

Mediation as such appears not only as an institution that unifies the legal culture (i.e. a common mediation mechanism) and strengthens democracy – as well as a form of the 21st-century justice that corresponds to respect for individual freedom of choice within the limits of the law – but also as a tool for increasing the area of a dialogue within the law.

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THE INTENTIONALITY, INTERSUBJECTIVITY, AND CAUSABILITY OF CIVIL LAW TRANSACTIONS[1]

Abstract. The paper presents and discusses the principle of causability as expressed in many civil codes. This principle requires that the existence of any obligations of transfers of ownership the legal cause – usually associated with 3 types of dealings having been identified by Roman jurists and elaborated by postglosators and founders of the 17th-century natural law movement, namely: *causa solvendi*, *donandi, aquirendi*, or *causa cavendi* – creates a condition for validity of legal act. Referring to the philosophical background of the analytical philosophy of intention and intersubjectivity, authors advocate a modified theory of causability, according to which it is permissible for the parties to invoke abstract actions if this is not opposed by binding legal provisions.

Keywords: the principle of causality, legal acts, intentionality, brute facts, institutional facts, the philosophy of mind, intention

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[1] The paper is devoted to the memory of late Professor Tomasz Bekrycht. He devoted his doctoral dissertation to these issues, which was the first comprehensive study of Reinach's philosophy of law in Polish literature (cf. Bekrycht 2009). This work presented in a comprehensive and, at the same time, extremely insightful way, issues at the junction of phenomenology and linguistic philosophy. Aprioric foundations of civil law as perceived by Professor Bekrycht is a research project aimed at reconstructing the theory of speech acts and its application to the analysis of problems in the field of dogmatic analysis of civil law on the one hand and interpersonal communication on the other. In our attempt to build upon Professor Bekrycht's achievements and interpretations, in this paper we shell scrutinise the applicability of the theory of speech acts to the principle of consideration applied in civil law.

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INTENCJONALNOŚĆ I INTERSUBIEKTYWNOŚĆ A ZASADA KAUZALNOŚCI W POLSKIM PRAWIE CYWILNYM

Streszczenie. Artykuł przedstawia różne teorie dotyczące zasady kauzalności czynności prawnych przysparzających, obowiązującej w różnych kodyfikacjach prawa cywilnego. Zasada ta w ogólnym zarysie stanowi warunek ważności czynności prawnych przysparzających, wpływając na konstrukcję zobowiązań oraz przeniesienia własności. Wywodzące się jeszcze z prawa rzymskiego, a następnie rozwinięte przez postglosatorów oraz zwolenników szkoły prawa natury typy kauza, takie jak *causa solvendi*, *donandi, aquirendi* czy *causa cavendi* stały się zatem punktem odniesienia dla oceny ważności przysporzeń. Odnosząc się do intencjonalnego działania na płaszczyźnie intersubiektywnej w ujęciu filozofii analitycznej, autorzy opowiadają się za modyfikacją zasady kauzalności i dopuszczeniem możliwości kształtowania czynności oderwanych od przyczyny prawnej, o ile nie jest to sprzeczne z obowiązującymi przepisami.

Słowa kluczowe: zasada kauzalności, czynność prawna, intencjonalność, zdarzenia, fakty instytucjonalne, filozofia umysłu, intencja

1. INTRODUCTION

In this paper, we shell scrutinise the applicability of the theory of speech acts to the principle of consideration applied in civil law as the so-called 'general principle of the causability of any legal dispositions'. The core of the principle could be identified with the problem of enforceability of informal conventions and agreements in classical and postclassical Roman law. For lawyers, the 'spirit' of Roman law is very palpable in today's legal regulations. In the European culture, and particularly in its continental forms, certain terminological (and semantic) similarities relating to specific legal institutions can be discerned, and this is connected with the reception of the Roman law and its conceptual apparatus. This is a result of the return to the archetypes of civilisation, which is characteristic for the Roman culture and had previously been imposed by the Roman Empire, usually by force. The problem of causability in civil law transactions has endured as one of the most interesting and most controversial legal issues since the Roman times[2]. This issue continues to absorb the attention of contemporary civil law scholars (cf. Bahr 2000; Academy of European Private Lawyers 2001)[3]. Generally speaking, the question is whether such actions always have their *causae*.

In discussing this issue, however, we would also like to draw attention to the Greek roots of modern legal culture. Naturally, no one doubts that the Aegean

[2] The historical sources of considerations on causality can be found primarily in fragment D.2,13,6,3, in which Labeon lists three legal reasons for performing legal transactions: "Rationem autem esse Labeo ait ultro citro dandi accipiendi, credendi, obligandi solvendi sui causa negotiationem (…)." Cf. D'Ors (1976, 29–30), Albanese (1972, 205–206).

[3] With regard to the latest publications devoted to this issue, see, among others: Bassani, Minke (1997); Vacca (1997); Scholl (1999); Hähnchen (2003); Inauen (2004); Ruland (2004); Ghestin (2006).

constitutes a kind of the 'golden branch' of civilisation; on the contrary, today, the Hellenic roots of our culture are once again being emphasised. There is even talk of the "Hellenisation of culture," which is understood in the scholarship as the acceptance of cultural values and models in a voluntary way in response to the strength of the inner qualities of the scientific, moral, or aesthetic ideas concerned (cf. Ziółkowski 2003, 219). Therefore, we would like to posit a certain general assumption, according to which legal discourse, and thus law, is treated as a variety of practical discourses regulated by ethical requirements; and thus to emphasise the communicative character of law, evoking the idea of Socratic dialogue between free and rational subjects. Already in the ancient times, attention was drawn to the defining features of a human being, referring to his/her role and social tasks. Aristotle defined the essence of a human being as *zoon politikon* (ζώόν πολιτικόν) and *zoon logon echon* (ζώόν λόγον έχον). These two aspects of humanity seem to intertwine and form a certain pattern of a human being that was already recognised in antiquity. It is not possible to talk about a human being, about his/her nature as well as rights and duties, without treating him/her as a rational, free, and social being.

In the authors' opinion, the validity of the thesis on the causality of civil law actions should be assessed in considerations that reach beyond strictly dogmatic conclusions. To be more precise, the issue should be addressed in the context of a discussion on the philosophical foundations of the theory of speech actions and an analysis of the concept of action, both of which tend to be situated within the branch of the philosophy of mind, inspired by research conducted in cognitive science. Our intention is to attempt a critical explanation of the nature of civil law transactions by referring to the latest research in the philosophy of language and mind, with particular focus on the notions of the intentionality and intersubjectivity of these phenomena. We will treat legal actions as a variety of human activities, with subjects retaining their autonomy. The subjects of legal action are not only autonomous, but also equipped with consciousness and free will, owing to which they can initiate their actions and, as a result, take free and rational decisions, also when participating in civil law relations.

2. THE GENERAL PRINCIPLE OF CAUSABILITY – THE VIEWS OF ADHERENTS AND OPPONENTS

On the basis of the French Civil Code, it may be stated that all legal transactions are examined in terms of their cause. Consequently, an obligation entered into without a cause or based on a false or fraudulent cause is null and void (Article 1131 of the French Civil Code), hence it is the *causa* that indicates why the parties entered into the obligation in the first place (Montanie 1992, 55; Pyziak-Szafnicka 1995, 45). The literature distinguishes between *cause du contrat* and *cause de*

l'obligation. The former indicates a legal cause in the subjective sense, i.e. it explains the motives for concluding a contract, while the latter constitutes the basis for the obligations of the parties in the objective sense, i.e. it resides in the nature of the contract. In contrast to legal orders based on the Roman law, the German law does not treat the concept of *causa* as an element that underpins the existence and correctness of a contract in terms of its legal effects. More specifically, the German Civil Law Book (BGB) does not contain the concept of an abusive *causa*, and the control of the purpose and content of the contract takes place by means of other mechanisms (the so-called *Inhaltskontrolle*[4]).

Historically, the concept of *causa* has been explained in civil law scholarship as the goal ("a part of the goal") pursued by the person undertaking legal action. In other words, such a goal is intended to justify the detriment caused to the assets of the person undertaking action to accrue benefit (Czachórski 1952, 35). A. Wolter asserts that "in the case of benefit, the motive plays an essential role, which is the idea of a so-called legal purpose or legal basis" (Wolter, Ignatowicz, Stefaniuk 2001, 270).

S. Grzybowski adds that from the point of view of the normative notion of *causae*, only such objectives are important which fall within the motivational sphere directly related to the content of the legal transaction, and which are also typical and constitute objective motives in everyday legal transactions (Grzybowski 1974, 497 ff.).[5]

The scholarly literature distinguishes between three essential forms of the legal basis for accruing benefit:

– *causa solvendi*, the purpose of which is to release from the obligation incumbent on the person obtaining the benefit;

– *causa obligandi vel acquirendi*, which seeks the acquisition of a right or other economic advantage by obtaining the benefit;

– *causa donandi*, which applies in situations where a legal transaction is carried out with the sole aim of effecting a transfer to another person without any equivalent consideration (Wolter, Ignatowicz, Stefaniuk 2001, 271 ff.).

A distinction which is much disputed in the literature pertains to the taxonomy of the so-called establishing legal causes of action[6], in particular *causa cavendi*,

[4] This role is played in particular by § 134 of the BGB, which concerns the invalidity of a legal transaction contrary to a statutory provision; § 138, § 138 of the BGB, which concerns the invalidity of a legal transaction contrary to public policy and aimed at the exploitation of one of the parties; and § 242 of the BGB, which stipulates the duty to respect the principles of good faith in the performance of obligations, previously analysed under § 311 of the BGB (2002), i.e. former § 9 AGBG, which contains a clause to control general terms and conditions of contracts.

[5] Other authors also note that a *causa* is a stipulated element and, therefore, certain types of legal grounds should be closely related to a given type of legal transactions. See Łętowska (1970, 96 ff.); Wolter, Ignatowicz, Stefaniuk (2001, 270 ff.).

[6] This *causa* is typologised in Polish literature by, among others, Pyziak-Szafnicka (1995, 82–89); Radwański (2005, 230).

which is supposed to constitute a security cause. G. Tracz claims that "it is as if *causa cavendi* occupies a different plane of consideration than the traditional triad […] of *causae*. It expresses the economic purpose rather than the legal purpose of a legal action. In the concept of *causa cavendi* one can distinguish at least *causam solvendi* or *causam donandi*. But there is no such relationship between the three *causae*" (Tracz 1998, 151 ff.)[7].

Z. Radwański points out that the distinguished types of *causae* function both within the subjective and the objective theory of causality, because they instantiate different forms of legal justification of the benefit (Radwański 2004, 193). Obviously, when using the term *causa*, it is necessary to clearly specify whether we mean the *causa* of obligation (*causa obligationis*) or the *causa* of performance (*causa solutionis*) (Zaradkiewicz 1999, 259–261). The scholarly literature correctly observes that defining *causa* in the context of a valid legal transaction entails identifying it with the legal cause. On the other hand, if we treat *causa* as a cause of performance-regulation, it is rather a legal basis, and in terms of type it would correspond exclusively to *causa solvendi* (Zaradkiewicz 1999, 260; Gutowski 2006, 9). At this juncture, it is worth stating that on the grounds of the Polish Civil Code, the causative character of disposition contracts does not give rise to any doubts. Thus, on the grounds of Article 156 of the Polish Civil Code, the validity of a contract to transfer ownership through the performance of an obligation arising from a previously executed contract creating the obligation to transfer ownership, as well as from a legacy, unjust enrichment or another event, depends on the existence of that obligation.

The views emerging in the Polish civil law scholarship concerning the causality of legal transactions that accrue benefit[8] may be arranged in certain groups. The first one covers the position of those legal scholars who believe that the validity of a benefit depends on the correctness of its legal cause (Berier 1934; Czachórski 1952; Wolter 2001).The second group would include the views of civil law experts who hold that there is a lack of dependence between the correctness of the *causa* and the validity of the benefit, i.e. those whose position is that of abstractness (Drozd 1974; Kubas 1974; Zawada 1990; Tracz 1997). In turn, the

[7] This author claims that "the concept of *causae*, in other words the concept of a legal goal, cannot be equated with the concept of an economic goal. The *causa* is the legal purpose of the benefit, being typical and objective, which answers the question of why the entity performs a legal transaction. (…) The purpose of the contract, often also referred to as an economic goal, explains further, unusual and biased motives of the parties to the contract, in particular, it defines more precisely what economic result the parties want to achieve by concluding a specific contract."

[8] By a legal transaction that accrues benefit, we understand a transaction which results in an increase in the property of another subject as a result of the acquisition of a property right, an increase in the value of an already existing right or a decrease in liabilities, or the prevention of a loss that would have occurred if the given transaction had not been performed. It is worth noting that the effect of the benefit resulting from the gain should be intended by the person performing the legal act (Tuhr 1918, 49 ff.).

third group includes those who acknowledge the existence of the so-called partial *causae* that occur at least in the case of disposition transactions (A. Szpunar). Finally, the fourth group consists of theoreticians who distinguish the so-called presumption of causality. This concept was formulated by M. Safjan, according to whom "accepting that the causality of a contract may be excluded by the will of the parties in favour of an abstract relation could be reduced to the thesis that in place of general causality a general presumption appears in favour of the causality of a contract. In other words, the abstract nature of the contract should be embraced by the will of the parties and should clearly appear from the content of the contract"[9].

3. THE PLACE OF PRACTICAL RATIONALITY AND INTENTIONALITY IN LEGAL ACTION

Human actions can be and often are considered in terms of their rationality. Thus, they are considered in the light of directly or indirectly posited goals, as it is held that a necessary (and sufficient) condition for establishing the rationality of certain actions is that only such actions are taken that aim to achieve a given goal. Naturally, through the prism of rationality, we can also assess the aim we posit, which must meet certain criteria for the action leading to its realisation to be considered rational. In the former case, we are dealing with the so-called formal (methodological, instrumental) rationality, while in the latter case, with substantive rationality (Kleszcz 1998, 42). In contemporary practical philosophy, the concept of principled rationality prevails, according to which rationality consists not only in choosing the most effective means leading to the realisation of an intended end, but also in a complex reflection on the aims of life in general, in rationalising the made value judgements, and in verbalising the conditions for realising these values (cf. Habermas 1987a; Alexy 1978, 223; Król 1992, 73, 77)[10].

Intentional action[11] is the purposeful – i.e. conscious and free (in the sense of freedom of choice) – triggering of a particular event with the intention of achieving a given result, which constitutes a value for the acting subject. Following J. G. Fichte, it is worth noting that human nature, in addition to the ability to reflect, comprises the ability to want, which the author vividly depicts as follows: "I find myself as myself only in wanting" (Fichte 1995, 18). The author of the *Grundlage des Naturrechts* points out that reflection on its own is not capable

[9] See Safjan (1998, 6); see also Zaradkiewicz (1999, 296).

[10] M. Król distinguishes rationality in an instrumental, essential, and justifiable sense. On legal rationality, see also Zirk-Sadowski (1984).

[11] Action understood in this way can be equated with the notion of 'action.' In the terminology of Z. Ziembiński, it will be a variant of an act understood as "proceeding considered in effect." See Ziembiński (1972, 29–40).

of acting (causation), but it produces a concept called will-order and only owing to this does it become the "supreme power of the concept," which determines the human will in terms of its purpose. The spontaneous power of the human will is thus called the "real capacity to act" (Fichte 2002, 29). The author understood will as the ability to exert influence on the physical world. Out of the living creatures known to us, only human beings possess the necessary features that allow them to have a purposeful (planned) influence on the external world. This manifests itself in the following: a rational will, the ability to learn, knowledge of causal relations, awareness of one's own needs, and the ability to hierarchise values, make decisions, and choose the means necessary for their realisation.

Similarly, A. Reinach points out that the social and legal sphere depends on "social acts", in which a very important role is played by intentional experiences, i.e. those in which we direct ourselves towards an object (Reinach 1989, 158 ff.)[12]. The author divides intentional experiences into active (where I am the acting subject, e.g. a state of indignation) and passive (in which case they can overwhelm me against my will, e.g. a feeling of sadness). Furthermore, active intentional experiences can be divided – using the criterion of the source of their causality – into those whose cause lies "in me" (*eigenkausale Akte*) and those whose cause lies in a "foreign subject" (*fremdkausale Akte*) (Burkhardt 1986, 24–31).

It becomes necessary to emphasise the intentional character that typifies all actions, because we can only recognise an event as an action if it is intentional. Generally speaking, an intentional action is one that is consciously performed as a result of a decision to act. Some authors believe that if an event cannot be described in terms of intention, then such an event cannot be regarded as an action (Davidson 1963, 685–700; 1991, 217; 1997, 96–102). Intention makes it possible to distinguish between actions which are expressions of our intentions and beliefs, i.e. those which we pursue and for which we are, therefore, responsible, and others, such as accidentally finding something on the street.

When intentional determinants are taken into consideration, this allows those who are taking action to make a choice between different intended actions and the wilfully embraced consequences of such actions (Searle 1998, 106). At this point, it is worth noting that the actions of different actors undertaken in the same external situations may be different and yet rational. The external situations in which choices are made may be basically indistinguishable, and the made consideration of the individual choice of action – even taking into account certain general principles of action – may be evaluated differently with respect to the individual actor and specific factors, which are sometimes ancillary (Żegleń 2003, 203). For example, my original intention was to buy shares in a listed company to increase my funds,

[12] Reinach also distinguishes the so-called unintentional experience, i.e. one in which there is no such direction.

but I ended up putting my assets in a long-term deposit, despite the fact that I find the latter financially less attractive. The change in my decision was prompted by my conviction that there was a danger of a bear market in the second way of investing. My beliefs are part of a broader network of beliefs, which in this case concerns knowledge about the stock market and an appreciation of the dangers involved. Hence, the relation between beliefs and the decision (taken propositionally) is treated as a logical rather than a physical causal relation (Żegleń 2003, 202). In its simplest form, it can be presented as an asymmetrical relation: it is better to take (or not to take) a given action than not to take (or take it), and the positive or negative decision in favour of one of the alternatives will be dictated by our beliefs and preferences. In other words, this relationship allows me to decide what is better for me in a given situation, to find a reason allowing me to make one choice and not another. Similarly, when there are competing alternatives for action (the multiplicity of means for achieving a given goal), the decision-maker orders the alternatives on the scale of preferences (the scale of alternatives for choosing an action) according to a specific criterion necessary to make a rational choice of one of them.

While there can be multiple intentions for a given action, due to the fact that intention is based on best judgment, there can never be mutually exclusive intentions (Davidson 1985, 199–200; Nowakowski 2004, 165–168), at most just good or bad intentions. If intentions could come into conflict with one another, this would mean that one of them would necessarily be an intention to do something that is impossible, thus there can be no such conflict. I want to be entitled to a full agricultural pension even though I have not reached the required age, but at the same time I do not want to stop farming. I know that I cannot obtain full pension rights by continuing to farm, so I cannot have the intention to keep on farming and to receive a pension at the same time. I have to make a choice between these mutually exclusive goods, so in order to arrive at any intention, I have to resolve the conflict by weighing up the reasons. The truth or falsity of a person's beliefs, and thus intentions, can be brought to light in a frank conversation, assuming that we can put aside distractions such as not knowing one's reasons, memory deficiencies, laziness, self-deception (Nowakowski 2004, 167–168).

It is possible to act in an entirely free and intentional way – as S. Judycki points out – when certain necessary conditions are fulfilled (Judycki 2006, 86–90). We are conscious and self-aware beings. In general, this refers to our ability to make our own conscious experiences the object of our own higher-order observations, as well as to the cognitive ability to distinguish ourselves and our own body from all other objects. Furthermore, the consciousness of the person to whom we wish to attribute an action must maintain their identity over time. The subject must also have the capacity to respond to values, which does not mean this is a question of accepting a particular hierarchy of values while having free will and being able to initiate action in a way that does not violate their identity. Such a person must therefore be autonomous in relation to the physical world, and

particularly in relation to the content of their own acts of consciousness and their own actions. The behaviour of a particular person is rational when it has a cause, but this can only provide an explanation for their behaviour if the relationship between the cause and the behaviour is both logical and causal (Searle 1998, 106)[13].

It therefore falls to a free-willed, autonomous, and conscious person to decide to act in this or that way. With regard to legal transactions, we would say that such a subject must have legal capacity and autonomy of will, and that the proper form of their performance will be consensual agreement between mutual interests. In the science of civil law, the autonomy of the will of the parties is understood as a legal situation wherein, by virtue of the established law and within the limits set by this law, the subject may shape their private-legal relations on their own, in particular through legal transactions (Niedośpiał 1984, 64). Hence, subjects of law may shape binding legal relations by means of legal transactions within the limits of the law in force. Subjects acting in the sphere of legal relations, i.e. those external to their internal mental decisions, must take into account not only their intentions, understood as internal decisions, but also the legal norms restricting them. In modern, liberal civil law relations (but not only), dialogue and consensus are the essential means of reconciling the interests of the parties. In turn, within the framework of their autonomy, the parties are free not only to perform or not to perform a given legal act, or to choose a party, but also to shape the content of the legal transaction. The *causa* of a legal transaction that accrues benefit is, in our opinion, the kind of intention that underlies every such act. It is more than an aim or a motive and, as such, it is an element of every action, because, in general, when we make any choice among many possibilities (e.g. whether to buy a Toyota or a Honda car, a minivan or an off-road vehicle, in a showroom or at an exchange, etc.), we must refer to the intention we have. Intentionality is characterised by reference, content, and by being about something; representation is a property that belongs to language and to mental processes.

Intention is regarded as a necessary component of the mind that allows us to distinguish those actions that are the result of our agency (which are free, and for which we are responsible) from other forms of behaviour that may be accidental, e.g. a knee reflex, a fall down the stairs. Intention is manifested in interactions with other participants in the communication process and in social relations, for example while shaping the content of a legal transaction. Consequently, the existence of conscious human intentionality would argue *prima facie* in favour of the generality of the principle of the causality of civil law acts, since only transaction performed with a certain intention is a genuine transaction. We thus refer to the French tradition of *cause du contrat*, or a subjective legal cause. It could be said in this context that a certain intentional state is a performative one if the transaction binding the parties is concluded (Searle 1998, 104 ff.).

[13] Searle observes that "Explanations of rational human behavior thus essentially employ the apparatus of intentional causation."

4. THE DISCURSIVE APPROACH TO LAW AND THE INTERSUBJECTIVITY OF CIVIL LAW TRANSACTIONS

The content of our convictions should be intersubjectively accessible and understandable, i.e. intersubjectively communicable and verifiable. This is of particular importance when entering into contracts, when taking actions within the framework of any legal discourse. We should be able to assume that the intentions of the subjects of a specific legal relationship are, in principle, convergent, or may become so. It is traditionally noticed that every argumentative (communicative) act assumes certain *a priori* conditions of validity (of a normative character), which J. Habermas refers to as validity "claims" (Habermas 1984b, 355)[14]. Moreover, the author of *Theorie des kommunikativen Handelns* holds that every participant in a speech act (speaker) speaks sincerely and communicates true sentences in such a way that the listener recognises their utterance as certain (correct), and that their utterance is correct, i.e. accepted by the audience in a given axiological system.

It is worth noting that in his later works, Habermas stresses the role of discourse theory in shaping democratic procedures, fundamental political rights, and the functions of particular apparatuses of public power (Habermas 1994, 217, 241 ff.; Alexy 1995, 165–174; cf. Morawski 2000, 30; Kozak 2002, 129). The practical discourse broadly outlined above, within which the justification of normative statements takes place, became the basis for the construction of the theory of legal discourse. The concept of legal discourse was most extensively discussed and developed by R. Alexy, who treated it as a special case of general and practical argumentation (Alexy 1978, 62 ff.)[15]. Justice cannot be done to the thought of this outstanding German philosopher in this short text[16]. However, here it is necessary to emphasise that the concept of legal discourse presupposes that it belongs to institutionalised discourses. Apart from referring to the assumptions of an ideal speech situation characteristic of practical discourse, legal discourse formulates pragmatic rules and forms of argumentation that are to serve the purpose of issuing a rational and correct decision on the basis of legal *topoi* and the law in force.

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[14] In everyday communication, validity claims are supposed to constitute an assumption of rational communication. Validity claims include: the intelligibility (*Verständlichkeit*), truth (*Wahrheit*), reliability (*Wahrhaftigkeit*), and correctness (*Richtigkeit*) of the means of communication. See also the discussion of Habermas' theory in Polish scholarship from this point of view (e.g.: Zirk-Sadowski 1986; Kaniowski, Szahaj 1987; Morawski 1990).

[15] The thesis that legal discourse is a special case of practical discourse is not universally accepted and has been widely criticised, for example by Neumann (1986, 86) and Hilgendorf (1991, 109).

[16] In the Polish philosophical and legal literature, we can find a number of works dealing with the theory of legal discourse, for example: Wróblewski (1976; 1988); Morawski (1988); Zirk-Sadowski (1998); Grabowski (1999); Wojciechowski (2001; 2004, passim).

In this article, our intention is only to draw on discourse theory to address the problem of the intersubjectivity of interpersonal relations in the context of the causality of civil law actions.

The intersubjectivity of our beliefs is linked to the communicative reciprocity of dialogue and mutual understanding. Thus, law also has to be understood as an element of linguistic and cultural communication, albeit formalised one. The thesis on the communicative nature of law has found full acceptance in the methodology of contemporary legal studies. Law is a cultural phenomenon and, therefore, also a result of communicative activity. Speech is the common means of communication of all people and, thus, a large part of human interaction takes place in it and with it. Reflections on this subject tend to be conducted with reference to Habermas' concept of communicative action.

It is worth noting, however, that communicative relations of reciprocity and the problem of intersubjectivity in legal relations were important elements of the Fichtean-Hegelian vision of philosophy of law, which focused on property and contract law. The concept of interpersonality (*Interpersonalitätslehre*) is regarded as one of the essential elements of the Fichtean social philosophy[17]. For Fichte, the basic assumption is that in the moral world, people live together within certain social relations. "Without it there exist only scattered natural people, savages, cannibals, who nevertheless have marriages, parents and children" (Fichte 1996, 331). This is why the following principle becomes so momentous from the point of view of just law: "The finite rational being cannot assume the existence of other finite rational beings outside it without positing itself as standing with those beings in a particular relation, called a relation of right (*Rechtsverhältnis*)" (Fichte 2000, 39). Interpersonal relationships based on the mutual recognition and appropriate treatment of rational and free subjects are thus subject to legal protection.

In Hegel's philosophy, a momentous role is played by the "ontologically" constitutive notion of intersubjectivity, which is fundamental to humanity (Siemek 1998)[18]. The communicative society, defined as the objective spirit emerging in civil society, provides the basis for primal intersubjectivity. In turn, for Hegel, intersubjectivity is intrinsically linked to the concept of "recognition," which plays an essential role in his philosophy of law. Hegel's views on this subject are expressed with particular clarity in the following passage: "Contract presupposes that the contracting parties *recognize* each other as persons and owners of property; and since it is a relationship of objective spirit, the moment of recognition is already contained and presupposed within it" (Hegel 1991, 103). The author of the *Phenomenology of Spirit* thus replaces the primary struggle

[17] Cf., *inter alia*, Hunters (1971); Girndt (1981); Düsings (1986); Siemek (1998).

[18] Hegel posits that human reality can arise and persist in existence only as a "recognised" reality. In other words, a human being is actually human for himself/herself and for others, provided that he/she is recognised by those others, that is, other members of society.

with an intersubjective logic and ethics of a common game (Siemek 1998, 101)[19]. Habermas condemns Hegel for summoning the "authoritarian embodiments of a subject-centered reason' against 'the unifying power of intersubjectivity" (Habermas 1987b, 30). Thus, for Habermas, it is the communicatively-achieved agreement between subjects that becomes the basis of modern society.

The concepts of mutual recognition and intersubjectivity are key elements of both Habermas' concept of communicative action and A. Honneth's concept of recognition. In these notions, as in Hegel's philosophy of law, the basic principle is the interaction of rational and free individuals who, through the process of intersubjective mutual recognition and understanding, can construct a social and legal reality.

The contemporary concept of recognition is linked to a critique of the subject presupposed by liberal conceptions of politics and society[20]. Thus, atomistic liberal conceptions are contrasted with the model of a discursive, cooperative society, in which the recognition of social relations and the law itself takes place through intersubjective communication, and which is based on a relationship of reciprocal dialogue and agreement. In this perspective, the human being is treated as a self-interpreting subject, whose fundamental duties include the exercise of choice and hierarchising values and behaviour. This is a subject equipped with identity and free will, while at the same time being confined by a set of discursive relations. Everyone is treated as a full participant in social interactions who, in the struggle for their recognition in every sphere, can formulate a variety of claims that must be considered and evaluated within the framework of intersubjective communication by others[21].

Habermas situates rationality in communicative action, highlighting the rational character of this action. The potential of rationality, which was once contained in religious depictions of the world, is now located in the intersubjective conditions of communication. It can be described as communicative reason. In order to achieve this goal, Habermas analyses the concept of social rationalisation, which finds expression in the 'growth of reason' in society. The author makes a distinction, which is crucial for his concept, between two types of rationality and two related varieties of the theory of action.

Social actions differ from one another in the way they are coordinated – by the intertwining of egocentric calculations of utility (goal-directed action) or by reaching agreement in the sense of a cooperative process of interpretation (communicative action) (Habermas 1984a, 101). Habermas suggests that two levels of communicative action can be distinguished: a content-based one, where a certain state of affairs is communicated, and an intersubjective one, where the relationship between the discourse participants is established. Communicative action is contrasted with strategic interaction, in the sense that "*all* participants

[19] See also Siep (1974; 1979); Sae-Seong (2001).

[20] For more on the concept of recognition, see, among others, Honneth (1994; 2003).

[21] See Apel (1976, 102); Sierocka (2003, 122).

harmonise their individual plans of action with one another and thus pursue their illocutionary aims *without reservation*" (Habermas 1984a, 294). On each occasion, communicative action is interaction involving at least two subjects capable of speech and action who enter into interpersonal relations. In this case, the criterion of rationality is not primarily efficiency, but, rather, the voluntariness of the reasoned acceptance of the norms in force. From the point of view of justifying the thesis on the causality of civil law actions, the most important theoretical component seems to be Habermas' assumption that "the process of mutually convincing one another in which the actions of participants are coordinated on the basis of motivation by reasons" (Habermas 1984a, 392). In other words, reaching consensus means 'communication aimed at a legitimate agreement.'

The performance of any civil law transaction that accrues benefit is the result of a certain consensus between the parties. Commonly accepted and intersubjectively verifiable reasons constitute the foundation of every action. Otherwise, we would not be able to say that their consensus depends on shared beliefs. A certain speech act (even more so a legal transaction) is successful when both participants accept the offer contained therein (Habermas 1984a, 475).

This allows us to objectify the legal cause underlying the act, in the sense that we can assume that it is the consequence of an agreement based on an intersubjective recognition of shared convictions concerning its essential elements. This, in turn, makes it possible to achieve the desired illocutionary result, owing to the possibility of citing the reasons (derived from shared beliefs) that constitute the rational motivation for performing the act in question. In this sense, these intersubjectively communicable and verifiable reasons (beliefs, validity claims) constitute the *cause de l'obligation*.

5. CONCLUSION – THE PHILOSOPHICAL AND LEGAL JUSTIFICATION FOR THE PRESUMPTION OF THE CAUSABILITY IN CIVIL LAW TRANSACTIONS

Since we are free, autonomous subjects, even though there is an actual intention (treated as one of the propositional attitudes) underlying a given legal action, we may modify it, or even resign from it (which, in effect, will also constitute a certain intention), and make the performed action have a detached (abstract) character. A modified theory of causability could therefore be advocated, according to which it is permissible for the parties to invoke abstract actions if this is not opposed by binding legal provisions. We would then be dealing with a kind of the 'presumption of causality'[22], which could be rebutted by the parties themselves by means of

[22] In the civil law literature, the concept of "presumption of causality" was formulated by M. Safjan, who stated that "the recognition that the causality of a contract may be the will of the parties to be excluded in favour of an abstract relationship could boil down to the thesis that instead of general causality there is a general presumption in favor of the causality of the contract. In other

a discursively shaped action, if the relevant provisions allow for it (for example, the derogation from the causality of disposition transactions concerning real estate would be excluded). Such a distinction is not just empty sophistry devoid of practical value, as such a presumption may constitute a certain rule for the interpretation of declarations of will. Therefore, the parties' exclusion of the contract's causal character should take the form of an express waiver of objections *ad personam* (Zaradkiewicz 1999, 296). The abstract character of a legal transaction must thus result from an intersubjectively reached agreement, and it should also be possible to intersubjectively verify the correctness of such a regulation of a specific legal relationship by assessing the correctness of the legislative process, or the conclusion of an agreement between the parties to a specific legal relationship. Consequently, the party invoking the abstract nature of the legal act would bear the burden of proving the truth of such a claim. It should be stressed that the adoption of such a flexible theory of causability strengthens the requirements of the certainty of trade (especially in the sphere of economic relations) and constitutes an expression of respect for the autonomy of will of the parties within the framework of contract bonds.

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LEGAL HEURISTICS AND THE POSITIVISATION OF LAW IN DOGMATIC DISCOURSE

Abstract. The general opinion that the text of the law does not imply its use leads to an understanding of the role that legal dogmatics and legal practice can play in solving this problem. Common thematic field of both those lawyers' activities allows us to distinguish a dogmatic discourse, by which and in which the law is positivised by consolidating applicable (operative) patterns of solving legal problems. These patterns are created by referring to the aspects of text, language, and system of law, but also to the history of the discourse. The positivisation of law is the result of specific legal heuristics, consisting in combining meanings, expectations, values, and existing practices in solving legal problems. Legal heuristics does not boil down to a method, but, rather, is a framework, a context, and a set of conditions for cognition aimed at solving practical problems.

Keywords: legal heuristics, legal dogmatics, positivisation of law, legal argumentation

HEURYSTYKI PRAWNICZE A POZYTWIZACJA PRAWA W DYSKURSIE DOGMATYCZNYM

Streszczenie. Powszechna opinia, że tekst prawa nie wyznacza jego zastosowania prowadzi do zrozumienia roli dogmatyki prawniczej i praktyki orzeczniczej w rozwiązaniu tego problemu. Wspólne pole tematyczne obu obszarów działalności prawników pozwala wyodrębnić dyskurs dogmatyczny, w którym prawo jest pozytywizowane poprzez utrwalanie stosowalnych (operatywnych) wzorów rozwiązywania problemów prawnych. Wzory te powstają przez odwołania do tekstowości, językowości prawa i systemowości prawa, ale również do historii samego dyskursu. Pozytywizacja prawa jest wynikiem określonych heurystyk prawnych, polegających na łączeniu znaczeń, oczekiwań, wartości i istniejących praktyk w rozwiązywaniu problemów prawnych. Heurystyka prawnicza nie sprowadza się do metody, jest raczej ramą, kontekstem i zespołem warunków poznania nakierowanego na rozwiązywanie praktycznych problemów.

Słowa kluczowe: heurystyka prawnicza, dogmatyka prawa, pozytywizacja prawa, argumentacja prawnicza

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1. INTRODUCTION

In principle, the cognition of law has two dimensions – theoretical and practical. It is difficult to differentiate between these two dimensions when only the intentions of researchers are taken into account. Theoretical cognition takes place at two levels. At the first level, one seeks to answer the question of what law is; to what category of beings it belongs. Considerations of a philosophical nature may develop into scientific theories which generally have a notional character, or which seek to explain law as an empirically-studied phenomenon. A specific characteristic of such research is that at the outset the researcher does not assume that law is what it is understood to be in a given social practice.

At the second level, this very assumption is adopted at the outset. From this it follows that legal doctrine (a term usually used in this context) is of a normative nature, because it shapes legal practices while at the same time being a legal practice itself. I understand the legal doctrine as the entirety of recognised practical knowledge which is expected to provide an explanation of many things, including what the law is in the practices of state organs, what its content is, and which lawyers' actions should be considered as acceptable in the light of their institutional role. A very important component of the legal doctrine, apart from the findings of the theory of law, involves the findings of legal dogmatics (legal science, *scientia iuris, Rechtswissenschaft*) – a domain which is clearly identified in European legal culture, though named in various ways (Peczenik 2005, 1–2).

The belief that legal doctrine – and especially legal dogmatics – is of a normative nature is one that is held by many researchers. According to Kaarlo Tuori, legal science possesses a particular normativity which separates it from research on law conducted in the spheres of other social sciences, such as sociology or political science. This particular normativity stems from its dual nature: legal science is not only a scientific practice but also a legal one, and it participates in the reproduction and modification of the legal order – its own object of research (Tuori 2016, 285).

The aim of this article is to present some aspects of the normativity of legal dogmatics. I suggest that utterances formulated within legal dogmatics, along with court rulings, positivise the law, i.e. determine its content (3), by formulating patterns of solving legal problems (4), justified in a specific way (5). I also indicate the significance of the hermeneutic explanation of the relationship between knowledge and practice (6). However, I start with some introductory remarks concerning the self-consciousness of lawyers, highlighting the role of their work in shaping the legal order (2)[1].

[1] I was encouraged to write this text by Tomasz Bekrycht, who was working on a collection of articles on legal heuristics, which was not completed. Legal heuristics was then the subject of his keen interest. This article is based partly on my previous work: Leszczyński (2010).

2. THE SELF-CONSCIOUSNESS OF LAWYERS AND THE NORMATIVITY OF LEGAL KNOWLEDGE

Legal doctrine is based upon a certain "image" of what a legal order is, resulting from many sophisticated assumptions, but above all from what is expected by the participants of the discourse. This "image" of law is confronted both with an ideal of law brought into the discourse through theoretical and philosophical reflection and, on the other hand, with everyday facts concerning the practices of state offices and courts. Thus, it can be said that the "image" of the legal order is a product of negotiation. However, this assertion is not encountered in the discourse of legal practices; neither is the notion that law is just an "image". If a given social practice perceives the image of law as inadequate in some of its parts or aspects, then the removal of this inconsistency must take place through a correction of the practice or theory of law. The significant and permanent inadequacy of the doctrinal image of law would be a source of its dysfunctionality due to various social implications, such as those associated with the educational function of the theory of law.

The practical aspect of the theory of law is twofold. In an obvious way, the theory is practical, normatively concentrating the actions of lawyers who arrange the limits of law and its contents, using heuristic criteria deemed consistent with the theory. Such a theory legitimises specific legal practices. In a less obvious way, the theory is also practical, because it constructs lawyers' self-consciousness, drawing on those aspects that create given practices. Somewhat paradoxically, for the same reasons that justify describing this aspect of the theory of law as practical, we can also identify cognitive values in the theory, since they condition one another.

> Legal scholars, of course, differ in their self-understanding, and legal theorists and legal philosophers in particular may deny the normative implications of their statements and the corresponding normative validity claims. Nevertheless, it appears that the legal scholar is not free to choose between a purely cognitive and a performative attitude. She is, to a certain extent, a prisoner of her social position; the implications and validity claims of her statements are affected by her dual citizenship. (Tuori 2016, 292)

The shaping of the self-consciousness of lawyers by the theory of law is a subject often discussed in the literature of modern legal theory and legal philosophy. I treat this paper as a contribution to the debate and propose treating legal dogmatics as playing a key role in the positivisation of law. The positivisation of law is understood here as a function of some legal practices consisting in limiting a multitude of possible solutions to legal problems that arise during the application of law.

3. THE POSITIVISATION OF LAW AND LEGAL DOGMATICS

The concept of the positivisation of law indicates a certain way of solving social problems, namely the fact that legal provisions do not determine, in principle, the way they are applied in court decisions. It is not an issue of the sheer "technical" possibility of applying law, but a question of how this can be accomplished in a way that is acceptable from the point of view of the adopted values and purposes of law. It can be said that the positivisation of law is the result of specific legal heuristics, consisting in combining meanings, expectations, values, and existing practices in solving legal problems and consolidating patterns of these solutions. Thus understood, heuristics does not boil down to a method, but, rather, is a framework, a context, and a set of conditions for cognition aimed at solving practical problems (Hartman 2011, 25). The concept of the positivisation of law is not a concept developed in legal doctrine; it belongs to the legal theory that constructs the self-consciousness of lawyers, explaining and justifying their actions at the same time.

There are at least two meanings of the "positivisation" and the "positiveness" of law. The more traditional one concerns turning a law that already exists in some way (i.e. natural law) into a form of positive law. As an effect of the enactment of law (law-making), the positiveness of law can be described as the positiveness of a legal text. However, this paper concerns the positiveness of law which is achieved in practice, especially in court decisions. Therefore, the issue concerns the positiveness of law in terms of its determinacy with regard to content.

Jan M. Broekman demonstrates that the adoption of linguistic measures alone will not impart stability to a certain way of understanding the contents of law. The action of some institutional mechanisms is essential. According to Broekman, the positivisation of law (the author introduces this concept in the second meaning described above), takes place in legal dogmatics (Broekman 1985). Broekman notices that the auto-referential structure of legal dogmatics, constituting the central core of a legal paradigm, must remain intact to compensate the open and informal character of a legal text. The auto-referentiality of dogmatics remains in a functional relationship to the argument of the open textuality of law. Not only is this relationship a result of philosophical reflection, but it is also a structure – and thus an element of the argumentation structure. This means that when one arrives at some dogmatic conclusions, the argumentation attains the objectivity which cannot be achieved through reference to a legal text alone.

The connection between the positivisation of law and legal dogmatics is clear when one appreciates that legal dogmatics has a practical function. The theory of law often accepts that the cognitive functions of legal dogmatics are secondary to the practical functions connected with the practice of applying and creating law. In reflection on legal dogmatics, there was a distinct idea that, because of its close

connection to practice, dogmatics does not fit the model of humanistic science, or even that it is a form of a practical activity. It has been noted that solving dogmatic problems consists not only in providing an exhaustive description of a legal norm, but also in ensuring that the implementation of such a norm is an appropriate means for achieving the desired objectives. Irrespective of the ideology determining the attitude of lawyers to the interpretation of the law, legal dogmatics subordinates itself – deliberately or unconsciously – to a certain socio-technical task of building trust in the certainty of legal transactions, legal security, and the stability of interpretation (Ziembiński 1980, 26).

Legal dogmatics also has a normative function. It does not restrict itself to the description of binding legal norms: it proposes or suggests criteria for solving legal problems. Systematisation is an important activity of legal dogmatics, and not only for the sake of systematisation itself. Dogmatics plays a more significant social role in providing models for the application, interpretation, and modification of law (Atienza, Manero 1998, 20–21). As Jan M. Smits notes:

> Legal systematisation differs in one important respect from description in other disciplines: it influences the actual application of the law. Because legal academics work on a system that is also used in practice, important normative consequences can follow from their work. Anyone making use of a coherent system will propagate a change of the law if this fits in with the system itself. (Smits 2015, 11)

When viewed in the light of the above-mentioned qualities, legal dogmatics is brought closer to the discourse of applying the law, which leads to the conclusion that the positivisation of law is a result of legal discourse being understood more broadly than it is within the field legal dogmatics. The activities of judges or officials produce real effects which are not brought about by the scientific theses of legal dogmatists. However, this difference results from the power to produce such effects, which are institutionally-attributed to state organs, and to which the roles played by lawyers correspond. Legal scholars do not have such power because the institution within which they act is not thus equipped. However, one should not draw conclusions about the principal differences between these two discourses and the knowledge that constitutes their thematic field on the basis of whether or not such a power exists.

To combine these two discourses and refer to them as a "dogmatic discourse" would constitute a step beyond the traditional distinction between the doctrine (legal dogmatics) and the judicature. The discourse thus understood comprises legal dogmatics and the discourse of applying the law. The leading role of legal dogmatics expressed this way is in line with the belief that the function of articulating the legal worldview is mainly vested in legal dogmatics (Zirk-Sadowski 1998, 70–71).

4. PATTERNS OF SOLVING LEGAL PROBLEMS

The knowledge which positivises the law consists of conclusions concerning various issues: understanding a legal rule, situations to which it applies, the relation of a given rule to another rule, etc. The applicability of a legal rule, as reached through these arrangements, does not mean only that the scope of its application is determined, but also that it is acceptable in the light of the purposes and the values connected with the legal rule. An applicable legal rule becomes a pattern of solving legal problems.

Such a pattern meets the requirements of utility and validity. To achieve utility means satisfying the expectation that the actual situations to which such models apply should be clearly determined. This allows for repeatability in the way legal problems are solved. The requirement of validity is fulfilled when the patterns of solving legal problems are models for the application of law that is relevant in every respect. Validity is related to interpretative directives, to whether the understanding of the provisions is compatible with the content of other legal texts (especially those of a constitutional nature), and, finally – and this is quite problematic – to moral and economic arguments or a legal policy. The validity of the pattern for resolving a legal problem requires that it should be characterised by universality and objectivity. The requirement of universality means that the essence of the problem characterising a given case should be recognised, and an appropriate model for resolving each case containing this essential problem should be formulated. Objectivity (non-subjectivity) can be understood in a two-fold way. On the one hand, the model should not be an individual expression of the lawyer's views, while on the other hand, it is expected to be justified by reference to something that is beyond the lawyers' consideration of the problem. The latter requirement sometimes raises pitfalls when the reference is to discussions in the legislative process.

It is necessary to indicate some objections to the inclusion of this issue in the discourse of the positivisation of law. One could say that to *show* the validity of a norm impartially is one thing, and to *apply* it impartially is entirely another thing. The norm recognised as valid *prima facie* will be the basis of a valid resolution when it is appropriately and impartially applied without any relation to the problematisation of the validity of this norm or the other norms competing with it (Günther 1989, 156 ff). However, the legal rule understood in some way, applied and functioning as the pattern of solving a legal problem, at least in some cases, is not the same legal norm as the one *prima facie* belonging to the legal system (viewed in the abstract).

The application of competing legal principles, based on their balancing, also demands a justification which will function as a precedent for other cases. Robert Alexy argues that claims to validity cannot be repealed through reference to assertions formulated in the discourse of applying the law, and suggests that

for this reason the distinction between the discourse concerning the validity of legal norms and the discourse concerning their application is not firmly grounded (Alexy 1993, 163–164).

5. THE PROPERTIES OF ARGUMENTATION IN DOGMATIC DISCOURSE

The positivisation of law is conducted through reference to a rather generically closed set of arguments which can be divided into two groups. The first one includes references to the legal text, the language of law, and the system of legal norms, while the second one – references to the history of the dogmatic discourse. The properties of the text, language, or the system of norms can be called their attributes; they are decisive for the formulated arguments attaining objectivity. For example: (1) the attributes of facticity, legibility (regardless of its clarity or non-clarity), internal context, and semantics appertain to the text of law; (2) the attribute of intersubjectivity appertains to the language of law, because it is a fragment of a natural language determined by semantic and syntactic rules; and (3) the attributes of the law as a legal system are the relations between norms: hierarchical relations, interim ones, and the ones connected with the content of norms, especially those that concern the consistency of the legal system.

The attributes of the text of law, language of law, system of law and the relations between them, i.e. recognised ways of joining them in argumentation, make up the structure of law in dogmatic discourse. What we are concerned with here is not a system of law in which a structure is a collection of relations between legal norms; rather, a structure is something that is accepted as an objective determinant which grounds an utterance on law in real dogmatic discourse. A structure of law appears at the level of argumentation concerning legal norms and not at the level of the system of legal norms.

Structural arguments are of a fundamental character, because dogmatic discourse treats a structure of law as external to dogmatic argumentation, and due to this arguments which lean towards an adopted method of solving a problem are objectified. This serves to foster and maintain convictions that the structure of law is stable, irrespective of those arguing, and, hence, it does not allow any discretion in argumentation.

As the interpretative directives are derivative in relation to a legal structure, they do not constitute an object of reference in dogmatic discourse. They are "tools" for solving problems. In the practice of dogmatic discourse, these rules come to the foreground; through them, and especially by means of interpretative directives, lawyers refer to the text of the law, the language of the law, and the legal system. Due to the prescriptive nature of these directives, making references to the structures of law is one of the obligations of lawyers. Not all interpretative directives use the objectivity of the object of reference in the same way; the

differences between references to language rules and references to the purposes and intentions of the legislator, or to the function of the law, are evident. These differences are a reason for problematising the values of various methods of interpretation and are associated with general disputes about the values pursued by law or by the application of law. The fact of whether one accepts or rejects the factuality or the objectivity of references to legislative intentions, purposes, functions, etc. has the ideological dimension. Hence, the preference for the priority of linguistic interpretation, which is often justified by methodological reasons, often conceals axiological choices, connected either to types of interpretative directives or directly to the effects of their application.

Referring to the attributes of the text, the language, and the system of law is often not sufficient for justifying the application of a legal provision in a certain way. The reason for this is especially, though not exclusively, the openness of functional interpretative directives (including purposeful ones). The acceptance of the resolution to some legal problems, weakly justified in a legal text or not justified at all, is supported by reference to the history of the dogmatic discourse. In this way, doctrinal utterances, not least those of the judicature, are ascribed the same attributes which primarily belong to legal texts (factuality, legibility, etc.) However, controversies arise due to support for proposals which seek to solve certain problems posed in the dogmatic discourse through assigning such attributes to the utterances of participants of the legislative process.

6. THE RELATIONSHIP BETWEEN THEORY AND PRACTICE

The concept of the positivisation of law is associated with the philosophical issue of the relationship between theory and practice, or between knowledge and practice. The philosophical hermeneutics of Hans-Georg Gadamer draws attention to the bidirectional relation of acquiring general knowledge and its practical exploitation. It follows that the application of a general norm is not a consequence of its understanding, but, rather, is its integral part. Gadamer believes that the cognition of the meaning of a legal text and applying it to a specific legal case are not two separate acts but one and the same process (Gadamer 2004, 308–309). Practicality in the legal sphere means, on the one hand, the possibility of applying the law according to the general knowledge one has acquired, and, on the other hand, the necessity of finding oneself in an unpredictable, specific case of practical reality which reciprocally influences the understanding of what constitutes general knowledge. As models for action, rules are concretised through application. The problem is what makes one application of a rule correct, and not another. One response given to this question (i.e. by Ludwig Wittgenstein) emphasises the role of practice, including customs and institutions, because – as Aristotle held – a rule in itself does not unambiguously determine the way it is applied.

7. CONCLUDING REMARKS

One can notice that the forms of discourse in which law is positivised are stable, and this is certainly the case with legal dogmatics. The failure of attempts to present the development of the dogmatics of law in accordance with the conception of a historically-changing paradigm (in the sense given to this concept by Thomas S. Kuhn) is explained by the fact that legal dogmatics is not only – or perhaps not even primarily – a field of cognition, but is at least equally a sphere of practical action. In this case, assumptions as to the nature of objects distinguished from the point of view of practice, the relations between them, their influence on practice, etc. do not have a theoretical character *sensu stricto*. The assumptions do not form part of an empirical theory in which the objects may have a theoretical explanation as natural objects. What influences the shift of paradigms in the empirical sciences cannot be found here.

While fulfilling the important social function of maintaining the values of justice and legality, legal dogmatics is guided by the necessity of prudence and theoretical self-restraint to avoid the pluralism of ideas and incessant change. The factors limiting potential change are assumptions concerning the object of research, heuristic methods, and the internal values of law. On the other hand, legal dogmatics is a "science of meaning." It follows that the use of conceptual tools for regulating social conduct is justified not only by science, but also by a free and morally-responsible discourse (Aarnio 1984, 31).

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OUT OF THE CONTEMPLATION OF THE LAW: AN ATTEMPT AT OUTLINING SOME PROBLEMS

Abstract. The author addresses the problem of the cognitive role of intellectual processes in the sphere of intellectual objects, which also include the established law. Only by virtue of intellectual processes focused on the law can it be cognitively made available to others. Contrary to conceptualists, and above all Kelsen, it is then necessary to move away from determining the doctrine of law with a conceptual grid, as the basic undertaken means of controlling the legal issues. It cannot be accepted that what is not verifiable in such a grid cannot be treated as a heuristic attitude towards the law. The author distinguishes the so-called high interpretation, which has the characteristic that it consists in the course of the entire law, including the development of legal thought on the law and the consequences of the law. There is no such thing as the development of law in its empirical sense. On the other hand, thinking about it through interpretation, properly combined with interpretation at a high level, contemplating it by combining legal considerations with interpretation at a high level should, in the Author's opinion, be considered the deepest manifestation of the reflexivity of legal culture.

Keywords: legal knowledge, theory of law, legal concepts, legal cognition, reflexivity of law, progress in law

W MYŚLENIU O PRAWIE PRÓBA ZARYSOWANIA PEWNYCH PROBLEMÓW

Streszczenie. Autor podejmuje problem roli poznawczej procesów intelektualnych sferze obiektów intelektualnych, do których należy również prawo stanowione. Tylko na mocy procesów intelektualnych skupionych na prawie można poznawczo udostępnić je innym. Wbrew konceptualistom, a przede wszystkim Kelsenowi, trzeba wówczas odejść od determinowania doktryny prawa siatką pojęciową, jako podstawowym środkiem kontroli podejmowanych zagadnień prawnych. Nie można przyjąć tezy, że to co nie jest weryfikowalne w takiej siatce nie może być traktowane jako heureza prawa. Autor wyodrębnia tzw. wysoką wykładnię, która ma to do siebie, że polega na przebiegu przez całe prawo, a w tym rozwój myśli prawniczej nad prawem i konsekwencji prawa. Nie ma czegoś takiego jak rozwój prawa w empirycznym jego sensie. Natomiast myśl nad nim za pośrednictwem wykładni, odpowiednio połączonej z interpretacją na wysokim poziomie,

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kontemplowanie go poprzez połączenie rozważań prawnych z interpretacją na wysokim poziomie powinno być, zdaniem Autora, uznane za najgłębszy przejaw refleksyjności kultury prawnej.

Słowa kluczowe: wiedza o prawie, teoria prawa, pojęcia prawne, poznanie prawa refleksyjność prawa, postęp w prawie

Within some deep considerations related to the law[1], and thus within the reflective perception of the law, we may capture its relevant associations; both the internal and the external sets of relations, thinking about some large possibilities significantly opening certain extensions of the circles of contexts of occurrences of the law and, what is more, building upon the occurrences within the law some essence which does not have to mean any self-regulatory characteristics of new problems. Taking this into account, within the characteristics of the point of entry assumption, it may appear that many seemingly closed topics would come alive (for instance, structures of the legal norm, or at least the principles of the law, not to mention other topics), offering the currently unprecedented ways of thinking about the entry points (particularly). As is known, the law has various levels which should not be taken for layers, but which could be seen as hierarchies, super-levels, along with the multiplicity of their accompanying rules. Accepting this variety, simultaneously separating ourselves from their to-date frames, and especially from the ways of their applications, most commonly uniform, certain, but within their uniformity ultimate, attributing to them some value of discursiveness, and within it certain research-assumptions, because they should not be always unambiguous, we may finally count on the opening of the closed topics, and the closed theory within the theory of the law. We need to make here some reservations relating to that opening. That process of achieving some flexibility in relation to its meaning would occur mainly intellectually and not through any imagined fitting of the internal perception of the law in relation to the already known dictionary of the legal doctrine, or also, for instance, the known legal constructs. There is no modern approach in it, and not infrequently it relies on expressing some tendencies towards multiplicities, not to say the cumulativism. The law itself has for a long time had well-developed, relational-structural features. It becomes particularly conspicuous when we move from the legal language to the juridical language. The space between these languages still remains a complex problem, which cannot be embraced by specifically saying what those languages are out of their definition (cf. Jabłońska-Bonca 2017; Oniszczuk 2019). Here we suppose that the law comes alive, especially with its inherent properties – structural properties, expressible not only as a certain variant – in search of the meanings of the language used by the lawyers for their purposes, within their communications, as well as for the purposes of other users of the law. This approach in the extraction of the

[1] Basic concepts and definitions of reflectiveness of the law are developed by Pichlak (2019, especially chapter I) and Hałas (2011, 200).

structures can be noticed, for example, in creating various case studies, especially within their internality, or within the development of compendium (cf. Helios 2014, 80 and further pages) or in general within the perception of the private law (cf. Helios, Kaczmarek, Kaźmierczyk 2006; Banaszak, Bernaczyk 2012). We do not strive here to disguise the law by means of any structures or structuralisms as philosophical directions, though they are tempting for many lawyers. The thing is to first consider that the law endeavours structuring itself, for it is a process which seemingly is always complex, at least within the need of its description, recognising its beginnings. However, let us leave aside the describing, especially that both the elements of the mentioned process as well as the process itself may depend on the diversity also in relation to the entry point assumptions relating to the law, i.e. the starting assumptions. Let us stick to the terms, concepts, or even categories, which could help capture the questions associated with those processes. It is also not so simple, because it is not about the genesis given in describing some facts, but about the abstractly captured thought on the law, simultaneously being able to drive the law.

What is more, we underline that the most commonly encountered entry points are such that: one goes from one law to another law, from its very simple generations, though already permissible within the image of the law, not talking about its doctrine. Differently from that, we would like to reach the law and though we know what it is, that entry point could enrich it. Why? Well, choosing the access to it we are in need, though already intellectually taken, of building such an access path, by means of an already different thought on the law. Thus, our thought on the law becomes essential, as if it was less than the law itself. The law will emerge later. Thus, it is about the appropriate additional intellectual input contributed to the law, creating at the same time the relationship between that contributing intellect and the law. Creating this relationship requires making the law cognitively different on the basis of the power of making the intellectual processes of the law. Then it would be necessary to go away from determining the conceptual network of a given legal doctrine as a measurement of control of the topic undertaken in the sense that what is verifiable within that network cannot be treated as utterances on the law. Obviously, we do not want to suppress the to-date concepts. They serve to understand the law at their level. Nevertheless, the change would require the mere operating on them in a modernising way with some reservation relating to the law or rather to the matter that it refers to. Admittedly, we could say, that it happily saves everything which belongs to it and at the same time it does not create obstacles, e.g. to the developing technologies. But then we do not talk about the developing law, but about the technologies. In such cases, the law itself is expected to be satisfied with its own self-development. Unfortunately, this is absent. There is more rudimentary logic within that self-development than the law. The reason for this is that the law has only that property which will not be an obstacle to the technological development, because it is so

that usually everything develops except for the law. Without developing in the sense of the scientific progress, it does not use the term 'development,' unless there is space for some special sense. It is not to create any obstacle, but to save the principles of rationality. Thus, it is to occur in a role appropriately adequate to the needs and positive values. The adequacy opens it, creating further factual states to its norms, and it can be a recognition of the future law. Within that particular reasoning, it may acquire intellectuality with its whole burden of legal domination over the modern technology, obviously under a condition of creating reasonableness, and not clutching the given encountered concepts or terms. Thus, everything depends on how we operate on it, creating mental constructs in it. It is known, that the law may include limits and certainly it includes them, but in the context of the intellectualised approach, based on them, applying them, at least as assumptions, it is possible to achieve some new explanations, not talking about new problems. Omitting the intellectual approach, the mentioned limits will cease to be able to satisfy making the legal mentality flexible as a cognitive category. And sticking to this, the law goes then out to its capacity of making out of it adequacies in relation to the technology, or some other technical or economic norms, military forces, and even perhaps at times some entertaining activities of kids in a kindergarten. As there is no space here for relating the law to the self-development or disguising it with the self-development, explicitly saying, in the elementary logic, which does not lose anything from its seminal dimension. And it does not substitute the law.

Taking the above into account for deepening the reflexivity, also underlining that adequacy of the law is a commonly accepted condition and it has a significant weightiness generating some dimensions of rebelliousness, while also occurring at all the levels of the legal interpretation, having at the same time many other values, allows by means of its mediation or directly for connecting with the deeper decks of the nature of the law. Then, we believe, it is complex and only together with the occurring adequacy and not the law co-occurring with it we receive the final legal complexity. What is more, in general it is here within the complexity of the law to be perceived as a separate topic, not to say a separate type. We rely on the complexity of the law, often without dealing separately with its matter, making it as if there was no complexity consisting of the adequacies taken together with the law. Structuring this area of topics could lead to a significant multiplicity of the problems of familiarity with the law and generating some new starting points for the law.

In order to approach it, let us notice: the consistency with the law or the lower law with the higher law could be distinguished as situations comprising topics of various legal relations, however mainly linguistic. We say that a legislation is consistent with the constitution. Usually, we will not say that it remains adequate to the constitution. We will not say this although it is so. Thus, whenever we are to deal with distinguishing certain hierarchies between the laws,

as many times especially when we are using the expression of hierarchisation we immediately enter into the area of linguistic leadership and particularly with a variety of semantic ranges. Let us try to draw a distinction, and in this way, by selecting appropriate concepts of the reconstruction, let us explain that there is some kind of the law which first of all requires some consistency. What is it all about? A possible response does not seem to be coherent, nevertheless where the determination of the place has to be required to make it legal, as consistent with the law, the language occurs to be a certain and a uniform tool. However, despite those undeniable features, there is no necessity to enter the above-mentioned place beyond the linguistic consistency, not the mere consistency. It becomes sufficient, determining at the same time the set of features of the law.

Language is the whole world, as have been noted by outstanding characters of each epoch, whereas the juristic (legal) in the light of what has been said may have its complexity somehow proportional to the requirements included within the mentioned place. And they seem again not to be that much exorbitant. First of all, there are no generations over there. The consistency is usually unilateral. It is popular among lawyers, because it is at the stage of its completion and, well, most commonly the indisputable one. It is, basically, the language, of the surface of the law, at least its external matter, i.e. externality, infrequently made of already used complexities. Thus, it appears that the lawyers easily succumb to the magic of the language rather than, for instance, its style taken from the law, or depths which they refer to, but usually without demonstrating achieving them separately within the depths of relations between the law and the language, taking the law as a kind of a formation. Then, perhaps, it could be possible to avoid the occurring interchangeability between the law and a case belonging to the scope of interest of a lawyer. As a result, language then presents itself as a tool for translating something or also reconstructing; it relates to interchangeability of a given case. And it will not help us that new cases occur because regardless of what else their language is, it is certain that it serves interchangeabilities of new and separate cases. Many depend on whether we treat the mere translation of cases as sufficient, and then the achieved translativity becomes the closing of a given case. Here there is no, as it appears, sufficient space for searching for the complexity. There is the language within its formational capturing and the language e.g. of a legislation, of legal regulations, which we also treat as legal, forgetting at the same time that between those languages there are some determinations which have not been yet provided. Finally, but already at a lower level, the space between the constitution and the legislation has numerous determinations, which are surely expressed in languages, and only the language of those determinations generates the language of the law and legislations, and not as we suggest that every text of the Journal of Laws appears as the language of the law. Let us leave it aside for a separate article.

On the occasion of dealing with these remarks, entering the complexities to bring them out, we should first take into account ambiguities of the language,

and next those determinations, though only those ambiguities which linguistically are able to generate problematic complexities, and not their usual suppression. What is related to the above-mentioned determinations is the point that from their internal point of view, one may create the language appropriate for recognising and learning about the conditions in which those determinations occur. Their linguistic recognising may next lead to the language of the law in the formational frame, or to the lower type of the legal relations. We believe that it is important to enter the language of the law, wanting to create it as the language of the law, starting from the law and not from the language. This is because it cannot be treated as "ready." By accepting the law as a starting point, especially jointly with the mentioned determinations, we endlessly open possibilities at the same time. We believe that this becomes some text, but not necessarily the law, whereas when we go out from the language to the law, we immediately encounter the limits in our understanding of the limits of the particularity of the language and also in relation to this the limits which we may be able to reason. However, they constitute a significant reason for which it is important whether we may go from the law and then into its language, or from the language, allowing at the same time for the creation of a kind of a pre-law. Some doubts may appear at this point, but it does not have to mean that these considerations do not have some significant sense. They have it, also from the methodological point of view. They just constitute some basic set of assumptions for the purpose of, as it appears, a richer capturing of the issues of the law combined with the language. Lawyers' thought about the language is significantly deeper than about the law in relation to the language. Within the first one, there are freed considerations and as such they give some learned lawyers certain freedom, while in relation to the latter, where the legal interpretation is a major feature, referring to the progress, etc., the knowledge about the legal interpretation, though within its many parts it is closed, by its level it influences the language, particularly with the not always developed depth, enforcing its level within the language. Thus, the thing is not to attribute 'this and that' to the legal interpretation, but to enter between their meanings, between the language and the law, taking the appropriate ways of the reaching and going out transcendentally towards the appropriate levels of the law within the language. It is not easy, because we do not deal here with the way in which the language enters the language, but mainly in what is called, spoken. It is not neutral, whether it is to enter within the formational capturing, or rather within the figure of the cases of interest. It is possible to notice that it is simplified even without observing those distinctions. As a result, the effects which we agree with become sufficient, stating that the state of affairs emerges as conclusive. Naturally, it does not develop the law, and it also does not develop its application, leading it mainly to the level of the so-called jurisprudential line. Being with the law as a formation, the question on the law arises to the form of categoricalness, while entering the language, it becomes an even more compound category for

the reason of its entering. Apparently, the seeking of the complexity may be, in itself, the nucleus of the reflexivity. Without the complexity and a belief that it may be best reached in an explanatory[2] way, some repetitions of the already known propositions or "the dense description" are particularly possible. Asking about the language on the occasion of dealing with the distinguished formational law in general, we strive towards the legal interpretation, always the legal interpretation. And there would be nothing extraordinary in it if the legal interpretation, each and every, was not poorer from the richness in the language. Equating them with each other would be approximated, if it was mainly humanistic (Wróblewski 1986, 25 and further pages; Wronkowska, Ziembiński 2001, 30 and further pages) in majority. Meanwhile, teaching law is mainly teaching about principles, and one could say that it is somehow teaching of a technique of recognising the law; it is not possible to justly say that it is to enter the language.

Let us move to the adequacy. Certainly, it is an ambiguous concept, but in the translation, it is consistent with something, and it appears to be the most legally efficient. However, before we deal with it from the side of the legal interpretation, or better just the law, let us try to distinguish between the legal interpretation, the mere legal interpretation as a certain activity – let us say conventional, we will receive its scope on a certain legal case – and, finally, the legal interpretation as a certain function. Kinds of the legal interpretation together with their details already have their libraries. We would like to investigate the functions more closely. Thus, going from the end, the function seems to be in a relationship with adequacy, and we believe that it is promising. Most commonly, we say that the legal interpretation is an issue of understanding the language, in which, for instance, a legal regulation was expressed, up to reconstructing from it the legal norm. This is consistent with what is said by the authority in the person of M. Zielinski, and he is certainly right about this. Nevertheless, it is a question of whether we then operate on the legal interpretation as something ready, or whether we want to reach it, but not through the activities consisted in it, or concepts (terms), and maybe methodology of the law as its cognitive property, mainly transcendentally perceived. Then we would avoid the legal interpretation as a certain kind of "a puzzle"; however, we would then achieve the enrichment of the theory of law with methodology as a preliminary element. Justly, as a beginning from which the theory needs to be commenced, it appears to be belonging to the most important one, not only for reason of the assumptions still indisputably accepted, but in consequence of conceptually reaching that beginning. It would be then difficult to be satisfied that the theory can be expressed in utterances generally arranged in relation to the law. It is too little and it does not come from the taken law. It would be also difficult to accept that such ideas for the theory have a capacity to be justified with an expression 'colloquially speaking.' We reckon that in taking into

[2] On the explanatory approach, cf. Patryas (2016).

account the role of achieving a theory, elevation of the legal interpretation to any level beyond the law, especially that its generation is not always legal, and not always deeper from the genesis, together with raising the mentioned methodology and using it for the purpose of that raising, may give an attempt of the above-mentioned beginning, liberating at the same time the legal interpretation from its associations with legal cases. We know that those associations are unavoidable, but going first from the above-mentioned raising and the mentioned beginning, it seems that we are reaching the free legal interpretation, though from the law to the law, taking into account its all determinations. In brief, we would like to distance ourselves from the refined legal interpretation, as well as the law, for this imposes some limitations on the law, especially in relation to such categories as its externality or internality. Wanting to take this direction of the reflection on the law, we are proposing to distinguish the legal interpretation at its high level and take it as a kind of a class of the legal interpretation. It certainly is the legal interpretation, but it also necessarily includes in itself the type of reasoning on the law in its formational dimension. Such separation, as a domain of thoughts mainly about the sentences of the Constitutional Tribunal, particularly referring to studies of the consistency of legislations with the Constitution, could reveal the wealth of topics which could be named as the weightiness of the law. We also include in this class of the legal interpretation the adjudication of common courts relating to verdicts, especially those at the borders between different sub-disciplines of the law. Distinguishing of the high legal interpretation is that it allows for the possibility of going through the whole law, including in this the development of the legal thought on the law. There is no such thing as the development of the law in its empirical sense. However, thinking about it with the agency of its legal interpretation, respectively combined with the interpretation performed at a high level, may result in deepening the law as the formation and developing it, taking into account the level (then already; the level) of the legislative law and the level of the law taken from the legal interpretation. The legal interpretation at a higher level appears to be the first of all doctrinal topics, prospectively doctrinal within the doctrine of the law. In turn, developing the condition of prospectivity, it may occur as an example of the fact that the law will deepen itself especially towards its internality, being taken in this regard as an intellectually needed vision of the law. The thought is to be staying beyond the law, which, in turn – without developing the doctrine, but in developing the exorbitant legal interpretation as the aim – will not be of any great use and will leave us at the current levels, because they equal with the current doctrine. Where do its sources come from? This question is of a certain fundamental nature and in some sense it is more important than other questions posed in relation to the law. In order to operationalise this, one first needs to deal with the sources of the above-mentioned question. This, however, invites a separate work, not necessarily of any erudite characteristics within the encountered set of ways of using the erudite dimension. Today we have the legal

interpretation taken from legal instances and interchangeable within them. Of course, we do not diminish them, because we do not step back from the law courts and tribunals. However, we would like to step back from the unrefined or unsophisticated legal interpretation and the law understanding that it petrifies it. Petrifying it in relation to some cases may be necessary, for instance in the context of the certainty of the law, its consistency, and uniformity. Nevertheless, it is not the method in the methodological sense.

Going back to adequacies, occurring within the legal interpretations, as is known, they are to be fulfilled with respect to the law and mainly only to the benefit of the law. In the meantime, given the above-mentioned propositions, the adequacies may numerously occur within the legal interpretation. Going further, we assume that in the presence of the legal interpretation, an adequacy occurs at a high level as a sensibly desirable thought given the further thought, and it is important, because despite there are no topics of validity here, the role of the interpreting person, most likely the judge, raises to the dimension of the level of the quality of the law. And it is possible to say this, because he/she will be then, among the possible adequacies, using the most optimal adequacy of the law. Nevertheless, he/she has to endeavour to achieve the deeper level than in situations when in searching for adequacies we only dispose the applied law, without the higher legal interpretation. The high legal interpretation already gives us a large set of choices within the adequacies. It is high due to creating possibilities of those choices, clearly in consistence with the law. When the legal interpretation is not carried out through the multiplicity of adequacies, then it usually enters the already mentioned interchangeability with the resolved case. Some doubts may emerge here. After all, the role of law courts is not to build problems but to find verdicts for every legal issue in relation to the ongoing matter. During the process of finding the verdict, that role is to solve the legal problems, but within the limits of finally achieving some adequate legal verdict. Then, when the magnitude of the legal interpretation grows, it will be moving not within the individual adequacies, but also within such which may also be current for the given legal formation. Admittedly, it will choose that one, because this is required by the application of the law; nevertheless, it is already enriched, at least with that one formation or the appropriate to this development of the thought about the law and its applicability. Meanwhile, it is so that, first, the legal regulation happens and it necessarily needs to be so. In the sequence of applicability of the law, the legal interpretation is a consequence of just occurring difficulties. It is important to us to enter the legal interpretation immediately in the presence of its developed theory, with an appropriate regulation, leading in the same way with the higher legal interpretation towards the developed applicability with the intellectually conspicuous emphasis, without losing essentially anything of the taken model of applicability, but already less formalised. Today, the legal interpretation occurs as a result of the enacted law and its some ambiguities. There is no such a thing as joint occurrence, obviously

with that higher legal interpretation. In a word, shortening the distance between the law and its legal interpretation seems to be possible and it seems beneficial to the mentioned thought. This could go to the higher legal interpretation, without any enforcement of the valid power, because, contrary to appearances, it does not solve much. It is, then, already a separate issue not of the law courts, but of the legal interpretation. The legal interpretation, but without its feature of a technique of preparing, e.g. the law court for applying a given legal norm, respectively requires some deeper approach, a more humanised approach rather than just a verbalised understanding of the norm. It is visible, then, that the law as a humanistic category does – obviously in the presence of certain assumptions – lead to recognising in this category various topics raising from the law and for the law. This, however, does not mean that one could omit matters of the valid power, the legal acts, etc. They are indispensable to the extent to which the value of the deepening doctrine is appropriately stemming from the legal system, or from that duality of views on the law with some approach derived from the law.

The legal interpretation of the adequacy as consistency with something includes above this some act of qualification[3], and this already is a legal moment. Let us add that each legal interpretation possesses that one act distinguishing it. Usually, it is so that for the one applying the law it is sufficient within the understanding of the legal interpretation to understand the legal regulation. We have already talked about the interchangeability. The endeavour of simplifying has (as is known) a positive evaluation, but until the thoughtful interventions do not become connected with it, with the capacity of taking out the further cognitive possibilities or also the practical enrichment of the legal norm with its legal interpretation and then corresponding with the norm, it constitutes the deepening of relations in thinking about merits jointly initiating the deepened relations between the norm and its state (first of all, the relations within each of those elements basically dually occurring). Usually, it is so that the legal interpretation is not done for the reason of the occurring relatively cognitively projected relations, but through the mere capturing of the acts of understanding propositions within the understanding process. Meanwhile, these are two categories which are methodologically necessary. When they become fulfilled as separate, though connected with one another, the legal interpretation has to deepen itself leading to the high one, as it seems, within simple cases. We would not like to say in this way that it often includes the errors of simplifications; nevertheless, applying it as a cognitive sphere, using the both categories with the emphasis related to the second, differently than now, we could see the legal interpretation as: firstly emerging for the reason of the adjudicated case, and, secondly, for the reason of the formational expression of the law which we usually do not achieve within our legal interpretations.

[3] This set of issues was initially developed and commenced by Kiczka (2006).

Moreover, we associate that remark with the clear preference for the internal approach to the law, believing that in combining the legal interpretation with cognitive activity it leads to obtaining the theory of law from the law, thus something more than only dogmatic-legal instruments. At the same time, what is beneficial is the fact that, entering the internality essentially, no one gives us that entry in any conclusive way. As a matter of fact, we would be using language, but the mere qualification of something as external, based on the language and its meaning does not create the internal nature of cognition of something given to develop that internality, and within it the law particularly captured by means of the meaning of its formation. As we have already noted, the achievement of the internal was given to us, for instance due to the definition. Maybe if we say what it is and if we accept it, then, at least directly, nothing will follow to the benefit of the development, not only the law, but the concept of using the law in its wide scope.

And here a question emerges in relation to determining the external approach to the law. We believe that in a situation of dealing with the so-called dogmatism of the law, it would be possible to treat that externality as its part, though it is not easy to say which one. In treating the law as we do this in the ways given above, the externality cannot be revealed by dividing the legal matter into the external and the internal one. Despite certain practices, especially the linguistic usage of the external and internal, that division seems to have its sense when the two points of view can supplement each other within the here accepted approaches to the considerations. We think with a perspective that by accepting such a reservation, together with that externality, its identity is externally comprehended. This remark is made, because within the identity the internal is not missing (cf. Kazmierczyk 2015, 215 and further pages; Zirk-Sadowski 2017). For instance, it is at least related to the conceptual-terminological sphere, the essence of the law, etc. But when we want to refer to it, the identity seems to be the most appropriate and it can be also used in building the internal perspective of the externality of the law. In the presence of such an assumption, we omit then the optional process of describing that perspective and we get in touch at the same time with a belief that both the externality and the internality of the law are issues of the conception, and not conventional acts of underlining made within the text of a legal act. What does it give us? The law, though it is a creation of conventional activities of an employer, remains, perhaps to a larger extent, an effect of legal interpretation of a lawyer who achieves it.

However, in order to develop this thought, next to the belief that the legal interpretation "overlaps" a given considered regulation and that it functions with it to the benefit of the functioning of an applied legal norm for a given state of facts, it also results in some other particular merit for the law, which is that being together with it, as this is required by a verdict, its cognition assumes some separation of the legal interpretation, qualifying it as the law, and the dimension which is the better 'guild'. By accepting such a starting point and taking the legal

regulation, we not only achieve this to derive a legal norm from it and apply it, making the instrumentum out of the law, but separating it as this instrument from the achieved legal interpretation, creating the law out of it to the benefit of the quality of the law not within the understanding of a feature, but the law. This is the law out of the nature of the law taken to its higher level as the law. We understand that the law is one entity; nevertheless, accepting it also as some formation, one needs to search for its various levels. Without them, as found and fixed as a result of well-known assumptions, and together with them appropriately reconstructed concepts, the law became unilateral – it became a school discipline, which can be seen particularly in many works on the language. The lawyer was trained to be a lawyer. Meanwhile, the law in its depth amazes systems of problems, not only in relation to issuing verdicts, but also in relation to its social formation, taken mainly from the relations between these problems. It is always applied with it, without the technical way of quotations. Let us call it applying the law within the law and for the law. If we resign from this and we stay with only one type of applying the law, now learned, it will close itself in it. Within the law, the need of searching for its appropriate spectrum of aesthetical values will also go away within the broader frame than we usually encounter.

The legal compliance as a linguistic issue may also be complex, but due to different motives. This is, because it is important how the language of expressing the law can be related to the law for the reason of the expression and how the law gets in touch with the complexity such as language. The point relates to the complexities which we consider and unknown consequences which can be attributed to the consideration. There are many various distances in here, more than differences, which are not separated, resulting in our appearance omitting methodological consequences of creating and deepening the mentioned complexities. Legal works out of the scope of linguistics are rich in relation to the issues, often taken in total while being to a lesser degree used for the separation of both disciplines as well as problems. This results in the situation in which we omit consequences of creating as well as deepening the mentioned complexities. And it is so, we believe, because within the works, a descriptive approach dominates, and infrequently it is ultimate.

In many places we have talked here about the legal interpretation, building upon the reflectivity of the law, because also the legal interpretation is the best for this purpose. As far as the law itself is concerned, the mere law, we think that the progress cannot be related to it, except for the turning point in time. However, the turning point and the progress are matters of legal interpretation, best combined with the interpretation.

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NORMATIVITY AND ONTOLOGY OF LAW IN EARLY GREEK PHILOSOPHY

Abstract. The paper is devoted to the issues of the emergence of European science and philosophy, founded by the ancient Greeks. In the period known as the First Enlightenment, there was, on the one hand, a gradual departure from the mythological explanations of the reality, and, on the other, the construction of a new way of looking at the world, known as the *study of nature*. The inquiries of the ancient Greeks had an ontological dimension; they consisted in searching for the *arche* of the world and they were looking for the ultimate structure of reality, and, what is important, the human being was situated in these studies as an integral, but not the most important part of the Cosmos, subject to its laws. Presocratics did not put the human being above nature, because they did not strictly distinguish between the laws of nature and the laws of community. This was one of the reasons why the science of law did not arise at that time. Besides, the Greeks never reduced their right to the system, because too often gods or *demos* 'interfered' with the laws of the *polis*. It was a typical example of "law without jurisprudence", because it was flexible and had vaguely formulated rules and institutions. Another significant factor here was the lack of the trained group of professional lawyers.

This period ended with the advent of Socrates' philosophy. Up to his time, philosophy had studied numbers and movements, and had dealt with the question of where all things have their origin and where they disappear; it also had observed the stars, the distances between them, their circuits, as well as had studied phenomena which appear in the sky. The early sages believed that they could gain knowledge by conducting research into natural phenomena themselves. Socrates rejected the ontology and study of nature initiated by the Milesians and other early Greek thinkers in favour of searching for the meaning of words and concepts found in the Athenian *polis* language. He believed that finding the meaning of words translated into revealing the reality which could not be reached otherwise.

Keywords: *arche*, *physis*, study of nature, normativity, ontology, Thales, Anaximander, Pythagoras, Empedocles

NORMATYWNOŚĆ I ONTOLOGIA PRAWA WE WCZESNEJ FILOZOFII GRECKIEJ

Streszczenie. Artykuł poświęcony jest przybliżeniu problematyki powstania europejskiej nauki i filozofii, które zostały ufundowane przez antycznych Greków. W okresie nazywanym Pierwszym Oświeceniem doszło, z jednej strony do stopniowego odejścia od mitologicznych

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wyjaśnień rzeczywistości, z drugiej – do zbudowania nowego sposobu patrzenia na świat, zwanego *badaniem przyrody*. Dociekania antycznych Greków miały wymiar ontologiczny – polegały na poszukiwaniu *arche* świata – poszukiwali oni bowiem ostatecznej struktury rzeczywistości, a co ważne, człowiek usytuowany był w tych badaniach jako integralna ale nie najważniejsza część kosmosu, poddana jego prawom. Presokratycy nie stawiali człowieka ponad naturą, nie odróżniali bowiem ściśle praw przyrody od praw wspólnoty. Był to jeden z powodów, dla których nie powstała wówczas nauka prawa. Poza tym, Grecy nigdy nie redukowali swojego prawa do systemu, ponieważ zbyt często bogowie lub *demos* „wtrącali się" do praw *polis*. Było ono typowym przykładem „prawa bez prawoznawstwa", ponieważ było elastyczne a także posiadało niejasno sformułowane reguły i instytucje. Istotny był tutaj również brak wyszkolonej grupy zawodowych prawników.

Okres ten zakończył się wraz z pojawieniem się filozofii Sokratesa. Do jego czasów filozofia badała liczby i ruchy, a także zajmowała się zagadnieniem, skąd wszystkie rzeczy biorą swój początek i dokąd znikają; obserwowała też gwiazdy, odległości między nimi, ich obiegi oraz badała zjawiska pojawiające się na niebie. Pierwsi mędrcy uważali, że zdobywają wiedzę przez prowadzenie badań dotyczących samych zjawisk naturalnych. Sokrates odrzucił ontologię i badanie natury zapoczątkowane przez Milezyjczyków i myślicieli z obszaru Wielkiej Grecji, na rzecz poszukiwania znaczenia słów i pojęć występujących w języku ateńskiego *polis*. Sądził bowiem, że znalezienie znaczenia słów oznacza odsłonięcie rzeczywistości, do której inaczej dotrzeć nie można.

Słowa kluczowe: *arche*, *physis*, badanie natury, normatywność, ontologia, Tales, Anaksymander, Pitagoras, Empedokles

When we write about the Greeks, we often refer to their myths. Our acquaintance with myths allows the understanding of their culture, which is a long way off our times. We know that culture of every community is a searching for the reasons behind our presence in the world and the interpretation of the meaning that we give to our life. It is a series of trials of finding the answers to the questions that are related to the incomprehensible reality (Ortega, Gasset 1993, 68). Ancient Greeks found the answers to these questions with the help of myths.

In Greek mythology, we can find parables which refer to the law. Here, I summon a Platonic myth that came from *Protagoras* that is a dialogue devoted to the problem of whether we are able to learn how to use political abilities and virtues that enable us to live in the community or in general, and if we are capable of teaching others virtues. The protagonists of the dialogue include Protagoras, a sophist, who taught young people politics and public speeches, which brought them prudence, connected to issues of the city; and Socrates, who doubts that virtue and politics are learnable. Protagoras, who is trying to defend his views, tells a myth that in allegorical form presents his theoretical viewpoint:

Once upon a time, there were gods only and no mortal creatures. But when the destined time came, these also were to be created; the gods fashioned them out of earth and fire and various mixtures of both elements in the interior of the earth. And when they were about to bring them into the light of day, they ordered

Prometheus and Epimetheus[1] to equip them and to distribute among them their proper qualities severally. Epimetheus begged Prometheus: "Let me distribute, and do you inspect" (Plato 1956, 18, 320D). Prometheus agreed and Epimetheus made the distribution. Thus did Epimetheus, not being very wise, forget that he had distributed among the brute animals all the qualities which he had to give. And when he came to the race of human beings, which was still unprovided, he did not know what to do. Prometheus discovered then that his brother used all the qualities that he had, but had forgotten about the human – naked, shoeless, and defenceless. The appointed hour was approaching when the human in his/her turn was to go forth from the earth into the light of day. And Prometheus, not knowing how he could devise humans' preservation, stole the wisdom of Hephaestus and Athene of practicing the arts and fire with it (it could neither have been acquired nor used without fire), and gave them to the human. Thus the human being had the wisdom necessary to the support of life, but political wisdom he/she had not, for that was in the keeping of Zeus (Plato 1956, 19, 321A, B, C, D). Now the human, having a share in divinity, was at first the only one of the animals who had any gods, because he/she alone was of their kindred, and he/she would raise altars and images of them. He/She was not long in inventing articulate speech and names; and he/she also constructed houses, clothes, shoes, and beds, and drew sustenance from the earth. Although people's daily necessities were provided, the humankind at first lived dispersed and no cities existed. But as a consequence they were destroyed by the wild beasts, for they were utterly weak in comparison to them, and their arts and crafts were only sufficient to provide them with the means of life and did not enable them to carry on war against the brutes. Food they had, but not as yet the art of government, of which the art of war is a part. After a while, the desire of collective living and of self-preservation made them found cities; but when they were gathered together, having no art of government, they dealt unjustly with one another, and were again in process of dispersion and destruction. Zeus feared that our entire race would be exterminated, and so he sent Hermes to the humankind, bearing reverence (*αἰδώς*) and justice (*δίκη*) to be the ordering principles of cities and the uniting bonds of friendship. Hermes asked Zeus how he should impart justice and reverence among humans: "Shall I distribute them as the arts are distributed; that is to say, to a few only, one specialist in the art of medicine or in any other art being sufficient for a large number of laymen? Shall this be the manner in which I am to distribute justice and reverence among men, or shall I give them to all?" "To all," said Zeus, "I should like them all to have a share; for cities cannot exist if a few only share in justice and reverence, as in the arts. And further, make a law by my order that he who has no part in reverence and justice shall be put to death, for he is a plague of the state" (Plato 1956,

[1] 'Prometheus' is derived from the word meaning 'forethought', and 'Epimetheus' from the word 'afterthought.'

20–21, 322A, B, C, D, E). Thus, the gods decided that those principles should not be separated, same as other skills, that one human being is more endowed with to serve another people; everyone should participate equally in respect and justice – this is a condition for the existence of *poleis* (Voegelin 2013, 475).

Here, I will not analyse the myth that Protagoras have told (it is interesting due to the use of the concept of 'reverence', so the need of decency, what, as it is seems, faded in the contemporary culture), but when we think about the deep meaning of the myth, we will come to understand Greeks' belief that law, according to which humans should proceed, is a gift from gods.

It is interesting that in Greek myths which are referring to the law, there are metaphysical problems such as: Who gave us the law? What is law and why does it exist? When we make an attempt at reconstructing the answers to these questions, we will have to provide the cultural context of their asking. Let us think of the widest context of the myths' emergence: Why did ancient Greeks create a group of the Olympic gods? Well, some features of the Greeks' primary religion tell us that it appears from human weakness and from the need of help. In a mysterious and dangerous natural phenomena they saw the unknown for human powers, towards which they were completely helpless. Heaven and earth were gods for them, the heaven – Zeus, and the earth – Thetis. Their mythology was a great curtain woven with dreams of the birth of Olympic residents. Myths about the Olympic gods gave Greeks the possibility to understand and accept the world. In the pre-philosophical period, Greeks justified "with myths' help" the misery of life on the Earth easier, as well as the more beautiful life of gods (Snell 2009, 55). Myths were the epiphany of the ancient Greek culture. Existential solutions to the problems contained in them that came from a real necessity were authentic solutions, ideas, evaluations, styles of thinking, art, and law, being an effect of the radical depth of humans to the degree that they commenced a culture.

At the beginning of the 6th century B.C. in Ionia. a different view of the explanation of the world emerged, which constituted a challenge to tradition (after some time, it turned out that it had deep and constant impact on later Western culture). Greek science and philosophy have origins in this area, located in Asia Minor on the east coast of the Aegean Sea. In Miletus, on the island of Samos (where Pythagoras came from), in Ephesus as well as in other Ionic *poleis*, a completely new approach to perceiving the world developed – that of relying on a systematic observation of nature and on trust in the power of the human reason, which led to new and bold explanations of nature and creation. Back then, Ionia was a lively, cosmopolitan region, full of new ideas and innovations, in which conquests of old and new cultures merged with each other. Despite the fact that it was an important trade area, it was on the margins of older civilisations, such as Egyptian and Babylonian, but owing to the trading activity of its citizens, it could have access to knowledge achieved in the oldest cultures. The dissimilarity of intellectual and cultural situations between the citizens of

the Ionic *poleis* was relevant in relation to people who lived then in dominant, old circles of culture. Well, it is important that outstanding individuals who were living in the areas of the eastern coast of the Aegean Sea were almost free to express their views and to ponder the world. They were free from bureaucratic restrictions or religious dogmas that limited intellectual freedom in the dominant cultural centres back then. For those reasons, the cultural environment of Ionia was conducive to the comfortable interchange of ideas which flowed from the world that was known at that time. A remarkable skill that Milesians had due to their mobility and enterprise was the special treatment of knowledge which came from the East. The knowledge was absorbed and processed, but also creatively-developed and applied, and the process created fertile ground for formation of new theories and the development of science. This comfortable interchange of ideas, which came from different cultures, led to the emergence of new, unusual concepts, mainly astronomical and meteorological, that were designed to explain the structure of the world. For example, there was a view which established that the Earth is a planet that moves around the Sun, as well as the idea that celestial bodies are not gods but more likely – material beings. Metaphorically speaking, this period is a result of transforming mythological Chaos into philosophical Cosmos; Abyss into structure. Due to the freedom to conduct research, Ionian sages began to expose the naivety of the traditional way of explaining the world and they tried to present a new approach to its understanding, which was based on observation and rational insight into reality. They accepted a new and crucial hypothesis that the world and processes occurring in it can be known to the human mind, and at the same time they began to be aware of the fact that the physical world is functioning according to the laws that are knowable by human beings. It was a new perspective, although it was not completely atheistic, which estranged from mythology, with its anthropomorphic gods, and it tried to achieve the natural and cultural phenomena granted by oral tradition.

The new worldview was based on observation, mathematical measurement of natural phenomena, and the capacity of the human mind; so, it referred to the intellect. This cardinal and iconoclastic intellectual revolution for tradition deserves to be called the First Enlightenment and it started in the 6th century in Ionia, and quickly spread throughout the Greek world (Schyff 2010, 3). The beginnings of European philosophy are usually identified with the rejection of mythological explanations of reality and with the adoption of rational explanations in terms of causality by the Presocratics; therefore, the phrase "from myth to reason" accurately reflects the scale of the breakthrough made during that period. However, it is crucial to remember that philosophy and mythology were at that time inherently connected, and that until the time of Athenian Enlightenment, it was often difficult to distinguish them from each other (Naddaf 2009, 99). Much has been written on this famous transition, which many once considered

the "Greek miracle"[2]. First sages were called by Aristotle *phusiologoi*, because they examined *φύσις* and discovered 'nature' as objectivity. In their thinking the common assumption is visible that order which makes our world a Cosmos is natural. It means that it is immanently present in nature. Back then, the regularities in nature were noticed and it began to be discovered that the nature is not completely unpredictable; moreover, it was becoming clear that in the Cosmos which for Greeks was a name for the whole terrestrial and extraterrestrial world, there are patterns that allow the discovery of the repetitive and unchanging laws of nature. The consequence of these autonomous intellectual explorations, in relation to the traditions, was the recognition that for exploring the world it is not necessary to put intervention of supernatural beings in it, with the help of which the reality had been explained to date (Naddaf 2009, 105).

Ancient Greeks deeply felt the majesty of the reality grasped with the senses. They associated beauty, which is perceived by the sense of sight, with sunlight. The most important "lumber," which the transcendence of each of their sanctuaries referred to, was the light of our star. Those people who built Greek temples raised them high so that they could be as close to the sunlight as they can be. Let us take into account the Athenian acropolis, the temple of Poseidon built on Cape Sounion[3] or the acropolis of Lindos[4] on the island of Rhodes. The Greeks' adoration of

[2] See, for example: Burnet (1920); Morgan (2000); Most (1999).

[3] The farthest south-eastern cape of Attica. Every sailor who leaves Piraeus, passing the island of Aegina, says goodbye to the Greek continent looking at Cape Sounion. Due to its unique position, such as a 'lighthouse' on a high rock falling vertically into the sea, this cape has always been a landmark for sailors sailing from Ionia, Crete, the Dodecanese, and the Cyclades towards Athens. From the 8th century B.C., on a rock rising steeply above the sea, there was an area of worship with an altar. In ancient times, a temple which was dedicated to Poseidon was erected on it. Around 490 B.C., during the wars with Persia, it was destroyed by Xerxes' armies. In the years 444–440 B.C., during the reign of Pericles, the temple of Poseidon was rebuilt in the Doric order. It is one of the classic monumental buildings of Athens' golden age. The cape is associated with the myth about Aegeus and his son Theseus. When Theseus went to Crete to fight with the Minotaur to save Athens from the terrible annual tribute, his father waited for him on the southernmost cape of Attica. They agreed that when Theseus returned, he would give a signal to his father that he had killed the monster by setting scarlet sails. Theseus, who was in love with Ariadne, forgot about the contract and set black sails. When Aegeus saw the colour of the sail signifying his son's death, in despair, he threw himself into the sea from high rock. To commemorate this dramatic act, the sea into which Aegeus jumped from despair was called Aegean (Parandowski 1960, 208–212).

[4] Lindos is a town located on the east coast of Rhodes, the biggest island in the Dodecanese archipelago. In antiquity, it was included in the Doric Hexapolis, which also included Halicarnassus, Ialysos, Kameiros, Kos, and Knidos. In the 6th century B.C., on a seaside rock – on the high acropolis of Lindos – the Dorians erected the temple of Athena Lindia, which was probably the regional centre of her worship. Strabo wrote about Lindos in the following way: "(…) gold rained on the island (Rhodes) at the time when Athena was born from the head of Zeus, (…)" (Strabo 1924, 14.2.10). Outside the sanctuary, on the acropolis, there were *propylejes* and *stoa*. The temple was placed over a natural cave, situated on a seaside cliff, which may have been the place of worship of Athena before. The fame of the temple is evidenced by the fact that Alexander of Macedon and

the sunlight is visible also on many pages of *Odyssey* and *Iliad*[5]. A shocking, but thought-provoking example of their irresistible need for the sun is the prayer which Ajax addresses to Zeus after Patroclus' death outside the walls of Troy. At that time, during dramatic battle with the victorious Trojans, clouds obscured the sky and cast a shadow on the Achaeans. It is symptomatic that Ajax did not beg neither for life nor for victory, but for Zeus, although he decided to extinguish the Achaeans, not depriving them of the sunlight[6].

The strength of the Greek culture was an ability to combine a passion for sensual perception of the world with a tendency to grasp the world with reason. We can notice the example of the influence of poetry on the shaping of scientific theories. It indicates cultural or maybe, above all – observational (meteorological and astronomical) conditions for constructing hypotheses which are related to the mysteries of the world. The cultural 'transmission' of poetic fascinations of our star finds reflection in Milesians' views about the meaning of the Sun as a concentrated fire source in the Universe. The primacy of the Sun in the structure of the Universe was recognised by Anaximander of Miletus and by his followers and associates. The reaction of the Sun is reflected in their interest in solstices, equinoxes, and the measurement of days and hours. We know that the word 'meteorology' comes from Milesian research. Milesians could not tell the difference between astronomy and meteorology; they thought that they are related, because the Sun's annual advancement in the sky marks the stages of seasonal changes in Earth's atmosphere. Thus, at the beginning, meteorology did not constitute a separate subject of research; rather, it was an alternative designation for the concept of the 'study of nature' (*περί φύσεως ίστορία*). At that time, it included astronomy, but also the observation of atmospheric processes, although these two fields of research were considered to be physically continuous. If we

his successors made sacrifices there. The island of Rhodes was considered a significant place of worship of Athena in antiquity, and her sanctuary on the acropolis of Lindos was mentioned next to the temple of Athena on the Acropolis in Athens.

[5] "And now the sun, leaving the beauteous mere, sprang up into the brazen heaven to give light to the immortals and to mortal men on the earth, the giver of grain (…)" (Homer 1945, 68).

"Now Dawn arose from her couch from beside lordly Tithonus, to bear light to the immortals and to mortal men" (Homer 1945, 171).

Also, in contrast to the people who are gifted with the light of the sun, Homer sadly describes the misery of the lives of the inhabitants of the dark Cimmerian lands lying on the shores of the Oceanus:

"Never does the bright sun look down on them with his rays either when he mounts the starry heaven or when he turns again to earth from heaven, but baneful night is spread over wretched mortals" (Homer 1945, 386).

[6] "Father Zeus, deliver thou from the darkness the sons of the Achaeans, and make clear sky, and grant us to see with our eyes. In the light do thou e'en slay us, seeing such is thy good pleasure." So spake he, and the Father had pity on him as he wept, and forthwith scattered the darkness and drave away the mist, and the sun shone forth upon them and all the battle was made plain to view (Homer 1924, 645–651).

could call Ionian study meteorology, *μετεωρολογία*, that is because the interest in 'things up,' *τὰ μετέωρα*, was profound and the results they obtained had particular importance to their researches (Kahn 1960, 104–105).

Descendants of Agamemnon gave us a seemingly simple but also thought-provoking conviction which explains the sense of our presence in the world:

"We are on the Earth to look at the sky."[7]

Its depth amazed for many reasons, but from our point of view mainly for that it does not contain an ontological answer to the questions: How is the world built? *or* What is the world? Rather, it suggests a direction in which we should proceed to find out what the world is. So, it indicates for us an epistemological tool and tells us how we should use it: look at the sky and draw conclusions from these observations so that you can learn how the world works. Only by using this method is it possible to come to ontological conclusions.

Every day that a Greek observes the nature, he/she sees a continual exchange in it, by turns: the light and the darkness, fresh morning dew and hot noon. As a result of the everyday experience of repetitive phenomena, he/she singularises the same process which occurs during the producing of fiery lightning from the wind and clouds that, in turn, arise from steaming moisture. Falling extinguished fire and condensation rain cloud will counteract the rising tide of dryness and warmth, causing the maintenance of the balance of the wholeness. The appearance and disappearance of the moonlight, in turn, is completed in the lawful exchange of origination and decay. If celestial balance was conceived by Anaximander as the stable sphere, it is the rotating circle that best symbolises this rhythm of elemental change. This image of law which is dominant in the Cosmos is preserved in our terminology that in this regard is still early Greek: a word 'cycle' from *κύκλος* (originally 'circle'), a word 'period' from *περίοδος* ('rotation'). From Ionian school's point of view, the dominant cycle was the solar cycle, because according to annual movement that we observe, seasons of heat and cold as well as dry and rain follow each other when reign of the daylight goes away from long winter nights. In *De Victu*, Hippocrates describes divine necessity (*θεῖα ἀνάγκη*) according to which everything is happening; it is that rhythmical oscillation between maximum and minimum shown over the periods of day and night, moon and annual movement of the sun. In human beings, periods of the youth and old age of growth as well as descent from the world are example of the same cyclical law. The author of *De Victu* developed the idea according to which a human being's life is the abbreviated model of the space year, which ends with the winter solstice (Kahn 1960, 184).

[7] Pythagoras asked about for what purpose Nature and God brought us to life, replied "to see the sky" and, he added that he was "an observer of the nature and just for this purpose, he was brought to life" (Arystoteles 1988, 9).

For Ionians from the 5th century, it is the seasonal regularity of heavenly and meteorological processes that shows the organic structure of the Universe the best. The cycle of the stars and the seasons is a basic fact for every agricultural society that has to pursue establishing a certain harmony between human activities and movements of the celestial bodies.

In ancient civilisations, there were no concepts which distinguished nature from society and which have become a habit for us. For example, in Homer, there is no recognised boundary between the human way of life and the order of the Universe. Nature is not standing in front of a human being; there is the power of the gods who are interfering in people's lives as easily as in the world of nature. Poseidon is the ruler of the sea, earth-shattering, but at the same time he stands in battle alongside the Greeks in front of the walls of Troy. Zeus is a god of the storm and once a man of the power of the sky itself, but when he strikes a lightning bolt, its purpose is to enforce the penalty to the perjurers. Horas – daughters of Zeus who are goddesses of the seasons, are later to become astronomical hours. Their mutual mother is Temis and their names are Justice (*Dike*), Peace (*Eirene*), and Good Distribution (*Eunomia*) (Kahn 1960, 192).

A sophist Prodicus from the island of Ceos wrote a work called "Horai" (it has not survived to our times). The title of it is not clear to us. The word itself that related to the names meant three daughters of Zeus and Temis: goddesses *Dike*, *Eirene*, and *Eunomia*, but, what is more interesting to us is that "*horai*" as the common word meant all of the periods of time with the appropriate 'season' assigned (Krokiewicz 1971, 264– 265).

An emblematic example of a person who was conducting nature observations is Thales (ca. 624 – ca. 547 B.C.) He came from Miletus, a Greek *polis* located in a flourishing part of the Hellenic world, at the intersection of the trade routes between the Ionian Islands, the Sporades, the Cyclades, and the Dodecanese, mainland Greece, Egypt, Mesopotamia, and the Middle East. Back then, Miletus was an important metropolis that ruled over eighty colonies scattered across the area from the Black Sea to Egypt. The Ionian culture was developing there, influenced by older Eastern cultures. Contacts with Egypt and Mesopotamia had a significant impact that is visible in the 'orientalisation' of the Milesians. It seems that it had an effect on some ideas and discoveries that were attributed to them (McKirahan 2010, 24).

Information about the life of the founder of the Ionian school is uncertain; his father probably came from Phoenicia (Świeżawski 2000, 13–14)[8]. Thales was a sailor and, among other things, he was engaged in trade. He did not *study* in the modern sense. However, we know that after he came to Egypt, he got acquainted with the knowledge of the local priests (Laertios 2004, 24). He was an enterprising

[8] According to another author, his father Eksamyes was probably Karian (Krokiewicz 1971, 71).

man, an innovator who opened many practical spheres of knowledge, including engineering, physical surveying, and marin navigation. These practical abilities probably helped him to achieve refined astronomical and mathematical knowledge. He could, for example, measure distance of ships at sea as well as anticipate the Sun's eclipse and determine the time of the solstice of day and night. Thales used mathematical and astronomical abilities for theoretical purposes. Most likely, he was one of the first who tried to look for knowledge hidden from us, knowledge that would serve no practical purposes. He sought knowledge in a theoretical way through asking questions of a scientific and philosophical nature. Thales was the first one to try to present mathematically and rationalise celestial phenomena by making a distinction or counting the recurring sequences and compounds of the celestial bodies in the spectacle that appears in the sky, and then by measuring these periodic regularities. Thales' activity as an astronomer included the detection of new groups of stars, the observant measurements of the solar cycle, and the systematic correlations of star and solar data. In quantifying what he observed, Thales went much further than his predecessors had. Theophrastus agreed with Aristotle that Thales deserves his place as the founder of ancient Greek science (White 2002, 15).

Most of the historians agree that Thales was the first Presocratic; however, many unwillingly call him the first philosopher. In ancient times, he had a reputation of the sage. Plato, in a known dialogue, named him as an outstanding sage (Plato 1956). He introduced te key concept of the nature (*φύσις*) to the dictionary of philosophy. Term *physis* was closely related to the expression "*phyesthai* – to grow" and it meant some kind of precept which is demonstrated by the fact that what 'grows,' grows in the same arranged way, the right way that is inherently determined for it, how it grows and dies in its own natural manner. What is growing is changing and, at the same time, is remaining itself (for example, a seed and a grain growing from it). Thales noticed that what is growing, changes and at the same time, it remains itself, so it incorporates the *principle* of movement and rest. By the word "*physis*", he understood an essential being that was for him an internal cause of appearance (and movement) of the whole world and all of its parts which are falling under senses (Krokiewicz 1971, 74–75). Discoveries that were made during the *research of the nature* led him to the following *aporiae*: How does it happen that what we see in nature is changing and, at the same time, remains itself? Or, formulating the issue more generally: is there something in our world that is stable and permanent, or does the reality always change?

This question was created against the background of the Milesians' search for the structure of ultimate reality. That is why the main question asked by Thales is: What are all things "made of"? And, as far as we know, he was the first one to ask this question, and his answer is the same type of answer that was given by later Presocratics. However, it was not the only object of reflection on nature of

his. Different, but equally important was the question: What is the origin of all things? By identifying water as their source, he referred to Middle Eastern and Greek mythological descriptions of the origin of the Earth, with which his claim that the Earth is floating on the water was in perfect harmony. Thales' question came from the past, but his answer, which is rooted in the nature of the world around us, and not in the family history of the gods, rejected tradition and gave its successors a starting point (McKirahan 2010, 29).

Aristotle attributed the presentation of the first theoretical postulate in the history of natural sciences to Thales, which can be described as follows: all things are modifications of water[9]. It was the first formulation of a general principle in the history of European science (White 2002, 2–3). Here, we have to summon a well-known phrase from *Metaphysics*, in which Aristorle called Thales the founder of "this kind of philosophy" (Aristotle 1933), meaning a reflection seeking the material cause of everything – *Ἀρχή* of the world.

A word *ἀρχή* was a colloquial expression, but under the influence of Thales, it changed its meaning. Basic, colloquial connotations of this term come from the language used in Greek epics. For example, in *Iliad*, the basic sense of the verb *arche* was "leading [troops to battle]." *Ἀρχή* may also mean 'rule' and also 'go first,' 'begin' in any action. It can also be rendered as the first limb in a chain of events (see: Kahn 1960, 235–236).

By *arche* as a theoretical term Thales understood something that is the *beginning* and *cause* of the Cosmos and the whole reality; it was also equated with the word *physis*. However, for Anaximander, not only was there the beginning, but also the *rule* that runs the world; not only primary, but their exact nature. *Arche* for Ionian philosophers was an original rule that guides the world and, at the same time, pre-substance, from which all of the things have been made; it was also a basic component of the reality. Therefore, the opinion of Ionian philosophers of the nature about the principle of the world comes down to a conjunction: everything comes from *arche* and everything is *arche.*

Thales showed the ultimate structure of the world in the following hypothesis: everything is from the water, from the water it arose, and it consists

[9] Any attempt to recreate Thales' thoughts faces a serious obstacle, namely the complete lack of source texts. This is inevitable in his case. Thales lived at a time when writing was used almost exclusively in poetry and in administrative matters. But the lack of texts, while making it difficult to recognise the nature of his views, does not invalidate all of our testimonies. At least one person who knew him directly and was deeply interested in his views – namely Anaximander – left a written testimony of him. For this reason, Aristotle's message is important, because he drew from the collections of the library in the Lyceum, which contained the messages of Thales' students, i.e. the most faithful ones (we have a similar situation here as in the case of the testimonies of Socrates, given to us by Plato in his dialogues). We know from Aristotle and Theophrastus that at least some of his works have survived long enough to be studied in the Lyceum. If Anaximander and his contemporaries noted some of Thales' views, it probably also gave Aristotle and his associates a credible basis for judging at least some of Thales' achievements.

of the water. These words were unprecedented, so let us dwell on them and let us remember their real meaning: our eyes delude us; what we see is an illusion. It seems to us only that the sword is of the iron, the greaves of the bronze, and the boat of the wood. It all comes from a water; but from the water that seems so, and then different. Steam out of it, ice out of it, metal out of it, Earth and flesh out of it, everything that is in the world was made of it and all things are actually water, one way or another (Witwicki 1957, 10). This way, he denied the seemingly obvious testimony of our senses. For Thales, the water was an *arche*, which means the *beginning* and the *principle* of the thing. He reached this conclusion on the basis of the observations that: "(…) nutriment of everything is moist, and that heat itself is generated from moisture and depends upon it for its existence (and that from which a thing is generated is always its first principle). He derived his assumption, then, from this; and also from the fact that the seeds of everything have a moist nature, whereas water is the first principle of the nature of moist things" (Aristotle 1933).

Here, a completely new thought has been expressed. Thales said about *water*, his predecessors about *gods of the water*; he said about a real thing, they – about fantastic characters. Predecessors were embedded in mythological poetry. Thales broke with mythological and uncritical thinking. He saw nature as the complete and self-organising system, and he saw no reason why to invoke divine intervention from outside of the natural world by making this explanation complete – the water itself may be divine, but it is not something that interferes with the natural world from the outside.

Thales and Anaximander looked for a "rule" to which it is possible to reduce a multitude of phenomena that are revealed to us directly in the world. In metaphysical the question about *arche* there was an unusual conviction hidden that the world perceived by our senses does not explain itself. Presocratics believed that this was the reason why the reality is as it is and also that it exists at all; although it is immanently built into the world, it is hidden from us, because it lies deeper than what we can perceive. The path of seeking the ultimate reality that they chose led to the direction of finding the rule understood as the final substrate of what is directly given. In other words, in their attitude, the following cardinal assumption was included: only being available to pure rational cognition is real, and that what we perceived with our senses is unreal and illusive. Ionian sages wanted to demonstrate that *ἀρχή* is what *justifies* the rest of the reality, in this regard that this "rest" given directly to us can be reduced to one or another *arche*. What is significant is that the theories of Presocratics contained within them the implicit assumption of the existence of "two worlds": the reality of what is given to us through senses and the ultimate reality in which it is the implicit foundation of the first world (Stróżewski 2006, 257–258).

In his physical theory (*physike theoria*), Thales assumed that the order of the world which was called later a *Cosmos* is natural, which means that it is

immanently present in nature (Naddaf 2009, 105). A view, which is now valid is that Thales and Milesians were probably the first ones to *imagine* the entire Cosmos as the systematic structures of geometric solids. In sources that are available to us, we find very little information on what cosmological model Tales proposed. Everything what Aristotle and his associates attributed to him is the idea that the Earth is floating on the water (Aristotle 1933, 983 B). Plato described his fascinations with the world in *Theaetetus,* by speaking in the words of Socrates about what was occupied by Thales: "(…) as Pindar says, 'both below the earth,' and measuring the surface of the earth, and 'above the sky,' studying the stars, and investigating the universal nature of everything that is, each in its entirety, never lowering itself to anything close at hand" (Plato 1921, 173E–174A).

Thales watched the sky and admired there the endless spectacle which is portrayed by stars and planets. A poet named Callimachus described his practice of observing the sky. He usually did this near Miletus on the seaside hill called Didima, from which the view of the horizon was located in the western and southern direction, and on the hills in the east. Unlike Miletus, which lies low on the south side of the bay, Didima was a perfect place to mark sunrises and sunsets and to observe the stars (White 2002, 7). This research of the nature's procedure founded a method of conducting search which is consisting in careful observation and systematic, quantitative treatment of the obtained data. Let us notice that it assumed the possibility of knowing the world by the means of intellect, because observation of the sky was made in order to draw rational conclusions, which without any doubts was an intellectual activity. This procedure laid the foundations for scientific research in general and in particular for the way of observing the sky which is based on repeatability of physical phenomena (McKirahan 2010, 24; White 2002, 3).

Detailed information about the astronomical achievements of Thales was provided by Diogenes Laertius:

"Who first of men the course made plain
Of those small stars we call the Wain,
Whereby Phoenicians sail the main" (Diogenes Laertius 1972).

The stars of the Little Wain, captured by Thales, are the constellation known today as Ursa Minor or "Little Bear." So, he was the first Hellen to see any reason for distinguishing the group of stars to which the Pole Star belongs. Greek mariners steered by the Great Bear and the Phoenicians by the Little Bear, as Ovid states. The association of this message with what we know about the activities of Thales, which included sailing in the waters of the Mediterranean Sea, may indicate that the sky observations were mainly used for navigation purposes.

Thales also observed two different groups of the stars: Hyades and Pleiades. Both of them had been known to Greeks much earlier; they had already been mentioned in the epics of Homer. The mythological context in which they are appearing is significant in any case. They are described in *Iliad* (Homer 1924,

470–489), where they are portrayed on the shield that Hephaestus sculpted for Achilles. The author tells us about them also in *Odyssey* (Homer 1919, 268–280), where they are mentioned in the directions that the nymph Calypso points to Odysseus to sail happily home. The nymph gives advice to Odysseus that he should keep the Pleiades and three other constellations to his left when he is to manoeuvre the boat. It is a perfect example of this kind of strictly observational knowledge which Aristotle called "marine astronomy." Regardless of the navigational references, we should remember that from the Greeks' point of view, Pleiades were the most important constellation of stars of an archaic community, because they determined the key stages of the agricultural cycle. It is due to the fact that their morning appearing and disappearing appointed to present the beginning and the end of the year: tillage in November and harvest in May.

There is no doubt that Thales was an unconventional and also creative thinker. His originality and genius of theoretical achievements is evidenced by creation, which is unknown in Egypt and on the East; the creation of theoretical geometry, which means geometry recognised as a system of theorems, *theoremata*, logically resulting from and related to each other (Krokiewicz 1971, 73). The impact of his reflections on change in the way of thinking about the world can be defined as disruptive, because it was one of the first assigned numerical values of the observed regularities of phenomena. Thales' research practice was based on observation and quantitative treatment of the collected data. The basis of his hypotheses about the ultimate reality was thus empirical. According to our knowledge, Thales was the first one to try to present mathematically and rationalise celestial phenomena by distinguishing or counting repeated sequences and relationships of celestial bodies in a spectacle in the sky, and then measuring these periodic regularities. Thales, in general, laid the foundation for scientific research and in particular for the way of observing the sky.

Thales and Presocratics perceived the world as *Cosmos* and by this word they understood naturally-ordered arrangement that is inherently understandable and is not a subject of external supernatural intervention (Curd 2019). Presocratics distinguished the order of the Cosmos from the basic features of its components themselves, which they called "elements."

The theory of four elements which are also called "natural forces" is probably the most fundamental achievement of pre-Socratic physics. As we know, Presocratics' deepest struggle as a part of the conducted research of the nature (*περί φύσεως ίστορία*) was a discovery of the most basic lumber and the principle of Cosmos' structure at the same time; they looked for *arche* (*ἀρχή*). The beginning of this search was given by Thales and it was continued by the representatives of the Ionian school of natural philosophy and other Presocratics[10]. The culmination

[10] For Thales, the element was water, for Anaximenes – air, and Heraclitus of Ephesus considered it to be fire. The exceptions were the views of two Presocratics, who also searched for

of these observational and intellectual search was the classical doctrine of four elements, whose author was Empedocles of Akragas[11] (ca. 493 – ca. 433 B.C.), one of the biggest colonies, located in the southern part of Sicily. Empedocles introduced a group of four elements (tetrad) to the description of the world: earth, water, air, and fire (Love is what connects them, Disagreement is what dissociates them). Fire was symbolised here by the figure of Zeus, earth – by Hera, air – by Aidoneus, and water – by Nestis (Diogenes Laertius 1972, Chapter 2.76). The classical concept of the elements assumed the division of the visible Universe into the four great masses of Earth, Sea, Air, and the upper atmosphere or sky, considered to be a form of Fire. The canonical order of the elements, starting with the earth and ending with the fire, presents them in this particular order of ascending layers, and more specifically as the concentric rings grouped outside around the earth. However, there is another aspect to the classic four. In the earlier period of research of the nature, it was not less important that continually elements are in the process of constant and mutual transformation (transmutation)[12]. This is how Plato wrote about it in *Timaeus*:

> In the first place, what we now have named water, by condensation, as we suppose, we see turning to stones and earth; and by rarefying and expanding this same element becomes wind and air; and air when inflamed becomes fire: and conversely fire contracted and quenched returns again to the form of air; also air concentrating and condensing becomes cloud and mist; and from these yet further compressed comes flowing water; and from water earth and stones once more: and so, it appears, they hand on one to another the cycle of generation (Plato 2009, 173).

It is important that the theory of four elements is not only a simple calculation (water, fire, air, and earth) in terms of natural forces, from which Cosmos is built. It is about a deep intuition of physical "states of the matter" which are creating the structure of the world. A concept of four elements captured and led through the observation of nature to very abstract conclusions about "states of the world." They could mean the dynamic phase (in the case of fire as an element), the volatile phase (air as an element), the liquid phase (water as an element), and the solid

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the *arche* of the world, but found them in a completely different element of the Universe than the material element or the natural forces. It is about Anaximander and Pythagoras. The first of them considered that *apeiron* is an immaterial *arche*, which we explain today as *Endless*. Pythagoras, on the other hand, believed that numbers were the elements of all things and that the whole heaven was harmony and number.

[11] Akragas (Latin: *Agrigentum*) is a *polis* on the southern coast of Sicily; it was one of the richest cities of Magna Graecia. It was founded in 582 B.C. by the Corinthians and the Rhodians. In the period of its greatest prosperity, the colony had about two hundred thousand inhabitants. In the 7th century B.C., the temples of Hercules in the Doric order were built. The wealth of the *polis* is evidenced by the erection in the 5th century B.C. of the following temples: Hera, Zeus, Castor and Pollux, Hephaestus, Asclepius, and the most important of them, i.e. the Doric temple of Concord, which has survived to this day.

[12] See: Kahn (1960, 121–122).

phase (earth as an element). In contemporary physics, we talk about phase states of the matter that seems to be an exact reflection of the pre-Socratic concept of the four elements. As we can see, the theory of four elements which originally seemed to be naive and banal, by looking at it from the perspective of modern physics, extraordinary value should be attributed to it. Its congeniality becomes visible when geometric dimensions are assigned to the individual elements in the form of regular polyhedra: fire – tetrahedron, air – octahedron, water – icosahedron, earth – hexahedron. From this emerges the belief that the states of the world can be expressed mathematically by using stereometry. So, here the later view of Academics arises from that the world is mathematical, not because we put the mathematics that we have created, but because its structure is mathematical and, therefore, the mathematicality of the world does not come from humans. Thus, fore Greer seekers, cognition of the world had a dimension of the mathematical cognition. The doctrine of the early Presocratic – Pythagoras – was surely at the basis of such an attitude, as in searching for the structure of the Cosmos, he pointed to the number as the *arche* of the world (Dembiński 2010, 61–62).

As we can see, the achievements of Thales that were developed by later Presocratics disclosed *the normative character of the nature*, as well as its immanent element – a human being, who is a component of the entire Cosmos, subjected to the same laws. Let us notice that the discovery of periodicity, the repeatability of the phenomena in general, i.e. the normativity of the world, concerned all of aspects of the world, starting from:

– astronomy: with reference to star and planetary cycles, sunrises and sunsets, etc.;

– meteorology: with reference to cycles involving the transformation of four elements of the nature into each other;

– human life: with reference to birth and death, waking up and falling asleep.

Disclosure of the nature's normativity is a cardinal achievement of our civilisation. Let us think a little deeper what the hypothesis of the normativity of the world means. Well, it seems that it assumes a mechanism of the functioning of the reality that we see, based on constant repetition of the pervasive cycles of expressed phenomena.

On the one hand, the discovered periodicity and repeatability of the phenomena, if it is correctly described, allows for predicting future phenomena. On the other hand, the periodicity and repetition of the reality enables science as such to arise, and the laborious discovery of the laws that are ruling the world (the Cosmos). For our purposes, it is necessary to emphasise that no distinction was made then between the laws governing the physical world and the laws governing human communities.

Going further, it can be interesting to refer to the well-known thought of Ludwig Wittgenstein, placed in *Philosophical Investigations*: "199. Is what we call

'obeying a rule' something that it would be possible for only *one* man to do, and to do only *once* in his life? (…)" (Wittgenstein 1953, 80).

Nevertheless, we are not interested in the problem of following the rule now. From the point of view of our considerations, in the quoted thesis, one can find an insight into the nature of our reality, which boils down to a visionary intuition of understanding the impossibility of understanding transcendence in every area of the reality known to us, unless we assume the repetition and periodicity of phenomena. After all, we would never be able to understand what the Cosmos and reality would look like without the periodicity of planetary cycles, without astronomical and meteorological cycles, without the repetition of the seasons, and without the periodicity of human life. We cannot imagine what a "linear" world would look like (as opposed to a "closed" world in various types of cycles). It is unimaginable, because everything repeats over and over again according to the universal rule – the cycle (*κύκλος*) of the world, the constant repetition of the circulation of galaxies, stars, and planets around the stars, as well as the constant repetitions present in human life. But when considering such a 'facilitation' of the physics of the world, we can guess that these multiple cycles allow us to understand anything of the reality in which we appear! And now, the inevitable question is: Why does the world, and us, move in the cycles? This is obviously a metaphysical question that we are unlikely to find an answer to. However, to paraphrase Wittgenstein's thought, we can ask, and this is not a question much shallower than the cardinal question posed by Leibniz: "Is it possible that in any planetary system consisting of stars and planets, on any of the planets of that system, the light from that star could arise only once?"

Let us further follow the hypothesis of the Milesians and the analogous hypothesis of modern physics that everywhere in the Cosmos the same universal laws govern. In other words, let us ask ourselves: Would the existence of our world be possible without the repetition of physical phenomena, without the repetition and prediction of human behaviour, which is subject to the same cosmic laws? Logically, it seems not! Because then how could every law function, both physical and the one that regulates the rules in force in the community? The answer to this question does not only seem simple, but also enables us to get to the basic principles that govern human rights. This is because these principles turn out to be principles identical to physical laws, according to which the entire reality is constructed.

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BETWEEN NORMATIVISM AND PHENOMENOLOGY: ON THE INFLUENCE OF ADOLF REINACH'S CONCEPT OF SOCIAL ACTS ON SZYMON RUNDSTEIN'S THEORY OF LAW

Abstract. This text is devoted to commemorating Professor Tomasz Bekrycht, who was an eminent expert in the phenomenology of law. His interests focused particularly on the analysis of the philosophical and legal views of Adolf Reinach. The undoubted achievement of Professor Tomasz Bekrycht is that he restored the works of Adolf Reinach to Polish theory and philosophy of law. This study focuses on the references to A. Reinach's concept of social acts in the indicated work by Szymon Rundstein, who does not ignore the concept of social acts in his considerations, but treats it as an interesting theoretical and legal suggestion. While analysing the influence of phenomenological concepts on Rundstein's theory, an important conclusion was made: as a normativist, Rundstein accepts the concept of the "basic norm" (*Grundnorm*), suggested by Hans Kelsen, which legitimises law (the validity of other legal norms within the system).

Keywords: Adolf Reinach, Szymon Rundstein, phenomenology, normativism, the concept of social acts

POMIĘDZY NORMATYWIZMEM A FENOMENOLOGIĄ – O WPŁYWIE KONCEPCJI AKTÓW SPOŁECZNYCH ADOLFA REINACHA NA TEORIĘ PRAWA SZYMONA RUNDSTEINA

Streszczenie. Szymon Runstein był czołowym polskim przedstawicielem normatywizmu okresu międzywojennego. Pozostawał on także pod wpływem koncepcji fenomenologicznej Adolfa Reinacha. Opracowanie zostało poświęcone problematyce wpływu koncepcji aktów społecznych Adolfa Reinacha na teorię prawa Szymona Rundsteina. W szczególności autorzy zadają pytanie, czy poglądy Adolfa Reinacha wpłynęły na pojmowanie przez Szymona Rundsteina kelsenowskiej „normy podstawowej" (*Grundnorm*). W toku badań okazało się również, że autorzy wywodzący się z różnej

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tradycji filozoficznoprawnej, poddając analizie właściwości prawa, wskazują na konieczny element komunikacji społecznej. Każe to zadać pytanie o możliwość uzasadnienia prawa, czy charakterystyki pewnych jego właściwości, bez odwołania się do praktyki aktów społecznych. Artykuł ma na celu przypomnienie często pomijanych we współczesnych pracach poglądów Szymona Rundsteina oraz Adolfa Reinacha. Tekst został przygotowany, dla upamiętnienia zmarłego Profesora Tomasza Bekrychta, który koncepcjom fenomenologicznym Adolfa Reinacha poświęcił swoje najważniejsze prace.

Słowa kluczowe: Adolf Reinach, Szymon Rundstein, fenomenologia, normatywizm, koncepcja aktów społecznych

1.

Professor Tomasz Bekrycht was an eminent expert in the phenomenology of law (Golecki 2021, 11). His interests focused particularly on the analysis of the philosophical and legal views of Adolf Reinach. He devoted his doctoral dissertation (Bekrycht 2009a) and many of his published articles to this subject matter (Bekrycht 2020, 63–73). In his habilitation treatise dedicated to the issue of validity and justification of the existence of law, there were also references to Adolf Reinach's views (Bekrycht 2015, 69, 70, 74). What should not be forgotten as well is the preparation by Tomasz Bekrycht of the Polish translation of A. Reinach's work titled *Die apriorischen Grundlagen des bürgerlichen Rechtes* (Reinach 2009). In the introduction to its Polish edition, Tomasz Bekrycht wrote that the views of this author were currently largely forgotten (Bekrycht 2009b, 7). Without a doubt, the publication of the Polish translation of this work enhanced Polish researchers' interest in the views of this outstanding representative of the phenomenological movement.

At this point, it should be indicated that the views of A. Reinach had a significant impact on the Polish theory and philosophy of law in the interwar period (Bekrycht 2009b, 7). One of the authors influenced by his concept was Szymon Rundstein. This is particularly evident in his monograph titled *Zasady teorji prawa* [*The Principles of the Theory of Law*] (Rundstein 1924), published in 1924, in which he presented his own vision of law and its legitimising. In this study, the focus will be on the references to A. Reinach's concept of social acts in the indicated work by Sz. Rundstein. What should be emphasised is that the considerations presented here are limited to the topic outlined in this way. A number of other problems concerning Sz. Rundstein's theoretical and legal views require further research in the future.

2.

Szymon Rundstein is considered to be a supporter of normativism. The role of normativism in the two interwar decades is assessed ambiguously (Opałek 1987, 17–25). Some authors express the view that normativistic concepts in interwar

Poland had relatively few supporters (Czepita 1980, 130–134). Others point to the uniqueness of Polish normativistic concepts and the interest they aroused among authors representing a different theoretical and legal standpoint (Tkacz 2018, 167–185).

Szymon Rundstein presented his normativist view in a monograph that appeared in 1924, entitled *Zasady teorji prawa* [*The Principles of the Theory of Law*] (Rundstein 1924). It should be highlighted, however, that this work is an independent lecture presenting thoughts of an author who accepts the fundamental assumptions of normativism rather than a repetition of Hans Kelsen's views (Martyniak 1938, note 21). For example, Stanisław Czepita directly writes that Sz. Rundstein's position consisted of his own original concept of legal norms (Czepita 1980, 130). Undoubtedly, Rundstein's concept modified the original normativist concepts, as the author was strongly influenced by the phenomenological theory of law (Opałek 1992, 109; Czepita 1980, 131). In this study, our focus will be on one problem of fundamental theoretical and legal significance in A. Reinach's concept, namely the problem of social acts ("*der soziale Akt*").

3.

Reinach's concept of social acts is compliant with his deliberations on the foundations of civil law comprised in the work titled *Die apriorischen Grundlagen des bürgerlichen Rechtes* (Zimmermann-Pepol, 1–16). Without a doubt, by presenting a proposal for the concept of social acts, Reinach made a significant contribution to the theoretical discourse on the legitimisation of law. At this point, the detailed analysis of Reinach's views carried out by T. Bekrycht will be omitted (Bekrycht 2009a; 2015; 2020). Those elements of his concept will be dealt with that are important from the standpoint of Sz. Rundstein's statements.

A. Reinach searches for an answer to the question about the source of law and its justification. This is aimed at finding an answer to the question of why law exists. Law can be legitimised in two ways. First, its existence may justify an appeal to some being which is above or possibly beyond the law (theories of natural laws). Second, law can be legitimised by a legislator (a human being), i.e. the sovereign who creates it, or by the law itself (positivist theories) (Bekrycht 2020, 64–73).

The concept of social acts is a separate suggestion for justifying the existence of law against legal positivism and the concept of natural laws. As T. Bekrycht writes, this concept is ambiguous in many points (Bekrycht 2015, 113). Without going into details, social acts can be of a different nature. In order for such an act to take place, its content must be communicated to the addressee (Bekrycht 2009a, 93). Among the acts, there are those that also require acknowledgment by the subject to whom the content was directed (Bekrycht 2009a, 93). Therefore,

apart from the intention of the creator of the act to fulfil it, its implementation requires the intention of the recipient (who fulfils the act) (Bekrycht 2009a, 96). A. Reinach includes requests or orders in this group (Zimmermann-Pepol, 9–13). He calls these acts social, not linguistic, because language is their possible but not necessary element (externalisation can not only have a linguistic dimension, but can be manifested in any other possible way – e.g. through gesture, facial expressions, or silence) (Bekrycht 2015, 113). Thus, a social act is of a functional character (Bekrycht 2015, 114). Its fulfilment is a source of communication owing to which it is possible to influence the behaviour of other people (Bekrycht 2015, 114). Therefore, these acts enable making changes in the social reality (Bekrycht 2015, 114).

The concept of social acts is used by A. Reinach to justify the existence of law (understood as a relationship between a right and an obligation). Reinach asks what conditions are necessary for the emergence of law, and mentions two necessary conditions. Firstly, for its creation there must be at least two entities that can communicate with each other (the entity that creates the law and the one to which it is directed). Secondly, a communication situation between them must take place (they must communicate with each other)[1]. By applying these assumptions, Reinach accepts the communicative vision of creating law, which was later developed by Jürgen Habermas (Bekrycht 2015, 112).

At this point in his deliberations, A. Reinach raises a fundamental question about the source of the legitimisation of the law which is defined as positive law (the legal norms with which the feature of being in force is associated). What justifies the validity of legal norms? The findings concerning the concept of social acts presented by the author can be related to the justification of positive law. According to Reinach, it is social acts that constitute positive law. As a result, a right arises on the part of the law creating entity and the obligation on the addressee's side. Yet, Reinach points out that in the case of positive law, some modifications should be made. A structure of positive law built only on a right and an obligation would be too weak (Bekrycht 2020, 70). In his opinion, positive law must contain effective tools enabling the enforcement of norms. Therefore, an element of coercion is indispensable, the effect of which is the introduction of sanctions[2]. This element is associated by A. Reinach with the act of normalisation

[1] Cf. Bekrycht (2020, 68): "Thereby, from the point of view of ontology we can speak about two sources i.e. the ontological bases of the existence of law. The first source is the occurrence of a communicative situation, the other source is that there is an entity, and more precisely entities, that can take part in the communication. What is important here is the fact that in the ontological analyses we have reached the possibility of setting conditions for the existence of law."

[2] Cf. Bekrycht (2020, 70): "The structure of positive law cannot be built on the grounds of a promise, i.e., on a claim and an obligation, since it is too weak. We must find something stronger. Why? Because a phenomenon of positive law should contain a potential element of coercion to enforce its norm and not a claim in the content of which there is such enforcement."

(*Bestimmugsakt*), which constitutes positive law, understood as a set of binding legal norms. Reinach's statements regarding the normalisation act can be interpreted in various ways (Bekrycht 2009a, 132–146). It seems that this act either coexists with a social act or is its special type. However, it undoubtedly has its source in the relationship between the speaker and the recipient of the statement. Thus, the former becomes a legislator. A separate issue is where the speaker derives the competence to establish binding legal norms. This problem will be discussed later.

4.

It is written in expert literature that Sz. Rundstein treats the assumptions of normativism extremely rigorously (Wróblewski 1955, 303). At the same time, in the monograph titled *Zasady teorji prawa* [*The Principles of the Theory of Law*], the author quotes the views of A. Reinach several times (Rundstein 1924, 5, 7–8, 9, 17–18, 35, 42–45). This proves his interest in the concepts of this author. Rundstein shares Reinach's view on the need to search for sources that legitimise positive law. Like Reinach, he rejects justifications that reach back to metaphysics. Remaining faithful to normativism, Rundstein tries to find a justification for positive law within the law itself, which has a hierarchical structure. There is a visible difference in comparison to the views of Reinach, who seeks justification for positive law in the context of relations that come into being as a result of social acts.

Sz. Rundstein does not ignore the concept of social acts in his considerations. He treats them as an interesting theoretical and legal suggestion (Rundstein 1924, 42–44). At the same time, the author, adopting the fundamental assumptions of normativism, criticises the fact that A. Reinach – in his opinion – mixes "what is" (*Sein*) with "what should be" (*Sollen*) (Rundstein 1924, 44). Sz. Rundstein asks the question whether it is really the case that the occurrence (fact) of a social act is a source of law? In his opinion, the facts of social acts are only the primary source. Therefore, the law is created not by social acts, but by a legislator with the competence to create norms, who expresses their opinions about these acts (within specific procedures). It is this legislator, not one of the subjects in the communicative situation, who transfers social acts into the normative sphere. It is the relation between the norm and the social act that is the source of the "secondary content" existing in the sphere of "what should be" (Rundstein 1924, 44–45). It needs to be mentioned that Sz. Runstein does not refer to the acts of normalisation (as they are understood by A. Reinach). Therefore, it is difficult to establish his theoretical and legal standpoint concerning this subject.

In our opinion, the different views of Sz. Rundstein and A. Reinach are manifested in whether the act of normalisation takes place within (inside) the

framework of a communicative situation (the legislator is the one who expresses themselves) or whether the legislator is an entity external to this situation. Another problem is where the legislator obtains their power to legislate. As regards Rundstein, the answer to this question seems simple. Law understood as a hierarchical system, guided by the constitution, authorises certain entities to regulate. Reinach's theoretical and legal position in this matter was not clearly formulated. Years later, T. Bekrycht, while analysing the views of A. Reinach, proves that the speaker has been given the authority to legislate (to an act of normalisation) by the addressee of legal norms (the subject to whom the statements are addressed). Therefore, law-making must be preceded by an act authorising to legislate it. This is a kind of surrender act (following the principle: yes, we agree that you set norms). Therefore, in order to give rise to law, there must be a sovereign who, having power, agrees to submit to law. It is this sovereign who, being the addressee of law, decides who is the legislator and with what competences. Thus, the addressee of the message that is a sovereign (nation, community, state) legitimises positive law, which determines its effectiveness (Bekrycht 2020, 70–71).

5.

While analysing the influence of phenomenological concepts on Sz. Runstein's theory, one more conclusion must be made. As a normativist, Rundstein accepts the concept of the "basic norm" (*Grundnorm*), suggested by Hans Kelsen, which legitimises law (the validity of other legal norms within the system) (Huk 2014, 204–214). According to Kelsen, the "basic norm" is a legal norm. Yet, Rundstein proves that the "basic norm" is an assumption of the system that does not require justification (Rundstein 1924, 343). Therefore, it cannot be normatively justified (it cannot be recognised in terms of law) (Rundstein 1924, 343–354). The fact is that the justification of the "basic norm" is the element of Rundstein's theory that raises the most doubts. However, it cannot be ruled out that when justifying the "basic norm," Rundstein – by departing from the assumptions of normativism – transfers his considerations on the "basic norm" (understood as a necessary assumption of the system) beyond the law (Tkacz 2018, 178–181). According to Rundstein, such an approach to the problem of the legitimacy of law will result in dismissing the accusations of scepticism and arbitrariness as regards the possibility of normative justification of the "basic norm." At this point, the question must be raised whether, in justifying the "basic norm," Rundstein does not depart from the assumptions of normativism by reaching for certain elements of phenomenology. This conclusion seems quite radical, but in the light of Rundstein's statement, it cannot be ruled out.

6.

When addressing the concept of social acts, it is impossible to ignore Leon Petrażycki's theory of law. It should be reminded that, by treating the law as a specific type of psychological experience, this author points to a bilateral nature of legal emotions (this is a criterion that distinguishes law from morality). According to Petrażycki, law is a class of psychological experiences which are sensed in relation to other people as embarrassment associated with them, and in which what is burdensome for one side belongs to the other side as its due (it has a bilateral character) (Petrażycki 2022, 8–128; 1959, 101–307). It should be noted that the author, starting from the psychological standpoints, also indicates the necessary element of communication between two subjects of law (in the sphere of psychological experiences). At the same time, L. Petrażycki pays little attention to the issues of legitimising the law. The characteristics of the "official law" proposed by him, as the applied law, supported by representatives of state authority, is extremely laconic (Petrażycki 1959, 307). It should be stressed that at this point Petrażycki introduces a criterion that is not psychological in the strict sense of this word. One of the authors explicitly points out that here Petrażycki's theory ceases to be a theory of psychological experiences and becomes a theory as real social practice [practice of social acts – A. W, S. T.] (Pietrzykowski 2012, 289–290). Sz. Rundstein as well, although he does not share Petrażycki's views on the possibility of describing law in terms of psychological experiences, recognises that this author accurately captures some of its properties (Rundstein 1924, 56). In particular, Rundstein accepts the thesis on the bilateral nature of legal norms (Rundstein 1904, 35). It seems significant that, in their analyses of the properties of law, three authors coming from different theoretical and legal traditions (A. Reinach – phenomenology, Sz. Rundstein – normativism, L. Petrażycki – the psychological concept) indicate a necessary element of social communication. This makes one ask a more general question about the possibility of justifying law or about the characteristics of some of its properties, without referring to the practice of social acts. In our opinion, the answer to this question still remains open.

7.

The presented comments require a few words of recapitulation. A. Reinach's concept of social acts is undoubtedly an interesting theoretical and legal proposition. This was pointed out by Sz. Rundstein. On the one hand, he tried to be faithful to the fundamental assumptions of normativism. On the other, the phenomenological vision of law was an original and inspiring suggestion for him. Therefore, some of its elements were accepted by him, which complemented the

normativist vision of the law he promoted. Obviously, there are also fundamental differences in the views of these authors. First of all, the differences pertain to whether the social act itself creates law, or whether it is determined by the norm of a social act, established by a competent entity external to the parties involved in the communicative situation. Normativism tells Runstein to distinguish the sphere of social acts (facts) from the platform of norms which determine that these acts become law.

It is worth noting that the concept of social acts presented by A. Reinach – from the historical point of view – is the first systematic analysis of communication activities (Bekrycht 2015, 112). The communicative nature of law (its properties) was more or less clearly emphasised by Sz. Rundstein and L. Petrażycki. This is particularly worth highlighting in the situation in which in the second half of the 20th century the theories of communication gained widespread recognition. Unfortunately, the views of both A. Reinach and Sz. Rundstein do not reach the common awareness today. Perhaps the reason is the sublime language of their works, which makes their analysis not an easy task. Therefore, the undoubted achievement of Professor Tomasz Bekrycht is that he restored the works of Adolf Reinach to Polish theory and philosophy of law. We can only hope that his efforts in this matter will be continued.

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